# Ethiopian Journal of Legal Studies

## Articles



## Case Comments




**Volume 1** **Number 1** **June 2021**

# Correspondence

**The Ethiopian Journal of Legal Studies (EJoLS) invites submission of scholarly articles, case comments, reflections, book review and other academic works for publication. Submission can be sent to the Managing Editor of the Journal in the following addresses:**

**Email:ejols.ecsu@gmail.com or lnanebo@gmail.com**

**P.O.Box: Managing Editor EJoLS,**

**School of Law and Federalism,**

**Ethiopian Civil Service University,**

**P. O. Box 5648,**

**Addis Ababa, Ethiopia**

The Ethiopian Journal of Legal Studies is published twice a year by the School of Law and Federalism, Ethiopian Civil Service University. Editorial and general offices are located in the Diplomacy Building next to room No. 018.

The Journal invites the submission of unsolicited articles, essays, and book reviews, comments, reflections, and case comments. Article submission should include an abstract of not more than 250 words.



**Disclaimer: The opinions expressed in the Journal are those of the authors, and do not necessarily reflect those of the School of Law and Federalism, the editors, the editorial board, or the University.**

# Ethiopian Journal of Legal Studies

# EJoLS

## Advisory Board Members



## Editorial Board Members



### Language Editor

# Full Time Academic Staff of the School of Law and Federalism

| Name | Academic Qualification and Rank |
|---|---|
| Mussie Mezgebo | LL.B., LL.M., Assistant Professor, Head School of Law and Federalism, |
| Tesfaye Abate | LL.B., LL.M, LL.D, Assistant Professor, Dean College of Leadership and Governance |
| Bisrat Tekleu | LL.B. LL.M, Lecturer |
| Dejene Girma | LL.B, LL.M, PhD, Assistant Professor. |
| Eyerusalem Jima | LL.B. LL.M, Lecturer |
| Fasil Alemayehu | LL.B, LL.M, Assistant professor |
| Gedion Mezmur | BA, MA, PhD Candidate, Lecturer |
| Gosaye Birhanu | LL.B, LL.M, Lecturer |
| Habtamu Hailemeskel | LL.B. LL.M, Lecturer |
| Lantera Nadew | LL.B, LL.M, LL.M, SJD Assistant Professor |
| Marshet Tadesse | LL.B, LL.M PhD Assistant Professor |
| Mekdes Tadele | LL.B., LL.M, PhD, Assistant Professor |
| Misganaw Kifele | LL.B. LL.M, PhD, Assistant Professor |
| Mohahmmed Abdo | LL.B, LL.M, PhD Assistant Professor |
| Mohammed Usman | LL.B., LL.M, PhD, Assistant Professor |
| Teguadda Alebachew | LL.B., LL.M, Assistant Professor |
| Tsega Andualem | LL.B., LL.M, SJD, Assistant Professor |
| Woldemichael Missebo | LL.B., LL.M, PhD Candidate, Lecturer |
| Girum Kenfemichael | BA, MA, PhD Assistant Professor |
| Yemserach Legesse | LL.B, MA, Lecturer |
| Zerhun Geleta | LL.B, MA, PhD Assistant Professor |

## Editorial Note

The Ethiopian Journal of Legal Studies (EJoLS) has a motto of advancing the Ethiopian legal literature a step ahead. EJoLS is a double-blind peer reviewed biannual journal that publishes articles of high standard that trigger toward tackling national, regional or international legal issues.

In this issue, several articles were submitted for publication in the Journal but most of the submissions could not pass the rigorous screening and review processes. Ultimately, four best articles are selected. The articles published in this issue range from business law to criminal justice. The first articles explores whether the Ethiopian Commercial Code recognizes the doctrine of ultra vires by applying doctrinal research methodology. Both the Commercial Code of 1960 and the Commercial Code of 2021 are silent regarding the application of the doctrine of corporate ultra vires. So far no such issue raised in Ethiopian courts but with the advancing economy and emerging companies, the issue of corporate ultra vires and effects of such transactions is inevitable fact. The articles analyses relevant provisions of the newly enacted Commercial Code of April 2021 and argues that though not directly expressed in the Code, the Ethiopian Code recognizes the doctrine of ultra vires in its classical sense.

The second article sheds light in the distinction between judicial mortgage, after judgement attachment and temporary injunction. The articles exhibits historical background and theories of judicial mortgage developed both in common law and civil law traditions. Currently there is a kind confusion in the Ethiopian courts, including Cassation Division of the Federal Supreme Court regarding the vivid distinction between judicial mortgage and attachment. The author argues that courts have erred by taking judicial mortgage and after judgement attachment alike. The article sufficiently proves how the three kind of interlocutory remedies are plausibly different through doctrinal research methodology.

The third article advocates for reconsideration of a traditionally unstressed rights of crime victim's. Crime victim's are the most important victims, but the laws does not regard their rights to play a role in crime prosecution. Unless a given crime is of nature of upon complaint, the actual victim's cannot play a role in the prosecution process. The only possibility that crime victim's can participate in the prosecution process is if called to stand in the witness box. This also depends upon the discretionary power of the public prosecutor. The article argues that though transgression of criminal law is violation against the interest of public, crime victims are the actual sufferers who need to play a role in the prosecution process. The article recommends for constitutional protection of the crime victims.

The fourth article examines the practice of international labour standards in Hawassa Industrial Park by applying mixed research methodology. The author collected empirical data as non-participant observer and through interview. The article agues, though Ethiopia is a signatory of the International Labour Standards and incorporated major provisions in the Ethiopian Labour Proclamation the standards are poorly practiced in the Hawassa Industrial Park. The articles exhibits that the promises of the Government to the investors with a view to attract FDI has partly contributed for the poor enforcement of the Standards.

I would like to express my appreciation to the contributors, editorial board, the School of Law and Federalism, ECSU, the College of Leadership and Governance, and the AVP, for Research and Consultancy, the University for the Unwavering Support and encouragement.

## Contents Page

**Articles (Peer Reviewed)**



**Case Comments**

# Limits on Corporate Power under Ethiopian Law: Does the Ethiopian Commercial Code Recognize the Doctrine of Ultra Vires?

Lantera Nadew Anebo*

## Abstract

*It is normally expected that companies to act within the contours of predetermined purposes as stipulated in the purpose (object) clause of memorandum of association. Any attempt to go beyond the scope of the delineated purposes is ultra vires. In accordance with the classic doctrine of ultra vires a dealing or a transaction which is beyond the legitimate power of company is devoid of legal effect. In Ethiopia however it is not clear whether the Commercial Code recognizes the doctrine of ultra vires or not. The Ethiopian Commercial Code simply states that business organizations cannot engage in unpermitted ventures. If this prohibition is taken as ultra vires, then its possible effect has to be determined. Nowadays in advanced systems the doctrine of ultra vires has been dwindling. The Ethiopian Commercial Code appears not in line with the global trend. The article attempts to expose the on-going global development on corporate ultra vires, and suggests the Ethiopian law to reconsider its stance by aligning with the changing global business milieu. After brief discussion on the rationale behind limitation of the contours of corporate powers expressed in the purpose clause of memorandum of association, this article explores the possible effects of ultra vires transactions in Ethiopia by applying doctrinal research methodology.*

**Keywords: commercial law, commercial code, ultra vires, company, corporate**

## I. Introduction

Since the time of *Fetha Nagast* Ethiopia has commercial laws that meant to regulate the emerging commercial activities. The then fragmented commercial legilsations were either discarded or recodified in the Commercial Code of 1960.[1] The Commercial Code of 1960 was designed to modernize the Ethiopian commerce by facilitating the creation and sustenance of capital. With a view to modernize commercial institutions and commercial regulation, the Imperial Government relied on the acumen of the renowned international comarative lawyers. Consequently, the rules enshrined in the Commercial Code of 1960 were

* LL.B., LL.M. (Commercial Law), LL.M. (Intellectual Property and Technology Law), SJD, Assistant Professor, School of Law and Federalism, ECSU. The author can be reached at: lnanebo@gmail.com

1 Comm. Code of the Empire of Ethiopia, Proc. No. 166 of 1960 *Neg. Gaz.* Estraordinary Year 19th May 1960, A.A..

crafted in comparative perspectives. The Code incorporated rules developed elsewhere in the globe in comparative approach. The rules of the Commercial Code of 1960 were very progressive and designed in projection of the future Ethiopia. It was not simply a transplant of one system, but reflected both continental and common law approaches. However, the ever advancing digital technology and virtual transaction rendered some of the rules of the Code obsolete. Consequently, the Commercial Code of 1960 had been under revision for a decade, and finally revised Book I and Book II of the Commercial Code of 1960, including bankruptcy provisions incorporated in the Commercial Code of 2021.[2] Like its predecessor, the Commercial Code of 2021 does not specifically use the expression ultra vires. It simply copied the old provisions prohibiting running unauthorized ventures. This necessarily triggers doubts whether the Ethiopian Commercial Code recognizes the doctrine of ultra vires or not.

The government, as a guardian of public interest, has a mandate to regulate the operation of business organizations. Needless to say the regulation of commercial transactions and commercial instituiuons is vital in economic governance. In line with the nations economic policy, commercial laws set forth rules governing the kind of business organiaiton that can be set up, the formation requirements and procedures that have to be followed, and in some cases the overall scope of operation. Business regulations starts with preliminary works of founding a business entity, scrutiny during business registration, business licensing and periodic follow up by an appropriate government agency. Though companies can engage in any economic activity that can usher profit, they have to act within the bounds of mandatory regulations by confining their activities within the ambit of the business license granted. Generally, though there is constitutional freedom to engage in a trade of ones choice, the freedom is not completely unstrained -- companies can operate only ventures with the permission of the regulatory agency. The regulatory agency controls corporate ventures through registration and deposit of foundational documents. During registration of the company regulators assess the commercial transactions to be carried out in line with the nations economic priorites. Companies are expected to list down all conceivable venture to be carried out in their preformaiton document – the memorandum of associaiton. In this regard, the Commercial Code of 2021 follows the rules of the Commercial Code of 1960. Both the

[2] Comm. Code of 2021, Proc. No. 1243 *Fed. Neg. Gaz, Extra Ordinary*, Year 27 No. 23 A.A. Apart from the some speicific changes in the form of companies, substantial rules of the Com. Code of 1960 forwarded to the Com. Code of 2021. The Com. Code of 1960 recognized three partnerships, a joint venture, and two companies. The Com. Code of 2021, has scrapped ordinary partnership, and introduces limited liability partneship, and single person private limited company. There is little change in regulation of share company and the traditional private limited company

Commercial Code of 1960 and the Commercial Codes of 2021 declare that no busienss organization can carryout an activity that is not permitted to do so.[3] Does this prohibiton mean recogniziton of the doctrine of ultra vires? If so what is the extent of the doctrine and its current effect? Now in most jurisdicitons the classical doctrine of ultra vires is either abolished through judicial pronouncment or its scope has been diminishing consideerablly, but the Ethiopia's stance is not clear. This short work attempts to assesses whether the Ethiopian Commercial Code recognizes corporate ultra vires by applying doctrinal research methodology.

## II. The Power and Function of Company: what companies can do and cannot?

Normally, founders/promoters determine the kind of company to be constituted, specific ventures to be carried out and the scope of business purposes to be carried out. As do in other cases, the freedom of business is not absolute. The right to carrryout a business activity is controlled by the mandatory rules of law. Subject to mandatory provisions of the commercial code, companies can decide on the nature and scope of activities to be carried out. Meaning, within the limites of law, companies are free to list down any conceivable venture in their constitutional document. Traditionally companies are confined to carryout activities enumerated in the purposes/objects clause of memorandum of association. A purpose is a goal that founders/promoters wish to achieve by the instrumentality of the company. Literally, it is a compendium of activities that a company intends to accomplish. Choice of the purpose depends upon the interest of founders/promoters. The present trend in drafting purpose (object) clause is to craft it in a widest possible terms, enumerating every possible activity in which the company might run at any time or wishes to engage in the future. To list down activities in the purpose clause, the drafter has to know the activities that promoters/founders of the company desire to operate. The drafter of memorandum of association is expected to counsel the promoters/founders and take note of whatever legal venture that the promoters aspire to operate.

Though rarely accepted in Ethiopia, a purpose clause of memorandum of association may hold a provision that allows non-enumerated but related ventures. English and some Anglo-Saxon laws allow companies to state a general object that may be implicit in the expressed objects. Incidental ventures are activities or business transactions having some nexus with the

[3] Comm. Code of 2021. Art. 25. This provision is a cut and paste of art. 26 of the Comm. Code of 1960, Art. 26.

expressed ventures. The implied doctrine permits to operate ventures necessarily implicit in the explicitly enumerated activities in the purpose clause of the memorandum of association. The last object of memorandum of association expresses the possibility of running activities incidental to the expressed ventures. This catch-all enumeration would entitle the company to run activities that are possibly incidental to the main ventures that are expressed in the purpose clause. In other words, the last enumeration often expressed in general terms in a way it allows the company to carry out all conceivable activities having nexus with the activities expressly enumerated in the purpose clause. Thus, express purposes in the purpose clause may be supplemented by "incidental objects clause," which align with the expressed purposes. This enables companies to run closely related ventures that are conducive to the attainment of the company's main objects.

One may question the purposes of purpose clause. In this fast-changing business milieu, why companies are not permitted to flexibly run whatever activity they wish to run without the need to rigidly fix it in the memorandum of association or get permission by the regulating agencies? The purpose clause has practical significance. First, incorporation of purpose clause in the memorandum of association helps regulating agencies verify the legality of the company's venture. The office of registration uses the business purpose clause to assess whether the company can legally engage in a particular business activity. The purposes enumerated in the purpose clause of the memorandum of association should be of a nature that can be legally carried out. Thus, if anyone or more of purpose is illegal or immoral, the office of registration may require rectification or in the worst case may deny registration. Second, a purpose clause shields investors' interest. The capital of a company (either share company or private limited company) is a money contributed by individual shareholders.[4] Contributors (investors) should know the purpose for which the investment will serve. The money raised from shareholders (investors) cannot be spent in a purpose which is not known to the investors at the time of subscription of shares or later added through amendment. The purpose clause therefore gives some assurance to the investors that the fund that was raised for one purpose cannot risk another undertaking. The business purpose (object) clause of memorandum of association safeguards the interest of shareholders by confining the company to run a predetermined venture. Shareholders of a company may be attracted by the

[4] A single – person company is almost similar to a sole-proprietorship. The single member decides the purpose of the formation of the company, shares are not offered for public subscription, and so forth. In reality thus the capital of the company belongs to the single member. As the liability of the company is limited, creditors of the company can also check the purpose of the company.

business that the company actually carries out or plans to operate. Thus, if the company were permitted to run whatever venture it views good without seeking the consent or knowledge of the shareholders, investors may not be attracted to invest. Investors may not be interested to subscribe shares of a company that would potentially compete with the investor's private business. Investing in a potentially harmful company is just like standing at the side of an enemy. Investment in a company should not serve as a backfire. The enumeration of specific activities to be carried out thus affords enormous benefit to prudent entrepreneurs.

An investor may also be interested in the venture expressed in the memorandum of association. An unlimited power to change the venture thus would inflict unexpected harm. The purpose clause of the memorandum of association assures shareholders that money contributed to the company cannot be spent in a field that is not mentioned in the purpose clause of the memorandum of association. Thus, "… an investor in a gold mining company did not find himself holding shares in a fried fish shop…."[5] Moreover, potential investors give priority to certain business activities that would benefit their own private business[6] or contribute to the venture that the investor values.

Further, purpose clause assists potential subscribers to determine whether to invest in the company. Before subscribing shares, investors often appraise the feasibility, profitability of the venture, and in some cases the side effects of the ventures of the company in investor's personal business. Thus if the purpose of the intended project is detrimental to the economic or other interests of the investor, he/she may not dare to invest in a company whose venture is prejudicial to the private interest of the investor.

Thirdly, purpose clause affords protection to creditors. The fact that a company cannot engage in an activity that is not specified in the purpose clause creates a sense of security to the creditors. Creditors, when lending money to a company, assess the objectives for which the company was set up and would like to know how the money loaned may be spent. This helps the creditors appraise whether the loaned money can be paid back. Financial institutions, when lending money, are guided by the object clause of the memorandum of association to release fund, as they have to consider priority sectors. The creditors would be

5 J. Beaston et al (eds.) *Anson's Law of Contract*. (30th ed. 2016) p. 248.

6 For instance, if the company plans to produce raw materials that would be consumed by investors private business or plans to consume products of the potential investor, he/she may be motivated to subscribe shares of the proposed company.

assured that the debtor company cannot run an unknown and risky businesses. If the company attempts to transcend the limits of the purpose clause of the memorandum of association, creditors can stop the company by instituting injunctive suit or demand payment or get some kind of assurance for payment of the debt. If companies were freely permitted to run an activity that is not predetermined, without any limitation, there is possibility that the company may spend its capital in a speculative venture. This would obviously jeopardise the interest of creditors – normally the company's capital is the only security available to the creditors. Thus, anything that may drain company's capital endangers the interest of creditors. Creditors, in addition to getting back the loaned money, may have interest in particular venture. The purpose clause may attract the creditors not only in possible profitability, but also may advance the creditors personal or business interest. If the debtor company does or plans to do an activity that would compete with the private business, the creditor may deny the application for loan.

Finally, purpose clause, by confining corporate activities within defined field, serves public interest. As a general rule, the company should stick to the objects stated in the purpose clause of the memorandum of association. The purpose clause, by confining the company only to the predetermined ventures, serves public interest. It prevents the concentration of economic power in one company – avoids or limits monopoly. Monopolization hurts the public in various ways. A company with monopolistic power may not worry about quality or efficient customer care. Further, in monopolistic holding customers have little or no choice – the public may be forced to pay high price. This undoubtedly hurts the public. Competitive market, on the other hand, enhances welfare system. Besides, if the company carries out only pre-determined activities it would get specialization in fixed ventures that would possibly boost productivity. This in turn increases customers' taste, which will encourage further investment. Specialization also reduces production cost thereby dropping selling price. But if the company were allowed to frequently change its venture, without any restriction, the company would remain unproductive – this hurts public interest. The law thus by confining the company to operate only predetermined businesses serves public interest.

## III. Purpose/object clause and the doctrine of ultra vires

The purposes specified in the purpose clause of memorandum of association serve as restrictive fence that limits the power of company management to act only within the contours of the defined landscape. Traditionally, any attempt to transcend the enumerated purposes or engage in a venture that is not expressly or implicitly stated in the purpose clause is violation of the law. In accordance with the classical theory, engaging in a venture that is not expressed or implicit in the purpose clause of memorandum of association is *ultra vires*.[7] Literally, the expression, "ultra vires" is "beyond power."[8] Thus, if representatives of company attempt to carry out an activity that is not expressly or implicitly stated in the purpose clause of the memorandum of association, the activity is beyond power of the company. As a representative's power naturally cannot exceed the power of the principal, the maximum limit of power of personnel is the power of the principal. Therefore, either the directors or managers who act on behalf of company, cannot legitimately work beyond the purposes specified in the purpose clause. Thus, unless predetermined purposes are modified through legally sanctioned procedures, no one could act beyond the specified purposes. In accordance with the strict application of the traditional ultra vires doctrine, even a general body of shareholders could not approve a beyond power venture.[9] This was based on the rationale that the company has got legal personality to carryout purposes it is empowered to engage in and has got business license. Artificial personality is not absolute – companies can execute only predetermined ventures. This aligns with the classic doctrine of ultra vires. In the words of Eisenberg:

---

7 The doctrine of ultra vires is different of *intra vires*. The company may have power to act in some ways, but the authority of its officers may be limited. If the company representatives act beyond the granted power, unless third parties act in bad faith, an intra vires transaction cannot affect the interest of third parties. The doctrine of ultra vires is Anglo – Saxon concept but it also introduced to civil law nations such as France, Germany and Japan. The Japanse Civil Code use the expresssion purpose calsue, which is also true in Ethiopia. See Akio Takeuchi, "How should we Abolish the Ultra Vires Doctrine in Corporation Law?" Law Japan (Dan Fenno Henderson (trans.)1968) p. 140.

8 See W. "Ultra Vires in Modern Company Law." *The Modern Law Review*, vol. 46, no. 2, 204 (1983), *JSTOR*, www.jstor.org/stable/1095493. Accessed 1 Dec. 2020.

9 L.C.B Gower *Principles of Modern Company*, (Paul L. Davies (ed.) 6th ed. 1997) P. 203. Lord Cairns in *Ashbury Railway Carriage and Iron Co. v. Riche* remarked: "… if the shareholders of this company could not abante have authorized a contract of this kind to be made, how could they subsequently sanciton the contract after it had, in point of fac, been made?" L.R. & H.L. 653 (1875) noted in H.R. Hahlo & M.J.Trebilcock, *Hahlo's Casebook on Company Law* (2nd ed. Sweet & Maxwell 1977) p. 158. In the words of eisgenberg, " … under classical English law even unanimous shareholder ratifcation wouldnot be a bar to an ultra vires defense if the trnsaciton was outside the objects of the coroporation." Mervin A. Eisgenberg, *Corporations and Other Business Organizations Cases and Materials (9th Foundation Press*, 2005) p. 122.

> … the corporation is regarded as a fictitious person endowed with life and capacity only insofar as provided in the charter [now memorandum of association]. Early corporate charters tended to narrowly circumscribe the activities in which a corporation could permissibly engage. Transactions outside that sphere were characterised by the courts as ultra vires (beyond the corporation's power) and unenforceable against the corporation….[10]

The doctrine of ultra vires shields creditors and investors from unauthorized use of company's fund. As liability of the companies is limited, its fund is the only security to creditors and third parties who deal with the company. In this sense, company's capital cannot be used to run a venture in respect of which the company is not licensed. Eisenberg shares this view stating: "The original purpose of the ultra vires doctrine seems to have been to protect the public or the state from unsanctioned corporation activity."[11] This dictates company management to run only predetermined ventures. Creditors or investors release loan or investment in the company in reliance of facts stated in the purpose clause of the memorandum of association, and other pertinent clauses that reveal the financial position of the company. The need to confine to the predetermined purposes that are enumerated in the purpose clause of memorandum of association restricts corporate management to avoid speculative ventures that would destroy the wishes of creditors and investors. If anyone or more of the purposes of company has to be modified, investors or creditors who invested or lent fund in assumption of the old purpose, should give their consent or get paid.[12] In this regard the classic illustration, "… an investor in a gold mining company did not find himself holding shares in a fried fish shop, and to give those who allowed credit to [a] limited company some assurance that its assets would not be dispatched in unauthorized enterprise,"[13] best explains how unexpected change in venture is detrimental to the interest of creditors.

---

10 *Id*.
11 *Id.*
12 Art. 463 of the Comm. Code *supra* note 1.
13 J. Beaston *et al supra* note 5.

The governing rule of the doctrine of ultra vires was first demonstrated in seminal English case *Ahbury Rail Way Carriage and Iron Co. Ltd v. Riche.*[14] The purpose/object clause of the memorandum of association of the company enumerated the following objects:

1. "To make and sell or lend or hire railway carriage, wagons and all kind of railway plants,
2. To carry on business of mechanical engineers, and genral contractors,
3. To purchase, lease work and sell mines, minerals, land, and buildigs,
4. To purcahse and sell, merchants timber, coals, metals or other materials,
5. To buy and sell materials on commission or as agents,
6. To acquire, purchase, hire, contruct or erect works or buildigns for the purpose of the company, and
7. To do all such other things as are necessary, continent incidental or conductive or any such objects."[15]

The Company with these chartered purposes concluded a contract with the Plaintiff (Riche), to finance construction of railway project in Belgium. Based on the financing agreement, Riche contracted with Ashbury Railway Carriage & Iron Company to construct the said railway. After Riche performed some of the stated works, Ashbury repudiated the contract claiming it was ultra vires. Riche brought action requiring Ashbury to respect the terms of the contract. The issue was whether financing construction of a railway in a foreign country was within the ambit of the power of the company. With the intention to release directors involved in the contract from the claim of abuse of power liability, shareholders of the defendant company unanimously approved the transaction. Disregarding this formal ratification of the unauthorized transaction the case was lodged in court of law. The "House of Lords held that the contract was ultra vires, on the ground that it lacked the power under the charter,"[16] therefore altogether void. If a transaction is void, then it cannot be ratified even by unanimous consent of all of the shareholders.

It is vividly evident that financing construction of railway in a foreign country was not specified in the purpose clause of the charter of the company. Financing a contract in a

[14] L.R. & H.L. 653 (1875) SeeHahlo and Trebilocock *supra* note 9.
[15] *Id*.
[16] *Id.*

foreign country cannot be easily followed up by the investors and creditors of the lending company. As a general rule, directors of the company have to confine themselves to carryout activities expressed in the purpose/object clause. In *Ashbury*, the House of Lords concluded that financing a construction contract abroad was ultra vires.[17] Though not stated in the judgement, it is equally doubtful to consider the legality of financing had the contract been not in a foreign country. Similarly, a company should have an express power to guarantee performance of an obligation. Unless it is a surety company, guarantee cannot be implicit. For example, In *Bringson v. Mill Supply Co*.,[18] it was held that guarantee given for performance of an obligation was ultra vires. [19]

The purpose clause of memorandum of association of Ashbury Railway Company appears very vague and may be subject to multiple interpretations. In Ethiopia a purpose expressed in general terms cannot be accepted for registration.[20] Further, in practice the office entrusted with registration of companies, in Ethiopia, denies registration of a memorandum of association with implied powers, or expressed in general terms. In Ashbury's case, the seventh purpose is a catch-all box that can beef up unexpressed but incidental objectives. In Ethiopia, with a view to cut litigation, registering clerks advise companies to stipulate only express purposes. However, inclusion of incidental objects would enable companies to run all related ventures without the need to amend the memorandum of association. This in turn effectuates business thereby contributing to the economy and boosting job creation. If we choose to avoid litigation at the cost of efficiency, the avoidance of implicit purposes is preferable. With a view to mitigate harsh effects of the decision of *Ashbury*, English courts devised the implicit power doctrine.

The Indian Companies Act follows the traditional effect of ultra vires transactions. If an activity or a transaction is ultra vires, then it is null and void. It cannot be ratified at all. It is true void transaction is non-existent and cannot get life at all. The first Indian case in this regard is *Jahangir R Modi vs. Shamji Ladha*.[21] In this case the company purported to

---

17 *Id.*

18 219 N.C. 498; 14 S. E. 2nd 505 (1941) noted in Eisenberg *supra* note 9.

19 *Id*.

20 Though not enunciated in the Code, the office of registration denies registration of a company with purposes stated in general terms enabling the company to run unexpressed but related ventrues. The prevailing global trend that suggest for abolition of the doctrine of ultra vires would change the Ethiopian stance. The law revision should consider the ever changing global trajectory.

21 4 Bomb. H.C. Report 185(1866 – 67).

subscribe stock of another company though this power was not expressed or implicit in the object clause of the memorandum of association. The then Bombay (now Mumbai) High Court held the transaction was ultra vires and hence void.[22] Is being a partner of partnership without express authority in the purpose clause of memorandum of association beyond power of company? Assume a company engaged in detergent factory. Running detergent factory was within the ambit of the power of the company. Is it ultra vires if the company invests in another detergent factory to operate it in partnership with another company? According to Eisenberg "[e]arly cases often held that a corporation had no power to enter into a partnership unless that power was explicitly granted by a statue or by the certificate of incorporation."[23] Similarly, the fate of entering into a joint venture business with another company is also questionable. Given restriction to devise an implied power in the purpose clause of memorandum of association, the possibility of implying unexpressed powers in Ethiopia is doubtful. Currently, in United States company laws expressly authorize corporations to enter into partnership or joint venture agreements even if the articles of association is silent on the issue,[24] but in Ethiopia implication is uncertain.

An ultra vires transaction is void – assumed non-existent. Consequently, persons involved in an ultra vires transaction may suffer loss or may be prejudiced in some way. Who is responsible for adverse effects of ultra vires ventures that are declared null and void? Normally a company is responsible for transactions carried out in its name. It is a person in law, but its personality is limited to carry out activities that it can legally carryout. Conversely, the company has no power to engage in an activity that it is not legally empowered to operate. On the same token, ultra vires generates duty on the company. Thus, if an ultra vires activity is rendered null and void, primarily managers involved in the transaction may be jointly and severally liable to redress the effects of ultra vires transaction. The directors or other personnel of company who acted beyond the legitimate power of the company are liable for the effects of ultra – vires transactions. The problem however is that the managers or other persons who represented the company in an unauthorized transaction/ venture may be not economically able to make the damage good. Is there any way to seek compensation from the company that has repudiated an ultra vires transaction? Unless

22 *Id*.
23 Eisgenberg *supra* note 9 at 123.
24 Sel. Gen. Corp. Law Section 122(11), N.Y. Bu. Corpo. Law Section 202(15) Model bus. Corp Act. Section 3.02(9) noted in Eisenberg *supra* note 9 at 123.

otherwise expressly provided by the company law, an innocent third party can seek compensation from the company by invoking the rules of unauthorized/apparent agency.[25]

Thus, if a company attempts to engage in an activity/ transaction that is not permitted to carryon, the illegal activity/ transaction generates double consequences: internal and external effect. Internally, shareholders may restrain the company from running an ultra vires activity by instituting injunctive action. The court may order the company to stop acting beyond its legal power. The external effect is an ultra vires activity is null and void. A null and void act cannot produce any legal effect. This rule was true in England before its incorporation into European Communities Law. After incorporation into the European Communities, the second effect of ultra vires transaction was changed. "Section 9(1) of the European Communities Act 1972 … attempted to dispose of all problems…." Accordingly, third parties we deal with directors of company in good faith were allowed to presume full power of directors in respect of all activities on behalf of the company they direct. This safeguards the interest of innocent third parties. Third parties may be said to be innocent if they were not actually aware of the limitation of the power of the company. In this case ultra vires transactions are viewed as valid and enforceable contractual link is created between the company and the innocent third party. The English company law did not absolutely abolish the doctrine of ultra vires but it rather establishes a presumption of good faith. The company still can set up the defence of ultra vires against a person who deal with it in bad faith, and where he seeks to enforce an ultra vires transaction against third party, the third party can still plead the defence of ultra vires. Shareholders can still be able to restrain a company from embracing on proceedings on or proceeding with a course of action, which is ultra vires.

The other consequence of ultra vires transaction is injunction. Shareholders or interested third parties can restrain the company from operating a "beyond power" activity by instituting action for injunction. In this regard too, the purpose clause of memorandum of association serves as a protective tool to safeguard interest of shareholders and the company from speculative businesses.

[25] See Art. 2195 of the Civ. Code. This point is brielfy dicussed in later section.

## IV. The Dwindling Effecct of Doctrine of Ultra Vires

Initially the doctrine of ultra vires, by confining the company to engage in certain predetermined venture, meant to safeguard the interest of the public, creditors and investors, but the confinement backfired at all concerned because the company was barred from running profitable ventures flexibly aligning with the rapidly changing business world. In the words of Leacock:

> The doctrine [of ultra vires] did not effectuate its goals. Rather than serving as a reliable and effective shield for shareholders and creditors as anticipated, on the contrary, it became a troublesome barrier to the conduct of legitimate business activities. It was unscrupulously exploited to invalidate otherwise legally valid contracts, and thereby prevented companies from pursuing potentially profitable activities. Companies were legally disabled from pursuing business activities not stated in the objects clause….[26]

In a situation where constitutional documents of company cannot be freely alterable,[27] deprivation of an ability to carry on a profitable business backfired on the very people that the doctrine of ultra vires was meant to protect. Needless to say, if the company is profitable, the value of shares will rise, the ability to pay debt would be enhanced, and the public would get better service etc. Further, declaration of voidness of an ultra vires transactions and non-responsibility of the company had harmed innocent third parties. This had negative effect in transactions involving registered companies. Consequently, nations and commercial entities took several actions that had steadily diminished the traditional effects of the doctrine of ultra vires. The introduction of plethora of purposes in the memorandum, the limitation of constructive notice rule to situations of bad faith, and the implied power doctrines diminished the classical effect of the doctrine of ultra vires.

---

[26] Stephen J. Leacock, "Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law: A Triumph of Experiancew Over Logic" *Depaul Business and Commercial Law Journal* Vol. 5 Issue 1(2006) p. 78.

[27] For instance until 1948 in England memorandum of assocaiiton of companies were not freely amendable. Before 1948 English companies could amend object clause of memorandum of association only after securing court authorization.

First, with a view to mitigate or possibly avoid ultra vires, companies drafted long list of powers that apparently meant to allow companies run wide spectrum of ventures. Companies started to list down plethora of powers even if the company does not invoke it. The long list of purpose/object clause, long list of power of the company could not help the company to escape from the invocation of the doctrine. Courts often ignored powers that did not relate with the expressed purposes. This subjected the companies with the unwarranted lengthy litigations.

Second, after five years of the decision of *Ashbury Rail Way Carriage and Iron Co. Ltd v. Riche,*[28]the Court recognized implied powers doctrine. The introduction of implied power doctrine has further diminished the doctrine of ultra vires. The House of Lords in *A. G. v. Great Eastern Railway Co,*[29]sanctioned the practice of using implied powers doctrine. By referring to the implied powers companies are allowed to run business having some kind of nexus to the enumerated purposes and goals of the company. For instance, a Florida company whose purpose under its charter was to run a railroad was allowed to operate leasing and running a resort hotel.[30] The Supreme Court of United States concluded:

> "Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into and engage in transactions which are auxiliary or incidental to its main business.[31]

But what is an implied power and how can we distinguish it from other ventures having no nexus with the expressed purposes/objects? Any legal activity that "… may fairly be regarded as incidental to, or consequential upon, the specified objects ought not be ultra vires."[32] The implied doctrine authorized companies to run all conceivable ventures that align with the main purpose/object of the company. An incidental business should have some nexus with the main object. If a company runs cattle breeding business for example, running non-enumerated veterinary clinic or veterinary school or cattle food factory may be viewed as ventures that are fairly incidental to the main business. But running completely unrelated

---

28 L.R. & H.L. 653 (1875).

29 *A.G. v. Great E. Rt.* Co. (1880) 5 App.Cas. 473 (H.L) noted by Leavock *supra* note 26 at 79.

30 Leavock *supra* note 26.

31 The Supreme Court of United States in *Jacksonville, Mayport, Pablo Ry & Nvaviation Co. v. Hopper*, 160 U.S.514, 526, 16 S.Ct. 379, 40 L.Ed. 515 (1896) cited in Eisenberg *supra* note 9 at 123.

32 A.G. v. Great E. Rt. Co. (1880) 5 App.Cas. 473 (H.L) noted by Leavock *supra* note 26 at 79.

business is violation of law and ultra vires. For example, in *Introduction Ltd v. National Provincial Bank,*[33] the Company (Introduction Ltd) was formed in 1951 to provide accommodation and service to overseas visitors for long period of time but after change of board of directors, the new directors started running pig breeding. With a view to expand the business the Company borrowed money from National Provincial Bank. Before releasing the loan, the bank took copy of the memorandum of association that contained the original objects, but released the fund. In suit for challenging the legality of the loan, the court declared that the loan was ultra vires. Pig breeding was neither expressed in the purpose clause nor incidental to the main purposes expressed in the purpose/object clause of the memorandum of association.

Further the authorization of board of directors to run any business that is beneficial to the interest of the company,[34] and its incorporators is another progressive measure that has further diminished the significance of the doctrine of ultra vires. In United States, unless restricted by articles of incorporation, corporations are free to run all lawful business activity.[35] This has virtually relieved companies from the obligation to specify purposes in the articles of association.[36] Unless unwanted ventures are specified in the articles of incorporation, the document need not have a clause labelled as purpose/object clause.[37] This may appear as complete avoidance of the doctrine of ultra vires in United States, but actually not. First, if a United States Corporation runs an illegal venture, the venture may be viewed as ultra vires. Next, if articles of incorporation holds restriction in conducting business, violation of an express prohibition is ultra vires.

Finally, in United States the doctrine of ultra vires is not accepted as a defence that would relieve the company from corporate tort nor criminal responsibility. The theory of vicarious liability in this case works. A beyond power transactions may be invalidated but the company is responsible for acts or failures of its directors and officers. This protects the security of business transaction and builds public confidence to deal with a registered company. Thirdly,

---

33 *Introduction Ltd. v. National Porvincial Bank*, Ch 199 (C.A. 1970).

34 *Bell House Ltd. v. City Wall Properties Ltd.* 2 Q.B. 656, (Eng. C.A. 1966)

35 In United States, states have their own company law. Though there is possibility to have a totally distinct corporation law, state corporaiton law aligns with the Model Corporation law.

36 In effect this has virtually weakened application of the doctrine of ultra vires in United States. Some may even argue that in United States the doctrine of ultra vires is practially dead.

37 This affords companies to flexibly run business activity. Though this may allow running a speculative business, its economic benefits outweighs the side effects.

if a company has already benefited from the effects of ultra vires transaction it cannot refuse to discharge its part of obligation claiming ultra vires. This assertion is based on the doctrine of estoppel. If a person has promised to act in some way, he/she should keep the promise and discharge it. If the other has discharged his/her part of obligation in reliance of the promise, the debtor is legally estopped to refuse his/her part of performance. Fourthly, in United States unanimous shareholder approval can bar the application of the ultra vires defence unless the action would be prejudicial to the interest of creditors. Finally, in United States the effect of certificate of registration is in a diminishing state. Thus, there is a possibility for companies to venture flexibly without the need to seek regulator's approval or control. This makes companies to run whatever business transaction without limitation simply based on business judgement rule. Though the practice may not be uniform in all companies, absence of limitation in corporate power practically diminishes the classical effects of the doctrine of ultra- vires.

Finally, the diminishing effect of the doctrine of ultra vires has a deteriorating effect in application of the doctrine of constructive notice. What is the doctrine of constructive notice and how it works in conjunction with the doctrine of ultra vires?

The law requires documents defining the power of company to be registered and deposited in the public office – the Office of Registration or uploaded on the website of the regulatory agency. The Office Registration is not simply Document Authentication and Registration Agency (DARA). DARA does not regulate companies or nor specifically authorized to register corporate documents. DARA however assists the Regulatory Agency – the Ministry of Trade and Industry and relevant regional agencies – by authenticating corporate documents. The Regulatory agency ascertains the legality of the purposes enumerated in the purpose/object clause of the memorandum of association or its constitutional charter. The memorandum of association should be available to the public. It has to be kept at a place where the public can see and even take copy of the registered documents. If the memorandum of association and accompanying documents are registered and deposited at a place where the regulatory agency (the Ministry of Industry and Commerce or uploaded in the web page) manages, the law assumes everyone knows the contents of the registered documents. This presumed notice is known as constructive notice. The doctrine of constructive notice is thus a legal supposition that the public is aware of the registered documents.

The strict application of the doctrine of ultra vires dictates persons who wish to deal with a registered company to inspect public documents and make sure that the dealing confirms with the purpose clause of the memorandum of association. Before contracting with a registered company third parties were expected to know the limits of the capacity of the company. This was unnecessary burden and imposition of duty on third party dealers. Failure to observe the voluntary duty may generate sever legal consequences. An ignorant dealer would suffer if the transaction is ultra vires and devoid of legal effect. The availability of the documents to the public and possibility to know the limits of the power of the company creates a legal presumption – a presumption that everyone who deals with a registered company is not only aware of the facts of the company, but also presumed to understand the contents of the registered documents. As the public may not necessarily have notice of the registered documents, the assumption of knowledge of registered document is harmful to unwary dealers.[38] Nowadays, company documents are available online, but still dealers should search the documents online to comprehend the legality of company's venture. Getting access to registered documents and understanding long list of purposes may not be easy to busy entrepreneurs. In this increasingly competitive business world, the 'duty" to comprehend the capacity of a company would create a hurdle that would stagnate business decision making.

Consequently in most advanced economies, there was tremendous dissatisfaction with classical effects of the doctrine of constructive notice and the theory of ultra vires. The classical theory of ultra vires is unsound to ever changing business activity. Rigidity would hinder advancement. Companies should be able to bend to cope with the fast-changing customer taste and advancing technology. The classical effect of ultra vires transaction had caused additional hardship to third parties. If a transaction is declared ultra vires, the interest of innocent third parties may be prejudiced. If the company assumes as if no transaction took place, and not responsible for effects of nullity of ultra vires transaction -- only third-party dealers bear the brunt of nullity of ultra vires transaction. Third parties are required to take precautionary measures by checking the true power of company. Thus, the doctrine of constructive notice and strict application of the doctrine of ultra vires is very detrimental to the interest of third parties.

[38] In lieu of observing registered documents dealers may ask the representatives of company regarding the legality of dealing and the capacity of the company, but in big companies this may not be feaible. In multinational companies, where thousands of dealers make business transaction, it would be hard, if not impossible to explain the contours of the power of the company to everyone who wish to transact with a registered company.

On account of various justifications, the traditional effect of the doctrine of ultra vires has been steadily diminishing. First, in most jurisdictions innocent third parties are protected from the effects of doctrine of constructive notice.[39] The basic objective of constructive notice is creation of the presumption of knowledge of the contents of registered documents (constructive notice). However, the doctrine is bad to unwary outsiders who cannot take precautionary measures before dealing with the company.[40] The public therefore is forced to be vigilant by taking note of registered documents as a precautionary measure to know the power and objects of a registered company. This made dealers reluctant to transact with a registered company. Innocent dealers who cannot understand the technicality of longwinded objects clause may be easily jeopardised. This obviously hurts past changing business milieu thereby affecting national economy by hampering the tempo of fast-moving business transaction.

With a view to halt the constraints of the constructive notice and reduce harsh effects of the doctrine of ultra vires, nations took remedial measures. English company law abrogated the doctrine of constructive notice except in situation of bad faith.[41] Leacock views the doctrine of ultra vires as a sword against innocent persons.[42] If the doctrine simply stands to relieve the company against acts of its representative who are supposedly aware of the limits of the power of the company, it is of course a sword that cuts the throat of unwary third parties who rely on words or acts of company representatives. Nowadays, in United States, UK[43], Canada and the Caribbean commonwealth, there is presumption of good faith.[44] Mere awareness of registered documents cannot affect the interest of third parties.[45] Third parties are assumed aware of the contents of registered documents if assisted by professional lawyers who understand the technicality of the registered documents. To establish bad faith claimants of ultra vires, presumably, the company should prove such awareness.

---

39 In England since incorporaltion into the European Community strict application of the doctrine of constructive notice was changed. Companies are prohibited to use the doctrine of ulta vires as a "sword" against innocent third parties (Sections 108 and 109 of the 1989 English Company Law.)

40 Accordingly revier of English Company law suggested for total elimination of the doctrine of consturctive notice on justification that third party dealer are busy to get note of constitutional documents of compnay. See Leacock, *supra* note 26 at 87.

41 *Id* at 91; Section 108 of the 1989 English Company Law.

42 *Id.*

43 Section 35(2) of the1985 English Company Law provides the presumption of good faith thereby be shiting the onus of proving bad faith on the persons claiming the application of ultr vires.

44 Leavock *supra* note 26 at 41.

45 *Id.*

Is the doctrine of constructive notice applicable in the Ethiopian company law? Proclamation No. 980/2016[46] is silent on this issue. The Ethiopian law simply requires registration and deposit of company documents. It is however implicit that registration is not simply record -- keeping of company documents in the public office or webpages of the Office of Registration of the Ministry of Trade and Industry or pertinent regional offices, but the very purpose of registration and deposit of documents is creating public awareness regarding the power and activities of registered company. Interested parties can see registered documents or upon payment fee can take copy of the registered documents. This rule should apply to access webpages in which company documents stored or download it with the permission of the webpage owner. Nowadays, before a document submitted for registration and deposit of documents in the Ministry of Trade and Industry or in regional offices, the memorandum of association is required to be registered and deposited in the Office of Document Authentication and Registered Authority (DARA). In accordance with Article 18(3) any interested party can "… get a copy of information about a document in the hands of the notary…"[47] Upon payment of a prescribed fee (usually nominal service fee), the notary gives a copy of the document.[48] Therefore, the public has apple possibilities to know facts stipulated in the registered documents. As there is no obligation to see the contents of registered documents, the law presumes knowledge. Thus, the Ethiopian law implicitly recognizes the doctrine of constructive notice. Apparently, the Ethiopian law appears to recognize the classical effects of constructive notice. In Ethiopia thus everybody is presumed to know and even understand the contents of registered documents. Currently, in Ethiopia it does not matter whether a person is actually aware of the facts of registered document or not– the defence of ignorance of the registered facts is not acceptable. With a view to know the capacity, and business purposes of a registered company, prudent dealers should take note of registered documents.

---

46 Commercial Registration and Licensing Proc. No. 980/2016, *Fed. Neg. Gaz*. 22nd year No. 101 Aug. 2016 A. A.

47 Authentication and Registration of Documents' Proc. No: 334/2003 Fed. *Neg. Gaz* 9th Year, No. 54 A.A 8th May 2003, Art. 18(3).

48 *Id*.

## V. Effects of Ultra Vires Transactions under Ethiopian Company Law

The Ethiopian Commercial Code does not expressly provide possible effect of ultra vires transactions. But can we infer the application of the doctrine of ultra vires and its effects from the prohibitive words of Article 25 of the Commercial Code of 2021? Article 25 of the Commercial Code of 2021 states: "No business organization shall carry on a trade which is not permitted to carryon or which is subject to specific requirements with which the said business organization has not complied."[49] This prohibition extends to all forms of unauthorized ventures, which include corporate ultra vires. Before granting the permission the Ministry of Trade and Industry or regional offices of trade and industry or other relevant government offices may requires pertinent agencies to assess professional competence of running an expressed venture. If the professional competence of candidate company is positively assessed, the license may be granted. When the venture sought to operate does need competence assessment, by examining the legality of enumerated ventures, the Ministry of Trade and Industry or relevant regional offices register the company, and the company acquires separate legal existence. The company is expected to run only the registered ventures. The personality and power of the company depends upon the carrying out of the permitted ventures.

Though it is arguable to take Article 25 of the Commercial Code of 2021 as a provision meant to regulate ultra vires transactions in Ethiopia, the classical effect of ultra vires transactions and the consequences of operating an unpermitted venture is congruent. In both cases an unauthorized transaction is devoid of legal effect.

One may fairly question whether an unpermitted transaction is really an ultra vires transaction. As pointed out above an ultra vires transaction is a transaction which is beyond the power of the company. If a company purports to operate an activity that is not mentioned in the purpose clause of the memorandum of association, the activity is unpermitted and hence beyond the power of the company. Then why not such an authorized dealing is ultra vires? It is not the use of a matching expression that matters, but the effect of the transaction. An ultra vires engagement is not only violates company's constitution, but also it transgresses company law. Thus, engaging in an unpermitted business is not only illegal but also it

[49] Com. Code of 2021, Art. 25.

prejudicial to the public interest, which holds the interest of shareholders, creditors and innocent customers. Synonymizing an "unpermitted" venture with the expression "ultra vires" may not be a puzzling equivalence – in effect the two notions appear identical. An However, the notion of "unpermitted" business is broader in scope. It holds some transaction that need not be ultra vires. For example, a company may commence business without having its constitutional document registered or getting business license. In this scenario the whole venture is unpermitted and hence unlawful but not ultra vires. The issue of ultra vires raises only in respect of companies that are legally constituted. With respect to companies formally incorporated fulfilling the requirements of law there is no apparent difference between ultra vires transactions and unpermitted transactions.

Operating an unpermitted transaction affects public interest as it is prejudicial to the interest of shareholders, creditors and innocent third parties. Similarly, ultra vires transactions also affect public interest (the interest of shareholders, innocent third parties or creditors may be summed as public interest. This work suggests that Article 25 of the Commercial Code of 2021 may be invoked to apply the doctrine of ultra vires in Ethiopia. Thus, until the legislator takes its silage hammer that defines effects corporate ultra vires or direction offered by the Cassation Division of Federal Supreme Court, it is suggested to invoke ultra vires transaction as a competent of unpermitted transaction.

If a given form of activity (purpose) is listed down in the purpose clause of the memorandum of association and business license is granted on the basis of the enumeration, it is assumed that the company has got permission to operate the expressed activities. Before registering the company the registrar at the Ministry of Trade and Industry or regional offices, checks the enumerated purposes. If one or more of the enumerated purposes is of a nature that cannot be permitted, the officer will deny registration. On the contrary, if the enumerated purposes are acceptable and the company is registered and business license is granted the company is permitted to carry out the registered businesses. Engaging in anyone or more of the licensed and registered ventures is not only legal, but also within the legitimate power of the company (not ultra vires).Conversely, if a company attempts to engage in a transaction that is contrary to the enumerated objects, the transaction is impermissible by virtue of Article 25 of the Commercial Code of 2021. Meaning, an unpermitted venture is illegal and cannot be enforced in courts. As the doctrine of constructive notice is a governing rule, third parties who involved in the illegal transaction cannot be protected. The effect of such transactions is

no different from the effects of classic ultra vires transactions. Hence, though both the Commercial Code of 1960 and the Commercial Code of 2021 are silent on corporate ultra vires transactions, the overall effect of running unpermitted transaction in Ethiopia, and the classical effects of ultra vires transaction appears congruent. In line with the foregoing discussion on the nature and legal effects of ultra vires, it appears possible to conclude the Ethiopian Commercial Code, in effect, recognizes the doctrine of ultra vires.

Article 25 of the Commercial Code of 2021 does not provide the legal consequences of transgression of the prohibition, but Article 23 offers some clue. Article 23 of the Commercial Code of 2021 expresses possible effect of carrying on an activity without getting permission, like unregistered and unlicensed 'traders." In the sense of Article 23 of the Commercial Code of 2021, running an unpermitted business/transaction generates penal and civil effects. Further, the company cannot exercise the rights of legal trader in respect of ultra vires transactions, but when it comes to liability, the law enforcement by consider the illegal or unpermitted transaction as one of the commercial activity. Thus, undoubtedly the company may be forced to pay tax in respect of the revenue earned through unpermitted (ultra vires) transaction.

The rationale for unenforceability of ultra vires transactions is based on the nature of personality of companies. Juridical persons are mere creations of law. The contour of their personality is limited. Artificial persons are have got legal personality to carry out only activities that are expressed or implicit in the purpose clause of the constitutional document. Thus, if an artificial person engages in an out of power venture, the transaction is void. This assertion aligns with the rules of Indian and English company law. In India, for example, if a company engages in a venture that is not explicitly or implicitly envisaged in the object clause of memorandum of association, the ultra vires transaction is void and cannot be enforced. Consequently, any attempt to carry out an activity that is not explicitly or implicitly stated in the memorandum of association is violation of law – ultra vires. Literally it is beyond the legitimate power of the company. Consequently, if a company ventures in a transaction that it is not permitted to carry out or that is beyond its purpose clause as outlined in the memorandum of association, the transaction produces no legal effect.

It is not arguable that Ethiopian companies are not allowed to run unpermitted or unlicensed ventures. What does this actually mean, or what would happen if a company runs unpermitted

venture? Is the transaction null and void or may be invalidated at the request of interested parties? Can the company or its officers, or third-party dealers petition for nullity of the unpermitted transaction? The Commercial Code does provide a clear solution. The term "not permitted," or "not licensed" signifies running a venture in violation of law. Literally a venture in violation of law is an illegal activity/transaction or contract. It is a basic rule of law of contract that an illegal dealing is devoid of legal effect – null or void.[50] If an act is illegal or carried out in violation of law, any interested party can petition for declaration of voidness. As pointed out above, an ultra vires transaction need not be an illegal transaction in sense of general law, but it may be declared void if the transaction is beyond the power of the company. This may be justified in absence of power or capacity. If corporate managers execute an ultra vires, either the company, its officers, third party dealer or regulatory agencies can require declaration of voidness. This assertion aligns with the classical effects of ultra vires transaction.

General nullity of 'unpermitted' transaction would affect smooth functioning of commerce and sanctity of market. Categorical declaration of voidness of an ultra vires transaction would motivate the public to take strict precautionary measures that would in turn hamper quick business decision making -- hesitation to enter into business transaction stagnates commerce thereby backfiring the company. Automatic nullity of an ultra vires transaction releases the company from unwarranted transaction but it is detrimental to innocent third parties. But what is the standard for gauging innocence? If a person honestly believed that the company has capacity to enter into the transaction without getting notice of the limitation, he/she may be viewed as innocent. If third party dealers are required to check the purpose clause of the memorandum of association, the failure to comply with the law may strain the innocence. This prompts a question on application of the doctrine of constructive notice under Ethiopian law. Is there duty to check company documents to know the limitations in the power of the company? The doctrine of constructive notice appears unfairly dictating the public to take further actions when dealing with a limited liability company. As pointed out above, the old English law that strictly applied the doctrine of constructive notice has been changed – nowadays, innocent third parties are protected. Innocence in this case is unawareness of the actual limitation of the power of the company, but not failure to check and understand the contents of the registered documents. In this case, the onus to prove non-innocence goes to

[50] Civ. Code, Art. 1714

the company. Therefore, unless the company proves that the dealer had actual knowledge of the limitation of the company, third party dealers are presumed innocent. This actually makes the doctrine of constructive notice ineffective.

If an ultra vires transaction is unenforceable, what possible remedies are available to innocent third parties against the company? In accordance with the classical theory, if a transaction is ultra vires, the company cannot be obligated to do anything in respect of an ultra vires activity. This is based on the rationale that an ultra vires transaction is void and generates no right and obligation. However, to avoid unjust enrichment, things delivered under the guise of a void transaction shall be restituted.[51] Third parties can invoke the doctrine of unlawful enrichment to get things delivered to the company.

Further, in certain cases, innocent third parties can sue persons who represented the company in the unauthorized transaction. Unauthorized agents are personally responsible for the unauthorized representation. Third parties can also join the company in the suit against the person who acted on behalf of the company without having an authority to do so. As agents may not sufficiently compensate the third-party joinder of the company may the best option to get compensated. As a rule, a representative who acted beyond the legitimate power granted by the company or exceeded the power of the company is responsible for the effects of ultra vires transaction, but in exceptional cases, the principal company may be sued together with the person who acted on behalf and in the name of the company.[52] If the board of directors or other officers of the company have exceeded the power of the company they represent the representation is ultra vires, but innocent third parties may invoke the benefit of appearance of authority and join the company in a suit for reinstitution.[53] The company is not required to honor an out of power (ultra vires) transactions but may be forced to compensate innocent third parties for the ostensible authority. The benefit of appearance of authority is not always available. To invoke the benefits of appearance of authority certain minimum requirements set forth in the Civil Code shall be fulfilled.[54]. On account of conduct or words of the apparent principal third party dealer may honestly believe that the representative had actual authority. First, if the principal (the company) had informed third parties that the agent

---

51 *Id*, Art. 1808(2).
52 See *Id*, Art, 2195.
53 *Id*.
54 *Id*.

had power to act in certain way[55], and later revoked this power but not informed revocation of the authority, the agent may deal with the third party in respect of the revoked power. If the third party is unaware of the revocation of the power, he/she considers the agent was authorized to represent the company. The innocent third party dealer can invoke the benefit of doctrine of apparent authority. This is a situation not so usual in respect of ultra vires transaction, but a company may alter its expressed or implied power amending the purpose clause of memorandum of association and get it registered and deposited in accordance with requirements of Proclamation No. 922/2015.[56] The informed third party may actually be unaware of the alteration of the informed power and deal with the company's representative. This is ultra vires transaction and may be declared null. The third party may join the company in a suit against the agent for compensation on account of appearance of authority. If the prior power of the company was communicated to third parties, the alteration has also to be communicated. The non-existent power but the already created appearance of authority make the company responsible to the innocent third parties. The transaction was ultra vires but the innocent third may consider the company continuously having the power. If the transaction was rendered null and void on account of ultra vires, the principal company may be jointed in a suit for compensation. [57]

Though the strict application of the doctrine of constructive notice makes it practically ineffective, appearance of authority can be created by conduct of principal.[58] For example, if the board of directors or a top-level manager or managing director of the company keeps silent when a person representing the company acts beyond the scope of his/her power which is also beyond the power of the company, an innocent third party may assume as if the company had power to conclude an ultra vires contract. In respect of ultra vires transactions, appearance of authority by conduct is arguable but it is still possible. Appearance of authority cannot make the company liable because exact legal power of the company are registered and

---

55 If the principal is a physical person this rule undoubtedly works but in case of juridcal persons this rule may promt an issue regarding the person who may inform third parties. As an artificial person the compnany cannot inform its powers. It should be the represenative of the company. Managers of company are assumed having full power regarding acts of management. (Art. 33 of the Com. Code of 1960) If the managing director or chairman of board of directors inform thrid partie the limits of the power of the company, any change in actual power shall be informed, otherwise, innocent third paries can invoke appearnce of authority. A related question is whetehr oral communication of the power of the company suffices for appearnce of authority. As Art. 2195 does not make distinction in this, it appears possible to apply the rule if the informant is authorized to make such statement.

56 Authentication and Registration of Documents, Proc. No. 922/2015 , *Fed. Neg. Gaz.* 22nd Year No. 39, Feb. 2016, A.A., Art. 9(1).

57 *Id*, Sub-art. a.

58 *Id*, Sub-art. c.

assumed known. The conduct of the company officials has no power to override the effects of doctrine notice (actual or presumed). Appearance of authority may also be created if the company had furnished document to the agent regarding the limits of power on the basis of the power of the company and later changed the purpose clause of the memorandum of association by amendment which was registered and deposited, but the agent acts on the basis of altered power, the company is responsible for its failure to change the written power of agency.[59] If the purpose on the basis of which the agent was authorized is changed through amendment that was validly registered and minutes of the meeting that had amended the purpose was registered accordingly, the representation conducted on the basis of the lapsed purpose and lapse power is ultra vires. The company can possibly invoke the doctrine of ultra vires, the innocent third party can invoke the doctrine of appearance of authority and fault on the part of the company by allowing the agent to continue representation with a lapsed power. In this case, the unauthorized agent is responsible to the third party, but the law allows joinder of the apparent principal. Thus, the company may be forced to compensate the third party even if the transaction is ultra vires. 1)

When an unpermitted venture is permitted or unremunerated purposes is included in the list of purposes clause through amendment, the venture falls within the legitimate power of the company. Owing to the nature of the company, or otherwise due to public policy measures, inclusion in the purpose clause by itself cannot legalize operation of the activity. In this case, the regulatory agency may not accept the amendment. But where the amendment is within the bounds of law, the company can run any form of venture by presenting the amended memorandum of association to the attention of the regulatory agency (the Ministry of Trade and Industry or regional offices or other pertinent offices, like National Bank of Ethiopia, where memorandum of association of banks is amended). The amendment has to comply with the legal and procedures requirements of the Commercial Code.

## VI. Conclusion

A company is expected to operate its business within the confines of predetermined ventures. The activities that the company may engage in or transactions it may execute are normally listed down in the purpose clause of the memorandum of association. The enumerated

[59] *Id*, Sub-art. b.

purposes are viewed legally permitted when the memorandum of association is registered and business license is granted. It is generally believed that the company is powerless to engage in an activity that is not enumerated in the purpose clause of the memorandum of association. Any activity that exceeds the power of the company is ultra vires. The Commercial Code of 2021 or its predecessor kept silent regarding the recognition of the doctrine of corporate ultra vires or its effects. The legislative silence however cannot usher Ethiopian company lawyers to take the silence as non-recognition of the rule of ultra vires. To allow a company exercise unlimited power appears inherently wrong. Thus, though the doctrine of ultra vires is not expressed in the Ethiopian Commercial Code, the requirement that company cannot engage in an activity that is not expressed in the purpose clause of the memorandum of association implies that exceeding the legitimate power or engaging in an unenumerated activity is ultra vires. Companies being artificial creations generally enjoy predetermined powers. The limits of powers of Ethiopian companies are required to be expressed in the purpose clause of memorandum of association. The company is required to carry out only the activities that are expressed or with necessary precaution implied from the nature of business. It is often viewed that the company got permitted to carry out activities for which it is licensed by the regulatory agency. This is line with Article 25 of the Commercial Code of 2021, which obligates companies to engage in only permitted ventures. The prohibition of operating an unpermitted business is a legislative dictate, while the need to confine to the powers enumerated in the memorandum of association is a corporate duty. If a purpose is enumerated in the purpose clause of the memorandum of association and the memorandum of association is registered in accordance with the requirements of business registration and licensing proclamation, it is generally assumed that the company is permitted to engage in anyone or more of the purposes expressed in the memorandum of association. Conversely thus unremunerated venture is unpermitted venture that the regulatory agency is not aware of it. By implication thus if engaging in non-enumerated business is ultra vires, the same goes to operation of unpermitted business or transaction. Hence, though not expressly stated in the Commercial Code of Ethiopia, it is possible to invoke doctrine of ultra vires through purposive construction.

Traditionally companies are expected to act within the defined contours of business activity, but the confinement backfired to incorporators by restraining the company not to engage in profitable ventures. The restriction not to go beyond the delineated ventures affected not only the very people who designed the company but also national economy and corporate clients.

This called for judicial and legislative intervention. Consequently, numerous changes have been made. In some jurisdictions, companies are permitted to carry out any legal business activity; while, others provide flexibility approach that extended the power of board of directors. The doctrine of ultra vires is not however dead in all advanced system. In some jurisdictions the doctrine is still alive, and can be enforced but it has been considerably deteriorating.

The changing global situation indicates that the doctrine of ultra vires in its traditional sense is outdated and prejudicial to the interest of corporate clients and the national economy. Ethiopian companies also should be permitted to carryout whatever legally possible ventures upon their choice without the need to amend the purpose clause of memorandum of association. The business license should be designed in a way Ethiopian companies can flexibly operate profitable business. Further, innocent third parties should be protected from harsh effects of the doctrine of constructive notice. Thus, unless bad faith is proven against corporate clients, mere failure to get awareness of the content of registered documents, should not a basis for liability.

# Judicial Mortgage under Ethiopian Law: Misplaced or Never Understood?

**Bisrat Teklu***

**Abstract**

*The article explores the nature and effects of judicial mortgage under the Ethiopian Civil Code. After brief discussion of the theoretical underpinning of judicial mortgage, the articles attempts to disprove the judicial taking of judicial mortgage ad attachment. The distinctive features of judicial mortgage, attachment and temporary injunction are briefly illuminated by applying doctrinal research methodology. The finding plausibly prove that the Civil 'Code defines judicial mortgage in a way different from after judgment attachment.*

## Introduction

Mortgage security is available to a creditor seeking to enforce his/her right in case the debtor of secured obligation fails to discharge the obligation in accordance with the terms of the contract. Born in the Roman legal system, mortgage is nowadays a living "King of guarantees." [1]

A mortgage may be of three types: legal, contractual and judicial.[2] However, all three kinds of mortgage are not recognized in all legal systems. In particular, a judicial mortgage is recognized as a security device only in few legal systems. The Ethiopian legal system recognize judicial mortgage as one the facets of mortgage. Article 3044 of the Civil Code of Ethiopia recognizes judgment mortgage.[3] The provision provides, *"A court or arbitration tribunal may secure the execution of its judgments, or awards by granting one party a mortgage on one or more immovable property of the other party."*[4] A problem, however, in

* LL.B. LL.M (Lecture of Law, School of Law and Federalism, ECSU)

1 The Law Reform Commission *Consultation Paper on Judgment Mortgages* (Ireland, ISSN 1393 – 3140, 2004 p.11.

2 K. Tsintsadze "Mortgage as a Means of Guarantee," *European Scientific Journal* (ISSN: 1857 – 7881) (2015) p. 106.

3 In a way, judgment mortgage is made of certain goods belonging to the judgment debtor's patrimony. *See,* M. Planiol *Treaties on the Civil Law* (Vol. 2, Part 2) (1939) p. 572, ¶ 2852. *See also* M. Olariu, *Extinction of Obligations and Securities in the Roman Law*, (Romanian-American University, Bucharest) p. 11.

4 Civ. Code of the Empire of Ethiopia, Proc. No. 165 of 1960, *Neg. Gaz.* Extraordinary, 19th Year No. 2 May 1960, A.A., Art. 3044.

the Ethiopian legal system is that courts and legal scholars confuse judgment mortgage with other adjective law concepts: attachment and injunction. For instance, under Cassation File No. 29269 the Federal Supreme Court Cassation Division (Hereinafter Cassation Division) stressed that one way in which a judicial mortgage may be constituted is through temporary injunction as provided under Article 154 of the Civil Procedure Code.[5] Similarly, in Cassation File No. 106494 the Cassation Division decided that an order given pursuant to Article 154(b) of the Civil Procedure Code establishes judicial mortgage as provided under Article 3044 of the Civil Code, but time of recordation of the encumbrance does not create priority among judgment creditors that register their mortgage on the property. Differently, the Cassation Division on File No. 106494 limited the scope of an injunction order, holding that a temporary injunction order on movable property pursuant to Article 154(b) of the CPC does not establish judicial mortgage. The confusion is further aggravated through scholarly publications that attempted to resolve it. Some scholars argue against the position of the Cassation Division in treating temporary injunction as a source of a judicial mortgage, which further rather complicates the concept. For instance, in a published case comment, an author took a position that holds attachments before judgment upon registration creates a judicial mortgage.[6] Such assertions further aggravates the apparent confusion. Further, there is some

---

5 የኢትዮጵያ ንግድ ባንክ እና እነ አቶ ዋለልኝ አያሌው (2 ሠዎች) (መ/ቁ. 29269፣ ጥቅምት 15 ቀን 000ዓ/ም የተወሰነ)፣ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ውሳኔዎች (ቅጽ 7፣ 2008ዓ.ም የታተመ) ገጽ 32-35። ይህ ውሳኔ ባልታተመውና በድረ-ገጽ በተለቀቀው ቅጽ 7 የፌደራል ጠቅላይ ፍ/ቤት ውሳኔዎች ላይ የተካተተው ገጽ 42-47 ነው። *See* also, **የኢትዮጵያ ንግድ ባንክ እና አቶ ኪዳኔ አፍራሶ** (2 **ሠዎች**) (**መ/ቁ**. 39170፣ 2008 **ዓ/ም የተወሰነ**)፣ **የፌደራል ጠቅላይ ፍ/ቤት ሰበር ውሳኔዎች** (**ቅጽ** 8፣ 2009 **የታተመ**) **ገጽ** 340-343።

6 ቤዛ ደሳለኝ (እ.አ.አ 2010ዓ.ም)፣ በሰበር መዝገብ ቁጥር 29269 ጥቅምት 15 ቀን 2000ዓ.ም የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በሰጠው ፍርድ ላይ የቀረበ ትችት (Mizan Law Review, vol. 4 No. 1) ገጽ 181። ጸሐፊው በጽሁፉ ላይ እንዲህ ሲል አስፍሯል፡-

‹‹ይልቁንም በፍርድ ከሚሰጥ የመያዣ ትእዛዝ የፍርድ መያዣንና ለማቋቋም የተለየ አግባብነት ሊኖራቸው የሚችሉት በፍትሐብሔር ሥነ-ሥርአት ሕጉ ንብረት እንዲከበር ስለማድረግ በሚለው ርዕስ ስር የተመለቱት ድንጋጌዎች ናቸው። በተለይ በክርሩ የሚመለተው በተከራሪዎች መካከል ያለን የገንዘብ ግንኙነትእንጂ ንብረቱ የክርክሩ መነሻና ምክንያት ባልሆነበት ሁኔታ ፍ/ቤቱ የተከሳሹን ንብረት ለሚወስንበት ፍርድ ተመዛዛኝ የሆነው ሀብቱ በሙሉ ወይም በከፊል እንዲያዝ ወይም ተከብሮ እንዲቆይ በሚሰጥበት ጊዜ ነው።

ይህም ቢሆን ግን ዋስትና የተሰጠበት የገንዘብ ልክና የማይንቀሳቀሰው ንብረት ዐይነት በግልጽ ልተመለከቱና ይህንኑ የፍርድ ቤቱ ትእዛዝ በሚመለከተው አካል እንዲመዘገብ ካልተደረገ ዋጋ የሚኖረው አይሆንም። ለምሳሌ ያህል ‹ሀ› እና ‹ለ› ከሳሽና ተከሳሽ ሆነው ‹ሀ› ባቀረበው ክስ ያበደርኩትን ብር 50000.00 በብድር ውሉ መሰረት ‹ለ› ይጅፈለኝ በሚል ጥያቄ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 152(1) መሰረት እግድ ሊሰጥበት ይችላል። ‹ሀ› በበኩሉ ይህንን ትእዛዝ ለሚመለከተው መዝጋቢ አካል ወስዶ ካስመዘገበው የማይንቀሳቀስ ንብረት የፍርድ መያዣ ተቋቁሟል ልንል እንችላለን። ይህ ካልሆነ ግን በንብረቱ ላይ የመያዣም ሆነ የቀዳሚነት መብት ሊያስገኝ የሚችችል ነገር አይኖርም።››

confusion in distinctive features of regarding injunction and attachment that call for a point of clarification.[7]

This article attempts to address two overarching concerns. First, it explains the concepts of judicial mortgage, temporary injunction, and attachment. Second, it differentiates judicial mortgage from other types of securities for performance.

## I. Mortgage[8]: Nature and Effects

### *1.1. Historical Origins*

Three generic types of security relationship dominate the history of real security: *fiduciary,*[9] *pignus*[10] and *hypothec*.[11]Among the three, the most important and complicated security device in both civil law and common law legal system is mortgage/*hypothec*.[12] *Hypothec*, also known as mortgage, is an accessory right developed sometime in the Mid-Roman Empire.[13] It appeared in classical Roman law representing real estate security that allows the debtor to secure his debt through his/her property retaining ownership title over the property.[14] Later on, researches glare that *hypothec* is transplanted to other legal systems; some naming it *hypothec* while others call it mortgage.[15]

---

7 A paper authored by Memberetehay Tadesse (PhD), former president of the Federal Supreme Court confuses injunction with that of attachment. It treats article 154 of the Civil Code as a provision governing attachment of property. መንበረፀሐይ ታደሰ (መጋቢት 1998ዓ/ም)፣ ሞርጌጅ፤ ዋስትና የተነፈገው የዋስትና ሕግ (ያልታተመ)ገጽ፣ 25-26።

8 Divisions on ownership among others occur when the owner makes use of his thing as real security. The New Encyclopaedia Britannica Macropaedia, Diplomatic Core Edition (2010) (the U.S.A, vol. 26), p. 194.

9 *Fudiciary*, commonly known as *fiduci* in the Roman legal system is the first and foremost real security. In the Roman legal system, *fudicary* has two development stages. At its first stage of development, the debtor used to transfer both ownership and possession of the property to the creditor. This was done subject to a personal obligation to recover the property upon payment. Later on, a new development in the system of *fudiciary* brought an instance whereby the debtor transfers the ownership title to the creditor, however, retaining the possession of the property by the leave of the creditor. In Roman law, *fiduciary* is also known as *mcncipatio cum fiducia* or *in iure cessia cum fiducia*. R. J. Goebel "Reconstructing the Roman Law of Real Security." *Tulane Law Review*, Vol. XXXVI (1961) p. 29. *See also* Olariu, *supra* note 3.

10 In *pignus* the debtor retains ownership title on the property. However, the debtor transfers possession to the creditor. In such a way, the creditor retains possession until the debtor discharges its debt. Goebel, *supra* note 9.

11 *Id.* In *hypothec*, the debtor retains both ownership and possession of the property, but transfers to the creditor a in the property.

12 The New Encyclopedia Britannica, *supra* note 8, p. 195. The term mortgage though it is derived from France is used in common law, whereas in civil law its twin is called *hypothec*.

13 Goebel, *supra* note 9, p. 30. From its genesis hypothec subsists only as long as the obligation whose performance it secures continues to exist. Tsintsadze, *supra* note 2.

14 Olariu, *supra* note 3.

15 Tsintsadze, *supra* note 2. A civil law hypothec is exactly equivalent to an English mortgage by legal charge or American lien-theory mortgage.

Though *hypothec* is later transplanted by countries adopting the common law legal system, the focus of its development in the civil law and common law legal systems was different.[16] In its early development, the focus of its development in the common law legal system was ensuring that the debtor gets the ownership of his property upon discharging its debt.[17]On the other hand, the focus of its development in Roman law was ensuring the protection of the creditor's right at times the thing given as security is transferred to a third party.[18]

These days, from the above mentioned two quite different primary purposes of *hypothec*/mortgage in view, and in its long course of development in both civil law and common law legal systems the device has come to where, despite great differences in vocabulary and conceptualization,[19] there is less difference in its practical result. [20] In the following two sub-sections, the historical development of mortgage in Roman law and Common law is briefly discussed.

### A. The Concept of Mortgage in Roman law

*Hypothec* is developed sometime in the mid-Roman Empire.[21]It appeared in the classical Roman law representing real estate security that allows the debtor to secure his/her debt through his/her property retaining ownership title.[22] Since its early development, in the Roman Empire, the institution of *hypothec* allowed the debtor the right to possess and use the property given as security.[23] The security was established while neither transfer of title over the property, nor transfer of possession was there.[24]The debtor may lose his/her control over the property given as security only when s/he defaults, in discharging the debt. [25] When the

---

16 The New Encyclopedia Britannica, *supra* note 8.

17 In the common law, securities transfer ownership or a real right in the thing to the creditor.

18 The New Encyclopedia Britannica, *supra* note 8. The Roman legal system kept the ownership of the thing charged with mortgage encumbrance with the debtor.

19 The difference in conceptualization relates to the type of property that may be given as security.

20 The New Encyclopedia Britannica, *supra* note 8.

21 Goebel, *supra* note 9, p. 30. From its genesis hypothec subsists only as long as the obligation whose performance it secures continues to exist. See Tsintsadze, *supra* note 2.

22 Olariu, *supra* note 3. The hypothec-mortgage-guarantee system is founded in Rome. By then, the term "*hypothec*" was first used in 6th century BC by Archon Solomon. During the reforms in 594, Solomon established a new rule, according to which a column was raised on the land of a borrower and there was written: "This Land is Guarantee for Obligation". This column was called "*Hypotheca*", meaning *Base*. At the late Roman Empire, the *hypothec* gained complete development, which has turned into the most popular guarantee mode. In Medieval European Law Mortgage begin practiced in the 8th Century. *See*, The Law Reform Commission, *supra* note 1, p. 5.

23 The New Encyclopedia Britannica, *supra* note 8, p. 195.

24 Olariu, *supra* note 3, p. 12.

25 Goebel, *supra* note 9, p. 30. Unless the debtor defaults, the creditor will simply have a possessory interest which is not actualized over the property given as a security.

debtor is in default of discharging his/her obligation, the creditor was entitled to take the possession of the property given as security from the hands of the debtor.[26] In other words, the debtor's failure to discharge his/her principal debt gives rise to the creditors right to possess the property given as a security. This was enforced through the *salivan interdict*.[27] However, the problem with the *salivan interdict* was that it was short of the right of pursuit. [28]

At its early development phase, the object of *hypothec* was a tangible movable or immovable asset.[29]In addition, it was clandestine in its nature.[30] There was no requirement of publicity/registration of *hypothec* that would allow third parties to know whether a property has been given as a security.[31]

The clandestine nature of *hypothec* coupled with the ambiguity in the *salvian interdict* created a problem in the persistence of *hypothec* as a real security. Its clandestine nature opened a room for the debtor to assume new obligation using a property already mortgaged. This threatened the existence of *hypothec* as a security tool.[32] Thus, Emperor Leo provided a solution stressing that a mortgage established by a public act or by a private act attested by three witnesses has priority to the mortgages established without forms of publicity, irrespective of their date.[33] In addition, at a later stage, the Roman Empire developed rules that require publicity of mortgage. This resolved the problem associated with the clandestine nature of *hypothec*.

In order to avoid the problem related to transferring a property given as a security to a third party, the Roman legal system developed the *serviana action.* This action allowed the creditor to follow the mortgaged property in the hands of any third party.[34] Through this action, a creditor that benefits from the *hypothec* was allowed either to take possession of the

---

26 *Id*.

27 Olariu, *supra* note 3, p. 12.

28 *Id*. If the debtor transfers the property to a third party, the creditor may no longer enforce his/her security claim over the property given as a security. The interdict will no longer be effective if the property is transferred to a third party. In other words, by then the creditor had no action against third parties.

29 *Id*.

30 *Id.*

31 *Id.*

32 *Id.* There were cases where mortgages were pre-dated, a more recent mortgage being fraudulently placed before an older mortgage.

33 *Id.*, p. 13. Moreover, if the same asset was mortgaged to several creditors, the relationship between was governed by the rule: *prior tempore potior ture*, meaning the right of mortgage previously established prevails over that subsequently established. In addition, by then, mortgage could also be established by the law. For instance, a legal mortgage was established by tax authorities over the property of taxpayers, and persons lacking capacity used to have a legal mortgage over the assets of the curators and guardians.

34 *Id*, p. 12.

asset or to sell it.[35] This assured creditors that neither transfer of property, nor the insolvency of the debtor puts him on risk for non-payment.[36] In fact, the discretion left to the creditor either to take possession of the property or to sell it, was initially proven to have given perfect security for the creditor.[37]However, later on, such automatic discretion created injustice. It was proved that using such discretion creditors opted to take possession of the property than selling a lucrative mortgaged property for a lesser amount of unpaid debts. Due to this, the Roman legal system prohibited creditors from automatically becoming owners of the property charged with mortgage encumbrance, allowing only sale of the mortgage.[38]

After these developments were made on *hypothec* Roman private law gained complete development on the scheme which turned *hypothec* into the most popular guarantee mode.[39]

### B. Common Law

In common law legal systems, the Roman law expression "*hypothec"* is termed as "mortgage." Elites of the common law legal system adopted the term mortgage from French. In French *Mort* means "dead" and *Gage* is "hand."[40] Hence, the terms, "*mort-gage*" coined to mean "dead hand".[41]

In the common law, the concept of mortgage was first developed in English equity courts.[42] In its early development, mortgage used to allow the transfer of ownership of the thing given as security automatically to the creditor subject to condition.[43] This condition, properly named "defeasance," provides that the debtor will have full ownership over the property

35 *Id.*
36 *Id.*
37 *Id.*
38 *Id.* However, in Justinian law, a trace of this concept is kept under the following form: the creditor could request the Emperor to give him the asset if no purchaser is found for that asset but under reserve of certain conditions which had to be fulfilled. In other words, the prohibition had certain exceptions.
39 Tsintsadze, *supra* note 2, p. 107.
40 A. Smith *Paper Money* (Macdonald & Co Ltd, London and Sydney), (1982) p. 69.
41 *Id*. Under the common law, there were two types of gages. The first one is 'live gage'. 'Live gage' represents a security transaction where the lender took control of the property given as security, collecting its rents and the produce until the debt was paid. In the modern language, this may equate to antichrists. This is a security device where the creditor kept the land long enough to collect the rents and profits sufficient for his debt, then returned it. The second type of gage was 'mort gage'. *Mort* being the French word for "dead," the instrument was known as *Mort-gage*. In the case of *mortgage*, the debtor kept control of his land and made payments from its income. However, if the debtor failed to meet the promise agreed the creditor may seize the property under *mort-gage*. But, if the debtor made the payments, he/she always retains the possession.
42 M. O. Hudson, *Mortgages: Real and Chattel, On Modern American Law* vol. 3(E. A. Gilmore, ed. Blackstone School of Law, 1958) p. 3.
43 The New Encyclopedia Britannica, *supra* note 8. This is contrary to the Roman legal system, where the debtor keeps the ownership of the thing.

mortgaged on the date he/she expected to discharge the obligation.[44] In other words, when a mortgage is given, the debtor/mortgagor transfers his/her ownership title over the immovable to the creditor/mortgagee subject to the condition that it would automatically revert back to him/her if he/she discharges the obligation properly.[45] According to English Courts, the debtor, as long as not in default, though the title of the immovable transfers to the creditor, retains the possession of the land.[46]If the debtor fully discharges his/her obligation on or before the date of performance, the ownership of the property reverts to the debtor.[47] Whereas, if the debtor defaults, the creditor's right to possess the land matures.[48] Meaning, the mortgagor's property right will be forfeited to the benefit of the mortgagee.[49]Under this harsh doctrine, a debtor who has mortgaged an immovable property loses his property.[50]

In those days, in the common law legal system, the debtor was not allowed to transfer ownership of the property encumbered with mortgaged. This was because, the title of the mortgage was not in the name of the debtor.[51] The creditor holds title of the thing mortgaged.[52]The debtor may, however, convey/transfer his equity of redemption.[53] The clandestine nature of mortgage in common law supposed to affect good faith acquirers. If the debtor defaults, he/she would be dispossessed, thereby affecting the property interest of the third party acquirer. The good faith purchaser might end up with nothing.

Later on, the harsh effect of the early form of mortgage, and its clandestine nature were proved to be incorrect. With a view to protect third-party purchasers, the common law legal system established public offices that record mortgage transactions.[54] Under the latter system, unless the mortgage is recorded, it allowed a good faith purchaser to acquire a good

---

44 La Salle Extension University, *American Law and Procedure* vol. 5 (1962) p. 230.

45 The New Encyclopedia Britannica, *supra* note 8, p. 195.

46 *Id*. There is disagreement on the issue whether the debtor may retain possession of the immovable mortgaged or not. In the Encyclopaedia Britannica it is stressed that the debtor retains possession in as long as he/she is not in default. In other words, it stresses, the fact that though the ownership title is transferred, the possession of the property remains in the hands of the debtor. Differently, in La Salle Law Library resources it is indicated that the mortgagee gets an absolute right over the immovable, and could take possession of the property until he/she is paid. It further stipulates the debtor may regain the unencumbered title of mortgage after full payment of the obligation on or before the date stated in the contract. *See*, La Salle Law Library, *supra* note 46.

47 La Salle Extension University, *supra* note 44.

48 The New Encyclopaedia Britannica, *supra* note 8, p. 195.

49 Hudson, *supra* note 42, p. 6.

50 La Salle Extension University, *supra* note 44.

51 *Id.*

52 The New Encyclopaedia Britannica, *supra* note 8, p. 195.

53 *Id.*

54 *Id.*

title against the mortgaged property.[55]Moreover, in search for justice, courts developed equitable doctrine.[56] The equitable doctrine allowed mortgagors to redeem the mortgage by paying the secured debt, even after default.[57]This right of mortgagor was called "equity of redemption."[58] Unrestricted redemption of mortgage, however, is problematic. There was no time limit within which the right may be exercised. As a result, mortgagees were unable to get a settled title over the property. This problem was resolved through developments that allowed the mortgagee to bring a bill to foreclose the mortgage and extinguish the mortgagors right of redemption.[59] In modern developments, the common law legal system, eased the above burdens and allowed the mortgagor to own and possess the immovable mortgaged in as long as he/she is not in default.[60]

The focus of mortgage by then in the common law was on ensuring that the debtor got his ownership back if he discharges his/her obligation.[61]

### C. Ethiopia

The exact historical count Ethiopia recognized mortgage as security is not known. The first historical legislative document the author located in this regard incorporating mortgage is the *Fitha Negest*[62] and subsequent decisions based on the *Fitha Negest*.[63] Judgments rendered during those days in Ethiopia show that both contractual and judicial mortgage was recognized. In one judgment, the presence of judicial mortgage was implied as follows: [64]

---

55 *Id.*

56 La Salle Extension University, *Supra* note 44.

57 *Id.*

58 *Id*, p. 231.

59 *Id.* In such proceeding, courts enter a decree that calls the mortgagor to exercise his/her right of redemption on a certain date fixed on the decree. If the mortgagor fails to exercise his/her right of redemption on the period provided in the decree, his/her right of redemption will extinguish for the last time.

60 *Id.*

61 The New Encyclopedia Britannica, *supra* note 8.

62 መጽሐፈ ሕግጋት ዓበይት (1962) ገጽ 246 እና ተከታዮቹ።

63 The judicial decisions are found on "The Old Ethiopian Judgment Digests" /በኢትዮጵያ ከጥንታዊያን የፍርድ መዘግብት የተገኘና የተዘጋጀ/. The digest contains precedents that were decided base on the Fiteha Negest. The digest is composed of four volumes. Each volume is written hand. The four volumes are composed of thousands of pages. The problem is so far the writer is able to locate a single copy of only the three volumes. The forth volume is missing. The fact that the information that the Digest is composed of four volumes is generated from Abera Jembere's book on Ethiopian legal history.

64 በኢትዮጵያ ከጥንታዊያን የፍርድ መዘግብት የተገኘና የተዘጋጀ፣ የፍትሐ ብሔር ሕጋዊ ድርጅት፣ ገጽ 827። ከአንድ ፍርድ ላይ የተወሰደውን ስናይ እንዲህ ሲል ያስቀምጣል፡- ‹‹3191 ፡ ገንዘቡን ተበድሮ ስለመያዣ እርስት በባለቤቱም ሆነ በዳኛ ፈቃድ የያዘ ሰው ባለእርስቱ የተበደረውን ገንዘብ በሙሉ ከከፈለ

ገንዘቡን ተበድሮ ስለመያዣ እርስት በባለቤቱም ሆነ በዳኛ ፈቃድ የያዘ ሰው ባለእርስቱ የተበደረውን ገንዘብ በሙሉ ከከፈለ መያዣ የያዘው ሰው ገንዘቡን ተቀብሎ መሬቱን ይለቃል። የመሬቱን ሰብል ግን አበዳሪው ከበላ ተበዳሪው ወለድ አይታሰብለትም፡

*(A person that mortgages his immovable either at his will or by the will of a judge may regain his immovable if he fully discharges the debt. The creditor may not claim interest if he collects the fruits of the immovable during the currency of the mortgage.) (*Translation by the author)

The above judgment indicates that the source of mortgage may either be contract or court decision. The fact that a judge may give a certain immovable belonging to the debtor against the will of the debtor clearly indicates the recognition of judicial mortgage.

During the *Fetha Negest* regime, the effect of both contractual and judicial mortgage was the same. In the *Fetha Negest* regime, a person that secures his debt through mortgage was required to hand over the immovable mortgaged to the creditor.[65] The creditor was obliged to return the immovable mortgaged to the debtor when the latter discharges its debt.[66]The creditor was obliged to accept performance and handover the property mortgaged even when the defaulting debtor discharged the secured obligation.[67] In other words, the debtor's default to discharge its debt on time does not automatically deprive the debtor his/her ownership right over the immovable. Unless the immovable is sold by the debtor, or by a court order with a view to discharging the unpaid debt, the debtor was given the opportunity to pay the debt and re-possess the property mortgaged. [68] Any contractual clause that bars the

---

መያዣ የያዘው ሰው ገንዘቡን ተቀብሎ መሬቱን ይለቃል። የመሬቱን ሰብል ግን አበዳሪው ከበላ ተበዳሪው ወለድ አይታሰብለትም።››

[65] *Id.* <<ገንዘብ ሲበደር ስለዋስ እርስቱን ጡርቶ ገንዘቡን ሳይከፍል የቀረ እንደሆነ ስለዋስ ያስያዘው እርስቱ የተበደረውን ገንዘብ እስኪከፍል ድረስ አበዳሪው እጅ ይቆያል።››

[66] *Id,* p. 824. በዚሁ ገጽ አንቀጽ 3176 ላይ እንደሰፈረው ‹‹ገንዘብ ሲበደር ዕቃ ወይም መሬት ያስያዘ ሰው የተበደረውን ገንዘብ ሊከፍል በቀረበ ጊዜ በመያዣ የያዘው ሰው እስከዚህ ቀን ድረስ ያልከፈልክ እንደሆነ መያዣው ፀንቶልኝ እሸጠዋለሁ የሚል በሕግ የተዋዋለው ውል ለሌላ ማያዣው ላስያዘው ሰው ይመልስለታል እንጂ አበዳሪው ገንዘቡን ከመቀበል በቀር መያዣውን ሊሸጥ ወይም አስቀራለሁ ብሎ ሊከራከርበት አይችልም›› ይኸው ውሳኔ የተወሰደው ከ46ኛው የኢትዮጵያ ጥንታውያን የፍርዶች መጽሐፍ በ/ቁ. 2034፡7፡ 156 ከተመዘገበው ፍርድ ላይ ነው።

[67] *Id,* p. 827.

[68] *Id,* p. 824. ‹‹ስለችግሩ መሬት ወይም ቦታ ስለዋስ አስይዞ የሰው ገንዘብ ሲበደር የተበደርኩትን ገንዘብ በዚህ ቀን አመልሳለሁ ያልመለስኩ እንደሆነ ይህ ስለዋስ ያስያዝኩት ቦታ ልቅ ይሁንብኝ ብሎ ተዋውሎ በዚያው በተወሰነው ቀን ገንዘቡን ሳይከፍል 6 ቀን ቢያልፍበት ያን ስለዋ ያስያዘውን ቦታ አስገምቶ ወይም በጨረታ አስማምቶ በዋጋው ሽጦ ዕዳን ይከፍላል እንጂ ባለዕዳው በፈቃዱ በዚያው ውለታዬ ውሰድ ካላለው በቀር

mortgagor's right to reclaim its immovable from the creditor for default was invalid.[69] By the same token, a contractual clause that entitles the creditor the right to dispose of the property mortgaged at the time of default is void. The debtor, however, may forfeit its ownership right over the immovable to the creditor after he is put in default.[70]

The only instance where a transfer of possession was not required was when the debtor had a title deed over the immovable mortgaged. In particular, when the mortgage is given to a bank, the creditor was required to hand over the title deed and keep its possession over the immovable. The debtor will regain possession over its title deed only upon discharging the whole debt. Moreover, the right of pursuit was recognized during that time. If the debtor transfers its ownership right over the immovable property to another person fraudulently, a creditor who has the title deed on his hand may exercise right of pursuit over the property.[71]

In this period, attachment was understood differently. It is captioned in Amharic *'Maget.'* This is literally means 'seizure'.[72]

### *1.2. The Concept of Judicial Mortgage*

In its early stage, hypothec used to emanate from agreement only.[73] However, later on legal mortgage[74] and judicial mortgage[75] were introduced. The three, however, do not exist in

---

በችግሩ ቢያስይዝም ብዙ የሚያወጣውን መሬት ባንድ ቀን እላፊ ሳይገመት በውለታው ብቻ ሊያስቀር አይፈቀድለትም።››

69 *Id.* ‹‹ገንዘብ ሲበደር ዕቃ ወይም መሬት ያስያዘ ሰው የተበደረውን ገንዘብ ሊከፍል በቀረበ ጊዜ በመያዣ የያዘው ሰው እስከዚህ ቀን ድረስ ያልከፈልክ እንደሆነ መያዣው ፀንቶልኝ እሸጠዋለሁ የሚል በሕግ የተዋዋለው ውል ለሌላ ማያዣው ላስያዘው ሰው ይመልስለታል እንጂ አበዳሪው ገንዘቡን ከመቀበል በቀር መያዣውን ሊሸጥ ወይም አስቀራለሁ ብሎ ሊከራከርበት አይችልም።››

70 *Id.*

71 *Id,* p. 825. ‹‹የርስቱን ካርታ አስይዞ ከባንክ ገንዘብ የተበደረ ሰው ገንዘቡን ሳይከፍልና ካርታውን ሳይቀበል በማታለል ለባንክ ያስያዘውን ቦታ ለሌላ ሰው ሸጦ ቢሞት ቦታው በፊት ለተዋዋለው ለባንክ ይሆናል እንጂ በኋላ ለገዛው ሰው አይጸናለትም።››
በአንቀጽ 3185 ላይ እንደሰፈረውም ‹‹የርስቱን ካርታ አስይዞ ከባንክ ገንዘብ የተበደረ ሰው ገንዘቡን ከፍሎ ካርታውን ሳይቀበል በማታለል ለባንክ ያስያዘውን ቦታ ሸጦ ቢሞት በወራሾቹ አማካይነት ለባንክ የተያዘው ቦታ ተሸጦ ገንዘቡ ከባንክ ቢተርፍ የተረፈውን ገንዘብና ሌላም ሀብት ቢኖረው ተሞልቶ በኋላ ለገዛው ሰው ወራሾቹ ሊከፍሉት ይገባል ሀብትና ወራሽ የሌለው ቢሆን ግን በኋላ የገዛው ሰው ከባንክ ሰራተኛ ጋር ሆኖ ቦታውን ሸጦ ከባንክ የሚተርፈውን ገንዘብ ለመውሰድ ይችላል።››

72 *Id,* p. 287.

73 Planiol, *supra* note 3, p. 571, ¶ 2850.

74 G. She , "On the Amendment and Perfection of Legislation of Mortgage," *Journal of Politics and Law* (vol.3, No. 1) (2010) p. 116-117. The legal mortgage happens directly based on laws. "This mortgage has the validity of law without register. It is valid on the day the conditions happen.. In modern time, in order to guarantee trading safety, many countries set strict limits on legal mortgage. For example, German laws recognize the legal mortgage right to the debts generated from construction contracts. Japanese laws replace legal mortgage system with first-get priority system and unmovable pledge right.

every legal system. Some legal systems recognize only contractual mortgage.[76] In other jurisdictions, in addition to contractual mortgage, a room is left for legal mortgage. In few, judgments in addition to contractual and legal mortgage, judicial mortgage is recognized..[77]

In countries that recognize judicial mortgage, mortgage encumbrance only emanates from condemnation.[78] Judicial mortgage only emanate from judgment, or an arbitral award imposing an obligation on the judgment debtor.[79] Simply put, it is when a court or arbitration tribunal secures the execution of its judgment, order or award on one or more immovable properties of the judgment debtor judgment mortgage is created..[80]This indicates that a judgment mortgage is created not by the voluntary act of the judgment debtor; it is created by courts upon request from the judgment creditor.[81] As a real right holder, judgment creditors gets priority when the mortgage is sold. This issue or priority arises where there are other claimants (unsecured creditors) against the judgment debtor.[82]

Ethiopia, Eritrea, and France are among the few countries that recognize judicial mortgage.[83] The exact moment where a judicial mortgage is incorporated in the Ethiopian legal system is not known. However, one historical document seems to indicate the presence of judicial

---

75 Only France recognizes the legal mortgage right to a wider scope and regulates the judgment mortgage right. *Id*, p. 117. For most scholars, judicial mortgage emanated in the 16th Century. *See*, Planiol, *supra* note 3, p. 571, ¶ 2850.

76 For instance, in China there is no legal mortgage right or judgment mortgage right. The agreed mortgage right is the only available mortgage.. She, *supra* note 74, p. 117.

77 Countries that recognize judicial mortgage includes Ethiopia, Eritrea, and France.

78 Tsintsadze, *supra* note 2, p. 109.

79 Planiol, *supra* note 3, p. 574. The obligation may be either monetary obligation or an obligation to do. If the obligation is monetary in its entire sense, the judgment mortgage is granted in order to secure the execution of the monetary obligation. On the other hand, if the obligation is an obligation to do, the security is given to secure the damage the judgment creditor may suffer due to the debtor's failure to execute according to the judgment.

80 N. Maddox "The Law and Practice of Judgment Mortgages," *The Bar Review* (published by Thomson Round Hall in association with The Bar Council of Ireland), Volume 11, Issue 6, (December 2006, ISSN 1339 – 3426,) p. 189.

81 The Law Reform Commission, *supra* note 1.

82 Terry Gorry & Solicitors, *Judgment Mortgages-What You Should Know*, (2010), available at< http://businessandlegal.ie/judgment-mortgage-registering-a-judgment-mortgage >, visited on 12/10/2016.

83 The French Civil Code simply provides that a judicial mortgage may emanate from judgments and awards: adversary or default judgments, final or provisional, in favor of the one who has obtained them. Moreover, French Civil Code recognizes that judicial mortgage may emanate from judicial decisions handed down in a foreign country and whose execution has been authorized by a French court. However, in France, a judicial mortgage is general as to the property. It is to mean that a judgment creditor may register judicial mortgage over all immovable properties of the debtor: present and future. He may, under the same reservations, have complementary registrations made respecting the immovable subsequently entered into the patrimony of his debtor. The provision regulating mortgage seems to be transplanted from the French Civil Code. A cursory look into the French Civil Code Art.s regulating mortgage reveals that most of the provisions regulating mortgage are the verbatim copy of the French Civil Code. *See* French Civil Code, Art.s 2412 and 2396.

mortgage before the 1960's codification. As it is indicated in Old Ethiopian Judgment Digests the immovable property of a person may be given as a mortgage either at the will of a contracting party or a court.[84]

The judgment indicates that a similar concept with the present day judicial mortgage was there during the era where Ethiopia was relying on the *Fitha Negest* as its major source of substantive law. In fact, the issue needs further study.[85]Later on, judicial mortgage was incorporated in the Ethiopian Civil Code due to the legal transplantation that took place in the late 1950s. It seems, the Civil Code transplanted judicial mortgage from France. The French Civil Code makes the rules on judicial mortgage short and brief.[86] It devoted a single article that directly deals with judicial mortgage. Article 2412 of the French Civil Code provides:

> *A judicial mortgage may arise from adversary or default judgments, final or provisional, in favor of the one who obtained them.*
>
> *It also results from arbitral awards provided with an enforcement order, as well as from judicial decisions handed down in a foreign country and whose execution has been authorized by a French court.*
>
> *With reservation of the right of the debtor to avail himself, either pending suit, or at any other time, of the provisions of Articles 2444 and the following, a creditor who benefits by a judicial mortgage may register his right respecting all the immovables currently belonging to his debtor, subject to his complying with the provisions of Article 2426. He may, under the same reservations, have complementary registrations made respecting the immovables subsequently entered into the patrimony of his debtor. [ex. Art. 2123.]"*

The French Civil Code is believed to make the rules on judicial mortgage short and brief assuming the jurisprudence based on judicial traditions would set the rules of the regime.[87] In the case of Ethiopia, judicial mortgage is defined briefly, though the Code holds relatively

---

[84] በኢትዮጵያ ከጥንታዊያን የፍርድ ሙዛግብት የተገኘና የተዘጋጀ, *supra* note 66.

[85] So far, it only the above historical judgment digest which the author is able to locate. As most of the old Ethiopian judgments are lost between political transitions, it would take a hard time to investigate the issue in detail. አበራ ጀምበሬ ***የኢትዮጵያ ሕግና የፍትሕ አፈጻጸም ታሪክ***፤ ከ1426 እስከ 1966 ዓ.ም (2006ዓ/ም) (**ሻማ ቡክስ፣ አዲስ አበባ**)

[86] Planiol, *supra* note 3, p. 573, ¶. 2855.

[87] *Id*.

detailed provisions in comparison to the French Civil Code. In this regard, the Ethiopian Civil Code explains the conditions for creating judicial mortgage better than its French counterpart.

Compared to the French Civil Code, the Ethiopian Civil Code prescribes the rule that requires the judgment creating a judicial mortgage to specify the maximum amount guaranteed and specification of the property given as security in a more clear and direct manner.[88] However, still the Ethiopian Civil Code is very brief on judicial mortgage. In this regard, based on Planiol's assertion, the author believes that the same rationale used in France that made the drafters of the Ethiopian Civil Code formulated judicial mortgage briefly.[89]Nevertheless, the historical genesis and the formulation of judicial mortgage in both legal systems coupled with the experience of other jurisdictions require the fulfillment of the following requirements for the creation of a judicial mortgage:

### 1. The Necessity of Condemnation

The first substantive requirement for the establishment of judicial mortgage is the necessity of condemnation.[90] Condemnation in this regard refers to a judgment or award that requires a debtor to perform a certain act.[91] Condemnation may require the judgment debtor to pay a certain sum of money or may impose an obligation to do.[92] If the condemnation obliges the debtor to do a certain task, the judgment mortgage is given with a view to secure the damage the judgment creditor may suffer due to the judgment debtors failure to perform his/her obligation.[93]In other words, a judgment that does not condemn a party may not become a source of judicial mortgage. Due to this, preliminary judgments that do not condemn a party may not create judicial mortgage.[94] However, a preliminary judgment containing an order to pay a certain sum of money, or to do a certain task, may be secured through a judgment mortgage.[95]

---

88 Civil Code, Art. 3044. This, in fact, is because the French Civil Code recognizes the institution of general mortgage. The mortgage may extend to immovable in the patrimony of the debtor.

89 French Civil Code, Art. 2412. A judicial mortgage may emanate from judicial decisions handed down in a foreign country and whose execution has been authorized by a French court.

90 Planiol, *supra* note 3, p. 574, ¶ 2857.

91 *Id.*

92 *Id.*

93 *Id*.

94 *Id*, p. 576, ¶ 2860. A provisional judgment may be provisional, preparatory, or interlocutory. Provisional judgments do not give rise to judicial mortgage, because they do not condemn the debtor.

95 *Id*, p. 577 and 575, ¶ 2860 & 2859.

In the Ethiopian legal system, the requirement of condemnation is indicated under Article 3044(1) of the Civil Code.[96] The Code stresses that a court or arbitration tribunal may secure execution of its judgments, orders or awards by granting the creditor security over the immovable property of the debtor. Moreover, it requires the judgment or award to specify the amount of the claim secured by mortgage and the immovable/s to which such mortgage applies.[97] The phrase, "[t]he judgment or the award shall specify the amount of the claim secured by mortgage," indicates that judicial mortgage is given in relation to a judgment or an award. It is only a judgment or an arbitral award that condemns a party that may establish a judicial mortgage. In other words, in Ethiopia, it is only on a party condemned to discharge an obligation a judicial mortgage may stand on.[98]

### 2. The Necessity of a Principal Obligation

A judicial mortgage does not have an independent existence. Its existence depends on the existence of a principal obligation: a debt established through a judgment or a valid arbitral award. The mortgage in a judgment/award lives only until the claim established in the judgment exists.[99] Moreover, judicial mortgage lives only in so far as there is enforceable judgment/award.[100]In particular, a judicial mortgage may be valid in a judgment or award within 10 years from the date the judgment/award is rendered.[101]

---

96 In Eritrea, in the Civ. Code of the State of Eretria, Judicial mortgage is recognized under Art. 2539. The newly adopted Eritrean Civ. Code uses the term "*Judicial Hypothec*" instead of the term "*Judicial Mortgage*". This change is deliberate with a view to use a civil law legal term.

97 Civ. Code Art. 3044(2).

98 The same holds true in Eretria. The State of Eritrea in its 2015 Codification adopted a similar provision likewise it's Transitional Civil Code it took from Ethiopia. The 2015 Civil Code of Eretria provides as follows:
"*Art. 2539.* - ***Judicial Hypothec***.
*(1) A Court or arbitration tribunal may secure the execution of its judgments, orders or awards by granting one party a hypothec on one or more immovables the property of the other party.*
*(2) The judgment or award shall specify the amount of the claim secured by hypothec and the immovable or immovables to which such hypothec applies.*"

99 If the debt established in the judgment is discharged, the mortgage will extinguish. It is created as an alternative remedy for the creditor in case the debtor fails to perform the principal obligation in accordance with the judgment

100 It cannot be enforced if the judgment or award is not enforceable any longer.

101 Civ. Pro. Code, Art., 384.

### 3. Specification of the Maximum amount Secured

In Ethiopia the maximum amount secured by the judgment mortgage has to be clearly specified in the judgment/award in monitory terms.[102]

### 4. The Necessity of an Immovable Property

it is only immovable property that may be the subject of judicial mortgage.[103] Though special movables may be subject to contractual and legal mortgage, it is only immovable property that may be subject to judicial mortgage.[104]Article 3044(1) of the Ethiopian Civil Code, Article 2539 of the Eritrean Civil Code and Article 2412 of the French Civil Code explicitly provide that it is only on the immovable property of the debtor that judicial mortgage may be established.

### 5. Specification of Property given as Mortgage

In Ethiopia, Article. 3044 (2) of the Civil Code requires the judgment/award creating the mortgage to specify the immovable/s to which the mortgage applies. The specification should be so vivid.[105]In particular, the commune in which the immovable is situated, the nature of the immovable and, where appropriate, the number of the immovable in the cadastral survey plan shall be specified in the judgment creating the mortgage.[106]Moreover, where the immovable is situated in an area where there is no cadastral survey plan, not less than two of its boundaries shall be specified.[107]

---

102 Civ, Code, Art. 3044(2). The specification of the maximum claim the payment of which is guaranteed has two principal purposes. The first is that it informs all third parties (other creditors, purchaser etc…) to know the maximum value of encumbrances on the thing. Secondly, it enables the debtor to create another mortgage on the same immovable in order to take an additional loan from other creditors also.

103 The same holds true in Ireland, in Ireland the Judgment Mortgage can be created only on the defendant's land in respect of the debt due on foot of the judgment. The Law Reform Commission, *supra* note 1, P.7.

104 Planiol, *supra* note 3, p. 580, ¶ 2867.

105 Civ. Code, Art. 3048(1).

106 *Id,* Art. 3048(2).

107 *Id* Sub-art. 3.

## 6. The Requirement of Inscription[108]

The judgment or award creating mortgage shall be made in writing.[109] Thus, in effect as a judicial mortgage should be made in writing.

## 7. Registration

Judicial mortgage takes effect upon registration.[110] The law of Louisiana in this regard acknowledges a creditor's right to record a judgment, whether "final or provisional"' and state that if an appeal is taken on the judgment/award where the mortgage is confirmed, the judicial mortgage "relates back" to the time of recordation.[111] Accordingly, such a judgment creditor has special powers in relation to the property.[112]

The same holds true in Ireland. In Ireland, the Judgment Mortgage (Ireland) Acts 1850 and 1858 provide a mechanism whereby a plaintiff who obtains judgment can register the judgment as a mortgage against the defendant's land in respect of the debt due on foot of the judgment.[113] From the moment of registration, the judgment creditor will have a priority right over the immovable against which the mortgage is registered as any other mortgage.

In Ethiopia, the requirement of registration is provided in Article 3052 of the Civil Code. A person may therefore validly establish a judgment mortgage and secure his/her right of priority, and pursuit if he/she registers the judgment mortgage at the place where the immovable given as mortgage is situated.[114]The same holds true in the Eritrean Civil Code.[115]

---

108 For contractual mortgage as well, the requirement of an inscription is mandatory. Art. 3045(1) cum 1723(1) of the Civ. Code requires any instrument establishing conventional mortgage to be in writing.

109 Civ. Pro. Code, Art.s 181(1) cum 318(2).

110 S. K. Peters "Judicial Mortgage Rights: Recordation of Non-Executory Judgments," *Louisiana Law Review* vol. 35, No. 4 (1975), p. 892.

111 *Id*, p. 892-893. When a judgment is validly registered as a judgment mortgage, registration has the effect of a mortgage created through contract over the judgment debtor's beneficial interest at the time of registration of lands set out in the affidavit.

112 The Law Reform Commission, *supra* note 1, p. 7.

113 *Id.* In summary, the procedure to be followed in Ireland is as follows: When a judgment is entered, the judgment creditor swears an affidavit setting out, *inter alia*, the terms of the judgment and reciting that the judgment debtor is the owner of particular lands. Once the affidavit is sworn, the judgment is converted into a mortgage by filing the affidavit in both the office of the particular court where the judgment was obtained and the Land Registry or Registry of Deeds (as appropriate). The Registrar of Deeds, or the Registrar of Title in the Land Registry, will thereupon send both parties a note confirming registration of the judgment mortgage. The effect of registration is provided for by Section 7 of the 1850 Act.

114 This registration shall be undertaken in accordance with Arts. 1656 and the following of the Ethiopian Civ. Code.

### *1.3. The Effect of Judicial Mortgage*

Both in civil law and common law, a validly registered judicial mortgage entitles the creditor the right of preference and the right of pursuit. However, registering a judicial mortgage is not an act in execution of the judgment itself. Rather, recordation establishes a substantive right granted by substantive law that should remain in effect, unless cancellation is warranted by a reversal of the judgment. In other words, until the judgment creditor decides either to force a sale as mortgagee pursuant to a mortgage suit or to claim entitlement to proceeds upon a sale by the judgment debtor, registering mortgage does not have an automatic and immediate effect on the immovable given as security.[116] Broadly speaking, a judgment creditor that registers judicial mortgage is in the same position as a creditor for whose advantage contractual mortgage is created which may enforce its payment through a court-enforced sale.[117]

Once a judgment entitles a mortgage right, its effect lives even though an appeal is lodged on the judgment that triggered the judicial mortgage. [118] Even if an appeal is taken on the judgment creating a judicial mortgage, and the execution of the judgment is suspended by the appellate court, the judicial mortgage will not lose its effect. [119] It may lose its effect only if the lower court's judgment is reversed/canceled.[120]For this reason, the judgment mortgage remains in effect. In other words, if the judgment appealed is confirmed, the mortgage remains retaining priority right from the date it was first recorded.[121]Moreover, if the judgment is reversed only partly, the mortgage will persist for that part which has not been altered or reversed.[122]

A judgment debtor who is ready to discharge its obligation in accordance with the judgment may discharge its debt and submit a petition to the court that created the judicial mortgage to have the mortgage canceled and a letter written to the concerned institution where the immovable is situated.

---

115 The Civ. Code of the State of Eritrea, Art. 2547.
116 The Law Reform Commission, *supra* note 1, p. 9.
117 *Id.*
118 Peters, *supra* note 110, p. 895. This is because unless the judgment is either reversed or canceled, it is it is presumed to be correct.
119 *Id.*
120 *Id.*
121 *See*, Louisiana Civ. Code, Art. 3323.
122 *Id*, Art. 3324.

In the Ethiopian Civil Code, like other types of mortgage creditors, a judgment creditor may get right of preference over a specific immovable of the judgment debtor if he/she is able to secure a judicial mortgage, provided the mortgage is registered.[123]If several mortgagees are registered on the immovable,[124] priority is set in accordance with the date of registration.[125] The rule works to all forms of mortgages. The Federal Supreme Court Cassation Division affirms this in Development Bank of Ethiopia (DBE) vs. Commercial Bank of Ethiopia (CBE). [126]

Moreover, the mortgage creditors' right of pursuit is recognized under Article 3059(2) of the Civil Code. A creditor protected by a registered mortgage can follow the immovable wherever it goes and attach it. A judicial mortgage does not restrict the judgment debtor from transferring ownership of the immovable mortgaged to a third party. Therefore, the judgment debtor against whom a judicial mortgage is registered can alienate the immovable mortgaged.[127] At the same time, judicial mortgage entitles the judgment creditor the right to pursue the mortgaged property and get paid. However, if the immovable is sold through court enforced foreclosure for the satisfaction of a judgment, the right of pursuit ceases to exist.[128] In the case, *Zemzem Nuru vs. Development Bank of Ethiopia*,[129] the Federal Supreme Court

---

123 Civ. Code, Art. 3059(1) cum 3052.

124 Art. 3088 of the Civ. Code recognizes the possibility of registering several mortgages on the same immovable for several debts.

125 Civ. Code, Art. 3081.

126 የኢትዮጵያ ልማት ባንክ እና የኢትዮጵያ ንግድ ባንክ (የፌደራል ጠ/ፍ/ቤት ሰር ሰሚ ችሎት ውሳኔዎች፣ ቅጽ 7፣ መ/ቁ. 25863) ገጽ 40። The Cassation Court remarked: ‹‹በአንድ በማይንቀሳቀስ ንብረት ላይ ብዙ ጠያቂዎች የመያዣ መብት አስመዝግበው እንደሆነ የቀደምትነት መብታቸውን የሚሰሩበት ተራ የሚወሰነው መብታቸውን ያስመዘገቡበትን ቀን በመከተል እንደሆነ በፍ/ብ/ሕ/ቁ. 3081 ላይ ተመላክቷል።›› (At times different creditors register several mortgages on the immovable of the debtor, their right of preference is determined based on the date each creditor registered its mortgage. This is provided under article 3081 of the Civil Code.›› (Translation by the Author

127 Civ. Code, Art. 3084.

128 In relation to this, it is important to note that the mortgage creditor cannot stop the execution of judgment on the mortgaged property. *See,* የኢትዮጵያ ልማት ባንክ እና የኢትዮጵያ ንግድ ባንክ, *Supra* note 129, ገጽ 41።

129 የፌደራል ጠ/ፍ/ቤት ሰር ሰሚ ችሎት ውሳኔዎች፣ ቅጽ 9፣ መ/ቁ. 36013) ገጽ 47። The Court remarked as follows: ‹‹በባለገንዘቡ ላይ መያዣ ያላቸውም ሆነ የሌላቸው ባለገንዘቦች በመያዣ የተያዘውን ንብረት በማስያዝ ለማሸጥ መብት አላቸው። ይህ በሆነ ጊዜ መያዣ ያላቸው ገንዘብ ጠያቂዎች የመያዣ መብታቸውን ባስመዘገቡበት ቅደም ተከተል ከሽያጩ ገንዘብ ሊይ በቅድሚያ ገንዘባቸውን የማግኘት መብት ያላቸው በመሆኑ ንብረቱ በማንኛውም ገንዘብ ጠያቂ ተይዞ ከተሸጠ በኋላ የመያዣ መብት ያለው ገንዘብ ጠያቂ የሚኖረው ብቸኛ መብት ከሽያጩ ገንዘብ ላይ በቅድሚያ ዕዳቸውን መሰብሰብ ነው። ከዚህ በቀር ንብረቱ ተይዞ ከተሸጠና ከሽያጩ ገንዘብ በቅድሚያ እንዲከፈለው ሳይጠይቅ ቀርቶ ገንዘቡ በሌሎች ባለገንዘቦች መካከል ከተከፋፈለ በኋላ ንብረቱን የመከተል መብት አለኝ በማለት የሚያነሣው መብት የለም። ምክንያቱም በመያዣ የተያዘው ንብረት በሌሎች ገንዘብ ጠያቂዎች ዕዳ ምክንያት ተይዞና በሃራጅ

Cassation Division reaffirmed the rights of registered mortgages and other creditors having interest in the mortgaged property.[130]

The above remarks of the Cassation Division then delimits the scope of the judgment mortgage creditors' right on the disposal of the property and the right of pursuit. On the other hand, the Civil Code is silent regarding appeal, or stay of execution on judicial mortgage. In this regard, it would be good if the Ethiopian law aligns with the rules set by the jurisdictions point out above.

## II. Temporary Injunction and Attachment before Judgment

### *2.1. Historical Origins*

Some remedies are developed to prevent the disappearance either of funds required for payment of eventual judgment or of specific property involved in litigation. [131] This purpose is served by remedies such as temporary injunction and attachment. [132]The origin of both injunction[133] and attachment[134]goes back to Roman law. In Roman law injunction was known as "prohibitory interdict."[135] Later on, taking the essence from Roman law, injunction evolved in England chancery courts as an equitable remedy.[136] In other words, England

---

ተሸጦ ዋጋው ለባለመብቶቹ ከተከፋፈለ በኋላ መያዣው ቀሪ እንደሚሆን በፍ/ብ/ሕ/ቁ. 3110/ሐ/ መገንዘብ ይቻላል። መያዣው ቀሪ ከሆነ ደግሞ መያዣውን መሠረት በማድረግ የሚያነሣው የመብት ጥያቄ አይኖርም ማለት ነው። ስለሆነም በንብረቱ ላይ የመያዣ መብት ያለው ባለገንዘብ ንብረቱን የመከተል መብት የሚኖረው ንብረቱ በማንኛውም ገንዘብ ጠያቂ ዕዳ ከመያዙና ከመሸጡ በፊት ነው።›› Art. 423(2)(b) of the Civ. Pro. Code requires the court to cause a proclamation of any intended sale on an immovable to be sold by a public auction. Such proclamation is required to specify any encumbrance to which the property is liable. Sedler remarked requirement of publicity to protect the interest of the person having a right through, and inform the purchaser the existence of such encumbrance so that it may not later challenge the existence of such right. Regardless, as the researcher wrote it in the body above, the Federal Supreme Court Cassation Division on Cassation File Number 36013 decided that mortgage will not follow a person that purchases the immovable through a court enforced public auction. *See* also, R. A. Sedler, *Ethiopian Civil Procedure* (Faculty of Law, Haile Selassie I University, Addis Ababa)(1968) p. 493.

130 *Zemzem Nuru* vs. *Development Bank of Ethiopia, Id.*

131 The New Encyclopedia Britannica, *Supra* note 8, p. 153.

132 *Id.*

133 R. R. K. Trivedi, 'Law of Injunctions', *Institutes Journal*, 1996, p. 1.

134 Mekbib Solomon, *Prejudgment Attachment under the 1965 Civil Procedure Code of Ethiopian: the Law and the Practice* (unpublished, AAU Undergraduate research), (1968) p. 5.

135 Trivedi, *Supra* note 133. In Roman law, interdict was divided into three parts: prohibitory, restitutory and exhibitory. The prohibitory Interdict corresponds to injunction.

136 Yosef Aemero, *Injunctions under the Civil Procedure Code of Ethiopia: the Law and Practice* (1998, unpublished) p. 7.

borrowed its law on injunction from the Roman legal system.[137] Since its genesis, its main purposes of temporary injunction, both in civil law and common law legal systems, maintains the status quo, by preserving the court's ability to render a meaningful decision, and protecting the plaintiff from irreparable injury.[138]Moreover, since its genesis, a temporary injunction is developed at the discretion of the court.

In Ethiopia, the rules governing temporary injunction set forth in the Civil Procedure Code. The rules of the Ethiopian Civil Procedure Code aligns with the Indian Code. Thus, in this regard, the Ethiopian law of temporary injection reflects the rule of the common law system. .[139]On the other hand, in the civil law system attachment emerged as a means to take private justice into the hands of courts.[140] In civil law legal systems until the middle ages contract concluded between the debtor and the creditor used to allow the creditor to seize the property of the debtor and satisfy its credit.[141]In the common law, attachment, also called seizure of property emerged as a means to coerce the defendant to appear in court.[142] The impending mechanism of attachment in the common law legal system is forcing the debtor to appear in the court of law, and it is called 'distraint'.[143] The purpose of distraint is not securing the plaintiff's claim; [144]rather it aims is securing the debtor's appearance in court.

---

137 P.P. Joshi, *Law of Injunctions: Temporary Injunction including ex-parte temporary injunction, Perpetual Injunction, and mandatory injunction*, (2015) p. 1, available on < http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=12&cad=rja&uact=8&ved=2ahUKEwj76oa4vpfgAhV8AWMBHdcHBFIQFjALegQICRAC&url=http%3A%2F%2Fmja.gov.in%2FSite%2FUpload%2FGR%2FConsolidate%2520Workshop%2520Paper%2520Ratnagiri%2520Civil-15032015.pdf&usg=AOvVaw13gYMsyveCPeQM93v9CMIO>, (last visited on 29 January 2019). Nowadays injunction is mostly used in countries following the common law legal system than in countries following the civil law legal system. *See* Yosef Aemero, *Supra* note 136.

138 M. Denlow, "The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard," *The Review of Litigation* Vol. 22, No. 3, (2003) p. 507. In particular, in the Common law legal system, the historical background of temporary injunction is equity. Hence, the grant of an injunction is left to the discretion of the court which is governed by equitable considerations. *See also* the New Encyclopedia Britannica, *Supra* note 8, p. 153.

139 Ethiopia transplanted its Civil Procedure Code from India. On the other hand, India borrowed its civil procedure from England. *See* አበበ ሙላቱ (…)፣ የኢትዮጵያ ፍትሐብሔር ሥነ-ሥርአት ሕግ መሰረታዊ ችግሮች፣ ---------(አለማየሁ ታይሌ መታሰቢያ ድርጅት፣አዲስ አበባ) ገጽ 10።

140 Mekbib Solomon, *supra* note 134, p. 4.

141 *Id*. In the middle ages, the Roman legal system introduced seizure. Consequently, creditors' power of attachment is abolished and substituted in an orderly manner that requires court interference for the seizure of debtors property for the satisfaction of an outstanding debt. In fact, during early times, Roman courts used to attach both the debtor's person and property. However, in a later stage attachment procedure narrowed itself to the attachment of the debtor's property only.

142 *Id*. The use of attachment as a means to secure the plaintiffs claim is however developed through custom in English towns, notably London.

143 *Id*, p. 5.

144 *Id*.

### *2.2. The Concept of Temporary Injunction and Attachment*

#### 2.2.1. Temporary Injunction

An injunction is a court order that commands a person to do or to abstain from doing a particular act.[145] It is a judicial remedy prohibiting persons from doing a specified act[146] or commanding them to undo some wrong or injury.[147]It is, however, more of preventive than restorative.[148]An injunction may be, interim or permanent.[149] However, all types of injunctive relief are similar in effect, because all require a party either to do or to refrain from doing some act, and all are enforceable by contempt.[150] In particular, a temporary injunction is ordered to protect the other party from irreparable harm when a suit is pending.[151]It is ordered during the pendency of the suit such as are to continue until the hearing of the case on its merits, or generally until further order is given by the court.[152]On the other hand, a permanent injunction is given as a decree..[153]

In both civil law and common law countries, orders of this nature ordinarily are granted only after hearing both sides. Sometimes a court order of an even more temporary and short-lived nature may be obtained without hearing the other side. [154] It is often granted on the basis of less formal procedures than a full-scale trial on the merits.[155] Thus, a party is not required to prove his/her case in full.[156] If a temporary injunction is given it shall wait until the disposal

---

145 Denlow, *supra* note 138, p.498.

146 This is called a restrictive injunction.

147 This is called a mandatory injunction.

148 J. M. Paterson *Kerr on Injunctions* (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 6th ed. 2013), p. 1.

149 *Id*. *See also* Joshi, *supra* note 137. For instance, in the USA, as U.S. Magistrate Judge M. Denlow put it injunction is classified into (1) temporary restraining orders, (2) preliminary injunctions, and (3) permanent injunctions. The three types of injunctions vary in their duration and the procedure required to obtain them. A temporary restraining order typically is entered for a period not to exceed ten days and may be obtained on an ex parte basis. Conversely, a preliminary injunction cannot be issued by the court without notice to the adverse party and is effective pendent lite. A preliminary injunction is issued after an initial hearing and argument, but before there has been a final decision on the merits of the case. One purpose of a preliminary injunction is to preserve the relative positions of the parties until a full trial on the merits can be held. Unlike a temporary restraining order or a preliminary injunction, the purpose of a permanent injunction is not to preserve the *status quo* but to afford the successful plaintiff appropriate relief when faced with an irreparable injury that cannot be remedied by damages. A permanent injunction can be issue only after a full trial on the merits that establishes the plaintiff's right to relief. Denlow, *supra* note 138, pp. 499 & 500.

150 Denlow, *supra* note 138, p. 499.

151 The New Encyclopedia Britannica, *supra* note 8, p. 153.

152 Paterson, *supra* note 148.

153 *Id*, p. 2.

154 The New Encyclopedia Britannica, *supra* note 8, p. 153.

155 Denlow, *supra* note 138, p. 507.

156 *Id*.

of the suit, or until the court gives further order.[157]Moreover, relief of injunction cannot be claimed as of right. It is granted when the court believes that the granting of injunction is absolutely necessary.[158]

Courts consider the fulfillment of the following cumulative requirements before granting a temporary injunction: [159]

1. the plaintiff shall have adequate remedy at law,
2. the plaintiff shall have a prima facie case,[160]
3. shall be necessary to preserve the status quo,
4. it should be probable that the plaintiff may suffer irreparable harm if the injunction is denied,
5. the harm the plaintiff suffers due to denial of injunction shall be presumed to be greater than the harm the defendant may suffer if an injunction is granted, and
6. the injunction shall not harm the public interest.[161]

In Ethiopia, a temporary injunction is issued during the pendency of a suit to prevent certain actions that would prejudice the other party's interest from taking place during the pendency of a suit provided that the above conditions are fulfilled.[162] In this regard, having this view in mind, the Civil Procedure Code authorizes the issuance of temporary in injunction in two instances. The first one is when the property in dispute is in danger of being wasted, damaged or alienated by the other party. During such times, the subject of a temporary injunction is the property which is subject to litigation.[163]The second instance whereby a temporary injunction may be given is where the plaintiff has brought suit to restrain the defendant from committing a breach of contract or other act prejudicial to him.[164]In such a case, if a temporary injunction is given the defendant will be restrained from breaching the contract or committing any act over which the injunction stands pending the determination of the plaintiff's claim.[165]The

---

157 R. A. Sedler *Ethiopian Civil Procedure* (Faculty of Law, Haile Selassie I University, Addis Ababa) (1968) p. 365 & 366. In this regard, Sedler claims Art. 154(2) of the Civ. Pro. Code allows injunction on property not subject to ligation where a creditor on a pre-existing obligation is suing a debtor to prevent the latter from removing or disposing of his property in fraud of his creditors.

158 It may be granted where it would help in the preservation of peace and public order.

159 Denlow, *supra* note 138, p. 508.

160 It is to mean that the plaintiff should have a reasonable likelihood of success on the merits.

161 In other words, an injunction is not granted if it affects another greater public interest.

162 Sedler, *supra* note 157, p. 365.

163 *Id.*

164 *Id*, p. 366.

165 *Id*, p. 367.

second instance glares temporary injunction that may be granted, even where the threatened act is not subject to litigation.[166]

### 2.2.2. Attachment before Judgment

Attachment relates to bringing the property under the custody of the law.[167]It involves a command for the seizure of the property of a person pending litigation by an officer of the court to a certain amount.[168] Moreover, at times, an attachment may be ordered to the person holding the property not to dispose it.[169] An attachment may also be used in connection with intangible property, such as money due or bank accounts.[170]Attachment is frequently granted in *ex parte* proceeding at the request of the plaintiff upon showing that certain facts exist that make it probable that the plaintiff has a good claim and that payment of the judgment by the defendant may be threatened. The primary purpose of attachment is keeping the property of the defendant from disposal so that the property may be used for execution,[171]through creating a right in *rem.*[172] Similarly, under Ethiopian law, an interlocutory attachment may be granted at the times when a court is convinced that the defendant against whom a case is pending is trying to obstruct the execution of judgment.[173] It is when the court is convinced that the debtor is about to dispose of or remove property from the local jurisdiction of the court in whole, or any part of his property with the view to obstructing the execution of judgment, and is unable to furnish sufficient security.

## 2.3. The Effect of Temporary Injunction and Attachment before Judgment

The purpose of a temporary injunction is protecting a party to litigation from irreparable harm whilst a suit is pending.[174]In order to ensure this, it may restrain the alienation, sale, removal or disposition of the property of the debtor as the court thinks fit. This restraint will stay in effect until the disposal of the suit, or further order is given by the court. Therefore, a temporary injunction restrains the possible right of the defendant from transferring ownership

166 *Id*, p. 365.
167 The New Encyclopedia Britannica, *supra* note 8, p. 153.
168 La Salle Extension University *American Law and Procedure* (vol. 10) (1962) p. 350.
169 The New Encyclopedia Britannica, *supra* note 8, p. 153.
170 *Id.*
171 La Salle Extension University, *supra* note 168.
172 Aschalew Ashagre, *Provisional Attachment Order vs. Judicial Mortgage in Ethiopia*: Comments on Decisions of the Cassation Bench of the Federal Supreme Court, *Journal of Ethiopian Law* (Vol. 28, No.1, 2016) p. 109.
173 Civ. Pro. Code, Art. 151.
174 The New Encyclopedia Britannica, *supra* note 8, p. 153.

of the property. It further sanctions any violation of the order under contempt of court. Apart from than this, temporary injunction does not normally create a right of priority for a party in whose favor the injunction is given. One may say, a party for whose favor the injunction is given may have priority right over creditors that do not secure their claims by the property restrained and did not secure judgment in favor of themselves. Further , if there are several individuals for whose favor injunction is granted, there stands no priority right depending on the date of registration. They are all treated as having similar status. If all turn-out to be successful, and the property is not sufficient to cover the monitory claim of the creditors, they will share the proceeds of the sale on a *pro-rata* basis.

On the other hand, attachment encumbers the property right of the debtor on the attached property. In particular, it restricts the defendant's right to dispose of the thing, and remove the same. Disobeying court order in this regard is sanctioned under the pain of contempt. Moreover, , neither pre-judgment, nor post judgment attachment orders give rise to priority right in favor of the person for whose advantage the order is granted for.[175] The experience in other jurisdictions is also similar. Similarly, in jurisdictions, such as, the USA, German, and Switzerland attachment does not create a preferential right for the beneficiary of the seizure.[176]Attachment order stays in force so long as the execution is not barred by limitation.

## III. Distinguishing Judicial Mortgage from Related Schemes

In the previous sections, it is explicated that the historical origin, function, and substance of judicial mortgage is different from temporary injunction and attachment before judgment. In this Section, some of the major distinctions between judicial mortgage, attachment and temporary injunction with particular emphasis on Ethiopian law are illuminated.

### 3.1. Moment of Creation

Temporary injunction can be ordered before judgment is granted, while attachment can be rendered before or after judgment. However, the after-judgment attachment has a plausible distinction from judicial mortgage. Most often, the two forms of remedies are granted to protect the interest of a party before condemnation. Meaning, a party may pray for any of the two interlocutory reliefs at any stage of the suit.

[175] Aschalew Ashagre, *supra* note 172, p. 111.
[176] *Id*, p. 109-110.

On the other hand, a judicial mortgage is always attached to condemnation. Unless a debtor is condemned through a provisional or final judgment, there will be no judicial mortgage. In addition, a party who wishes to get a judicial mortgage is required to plead for it. As a judicial mortgage establishes a substantive right, it is only when it is pleaded; at least through an affidavit that came subsequent to the statement of claim a judicial mortgage may be given.

### 3.2. Formality Requirement

Formality requirement among others relates to a method, order, arrangement, use of technical expressions, performance of specific acts, etc required by the law in the making of a juridical act.[177]Unless the juridical act fulfills the required formality , it may not be valid and/or enforceable.[178]

With regard to formality requirement, all judicial mortgage, injunction and attachment orders made against immovable property should be in writing and be registered.[179] However, when it comes to the specifics of form there are differences. In attachment and temporary injunction, the court, in its order, is simply required to specify the establishment of the encumbrance on the property and the description of the property subject to encumbrance. Moreover, such order shall specify that the property subject to encumbrance may not be sold, disposed of or transferred to a third party.

When it comes to judicial mortgage, in addition to the requirement of description of mortgage, the amount of debt the security is given for shall be specified in the judgment. This is one of the validity requirements for the presence of a valid mortgage. The latter requirement is not available in the case of injunction and attachment. In attachment before judgment and injunction, a court is not mandated to specify the maximum amount for which the immovable is restrained. Moreover, in a judicial mortgage, there is no requirement that imposes a restriction on the debtor's right to transfer the property given as a mortgage.

---

177 *See* Fekadu Petros "Effect of Formalities on the Enforcement of Insurance Contracts in Ethiopia" *Ethiopian Journal of Legal Education*, vol. 1, No. 1 (2008, p. 2.

178 *Id.*

179 It should be noted that the requirement of registration stands for all types of mortgage. *See,* ሞንበረፀሐይ ታደሰ, *supra* note 7, p. 14.

### 3.3. Subject Matter Confusion

The subject matter of judicial mortgage is only immovable property.[180] Movables and incorporeal are not the subject matter of judicial mortgage. On the other hand, both movables and immovable are the subject matters of temporary injunction and attachment. Temporary injunction and attachment do not make a distinction based on the type of the property. Further, a property encumbered with judicial mortgage may be sold, disposed or be transferred by the judgment debtor. However, the court can avoid the possibility of disposal by passing injunction. Hence, in this regard too, there is a plausible difference in judicial mortgage, temporary injunction, and attachment.

While knowing the broadness of attachment and temporary injunction in the subject matter, treating judicial mortgage as one facet of temporary injunction and/or attachment is wrong. Knowing that attachment and injunction encompasses movable and immovable property, treating attachment and/or injunction as judicial mortgage signals the desire of such proponents to treat judicial mortgage as a branch of interlocutory remedy. This is erroneous understanding of the concept. The historical origin of mortgage also tells that it is distinct from interlocutory remedies. Therefore, treating judicial mortgage as an injunction and/or attachment before judgment has subject matter confusion.

### 3.4. Right to Transfer Ownership

As briefly pointed out, the possibility of transfer ownership is one of the majore points of distinction between judicial mortgage temporary injunction, and attachment. If a temporary injunction or attachment order is registered on an immovable property of the debtor, he/she cannot alienate the property.[181] On the contrary, if a person against whose property injunction or attachment order is given attempts to alienate the property, he/she will be held liable under the pain of contempt.

This is not the case in case of a judicial mortgage. A person against whom a judicial mortgage is established may alienate the property mortgaged.[182]A judicial mortgage does not restrict an individual's right to dispose of his/her property.[183]If the court attaches the

---

180 Civ. Code, Art. 3044(1).
181 Civil Procedure Code, Articles 151 & 154.
182 Civ. Code, Art. 3084. *See also*, The Civ. Code of the State of Eritrea, Art. 2577.
183 መንበረፀሐይ ታደሰ, *supra* note 9, p. 18.

mortgaged property for sale to satisfy a judgment debt, the mortgagee cannot interrupt the auction procedure.[184] The only remedy available for such secured creditor is exercising the right of priority and get paid from the proceeds of the sale.[185]

### 3.5. Procedural vis-a-vis Substantive Law Dichotomy

Procedural law establishes rules applicable to reach the end. It defines what actions are right, and articulates how such actions may be executed. On the other hand, substantive law defines legal rights that give rise to actions, articulate different kinds of contracts and obligations, and the manner in which they are created and preserved. In this regard, if one says judicial mortgage is part of substantive law, i.e., right established through the Civil Code, then we may say it is a right established through substantive law. On the other hand, if we regard judicial mortgage as procedural in nature, then it establishes no substantive right. In addition, treating judicial mortgage as part of either procedural or substantive law has implication on private international law. If a judicial mortgage is treated as part of substantive law, one may establish it as a right at times Ethiopian law is selected the proper substantive law.

### 3.6. The Art of Vocabulary

The Civil Code of Ethiopia distinguishes judicial mortgage from attachment. In the section dealing with mortgages, it stipulates the distinct nature of attachment from mortgage. For instance, Article 3057(2) it provides that an entry relating to a mortgage to an immovable shall be of no effect where it is made after an action for the attachment of the immovable have been brought and entered in the registers of immovable property.[186] This dictates that mortgage and attachment are distinct. Similarly, Article 3068(1) provides if the immovable mortgaged is leased the mortgage shall apply to the rent having run from the day when the immovable was attached.[187] Furthermore, the Civil Code recognizes the mortgage creditor's right to priority of payment over other creditors of the normal costs arising from proceedings instituted by him/her for the attachment of the immovable.[188]

---

184 *Id.*

185 *Id.*

186 *See also* the Civ. Code of the State of Eritrea, Art. 2552.

187 Lessees are further prohibited from paying the rent to the owner of the mortgaged immovable after they have been notified of the attachment of the immovable. Civ. Code, Art. 3068(2).

188 Civ. Code, Art. 3079.

All the above provisions illuminate the distinction between mortgage and attachment. It is crystal clear that the Code uses different vocabulary to denote attachment is distinct from all other types of mortgage. Moreover, Article 3079 of the Code recognizes attachment proceeding is distinct from mortgage. A person having a contractual mortgage right may attach the property in order to secure his/her right. Such a procedure is attachment procedure; not a judicial mortgage. Similarly, a person having a judicial mortgage may attach the property to utilize its right. This all reveals attachment is different from mortgage.

The experience in Eritrea is similar. This is particularly clarified in the new Civil Code of the State of Eritrea.[189] Article 1122 of the new Eritrean Civil Code reads "*Hypothec and Attachment*".[190] In such a way, the Code elaborates the conceptual difference between mortgage/hypothec and other interlocutory court orders, in particular attachment.

### 3.7. Right of Preference

In mortgage, a person that registers its mortgage right in priority of other creditors before the attachment of the immovable has priority right over other creditors.[191] This priority right stands among mortgage creditors as well. A mortgage creditor that registers its mortgage right o the register of immovable shall have priority right over other creditors that register their mortgage after him/her. As a result, the other creditors are paid after his/her monitory claim is satisfied.[192]

## IV. Conclusion

A judicial mortgage is not one facet of attachment before judgment or temporary injunction. It is an independent legal bound that may create a substantive right for a judgment creditor. Overall, it is distinguished from other procedural tools that may secure the interest of a party, such as, temporary injunction and attachment before judgment. It is distinguished from the latter two, *among others* in historical origin, concept and rights it may create. For instance, unlike attachment before judgment and temporary injunction, judicial mortgage creates a

189 Eritrea adopted its new Civ. Code in 2015.

190 Art. 1122 of the Civ. Code of the State of Eritrea is found in Book IV, Title III, Chapter 3, Section 1 of the Civil Code. The Book deals with "Property" rights of a person. In particular, Chapter 3 deals with "Apartment Rights". A new development in the State of Eritrea is use of the original civil law nomenclature of the expression "mortgage"- hypothec.

191 Civ. Code, Art. 3076, Civ. Code of the State of Eritrea, Art. 2554 cum 2547. The priority right of the mortgage over unsecured creditors has, in fact, certain exceptions.

192 In fact, this may happen if the other creditors do not have privilege over mortgage.

substantive right to a judgment creditor. Moreover, it may create an encumbrance only on immovable property. In addition, judicial mortgage does not restrict the judgment debtors right to transfer the ownership of the immovable property mortgaged. The formality requirements set under the Civil Code and the vocabulary used in the same further made it clear that mortgage is entirely distinct from temporary injunction and attachment before judgment.

# The Status of Crime Victims' Rights under the Ethiopian Legal Framework: The Need for Constitutional Protection

Markos Debebe Belay*

## Abstract

*The article argues that in the criminal justice process the key players are the offender[1] and the Stat, but crime victims are merely passive spectators. Their participation is mainly dependent on the will of the public prosecutor; especially, in case of crimes that are not punishable upon complaint. In contrast, the Federal Democratic Republic of Ethiopia (FDRE) Constitution has recognized different types of rights for suspects, accused, or, convicted persons. However, it does not have a single express provision defining rights of crime victims. Although it remains on paper, the Criminal Justice Policy of Ethiopia has some important protections for crime victims. These facts attest that the crime victims are not getting enough attention under the Ethiopian legal framework. In the Constitution and other relevant laws, emphasize is afforded to the harm perpetrated on the legally protected interest of others than the actual victim. Therefore, to effectively protect the right of the crime victims and have practical implication, the rights of crime victims should be granted a constitutional status.*

**Key words: crime, victims, constitution, protection, criminal justice, police**

## 1. Introduction

The crime victims have critical interest in the criminal justice process, as they play indispensable role in the criminal justice administration. Victims often provide eyewitness account to the police, prosecutors and judges that could be used as evidence at different

* The author holds LL.B. from Jimma University; LL.M. in Constitutional and Public Law from Addis Ababa University; and, LL.M. in Transnational Criminal Justice from the South African-German Centre for Transnational Criminal Justice hosted jointly by the University of the Western Cape and *Humboldt-Universität zu Berlin*. Currently, he is working as a researcher of Democracy and Rule of Law at the Policy Studies Institute. The author can be reached at markoslawd@gmail.com

[1] In this article, the jargon offender intended to connote the suspects, accused, and convicted person.

stages of the process.[2] Although there are others who are indirect victims, the criminal justice process is set in motion directly from the direct physical, emotional, monetary injury inflicted on crime victims. As they bear the brunt of the crime, ignorance of the victims interest and wishes constitutes violation of their human rights.[3] Stated differently, crime victims are persons whose rights and privileges are violated by an illegal act of another person (suspect, accused, convicted).[4] Therefore, naturally, in the criminal justice process, their voice should be heard; participate in the handling of their case; being treated with respect and fairness in the process; obtaining information on the progress and outcome of the case; and obtaining economic and emotional redress.[5] This calls for exploration of possible rights and interests of crime victim. One way of doing so is by recognizing their rights in the fountain head of laws.

As things stands today, in most systems including Ethiopia, crime victims are arguably only seen as witnesses to a crime committed against the State.[6] Simply put, while the offender and the State (via the public prosecutor) are the main players, the crime victims are merely passive spectators.[7] Arguably, owing to the operation of the principle of the presumption of innocence, and a tendency of seeing the interest of the victim and the general public as one and the same, and can effectively represented by the Public Prosecutor, the focus in the criminal justice process has been on the protection of the right of those who have been suspected of committing or have committed a crime.

Since recent times, in some foreign jurisdictions, 'victims' rights movements' have been emerged.[8] For instance, in the US, all 50 States have passed some form of a statutory crime victims' bill of rights, and 29 of them have amended their constitutions to include rights for crime victims.[9] Similarly, at the Federal level, the Victim's Rights and Protection Act of 1990, and several subsequent statutes, gave victims of Federal crime many of the rights

---

2 Wodage W "Status and Role of Victims of Crime in the Ethiopian Criminal Justice System" 2 *Bahir Dar University Journal of Law*, (2011), p. 105.

3 Jo-Anne Wemmers, "Victims' rights are human rights: The importance of recognizing victims as persons" (2012), p. 80.

4 *Id,* p. 71.

5 Heather S, *Repair and Revenge: Victims and Restorative Justice*, (2002), p. 123.

6 Wemmers, J. *supra* note 3, p.71.

7 Gegan S and Nicholas Rodriguez N "Victims' Roles in the Criminal Justice System: A Fallacy of Victim Empowerment?" *Journal of Civil Rights and Economic Development vol 8* (1192), p. 228.

8 *Id,* p. 226.

9 Kilpatrick D, Beatty D, and Howley S "The Rights of Crime Victims—Does Legal Protection Make a Difference?" *National Institute of Justice*, (1998), p. 1.

accorded at the State level.[10] Moreover, in Belgium and Canada, there is even an extreme form of ‘‘victim statements of opinion’’ which allows victims to have influence on the carrying out of the sentence (decision regarding release on parole).[11] The same progressive development has been also witnessed at international law. Furthermore, the United Nations, the Council of Europe, and the European Union, are just a few examples of organizations that have adopted victims' rights instruments.[12] One should also mention the fact that the Rome Statute also provisions on rights of crime victims.[13]

In the lens of crime victims, the Ethiopian legal framework has not been studied well. There are only few academic works on the area. Hence, there is a need to make a closer study of the crime victims' rights and its status under the Ethiopian legal framework. Moreover, although arguable, as Ethiopia is currently in transition/reform process and hence in the process of updating some of its laws, this is the most appropriate time to make the necessary change in the scattered governing laws on crime victims and reassess their current status.

This article aims at examining the Ethiopia's legal framework focusing on crime victims' rights and urge an apt recommendation. Accordingly, the first part of the paper explores who crime victims are and their rights in a generic manner. The second part briefly discusses the status of crime victims under international criminal law. The third part, which is the main part of the paper, discusses the issue of crime victims in the Ethiopian law context.

## 1. Crime Victims: A Conceptual Underpinning

Alike many legal jargons, there is no unanimously agreed definition for the expression, "crime victims." As characterization of crime victim is mainly made by domestic laws of each country, connotation of a crime victim various from jurisdiction to jurisdiction. However, there is a tendency of limiting the definition of crime victim only to persons who are harmed by certain types of offenses.[14] So, as it is hard to write a single comprehensive

[10] *Id.*

[11] Mina R and Damien S "Victims and international criminal justice: a vexed question?" 2008, 90 *International Review of the Red Cross* (2008) p. 470. See also, Wemmers J. *supra* note 3, p. 71.

[12] Wemmers J. *supra* note 3, p. 71.

[13] *Id.*

[14] National Crime Victim Law Institute, "Fundamentals of Victims' Rights: An Overview of the Legal Definition of Crime 'Victim' in the United States" 2011, *Victim Law Review*, (2011), p. 1.

definition for crime victim, herein under, crime victim is defined in light of some of its common defining elements:

a. **The type of crime and injury**: this is about the specific crime that is committed against the person in question and the injury sustained by the later. In the determination of who is a crime victim, depending on the jurisdiction, all persons against whom a criminal offense has been committed may not be a crime victim. For example, in the US, while some states restrict the definition to some persons who are harmed only by certain types of offenses, other jurisdictions define "victim" to include persons harmed by any misdemeanor or felony.[15] Hence, in the determination of crime victim, it is necessary to look the nature of the crime committed. In the Ethiopian case, the nature of the crime has no effect as long as the act committed by the suspect constitutes a crime.

b. **Causation**: Many jurisdictions' definition of "victim" has an element of an express causation requirement.[16] This means it requires that the person in question need to be someone who is directly and proximately harmed by the commission of the crime. There must be a causal link between the conduct of the person in question, and the harm caused against another person. In the Ethiopian law, there is no a separate causation requirement than the general rule provided under Article 24 of the FDRE Criminal Code.

c. **Relationship to the victim who is a minor, or is deceased, incompetent or incapacitated**: When the victim is a minor, or is incapacitated, incompetent, or deceased, crime victims' rights laws generally allow courts to recognize other persons who can exercise their rights either in addition to or on behalf of that direct victim. In a number of jurisdictions, the family members or other representatives of such victims are included within the legal definition of "victim," which arguably allows those individuals to assert all victims' rights on their own behalf as well as on behalf of the direct victim.[17] The same approach is recognized under the draft Criminal Procedure Code of Ethiopia especially when the crime victim is dead or incapable.

---

15 *Id*.
16 *Id*, p. 2.
17 *Id*, p. 4.

**d. Status as an accused, an offender, or an incarcerated person**: Many jurisdictions' crime victims' rights laws limit the definition of "victim" or victim "representative" to exclude persons who fit within one or more of the following classes:

(i) a person who is accountable for the crime or another crime arising from the same conduct, criminal episode or plan;

(ii) a person alleged to have committed the crime at issue or another crime arising from the same conduct, criminal episode or plan; and

(iii) a person who is in custody (either as a pretrial detainee or a prisoner) for any offense.[18]

Be the above elements as it may, the 1985 the UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines victims as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.''[19] The declaration also states ''[a] person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.''[20]

The other international instrument that defines a crime victim is the International Criminal Court jurisprudence. The criteria for defining crime victim are stated in the Rome Statute and in the Court's Rules of Procedure and Evidence. Most specifically, Rule 85 of the Rules of Procedure and Evidence provides the definition of victims. Accordingly, victim under the jurisprudence of the ICC refers to either ''natural persons who have suffered harm resulting from crimes committed within the jurisdiction of the Court; or, institutions and organizations

---

18 *Id*.

19 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly resolution 40/34 of 29 November 1985, available at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.29_declaration%20victims%20crime%20and%20abuse%20of%20power.pdf (accessed on 20 April 2021).

20 *Id*.

that have had property harmed that has been used for religious, educational, arts or science or charitable purposes, or any historic monuments, hospitals, or places or objects used for humanitarian purposes.''[21]

Until now, there is no a binding international instrument on the right of victims. However, there is Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted in 1985 by the UN General Assembly. Moreover, different countries have recognized some rights for crime victims in their domestic legislation. Therefore, as there is no binding international instrument and the rights are recognized by domestic jurisdictions, there is no a single all-encompassing list of rights for crime victims. However, the following illustrate some of the rights that may be exercised by victims of crime:

a. **Right to Due Process, Fairness, Dignity, Respect, and Privacy**: The rights to fairness, dignity, respect, and privacy is the right to have one's rights considered within the criminal justice system.[22] In this regard, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states that victims have the right to access justice and fair treatment.[23]
b. **Right to Notice**: The right to notice is the right to advisement of the existence of crime victims' rights and the right to advisement of specific events during the criminal justice process.[24] The right to notice is distinct from the right to information, which refers to a crime victim's right to be generally informed about criminal proceedings and about available resources.[25]

c. **Restitution and compensation:** the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, for example, states that ''Offenders or third parties responsible for their behavior should, where appropriate, make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration

21 The International Criminal Court, Rules of Procedure and Evidence Rule 85(a) and Rule 85(b) (2013).
22 National Crime Victim Law Institute *supra* note 14.
23 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power *supra* note 19.
24 National Crime Victim Law Institute *supra* note 14, p. 2.
25 *Id*.

of rights.''[26] Moreover, the Declaration also writes ''When compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; and, the family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization.''[27]

**d. Assistance:** Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.[28]

## 2. The Place of Crime Victims under International Criminal Law Jurisprudence

The 1985 United Nations Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power is the first international instrument in giving recognition for victimhood by the international community.[29] Next to this declaration, a number of decisions and recommendations were drawn up at international level.[30] However, until the coming into force of the Statute of the International Criminal Court, adopted on 17 July 1998, victims were recognized only in their capacity as witnesses. [31] The only redress possible was acknowledgement that an international crime had been committed which was therefore punishable.[32]

The Statute of the International Criminal Court changed the above trend. The Statute in its preamble, to show the emphasis given for the crime victims, intentionally used the expression

---

26 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power *supra* note 19.
27 *Id.*
28 *Id.*
29 Mina R and Damien S *supra* note 11, p. 443.
30 For example, the UN Office on Drugs and Crime published the Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1999) in order to promote and guide the implementation of victims' rights in national criminal justice systems. See also the Handbook on Justice for Victims on the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1999). The Commission on Crime Prevention and Criminal Justice was set up to implement the 1985 UN declaration. Resolution 2003/30 of 22 July 2003 of the Economic and Social Council set up an Intergovernmental Expert Group to develop an information-gathering instrument on UN standards and norms related primarily to victimhood issues. The results of their work may be seen in document E/CN.15/2007/3, cited in Mina R and Damien S *supra* note 11, p. 443.
31 Mina R and Damien S *supra* note 1, p. 444.
32 *Id.*

‘‘during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity."[33] In addition to the introductory statement, the Statute affords victims' different rights that can be grouped into three different components: participation, protection and reparation.[34] Specifically, Article 68 of the ICC Statute lays down the basic rule on victim participation in the proceedings in its paragraph 3, which reads: ‘‘Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court.’’ Such participation should, however, not be ‘‘prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.’’ The structure of the Statute and Rules, mainly outlined in Rule 92(1), suggests that the drafters created various victim participation schemes. At least two are easy to identify: the submission of ‘‘representations’’ and ‘‘observations’’, and participation *stricto sensu*.[35]

Needless to state that before the ICC can allow an individual to participate as a victim in a trial; the individual must be certified as a victim. The decision as to whether the applicant does qualifies as a victim status or not will be made by the Pre-trial chamber.[36] Generally, though the adequacy of the protection accorded may be contested, the International Criminal Court has started a good practice of allowing crime victims of international core crimes to participate at different stages of the criminal proceeding.

Finally, it should bear in mind that Ethiopia is not a member of the Rome Statute and any charge related to the core crimes (Genocide, Crimes against humanity, War crimes, and aggression) is within the exclusive jurisdiction of its domestic courts.

---

33 Charles P. Trumbull IV, "The Victims of Victim Participation in International Criminal Proceedings" *Michigan Journal of International Law* vol. 29, (2008), p. 777.

34 For detail discussion of these three rights; see, Michael K, "The Status of Victims Under the Rome Statute of the International Criminal Court" in Thorsten B and Christoph S (eds), *Victims of International Crimes: An Interdisciplinary Discourse*, ( t.m.c. Asser press, 2013), p.49.

35 Rome Statute of the International Criminal Court, 1998, Art. 68(3) and the International Criminal Court, Rules of Procedure and Evidence (2013) Rule 89. For detail discussion on these various participation regimes; see, Elisabeth B "Aspects of victim participation in the proceedings of the International Criminal Court" 2008, 90 *International Review of the Red Cross* vol. 90, (2008) p. 412 – 413. For detail discussion on the status of victim under the international criminal court; see, Michael K. *supra* note 34.

36 Michael K. *supra* note 34.

## 3. Crime Victims' Rights under the Ethiopian Legal Framework

### 3.1. The Ethiopian Criminal Justice System: Historical Backdrop

Before the formal justice system developed, the crime victims used to use private justice to get justice. During this era, the victims have had an active participation in the process of rendering justice. [37] Put differently, rendering justice had been the exclusive domain of the crime victims or their clan (private vengeance). By then, almost all wrongdoings were considered as a private injury to individual victims as opposed to injury to the public.[38] Concisely, criminal punishment as we know it today was unknown.[39] However, gradually, with the development of the State as a political entity, private vengeance had been ceased and the process has started to be regulated by the State through its formal criminal justice process.[40]

Modern criminal procedure was new to Ethiopia.[41] Many of the modern Ethiopian laws were introduced following the second Italian invasion. Therefore, up until then, dispute had been settled based on customary and religious dispute resolution mechanisms.[42] This, however, does not mean that there were no other relatively more formal rules for dispute resolution mechanisms. For example, there was *Fetha Negest.*[43] Nevertheless, it was inaccessible to some section of the country's population; and hence there was an awareness problem even about its existence.[44] It must be also noted that after the promulgation of the 1930 Penal Code, the application of the substantive customary laws was restricted to civil matters.[45]

Before the adoption of the formal criminal procedure law, in Ethiopia, there had been traditional criminal investigation mechanisms such as *Awchachign* (*afersata*) and *lebashai*.[46] The procedure followed in these traditional mechanisms was different from the contemporary adjudication process. For example, unlike the current system, all cases - both civil and

---

37 Sebba L, "The Victim's Role in the Penal Process: A Theoretical Orientation" 1982, *The American Journal of Comparative Law* (1982) p. 202. See also, Wodage *supra* note 2, p. 107 - 108.

38 Wodage W. *supra* note 2, p. 107 -108.

39 *Id*, p.108.

40 *Id*.

41 Assefa S, *Criminal Procedure Law: Principles, Rules and Practices*, (2009), p. 33.

42 *Id*.

43 Aberra Jembere, An Introduction to the Legal History of Ethiopia (1434-1974) cited in Assefa S. *supra* note 41, p. 33.

44 *Id*.

45 *Id*, p.34.

46 Fisher S "Traditional Criminal Procedure in Ethiopia" 1971, 19 *The American Journal of Comparative Law vol. 19:43 (1971, ) p.*721-723.

criminal- were prosecuted by the victim, including execution of sentences.[47] In a nutshell, during this time, the crime victims had a paramount role in the whole process - investigation to sentencing.

Later, the *Afersata* Proclamation was issued in 1933, a part of which was repealed by the Administration of Justice Proclamation of 1942, which in turn was also repealed by the 1961 Criminal Procedure Code.[48]

Until the introduction of the modern criminal procedure law, traditionally, private victims or their kin conducted all prosecutions. In brief, crime victims had central position and played decisive roles in the prosecution process until the 1940s.[49] This private prosecution ceased when the public prosecutor's office was established and the law provides that crimes were to be prosecuted by the public prosecutor.[50] By virtue of this Proclamation, public prosecutor's office was authorized to take over and institute criminal cases, which were previously handled, by crime victims or their advocates.[51] Where, however, public prosecutors instituted charges against accused persons, victims continued to play substantial roles. Criminal charge could be interrupted or dropped at any stage if crime victims inform courts that they have settled the dispute through compromise or reconciliation.[52] In addition, victims could take appeal to next court(s) if they were aggrieved with decisions of lower courts, which public prosecutors did not contest.[53] The Proclamation, further, recognized the need to have:

> … rules regulating the administration of the Court, institution, conduct and hearing of proceedings therein, the admission, conduct and discipline of legal practitioners, the selection and duties of assessor, the committal of criminal cases from lower courts to higher courts, the imposition and recovery of fines, the award of imprisonment in default of payment and the procedure relating to execution and attachment, fixing fees and the general administration of justice, among others.[54]

---

47 *Id*, p.742.
48 Assefa S. *supra* note 41 p. 35; See also, the Code of Criminal Procedure of the Empire of Ethiopia, *Neg. Gaz. (*Extraordinary Issue No. 1 (1961) Art. 1(2).
49 Wodage W. *supra* note 2, p. 127.
50 Aberra Jembere, *supra* note 41 p. 37. See also, the Public Prosecutors Proclamation No. 29 of 1942.
51 Wodage W. *supra* note 2, p. 127.
52 *Id*.
53 *Id*.
54 Assefa S. *supra* note 41, p. 38.

Accordingly, the Courts Procedure Rules was enacted to be applied in the High Courts and Provincial Courts.[55]The period between 1955 and 1965 was the zeniths of codification process in the Ethiopian legal system. It was during this time that the country had its first modern codified criminal procedure law. To be specific, the preparation for the initial drafts of the Code was started in 1955. The task of drafting this law was bestowed to Jean Graven, who was also the drafter of the 1957 Penal Code.[56] After the draft of Jean Graven was rejected by the Codification Commission, Sir Charles Mathew of England was assigned for the drafting of the Code.[57] Finally, despite all the controversy regarding its true source,[58] Ethiopia enacted its first ever modern and still applicable criminal procedure code in 1961.[59] In fact, currently, Ethiopia is in the process of revising the 1961 Criminal Procedure Code. Moreover, in 2011, it also enacted a new criminal justice policy.[60]

### 3.2. The Place of Crime Victims' Rights under the Ethiopian Criminal Justice Process: A Holistic Analysis

To embark on with the fountainhead of laws, the FDRE Constitution, has no express provision on the right of crime victims. Although it has specific and relatively detailed provisions on the suspected, accused, and convicted persons, it says nothing about the rights of crime victims. There is no special provision devoted for crime victims. The only provision that is applicable to crime victims is the general provision that deals with access to justice. The Constitution provides that ''[e]veryone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.''[61] This is a general provision which is available to everyone who has a justiciable matter; civil or criminal. This provision, however, does not deal with the role of the crime victim in the criminal justice process.

---

55 For a detail discussion on the rules; see, Assefa S. *supra* note 41, p. 38-39.

56 *Id*, p. 39.

57 Wodage W. *supra* note 2, p. 128.

58 For detail discussion on the source for the Ethiopian criminal procedure code; see, Assefa S. supra note 41 p. 40-42. See also, Wodage W. *supra* note 2, p. 128.

59 The Criminal Procedure Code of the Empire of Ethiopia, 1961, *Neg. Gaz.* extra ordinary Issue; herein after the Ethiopian Criminal Procedure code.

60 The Ethiopian Criminal Justice Policy, 2011. The details of the policy in view of crime victims is discussed at the latter stage.

61 FDRE Constitution Proc. No.1/1995, Federal *Neg. Gaz.*, Year 1, No 1, Addis Ababa, 21 August 1995, Art. 37(1).

The other important document that needs an examination is the criminal justice policy of Ethiopia. The policy has some important points about crime victims. To begin with, the policy stresses that if measures are taken to increase the criminal justice system's effectiveness and establish a system that treat suspects of criminal conducts and crime victims in a balanced way, it would boost the public trust in the system.[62] This is indicative of the policy decision taken to balance the interest of suspects of committing a criminal act and crime victims in Ethiopia. The Ethiopian criminal justice policy also states that when the crime is an upon complaint crime, the Prosecutor is authorized the mandate the crime victim to bring a private prosecution.[63] Moreover, the Policy guarantee the crime victims the protections provided for witnesses.[64] Most importantly, in addition to the above points that are mentioned in its different part, the policy devoted a section that specifically deals with crime victims.[65] In this specific section, the policy focuses on the need for establishing a system that takes the interest of the crime victims into account. It specifically mentions that there is a need for establishing a favorable environment whereby the crime victims can able to get the necessary compensation in short time either by using regular courts or other alternative means. Moreover, the policy indicates that there should be a system that provides assistance and advice to the crime victims so that they able to recover from the psychological and other problems. The policy, furthermore, recognizes the crime victims' right to participate in the investigation, charge, court proceeding and right to get information. In nutshell, the crime victims have the right to participate in the investigation of the crime, instituting a charge, court proceeding and know the status of the case and get information about decisions made about the case. Moreover, the policy states that the crime victim has the right to be treated with honour and dignity in light of his/her damage sustained, age, skill and social status. Most specifically, the policy requires the following measures to be taken to respect the rights and interest of crime victims:

A. The criminal law and the criminal procedure law should be amended in a manner that respect the rights of crime victims;
B. A law should be enacted to protect the rights and interest of infants who are crime victim;

---

62 The FDRE Criminal Justice Policy *supra* note 60, p. 8.
63 *Id*, p. 13.
64 *Id*, p. 24.
65 *Id*, p. 49-51.

C. Express laws should be enacted to protect the rights and interest of women who are crime victims and persons who are victim of sexual harassment;
D. The necessary support should be provided for those institutions and organizations that provide various support to crime victims;
E. Necessary training as to their responsibility and the measure they should take should be given for those in the executive and judiciary sector who work on infants who are crime victims; and
F. When they appear and gives their testimony, the crime victims should be provided all similar protections accorded for witness including about their security, personal secrets, identity.

The FDRE Criminal Code is the third Criminal Code of Ethiopia, next to the 1930 and 1957 Penal Codes. The FDRE Criminal Code provides that its purpose is to 'ensure order, peace and the security of the State, its' peoples, and inhabitants for the public good'.[66] To this end, the Code aims at the 'prevention of crimes by giving due notice of the crimes and penalties prescribed by law and should this be ineffective by providing for the punishment of criminals in order to deter them from committing another crime and make them a lesson to others, or by providing for their reform and measures to prevent the' commission of further crimes'.[67] Therefore, it is not hard to comprehend that the Ethiopian Criminal Code gives priority for prevention of crimes. It does so by explicitly stating which acts constitute a crime and the punishment that would be imposed if they were committed. If prevention is not successful and a crime is committed, the Code provides punishment. The purpose behind the punishment is deterrence, rehabilitation and incapacitation of the offender. The Code, depending on the seriousness of the crime, also provides measures to be taken against the offender. Generally, the purpose of the FDRE Criminal Code is primarily designed in the way that gives emphasis on the offender and the general public interest. Therefore, it is possible to argue that for the Ethiopian criminal justice, crime is a violation of the state's criminal laws.[68] It considers crime as an act against the interest of the public, State. Nonetheless, some efforts have recently been made to improve the criminal justice system.

---

66 Criminal Code of the Federal Democratic Republic of Ethiopia, Proc. No. 414 *Fed. Neg. Gaz.* 9th Year, Extra Ordinary (2005), (herein after the FDRE Criminal Code), Art. 1, 1st Para.

67 *Id*, Art. 1, 2nd Para.

68 *Id*, Art. 23; See also, Enyew E., "The Space for Restorative Justice in the Ethiopian Criminal Justice System" *Bergen Journal of Criminal Law and Criminal Justice* Vol. 2 No 2, (2014), p. 223.

Saying the above as introduction, the next part discussion is devoted to specifically analyze the Ethiopian criminal justice process; its different stages, in light of the various interests of the crime victims.

### 3.2.1. The Pretrial Stage

#### A. The Initiation Stage

Whenever a criminal conduct is committed, information reaches to the formal criminal justice system via different means. One amongst the common sources of information is the member of the community including the crime victims. To be specific, the most common mechanisms are: a complaint made by the crime victims, when any member of the community made an accusation; or, the police officers on their own motion set the criminal justice system in motion.[69]

The important point for this paper is the responsibility imposed on the crime victim: Is it mandatory or optional for the crime victims to report the commission of the crime in Ethiopia? How much is the discretion of the crime victims regarding reporting or disregarding the commission of a crime? Do they have the right to control the initiation of the criminal proceeding? Would they be criminally responsible if they failed to make a report? Is there a legal protection accorded for them? This issue is explained next.

The FDRE Criminal Code clearly regulates the legal effect of failure to report the preparation, attempt, or commission of a crime or of the person who committed the crime. These persons, in principle, would not be criminally responsible and punishable as an accessory after the fact or an accomplice.[70] However, the law provides exceptional circumstances where those persons can be criminally responsible.[71] Stated differently, under the Ethiopian criminal justice system, informing the commission of a crime is not only a civic duty or right given to any person, failure to inform is; in exceptional circumstances, a

---

69 See, the Ethiopian Criminal Procedure *supra* note 59, Arts. 11 - 21.

70 Criminal Code of the Federal Democratic Republic of Ethiopia *supra* note 66, Art. 39(1).

71 For the exceptional circumstances, see the Criminal Code of the Federal Democratic Republic of Ethiopia *supra* note 66, Art. 254, 335. Note that these provisions do not talk about individual crimes victims; while the first provision talks about crimes mentioned under the provisions are 'Crimes against the external security and defensive power of the state'; the second provisions is about 'Failure to report Crimes Against the Defence Forces and Breaches of Military Obligations'.

punishable offence.[72] Specifically, from the perspective of crime victims, Article 443(1)(a) of the FDRE Criminal Code is worthy of a thorough discussion. The provision states:

> Whoever, without good cause: knowing the commission of, or the identity of the perpetrator of, a crime punishable with death or rigorous imprisonment for life, fails to report such things to the competent authorities; is punishable with fine not exceeding one thousand Birr, or simple imprisonment not exceeding six months.

Based on this provision, for the person in question to be criminally responsible, the following essential elements need to be fulfilled: absence of good cause; knowledge about the commission of the crime or identity of the person who committed the crime; the crime committed must be either punishable with death or rigorous imprisonment; and failure to report to the competent authority. However, the provision has one more, but unclear element, which is the person who can be criminally responsible for not reporting commission of the crime. Put differently, does Article 443(1)(a) of the FDRE Code includes the individual victims of a crime? For example, one can take the scenario provided under Article 620(3) of the FDRE Criminal Code. Would the victim of the crime of Rape who sustain a grave physical injury be criminally responsible for failure to report a crime under Article 443(1)(a) of the FDRE Criminal Code?

One should note that this kind of question is only important in cases of offences that are punishable without complaint. Regarding those offences that are punishable upon complaint, there will be no criminal investigation without securing a complaint from the crime victims.[73] In this specific circumstance, the crime victims control the investigation and prosecution; at least, to set the criminal justice process in motion or not. However, in the first circumstance, where the crime is not upon complaint crime, the crime victims have no control in the process. Because, the act is considered as a crime against the general community/state; though, it is directly inflicted on the crime victims. Therefore, it can be argued that the crime victims' failure to report the commission of a crime can be a ground for criminal prosecution under Article 443(1)(a) of the FDRE Criminal Code. After all, regarding the identity of the person, the provision uses an inclusive word 'whoever', which encompasses the crime

[72] Criminal Code of the Federal Democratic Republic of Ethiopia *supra* note 66, Art. 39(2) (3) and 443.
[73] *Id*, Art. 212.

victims. Hence, under the Ethiopian criminal justice system second victimization of the crime victims starts from its outset, at the initiation stage of the criminal justice system.

### B. Citizen's arrest power

In a circumstance where citizens have reasonable grounds to believe that the other person is committing an offence, there may be a need to take a private measure to apprehend the suspect/offender temporarily. Stated otherwise, a person who is not a police officer that includes the crime victims may go beyond informing the competent authorities about the commission of or their suspicion of the commission of a crime. There may be a circumstance where they should interfere into the liberty of the suspect - detain the person in question. Under the Ethiopian criminal justice system, private individuals are allowed to effect arrest but only in exceptional circumstances. The law provides:

> [a]ny private person or member of the police may arrest without warrant a person who has committed a flagrant offence as defined in Art. 19 and 20 of this Code [the Criminal Procedure] where the offence is punishable with simple imprisonment for not less than three months.[74]

Therefore, under the Ethiopian criminal justice system, the crime victims and potential victims (as well as the bystander), if they can, are accorded a right to play an active role in exercising citizen's arrest power. However, it is worthy to state that the law is not promoting vengeance but aims at fighting impunity and prevalence of justice.

### C. Police arrest and investigation

After receiving a report as to the commission of a crime, the next stage is to start investigation. The main purpose of the investigation is to gather evidence in order to ascertain whether the alleged crime has indeed been committed or not, and whether the suspected person has committed it or not.[75]

---

74 The Ethiopian Criminal Procedure Code *supra* note 59, Art. 50.

75 Enyew *supra* note 68 p. 225. See also, the Ethiopian Criminal Procedure Code *supra* note 59, Art. 22.

In Ethiopia, notwithstanding that police officers are of opinion that the accusation, complaint or information they may have received is open to doubt, the police are under duty to start investigation.[76] The police investigation process encompasses the arrest and interrogation of the suspect, search-and-seizures for obtaining any objects that may be used as an evidence for the case, as well as the calling of witnesses.[77] During these processes, it is not uncommon for the police to call the victim as a witness. Therefore, the role of the crime victims is not limited to reporting of the commission of the crime. Rather, they are the main source of evidence for the investigation and framing charging and the judges in finding the truth. However, under the Ethiopian criminal justice system, there is no explicit legal provision that imposes duty on the police officer to accept the crime victims' testimony in the process and make them part of the whole process. It is up to the decision of the police officers and the public prosecutors to call them or not. For example, the Criminal Procedure Code gives the discretion for the investigating police officer.[78]

### D. Prosecution

Following collecting all the necessary evidence, the investigating police officer submits a report to the public prosecutor.[79] Then after, the public prosecutor decides on the case; put differently, the prosecutor may decide to prosecute; order a preliminary inquiry; order further investigations; or, decide to or not to institute charge.[80] The law provides the grounds for the public prosecutor's decision to close or refuse to prosecute the case. Accordingly, the public prosecutor may close the file if the accused has died; or, is under nine years of age; or, cannot be prosecuted under any special law or under public international law (diplomatic immunity).[81] If the case is closed on these grounds, the public prosecutor is required to send a copy of the decision to the Attorney General, the private complainant, if any, and the investigating police officer.[82] The issue here is, the meaning, nature and contours of the expression 'private complainant.' Is it limited to upon complaint cases or refers to all crimes regarding which accusation is made by members of the community? This author believes that

---

76 The Ethiopian Criminal Procedure Code *supra* note 59, Art. 23.
77 *Id*, Art. 24-34.
78 *Id*, Art. 30(1).
79 *Id*, Art. 37(2).
80 *Id*, Art. 38.
81 *Id*, Art. 39(1).
82 *Id*, Art. 39(3).

the notion of 'private complaint' to be broadly interpreted in a way it includes anyone who brought the commission of a crime to the attention of police officer.

Moving to the other point, if 'the public prosecutor is of opinion that there is [no] sufficient evidence to justify conviction; or, there is no possibility of finding the accused and the case is one which may not be tried in his absence; or, the prosecution is barred by limitation or the offence is made the subject of a pardon or amnesty; or, the public prosecutor is instructed not to institute proceedings in the public interest by the [Attorney General] by order under his hand,' the case can be closed.[83] The issue here is to what extent the interest of the crime victim is considered when the public prosecutor refuses to institute a charge? In particular, is there a mechanism whereby the crime victims can challenge the decision of the public prosecutor? For example, what if the assessment of the crime victims is different from the public prosecutor's evaluation of the sufficiency of the evidence? What if the crime victims have objection to the order of the Attorney General? In the Ethiopian law, as explained below, there is no adequate answer for these questions.

If the decision of the public prosecutor is based on insufficiency of evidence, the effect of the refusal varies based on the nature of the crime. If the crime is punishable upon complaint, the public prosecutor shall authorize, in writing, the appropriate person (the injured party or his legal representative; or, the husband or wife on behalf of the spouse; or, the legal representative of an incapable person; or, the attorney or a body corporate) to conduct a private prosecution.[84] A copy of such authorization shall be also sent to the court having jurisdiction.[85] If the crime is among those that do not require complaint from the victim, the appropriate person (the injured party or his legal representative; or, the husband or wife on behalf of the spouse; or, the legal representative of an incapable person; or, the attorney or a body corporate) may within thirty days from having received the decision of the public prosecutor apply for an order that the public prosecutor institute proceedings.[86] The Criminal Procedure Code does not illuminate who these people are. In this regard, the Federal Attorney General Establishment Proclamation states that any person who has grievance against the decision of public prosecutor has the right to lodge complaint to superior public prosecutor at different levels. The superior public prosecutor who received the complaint shall

83 *Id*, Art. 42(1).
84 *Id*, Art. 44 (1) and 47.
85 *Id*, Art. 44 (1).
86 *Id*, Arts. 44 (2) and 47.

expeditiously investigate and give decision including by forming a committee composed of relevant professionals to investigate the case. After conducting the investigation, the superior may decide to suspend, change, modify, revoke or approve the decision of the subordinate prosecutor or remand the case to the section that saw the case previously by stating his legal and factual reasons.[87] However, the right of the crime victims does not seem to go to the extent of conducting a private prosecution. Since such crimes are considered as against the interest of the public/state primarily; unlike upon complaint crimes, the direct crime victims do not have the standing for prosecution. The power they have is limited to apply for an order. However, the law is not clear to which organ the complaint about the decision of the public prosecutor can be lodged. Should it be lodged to the same public prosecutor who made the decision or to the Attorney General? Would the complaint against the decision of the public prosecutor warrant automatic prosecution? These questions remain unanswered under the Ethiopian law.

Generally, besides these unaddressed issues, crime victims; under the Ethiopian criminal justice process, have no control over the process; specifically, crimes that are not punishable upon complaint. The crime victims' rights and interest is usually a secondary consideration. Especially, in the case of non-complaint crimes, victims are pushed out of the process of the criminal justice.

### E. Pre-trial detention

The provisions regulating pre-trial detention of suspects and defendants and the procedures applied for release on bail vary from jurisdiction to jurisdiction.[88] In most jurisdictions, the decision is influenced by the possible danger in 'tampering with the evidence', including, of course, exerting pressure on the victim.[89]

Under the Ethiopian legal framework, the principle on bail is provided under the FDRE Constitution. It provides that "[p]ersons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or demand adequate

87 Federal Attorney General Establishment Proc. No. 943/2016, *Fed. Neg. Gaz*. 22nd Year No. 62, May 2016, A.A, Art. 18.
88 Sebba L. *supra* note 37, p. 197.
89 *Id*, p. 198.

guarantee for the conditional release of the arrested person."[90] Specifically, the criminal procedure law provides that bail can be denied if the "court is of the opinion that the suspect is unlikely to comply with the conditions laid down in the bail bond; likely to commit other offences, and/or, likely to interfere with witnesses or tamper with the evidence."[91] Sometimes, the legislature may also deny bail based on the seriousness of the crime such as corruption.[92] Moreover, as rightly explained by Leslie, not in Ethiopian context though, the primary focus on bail is the threat to the "case against the defendant."[93] However, the threat of the well-being of the crime victims, and how is this to be measured against the infringement of the suspect's liberty inherent in his/her continued incarceration is not often attracting attention.[94] To the author's mind, similar analysis works for the Ethiopian case too.

### 3.2.2. The Trial Stage

#### A. Joinder of Civil Litigation

Often, the damage sustained by the crime victims is not unidirectional. The conduct of the suspect/offender exposes him/her to multifaceted problems. One of such problems is financial costs. The financial costs may be those, which are already materialized, and those will certainly happen. Therefore, every legal system devised a mechanism whereby such damage of the crime victims makes good. Put differently, all civil law legal systems allow the victim to bring a civil action following the criminal process.[95] However, under the common law rules of evidence, the criminal conviction would not even be admissible as evidence in the civil proceedings.[96] It is thus an irony that the European approach, which notionally places the victim in a more subservient role in the criminal prosecution, by comparison with the common law, in practice places him/her in a superior position by means of the joinder device.[97]

Under the Ethiopian legal system, crime victims have a better protection in bringing civil litigation alongside with the criminal prosecution. Chapter Six of the Ethiopian Criminal

---

90 The FDRE Constitution *supra* note 61, Art. 19(6).
91 The Ethiopian Criminal Procedure Code *supra* note 59, Art. 67.
92 Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation, Proclamation No. 434/2005, *Neg. Gaz.,21st Year* No. 37 (April. 2015) A.A, Art. 4(1).
93 Sebba L. *supra* note 37, p. 198.
94 *Id*.
95 *Id*, p. 200.
96 *Id*.
97 *Id*.

Procedure Code is devoted to principles on "Injured Party in Criminal Proceedings." The Criminal Procedure Law provides that the crime victims or his/her representative may, at the opening of the hearing, apply to the court trying the case for an order that compensation be awarded for the injury caused.[98] In this case, the crime victim is not required to pay for a court fee as though it were a civil case.[99] However, she/he must specify the nature and amount of the compensation sought in writing.[100] The Court, in its motion or application of the defence counsel or the prosecutor, can reject the application of the crime victim or his/her representative; if, "a young person is the accused; or, the accused is being tried in his absence; or, the injured party has instituted proceedings in a civil court having jurisdiction; or, the person making the application is not qualified for suing; or, the claim for compensation cannot be determined without calling numerous witnesses in addition to those to be called by the prosecution and defence; or, the court is of opinion that the hearing of the injured party's claim for compensation is likely to confuse, complicate or delay the hearing of the criminal case"[101] or where the amount of compensation claimed exceeds the pecuniary jurisdiction of the court.[102] However, the dismissal of the application does not prevent the crime victims from instituting a separate civil suit in a civil court.

Once the case is accepted, the crime victims have all the rights and play a key role in the process. However, if the accused is acquitted, the court shall not adjudicate on the question of compensation and shall inform the injured party that she/he may file a claim against the accused in the civil court having jurisdiction.[103] The Ethiopian law also provides that the acquittal of the accused in the criminal prosecution cannot be a bar for civil litigation.[104] However, if the accused convicted in the criminal prosecution; for the stronger reason, it will be a conclusive evidence for the civil litigation in determining whether the accused was at fault or not.

The other point in relation to compensation is: Should or must the state offer financial compensation to the victims of crime? Here the question is not about the harm sustained by

---

98 The Ethiopian Criminal Procedure Code *supra* note, Art. 154(1).
99 *Id*.
100 *Id*.
101 *Id*, Art. 155(1).
102 *Id*, Art. 155(2).
103 *Id*, Art. 158.
104 Civ. Code of the Empire of Ethiopia Proc. No. 165, *Neg. Gaz.* Extraordinary, 19th Year No. 2 (May 1960), Art. 2149.

victims owing to the decision of the State rather it is where other citizens cause the harm (which in general is the subject of civil lawsuits). To refer the practice of other countries; for example Germany, there is a trend of paying compensation for crime victims, not only as a symbol of an extended welfare state; more importantly, it signifies a growing trend in German society to sympathize and identify with victims.[105] However, for understandable reason of Ethiopia's development level, nowhere such right is recognized.

### B. The court hearing

When someone appears as a witness to the prosecutor or the defence, each side of the trial will have a chance for confrontation: at the examination in chief, cross-examination and re-examination. Of these stages, specifically, there is grueling at the cross examination with the aim of discrediting the testimony of the witness (that may include the crime victims) given at the examination in chief stage. The issue at this point is the protection given to the crime victims. Is it necessary to protect the crime victims from cross–examination that may mainly base on their character? For example, think of a victim of rape and incest. If there is a certain level of protection for the crime victims, they may be discouraged to bring the charge in fear of the merciless cross-examination at the trial stage. What about in case of child crime victims? For example, take child crime victims, especially in sexual abuse cases. The question is whether they have a right to appear as a witness during the trial with or without the consent of the public prosecutor. If they do have a right, are there special protection mechanisms for crime victims at the trial stage? Are children capable of being witness under the Ethiopian legal system? Are they free from cross-examination? Is hearsay evidence acceptable? These questions are not easy to answer; because at this stage, there are two competing interests: the defendant's right to confront witnesses against him/her and the need to provide protection for the crime victims including child victim within the criminal justice system.

In the Ethiopian law, the crime victims' right to appear as a witness is not legally recognized. It is being practiced at the discretion of the public prosecutor to either include or exclude the

[105] "Symposium: Victims and the Criminal Law: American and German Perspectives," Buffalo Criminal Law Review, Vol. 3 ( 1999) P. 1, noted (foot note 1) in Dubber M and Hörnle T, *Criminal Law: A Comparative Approach* (Oxford U. Press 2014), p. 30.

private victim from the proceedings.[106] Moreover, there is no protection accorded to the crime victims during examinations in the trial. The FDRE Constitution, however, provides that "[t]he court may hear cases in a closed session only with a view to protecting the right to privacy of the parties concerned, public morals and national security."[107] This protection is not directly and solely related to the crime victims. On the other hand, when the crime victim is called as a witness, she/he does not have a chance to properly encounter the accused, as her /his communication with the accused is limited to responses in cross-examination. [108] The victim is also not allowed to remain in the courtroom to hear the other testimonies in the case and to attend the rest of the trial so as to avoid influence testimonies of other witnesses.[109] As Worku rightly pinpointed, "victim-witnesses often experience mental anguish, humiliation and anxiety during cross-examination by, in particular, the accused or the defense counsel."[110]

### C. The Sentencing Stage

If, based on the evidence adduced by the public prosecutor and then the accused was not able to challenge it, a court convicts the accused. Accordingly, the next stage is the determination of the punishment to be imposed on the convicted person. At this stage, the court will seek the opinion of the public prosecutor and the offender; therefore, both would explain the available mitigating and aggravating circumstances. However, the crime victims are not given chance to give input during the sentencing stage.

In Ethiopian law, too, the determination of punishment mainly focuses on in achieving the purpose of criminal law; which is "to ensure order, peace and the security of the State, its peoples, and inhabitants for the public good."[111] What is clear is that the recognized objectives of punishment in modern times have not directly been concerned with the crime victims, but have primarily been concerned with society as a whole, on the one hand, and the offender on the other.[112] Thus, retribution and general deterrence lay stress mainly on the needs of society; reform and rehabilitation are concerned with those of the offender, while

106 Enyew E. supra note 68, p. 233.
107 The FDRE Constitution *supra* note 61, Art. 20(1).
108 Enyew E. *supra* note 68.
109 *Id.*
110 Wodage W. *supra* note 2 p. 140.
111 Criminal Code of the Federal Democratic Republic of Ethiopia *supra* note 66, Art. 87.
112 Sebba L. *supra* note 37, p. 205.

individual deterrence and social defence may be regarded as taking into account the mutuality of the interaction between offender and society.[113]

The question of whether the victims are able to express their suffering and needs in criminal trials through victim impact statements or not answer depends on the evolution of state punishment. If the state punishment is seen as a crucial step in civilizing and restricting vindictive reactions, there might be reluctance to provide extensive victims' rights and specifically victim impact statements.[114] In Canada, crime victims are allowed to make an impact statement. The Victim Impact Statement allows victims to make a written statement about the impact that the crime had on them and submit it to the court at the sentencing hearing after the accused has been found guilty.[115]

However, under German law, for example, victims in general are not entitled to participate actively in criminal trials and there are no victim impact statements.[116] However, there are important exceptions to this rule of the "passive victim." The German Code of Criminal Procedure allows certain types of victims to appear as "accessory prosecutor" (Nebenkläger).[117] This right is mainly available to victims of sexual offenses, assault and attempted murder, as well as to relatives of murder and homicide victims. The position of an "accessory prosecutor" includes a right to make statements. It does not, however, oblige the judge to put particular emphasis on the victim's suffering in his or her sentencing decision.[118] As rightly pinpointed by Endalew, under the Ethiopian criminal justice system, the crime victim is not given a chance to address the judge in the determination of the appropriate punishment rendered onto the offender.[119]

### 3.2.3. Post-sentencing Stage

The fact that the offender is sent to correctional institutions such as prison does not signify the end of the criminal justice process. There are some decisions that would be made while the offender is in the correctional institutions. For example, there may be a decision to grant

113 *Id*.
114 Dubber M and Hörnle T *supra* note 105, p. 31.
115 Wemmers J. *supra* note 3, p. 76.
116 Dubber M and Hörnle T *supra* note 105, p. 31
117 *Id*.
118 *Id*.
119 Enyew E. *supra* note 68, p. 229. See also, the Ethiopian Criminal Procedure Code *supra* note 59, Art. 148.

parole or amnesty. Therefore, the question is: Do the crime victims have standing to preventing/allowing such grants?

Under the Ethiopian criminal justice process, decisions such as probation (suspension of conviction and sentence) and parole are made in the interest of the justice system and for the benefit of the convict. The crime victims are neither consulted nor informed in the determination of whether the offender should be granted parole or release upon probation. This is in total disregard of the potential secondary victimization of the victim that could result from knowledge about or their possible future interactions in the community. Likewise, in the decision whether granting pardon or amnesty to the offender, the crime victims have no standing. However, the provisions on parole and probation still have a paramount role from the perspective of protecting the interest of the crime victims. Besides decreasing the negative consequences of incarceration and reduce the prison population, they also protect the interests of crime victims as they put repairing the damage caused by the crime or to pay compensation to the injured person as a precondition to be placed under probation or granted parole.[120]

## 4. The Need for Constitutionalizing Crime Victims' Rights in Ethiopia

A written constitutional law, in Ethiopia, kicked off in 1931 when Emperor *Haile Selassie I* granted[121] the first ever constitution to his subjects. This Constitution, although not primarily intended to limit the power of the Emperor, it had some interesting provisions. To be specific, among the very limited number of fundamental rights that had a constitutional status,[122] the due process right was a prominent one. Note that, however, the constitutional provisions were not related to crime victims. The constitution provides protection for Ethiopian subjects not only not to be arrested, sentenced, or imprisoned except in pursuance of law, but also guaranteed Ethiopian subjects the right to be tried by a legally established court and no one can deny this right without their consent. [123] The monarchial constitution also provided domiciliary searches to be only based on law.[124] However, in nowhere the constitution dealt with specific rights of crime victims; unlike the case of the suspects/accused. The subsequent

120 Enyew E. *supra* note 68, p. 237 and 238.
121 See, the 1955 Revised Constitution of Ethiopia, 1955, Paragraph 1 of the preamble.
122 See, the Ethiopian Constitution (1931), Arts. 22 – 28.
123 *Id*, Arts. 23 and 24.
124 *Id*, Art. 25.

constitution, the 1955 Revised Constitution, granted by the same Emperor, did introduce nothing new concerning crime victims' rights. Compared to its predecessor, however, the 1955 Revised Constitution had a wide-ranging list of fundamental rights and freedoms though.[125]

The Derg Regime, after suspending the 1955 Revised Constitution for 13 years,[126] enacted another constitution in 1987.[127] This short-lived constitution, akin to the 1955 Revised Constitution, had a long list of fundamental rights and freedoms.[128] The 1987 Constitution, specifically declared provision that gave protection to persons suspected of committing crime.[129] It should be noted that the Derg regime made no significant change in the criminal justice process. The 1957 Penal Code and the 1961 Criminal Procedure Code were not suspended or repealed. Derg rather introduced some new laws, which introduced new forms of crimes and increased punishment concerning some crimes; besides establishing military courts.[130] Therefore, it is submitted that from the crime victims' point of view, there was no new introduction even under the 1987 PDRE Constitution.

Finally, following the transitional period charter that crossed refer to the major human rights instruments such as UDHR[131] and provide the procedure for the future constitution,[132]Ethiopia enacted the current, FDRE, Constitution. Alike its predecessors, the FDRE Constitution mainly deals with the rights of arrested persons;[133] accused persons;[134] and, the rights of persons held in custody and convicted prisoners.[135] It also explicitly provides non-retroactivity of criminal law[136] and the prohibition of double jeopardy.[137] The

---

125 See, the Ethiopian Revised Constitution *supra* note 121, Art. 37 to 65.
126 Provisional Military Government Establishment Proclamation, *Negarit Gazeta*, Proc. 1/1974, Article 5(a).
127 The Constitution of Peoples' Democratic Republic of Ethiopia, PDRE Constitution, (1987).
128 *Id*, Arts. 35 - 58.
129 The constitution guaranteed presumption of innocence, non-retroactive application of criminal law, protection against self-incrimination, etc. See, the PDRE Constitution, Arts. 44 and 45.
130 See, Special Courts- Martial Establishment Proclamation, Proclamation No. 7/1974, Special Penal Code Proclamation, Proclamation No. 8/1974, Special Criminal Procedure Code Proclamation, Proclamation No. 9/1974, the Special Courts-Martial Establishment, Special Penal Code, Special Penal Code Proclamation Amendment Proclamation, Amendment Proclamation 21/1975, and the Revised Special Penal Code Proclamation, Proclamation No. 214/1975.
131 The Ethiopian Transitional Period Charter (1991), Art. 1.
132 *Id*, Arts. 9(g), 10, 11, and 12.
133 For the specific rights; see, The Constitution of Peoples' Democratic Republic of Ethiopia, PDRE Constitution, *supra* note 6, Art. 19.
134 *Id*, Art. 20.
135 *Id*, Art. 21.
136 *Id*, Art. 22.
137 *Id*, Art. 23.

only generic provision, at least indirectly, protects the interest of crime victims is the provision that guarantees access to justice. The Constitution guarantees everyone "the right to bring a justiciable matter to and to obtain a decision or judgment by, a court of law or any other competent body with judicial power."[138] The FDRE Constitution also allows "adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute."[139] Consonant with this, the constitution also provides: "Special or *ad hoc* courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures shall not be established."[140] Generally, the FDRE Constitution accords different protections for those who participate in the criminal justice as a suspect, accused and offender. However, it does not have even a single provision on the crime victims' rights save the right to bring a case before the concerned organ.

Based on the assessment made in this work, the crime victims are neglected in the Ethiopian criminal justice process. They have not been bestowed the place they deserved. Unquestionably, the criminal justice system would hardly be successful and the criminal law objective hardly achieved without an active role of the crime victims. Accordingly, currently, there is "a world-wide consensus and conviction to treat victims with compassion and respect for their dignity, to ensure that they are kept informed of the progresses of their cases, and to allow them to play meaningful roles in the criminal process."[141] Accordingly, many jurisdictions have been trying to give broader space for the needs of the crime victims in their legal tradition in general, criminal justice system in particular. Moreover, there are international initiative such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power that tries to recognizes the rights of crime victims so that achieve the laudable aim of criminal law.[142] Similarly, the 1998 Rome Statute of the International Criminal Court unequivocally recognizes the rights of the crime victims in various stages of the proceeding. Generally, it is clear that the trend at international and at various domestic jurisdictions level is giving a better protection for the rights of the crime victims in a way that is compatible with the rights of the suspects/accused/offenders.

---

138 *Id*, Art. 37.
139 *Id*, Art. 34(5)
140 *Id*, Art. 78(4).
141 Wodage E. *supra* note 2, p. 123.
142 *Id*.

The FDRE Constitution has been applauded for having a long list of fundamental rights. Specifically, the Constitution has recognized different types of rights for those who are suspected, accused, or, found guilty of committing a crime. However, it does not have even a single express provision for the rights of crime victims. This is not compatible with the growing trend in protection of the rights of crime victims. One should also bear in mind that, currently, many, for various reasons are demanding for the amendment of the FDRE Constitution but various other reasons. Moreover, the country is in transition, which, among others, needs reform of institutions. Therefore, it is wise to use this opportunity to make a progressive amendment to the rights of crime victims and bestow them a constitutional status. The Constitution should have provision on crime victims' right to participate in the process as key parties.

## 5. Conclusion

The criminal justice process starts mainly from the damage sustained by the direct crime victims. However, the offender and the public prosecutor on behalf of the State dominate the process. This is so, because the punishable act of the offender is considered as an act against the interest of the public. This is a narrow understanding of crime a utilitarian approach. However, to achieve the main objective of criminal law, 'ensuring order, peace and the security of the State, its peoples, and inhabitants for the public good', besides rehabilitating the offender, it is necessary to repair the broken relationship between the offender and the crime victims; the offender and the community; and, the crime victims and the community. This can be done by allowing the crime victims to play an active role in resolving the problem.

In the Ethiopian criminal justice process, the key players are the offender and the State. The crime victims remain as spectators in their own game. Their participation in the process is dependent upon the willingness of the public prosecutor, especially in case of crimes that are not punishable upon complaint. Indeed, some progresses have been introduced by the criminal justice policy. However, it is not enough. Therefore, much has to be done to bring the crime victims into the center of the process via constitutionalizing their rights in a way compatible with the rights of the defendant. The right of the crime victims must be treated in

a balanced way with the defendants including the suspect. This would save the rights of the crime victims from being subordinate to the defendant.

# Exploring Enforcement of Core International Labour Standards in Textile and Apparel Industries in Ethiopia: An Appraisal of Practice at Hawassa Industrial Park

**Salmlak Wodaj***

**Abstract**

*With a view to win the fierce competition for Foreign Direct Investment (FDI) nations have been proactively crafting possible attractive conditions that would usher foreign investment. The race for attracting international investors has the knock-on effect of lessening minimum labour conditions standards. Despite the government's commitment to attract investments, the emerging industrial parks are now being under scrutiny for abuse of fundamental workers' rights. This article assesses enforcement of protection of core labour rights in Hawassa Industrial Park (HIP). The article is qualitative in approach and doctrinal in form. The Study reveals that the general working conditions in the Park is exploitive and deviate from the ILO (International Labour Organization) standards.*

**Keywords: core labour standards, ILO, working conditions, FDI, and Hawassa Industrial Park**

## 1. Introduction

This article sheds light on the protection of core labour rights in the Ethiopian industrial parks witha specific reference to Hawassa Industrial Park. Industrial Parks have been leading schemes of attracting foreign direct investment in developing countries.[1] Hawassa industrial park is a significant step towards industrialization in Ethiopia. The Park was built in 300 hectares of land,

***LL.B, LL.M. Assistant Judge at Federal First Instance Court

[1] Michael Akomaye, "Are the Rules for the Registration of Trade Unions in Cameroon Compatible with the ILO's Concept of Freedom of Association?" *The International Journal of Comparative Labor Law and Industrial Relations*, 25, (2009), at 349. "available at < http://www.diva-portal.org/smash/get/diva2:899970/FULLTEXT01.pdf > (last accessed Feb. 25, 2020).

and hosts mainly textile and apparel industries.[2] Though Industrial parks aim to enhance and sustain pro-poor growth by way of job creation, they often pose formidable challenge to the conventional labour administration system.[3] Violation of rights of employees is often claimed. This tarnishes not only the very purpose of industrial parks but also hoodwinks Ethiopia's international commitments. Ethiopia has international obligation to respect and promote rights of workers. The nation is a member of International Labour Organization (herein after ILO) and has ratified 23 ILO's conventions, including eight core conventions that recognize fundamental labour rights. In addition to the international commitments that Ethiopia has pledged to respect the rights of workers, protection of workers' rights is constitutionally guaranteed. Further, Ethiopia has taken positive step towards broad policy formulation that meant to strengthen respect to the rights employees in industrial sector. Despite national or international dictates for the respect of rights of employees, industrial parks including Hawassa often blamed for suppressive work environment. Core labour rights and privileges are often violated in Hawassa Industrial Park.

This article examines the protection of core labour rights in Hawassa industrial park by using mixed research methodology. Empirical data collected through field visit and structured questionnaire and semi structured interviews, and qualitatively analysed. Labour policies and governing domestic legislations are examined in light of relevant international standards and enforcement of core labour rights in the context of foreign direct investment (herein after FDI). The first two sections of the article deal with the general conceptual issues of core labour rights in the context of industrial zones. Section three examines the legal regime governing the protection of core labour rights in industrial park. Finally, section four assesses the practice of core international labour standards protection at Hawassa Industrial Park.

---

[2] Helen Mato, "Ethiopia: Hawassa Industrial Park - a Journey towards Industrialization," *The Ethiopian Herald* 27, (Jul 2016).

[3] Jetu Edosa, "protection of core labor rights in ethiopian industrial development zones: the case of eastern industrial zone, " in Getachew Assefa *et al*, (eds). *Economic, Social and Cultural Rights in Ethiopia* (A.A.U. School of Law: A.A. 2016). 101-134.

## 2. The Development of Industrial Parks in Ethiopia

Industrial parks play pivotal role in economic development, job creation and attract FDI. In Ethiopia, the emergence of Export Processing Zones (herein after EPZs) as industrial development solution is a recent phenomenon, but the contribution appears high. Among others, industrial parks stimulated industrialization. The Eastern Industrial Zone (EIZ) in the town of Dukem is widely credited for the stimulation of the use of industrial parks as tool of industrialization.[4] The Dukem industrial zone was developed by the China-Africa Development Fund framework as one of the first six Chinese SEZs established in Africa.[5]

The Ethiopian government enthused by the Eastern Industrial Zone has established industrial park development as the main strategy to scale up the role of the manufacturing sector in attracting FDI. [6] Accordingly, through the establishment of Industrial Parks to accelerate the economic transformation and development, Industrial Park Proclamation No. 886/2015 was enacted[7] The Proclamation No.886/2015 has the following objectives:

- regulating the designation, development, and operation of industrial park;
- contributing towards the development of the country's technological and industrial infrastructure;
- promoting private sector participation in manufacturing industries and related investments;
- improving the competitiveness of the country's economic development; and creating ample job opportunities and achieving sustainable economic development.[8]

---

4 Gifawosen Markos, *Labor Rights, Working Conditions, and Workers' Power in the Emerging Textile and Apparel Industries in Ethiopia: The Case of Hawassa Industrial Park,* (Nov, 2019, Kasseler Online Bibliothek Repository &Archiv), P. 32.

5 In 2000, at the Forum on China-Africa Cooperation (FOCAC) meeting in Beijing, China agreed to share with African countries its experience in the field of investment promotion related to the establishment and management of special economic zones (SEZs). In the meantime, the proposal for the development of seven SEZs was approved by the Chinese government in six African countries including one in Ethiopia. The Eastern Industrial Zone (EIZ) in the townof Dukem, the first of its kind for Ethiopia, was built through the China-Africa Development Fund as part of "China Goes Global Policy". *Id.*.

6 *Id.*

7 Industrial Parks Proclamation No. 886/2015, *Fed. Neg. Gaz.* 21[1st] year No. 39 9 April (2015), A.A.

8 *Id,* Art. 4.

Further, the Proclamation authorizes private companies like publicly held companies, private enterprises, or by private entrepreneurs to develop industrial parks as organization for profit.[9]This presumably elevates the sustainability of industrial parks in Ethiopia. The public private initiative mechanism of developing industrial parks is in place for the establishment of IPs/SEZs: the first mechanism is fully developed by the federal or regional government, secondly, by Public-Private Partnerships (PPP) with the Industrial Parks Development Corporation (IPDC) and thirdly, by private developers only. Industrial parks in Ethiopia can also be categorized based on their focus sector including textile and garment, leather and shoes, agro-processing, pharmaceutical, and IT parks.[10]

Ethiopia's Growth and Transformation Plans envisioned industrialization through industrial parks. In accordance with the first Growth and Transformation Plan, popularly known as GTP 1 five industrial parks were launched: in Addis Ababa (two: Bole Lemi and Kilinto Industrial Parks), in Hawassa, in Dire Dawa, and in Kombolcha (one each)[11] In the Second Growth and Transformation Plan (GTP 2) more industrial parks were set up in Mekelle, Bahir Dar, Jimma, and Adama.[12] Further, several private foreign-owned industrial zones have been established.[13] The first and largest one of the private industrial zones is the Chinese owned Eastern Industrial Zone (EIZ) in Dukem. Other private industrial zones include the Lebu Industrial Zone, which is owned by Huajian Group, and the Mojo Industrial Zone, owned by Taiwanese George Shoe and CCCC Arerti IP of construction sector located in Amhara Regional State.[14]

---

9 *Id,* Art. 2 Sub- art. 10.

10 *Id,* Art. 2(1).

11 FDRE Ministry of Finance and Economic Development, "Growth and Transformation Plan (GTP) (Draft)2010/11-2014/15" (Addis Ababa: 2010), p.30.

12 Xiaodi Zhang, et al, *Industrial park development in Ethiopia Case study report* (2018). P46, available at <https://www.unido.org/api/opentext/documents/download/10694802/unido-file-10694802 >. last accessed (Feb 10,2020).

13 Ermias Wedajo Azmach, *Regulating Industrial Parks Development in Ethiopia: A Critical Analysis*, (2018), p39,available at <http://www.scirp.org/journal/blr>. last accessed (Feb 10, 2020).

14 FDRE Ministry of Finance and Economic Development, *supra* note 11.

## 2.1 Brief Sketch of Hawassa Industrial Park

Hawassa Industrial Park ((HIP) is located in the city of Hawassa, a city of about 450,000 residents, and located 275 Km south of Addis Ababa.[15] The Park is a nation-level textile and garment industrial park in Ethiopia, which is characterized by zero-emission commitment.[16] It represents the highest level of African textile apparel industrial park in the viewpoints of speed of construction, size and planning standards.[17] Constructed by China Civil Engineering Group Co., Ltd. (CCECC), the first phase of the park was started in 2015 and completed in nine months, with a total area of 2.3 square kms and a construction area of 230,000 square meters, including 37 standard sheds, living facilities and other supplementary facilities.[18]

As of January 2020 reports of the Park, 21 foreign companies from countries such as USA, UK, India, Taiwan, Belgium, Spain, France, India, Sri Lanka, Indonesia, China, and Hong Kong operate in the park has created direct employment opportunities for 30,701 people for local workers though, to some extent there is disparity of the total figure of employees reported by different concerning institutions. [19] While the Industrial Development Park has reported employment of 301,701 job seekers, the SNNRS Labour and Social Affairs Office reported more than 35,000 employees got employment opportunity in the Park.[20] Whatsoever, the fact is the Park has achieved the promised job creation.

---

15 Gifawosen Markos *supra* note 4, p. 37.

16 FDRE Ministry of Finance and Economic Development *supra* note 11, p. 28.

17 *Id.*

18 *Id.*

19 Interview with MengistuYimer, Investor Relationship Head, Hawassa Industrial Park Development Corporations, athis office Hawassa 13 January, 2020.

20 Interview with Yohanes Ezo Adulo, Claims Follow-up and Support Officer, at Directorate of Harmonious IndustrialRelations in SNNPRS Bureau of labor and social affairs, (Hawassa 14 January 2020 at his office).

## 3. ILO Core Labour Standards and Industrial Parks

Generally, labour conditions in industrial parks is an issue because of numerous reports exhibit poor labour conditions that are specific to the nature of the fact that industrial parks most often host labour intensive industries.[21] The International Labour Organization (ILO) has adopted 189 conventions that outline international labour standards in a wide variety of areas, such as minimum wage requirement, limit on working time, occupational health and safety standards, employment policy, and basic working conditions for specific categories of workers.[22]

These fundamental rights codified in the conventions are: freedom of association, the right to collective bargaining, elimination of all forms of forced or compulsory labour, abolition of child labour, and the elimination of discrimination in respect of employment and occupation. However, categorizing such labour rights is highly criticized in the academic literature in which the validity of picking certain labour rights as fundamental rights while excluding the more traditional and important socio-economic rights, such as the right to minimum wage and occupational health and safety are under question.

The ambition for quick expansion of industrial parks in the developing countries has its own negative consequences. Among other things, the competition for investment has prompted national governments to lessening the legal protection for workers. In bid to attract more investors and fetch FDI, nations have tempted for less regulation, low minimum wage, and weak union system. Numerous studies conducted under the sponsorships of ILO and International Confederation of Trade Union (ICTU) have found that governments of industry zones have failed to enforce labour legislations with resultant widespread violations of workers' rights.

For effective enforcement of ILO laws in member States, the conventions should be domesticated through ratification in each signatory.[23] With regard to eight core standards, however, ratification

---

[21] Mulu Beyene, *Labor Conditions in Export Processing Zones and the Role of the ILO: Focus on Freedom of Association*, University of Oslo (Sep.01,2013), available at: < https://www.duo.uio.no/bitstream/handle/10852/39031/Thesis.pdf?sequence=1&isAllowed=y > last accessed (Feb 11, 2020).

[22] Peter Bakvis and Molly McCoy, *Core Labour Standards And International Organizations: What Inroads Has LaborMade*?, available at: < http://www.fes.de/gewerkschaften > last accessed (Apr 21, 2020).

[23] *Id.*

is not a requirement.[24] Further, ILO by the Declaration on the Fundamental Principles and Rights at Work in 1998 called upon member states to comply with the four principles, regardless of whether they were ratified or not.[25] While each of the Core Labour Standards (CLS) corresponds to one or more ILO conventions, a member State is expected to comply with the dictates of core standards, even if the conventions are not ratified.[26]

However, the fact that a country has ratified a convention does not necessarily prove its compliance, the standards enshrined therein should be enforced.[27] Despite ratification of core labour rights, report of the Worker Rights Consortium in 2018 shows workers in industrial zones of Ethiopia are generally unable to effectively exercise their labour rights.[28] The Confederation of Ethiopian Trade Unions report also indicates employers in industrial parks violate rights of labour which recognized in accordance with the Ethiopian labour law.[29] As noted during field visit at the Hawassa Industrial Park there is widespread violation of the rights of workers which is also contrary to the rights envisioned in the FDRE Constitution. Additionally, when things went to the level of intolerable stage, employees of the Hawassa Industrial Park openly protested against apparent violations calling for strike in March 2019, which demonstrates the rampant violations of labour rights in the premises of the Park.[30]

---

[24] *Id.*

[25] ILO Declaration on fundamental principles and rights at work available at: < https://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm > last accessed (Apr 21, 2020).

[26] Core Labor Standards Hand Book, available at: < https://www.adb.org/sites/default/files/institutional-document/33480/files/cls-handbook.pdf > last accessed (Apr 25, 2020).

[27] *Id.*

[28] Snetsehay Assefa Tegegn, "etal." Workers' rights consortium report, Grim Conditions and Miserable Wages Guide Apparel Brands in their Race To The Bottom, available at: < https://www.workersrights.org/wp-content/uploads/2019/03/Ethiopia_isa_North_Star_FINAL.pdf. > last accessed (Apr 21, 2020).

[29] *Id.*

[30] Hannah Abdulla, *Workers' Strike at Ethiopia's Hawassa Industrial Park*, 15, Mar,2019, available at ; < https://www.just-style.com/news/workers-strike-at-ethiopias-hawassa-industrial-park_id135778.aspx > last accessed(Feb 10, 2020).

## 4. The Core Labour Rights: What it is and how it is practiced?

### 4.1 Freedom of association and collective bargaining

The notion of freedom of association may be connoted in both human rights discourses and in regulation of industrial relations. [31] In relation to human rights, it goes with the freedom of assembly and related rights,[32] however, in the context of labour relations, freedom of association applies to both workers and employers, and considered as one of the most important labour rights. Its importance lies in its contribution to the enjoyment of other rights by strengthening the worker's bargaining power in advancing their respective interests.[33]

To employees, freedom of association and collective bargaining is one of the fundamental labour standards that would enable workers to establish trade union and participate in strikes as well as collective bargaining without interference.[34] Collective bargaining is crucial to negotiate for the betterment of working conditions, including negotiation for wage advancement.[35]According to Organization of Economic Cooperation and Development (OECD), ensuring standards of freedom of association and collective bargaining can counterbalance the negative consequences of unfavourable working conditions.[36] However, freedom of association is among the rights which are frequently violated.

---

31 Peter Bakvis and Molly McCoy *supra* note 22, p.23.

32 *Id.*

33 *Report of the Committee of Experts on the Application of Conventions and Recommendations, Report* III ILO (Part1B), 2012a available at: < https://www.ilo.org/ilc/ILCSessions/previous-sessions/101stSession/reports/reports- submitted/WCMS_174843/lang--en/index.htm> last accessed (Feb 10, 2020).

34 Robert Sarna, *The impact of Core Labor Standards on Foreign Direct Investment in East Asia*, The Japan Institute For Labor Policy And Training( Oct, 2005), available at ; < http://www.jil.go.jp/profile/documents/Sarna. > last accessed (Feb 10, 2020).

35 *Id.*

36 Mulu Beyene *supra* note 21 p. 24.

Further, the freedom of association is one of the bills of rights recognized in international human right instruments.[37] ICCPR and UDHR provide that everyone has the right to form and join trade unions.[38] This includes non-restriction in freedom of association, prescribed by law.[39]

The ILO Constitution under its preamble declares freedom of association as one of the standards which needs urgent improvement.[40]Institutionally, the Committee on Freedom of Association was established in 1951 for the purpose of examining complaints regarding violations of freedom of association.[41] The ILO Committee on Freedom of Association plays a vital role in the enactment of Freedom of Association and Protection of the Right to Organize Convention No 87, the Right to Organize and Collective Bargaining Convention No 98, and the ILO Declaration on Fundamental Principles and Rights at Work. [42] The two major conventions on freedom of association sub classed into: right to organize, collective bargaining and the right to strike.[43] To make this discussion complete, a brief summary of each of these Conventions appears imperative.

**i) Freedom of Association and Protection of the Right to Organize (Convention No. 87)**

The convention underlines the fact that freedom of association is considered as a means of improving general working conditions.[44]The convention under its article 2 allows workers and employers the right to join organizations of their choice without seeking prior authorization. This right not only enables the right holders to join a union of ones choice, but also set up a new union.[45]

---

37 UDHR Art. 20, 23; ICCPR 22(2).

38 *Id* Art. 23

39 *Id.*

40 The Constitution of the International Labour Organization, Part XIII of the Treaty of Peace of Versailles, June 28, 1919, Available at ;< https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0241.pdf> last accessed (Feb 10,2020).

41 Mulu Beyene *supra* note 21, p. 24.

42 Lance Compa,*" Workers' Freedom of Association and the United States : the Gap Between Ideals and Practice*", (2003),Available at ;< http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1377&context=articles> last accessed (Mar 10, 2020).

43 Mulu Beyene *supra* note 21, p. 25.

44 Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), Entered into force 04 Jul 1950,adopted in the general conference held at San Francisco by the governing body of the International Labor Organization in its 31st Session on 17 June 1948

45 Freedom of Association: Digest of Decisions Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, (2006).

In accordance with article 5 of the Convention, unions set up by the workers can also form a federation of union or join federation and confederation, which may also have rights to associate with international organizations of employees and employers,[46] and also the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration formulate their programs.[47] Further, article 3(2) of the Convention stipulates that state authorities are warned to refrain from interference and restrict or hinder exercise of the aforementioned rights and privileges.[48] Moreover, the union leaders have extended protection from express or subtle intimidation, demotion, expulsion, or harassment that would impede the free functioning of unions. The protection not only demands the government not to interfere or obstruct the free formation and functioning of unions, but also stands against similar acts of interference by employers.[49]

**ii) The Right to Organize and Collective Bargaining Convention No. 98**

Collective bargaining is an essential element of freedom of Association, basically serving as a means whereby workers union/s and employer/s organizations would freely negotiate and agree on various terms of employment. [50] The ILO Convention No.98 and its accompanying recommendation detail its confines and extend the provisions enshrined under Convention No. 87. This convention gives workers a special protection against acts of discrimination at their workplaces. Article 1 of this Convention protects workers against acts of anti-uniondiscrimination, including dismissal because of union membership or participation in the union activities.[51]

The convention requires employers not to interfere in the administration of union. It goes to the extent of prohibiting employers from financial support or other form of gratitude with the intentionof controlling the activities of union.[52] However, all forms of support is not prohibited. A support

---

[46] *Id*, Art. 5.

[47] *Id*, Art. 3(1).

[48] *Id*.

[49] *Id.*

[50] Mulu Beyene *supra* note 21, p. 26.

[51] The Right to Organize and Collective Bargaining Convention No. 98 was adopted in the general conference of theILO convened at Geneva by the body of the ILO office in its thirty second session on 8 June 1949.

[52] *Id*, A rt. 2

with the positive effect of enabling the Union is acceptable. The convention recommends governments to adopt appropriate measures that would facilitate voluntary negotiation between employees and employers by using collective conventions.[53]These two conventions, freedom of association and protection of the right to organize and the right to organize and collective bargaining are intertwined and respect to these rights is crucial in enforcement of rights of workers.

The right to strike is the third important constituent of Freedom of Association. ILO Conventions and Recommendations do not specifically spell out the right to strike – attempts to codify the rightto strike as one of the pillars of the conventions did not succeed. Consequently, owing to both inadequate legislative protection and lack of enforcement mechanisms, freedom of association of employees in industrial zones of numerous nations around the world remained problematic.[54]

Needless to say, workers in industrial zones are entitled to form or/and join unions, collectively bargain and strike, as other workers. Though, there are exceptional situations in which the right to strike can be banned legitimately concerning workers in 'essential' services through wrong interpretation countries limit the right to strike in industrial zones. [55] In this regard the strict interpretation that the ILO experts Committee adopted for a service to qualify as 'essential' and thus be subject to a justified ban means that taking industrial action is a legitimate action in industrial zones too.[56]The restrictions on the right in industrial zones take many forms. Whereas some of them are typical to EPZs, others are equally applicable to non-EPZs industries as well. Focusing on the obstacles distinct to EPZs, three broad forms can be identified, viz: legal exemption, weak law enforcement, and systematic exclusion.[57]

The right to freedom of association is set forth in the Ethiopian Constitution, which also recognizesit both as a general human right and particularly in relation to workers. The Constitution declaresthat every person has the right to freedom of association for any causes or purpose.[58]The only

---

53 Saul Kinley, and Jhon Mowbray, *The International Covenant on Economic, Social and Cultural Rights, Commentary Cases, and Materials*, Oxford University Press, UK, 2004, p. 605.

54 Jetu Edosa *supra* note 3,

p.119. [55]Mulu Beyene *supra*

note 21 p. 29.[56]*Id*, p. 30.

57 *Id,* p. 31.

58 FDRE Constitution Proc. No.1/1995, *Federal Negarit Gazetta*, Year 1, No 1, Addis Ababa, 21 August 1995, Art. 31.

exception stated in this regard is that the association should not have the purpose of violating the law or should not be formed for illegal activity to subvert the existing constitutional order.[59] The Constitution according to article 42 specifically guarantees factory and service workers, farmers, farm labourers, other rural workers' and government employees to have the right to form associations to bargain collectively with employers or other organizations to improve their condition of employment.[60] It also stipulates the right to express grievances, including the right to strike.

In line with the international instruments and the FDRE Constitution, the Ethiopian Labour Proclamation guarantees freedom of association by allowing employees and employers to set up an organization that represents their interest.[61] The Proclamation considers number of employees to set up union – the law requires at least ten employees. [62] Further, unions get expedited registration process.[63]This appears another incentive for setting up unions. The Proclamation also regulates the content and process of collective bargaining as well as collective agreements between workers' unions and employers' associations. [64] The Proclamation further requires collective bargaining and collective agreements to cover employment relationships and work conditions, such as workers' participation in matters regarding promotion, wages, transfer, reduction and discipline, and work condition includes protection of occupational safety and health, and the manner of improving social services.[65] In accordance with Article 135(2) the purpose of collective agreements is providing conditions of work and benefits more favourable compared to labour law. But if the law is more favourable prevails over the collective agreement.[66]The right to strike allows workers to exercise to strike as means to express grievance.[67]

---

59 *Id.*

60 *Id*, Art. 42.

61 Labor Proclamation No 1156/2019,*Federal Negarit Gazett*, 25th year , No 89, Addis Ababa, 5th September 2019,Art. 113.

62 *Id*, Art. 114.

63 Jetu Edosa *supra* note 3, p. 118.

64 Labor Proc. *supra* note 61, Art. 125

65 *Id*, Art. 130.

66 *Id*, Art. 135.

67 *Id*, Art. 158.

## 4.2 Freedom from Forced Labour and FDI

In 21st century it may appear awkward to talk about forced labour, but given unfair and suppressive work environment, inequality of contracting parties, and absence of best options to sustain life often may force a person accept unfair and exploitative terms. As pointed out at the outset competing to win scare FDI supply, leaders often advertise the availability of abundant cheap labour. Investors venture with this mindset to exploit the abundant cheap labour. This mindset dictates investors to set suppressive labour plan that leaves no room to respect labour rights. Is the absence of option or availability of a worst option indirect force? It is undoubtful to take use of such subtle pressure as force and compulsion, as the labourer carries out the work voluntary.

What is the extent of prohibition of forced labour and how international instruments and domestic legislations regulate it? As a general principle, forcing a person to work a job that he/she does not wish to perform is strictly forbidden. In this regard, forced labour resembles to slavery, and is virtually avoided in early 20th century.[68]The 14th session of the International Labour Conference adopted a Convention Concerning Forced or Compulsory Labour (No. 29), that prohibits forced labour.[69] The convention calls on member States to undertake measures to suppress the use of forced or compulsory labour in all its forms. As the nature and motives of forced labour varies, it is hard to find out consensus on acts constituting forced labour. The convention defines forced labour as all work or service which is drawn from any person under the threat of penalty and for which the aforesaid person has not offered himself voluntarily.[70] Literally, thus expression forced labour is compelling someone to work against his/her will under the fear of penalties. Thus, what characterizes forced or compulsory labour is the nature of the relationship between the person performing the work and the person demanding the work.[71] The exercise of coercion and the denial of freedom are the central elements of forced or compulsory labour.[72] Even if the Convention was adopted several years ago, forced labour is still a common issue that affects the world.

---

68 Article 1 of the convention of 1926 a convention which was amended in 1953 (reproduced in United Nations TreatySeries UNTS).

69 Forced Labor Convention, 1930 (No.29).Adopted: 28 June 1930 entered into force: 1 May 1932

70 *Id.*

71 Jetu Edosa *supra* note 3 p.118.

72 *Id.*

The supplementary Convention on Abolition of Forced Labour No 105 which adopted in 1957 calls on member States to abolish and not to make use of any form of forced or compulsory labour, used as a means of political coercion, labour discipline, or racial, social, national or religious discrimination, nor as a method of mobilizing and using labour for purposes of economic development; nor as punishment for having participated in strikes.[73]The adoption of the ILO Declaration on Fundamental Principles and Rights at Work in 1998, and its follow-up procedure renewed the interest of the international community to prohibit forced labour wherever and in whatever form it may be practiced.[74] Despite the concerted efforts, the recent ILO estimation indicates that 24.9 million people are victims of forced labour globally, trapped in jobs into which they were coerced or deceived and they face a challenge to quit from job.[75] Even worse, although the ILO has yet to systematically document it, working conditions in industrial zones can be assimilated to forced labour according to the report of ICTU.[76] Excessive overtime is tied to the nature of numerous manufacturers in EPZs, especially in apparel and footwear, which require rigid shipping deadlines and have seasonal demand peaks.[77]This structural problem has made it difficult for even the most focused efforts to control compulsory overtime. Various studies have shown the existence of a direct relationship between low wages and workers motivation to work overtime.[78] By paying low wages, even below the minimum wage, employers influence the workers' by placing them in situations whereby working overtime becomes the only means to increase their total income.[79]

In Ethiopia, the FDRE Constitution prohibits forced or compulsory labour.[80] It promotes the right to freely choose once work as an essential part of being human and guarantees to every Ethiopian

---

73 Abolition of Forced Labor Convention, 1957 (No. 105) Adopted: 25 June 1957 entered into force: 17 January 1959.

74 ILO Global estimates of modern slavery: forced labor and forced marriage (2017), Available at; <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf> lastaccessed (Feb 09, 2020).

75 *Id.*

76 *Id.*

77 International Labor Organization (2014). "*Trade Union Manual on Export Processing Zones*," (Geneva: ILOPublications).

78 Jetu Edosa s*upra* note 3, p. 119.

79 *Id.*

80 FDRE Constitution *supra* note 58, p. 18(3).

citizen the right to freely engage in economic activity and pursue a livelihood of his/her choice anywhere within the national territory, and the right to choose his or her means of livelihood, occupation, and profession.[81] Furthermore, Article 42(2) of the Constitution congers on works, "the right to reasonable limitation of working hours, to rest, to leisure, to periodic leaves with pay, to remuneration for working in public holiday's time as well as healthy and safe work environment." [82] The Constitutional prohibition of forced and compulsory labour are further concretized in the labour proclamation and the Criminal Code to ensure their implementation.[83] The labour proclamation requires that employment contracts are based on the full consent of the worker and the employer. It also strictly provides workplace labour conditions by setting minimum working hours, safety and occupational health conditions including the time, place and mode of wage payment, which discouraging forced labour in private employment.[84]In addition the Labour Proclamation establishes the labour inspection service authorized for the unconditional inspection service of workers' labour conditions and the overall observance of labour standards in the workplace. The Criminal Code of Ethiopia declares that anyone found guilty of forced labour is punishable to a term of imprisonment not less than three months or fine.[85]

### 4.3 Child Labour and FDI

Child labour is generally prohibited, but it is not usual to witness to exploit cheap, but hardworking labour. Despite enormous efforts to avoid it, child labour still remains a global problem of enormous proportion which needs special attention in order to tackle it.[86] Child labour should be seen differently from the other three core labour standards since it is not just a labour issue but it triggering serious social, economic and human rights issues confronting rights of the most vulnerable group. International organizations have put much effort forth alike that the recent statistics. Efforts of various international organizations including the ILO were very crucial in

---

81 *Id,* Art. 41.

82 *Id.*

83 Jetu Edosa *supra* note 3, p.119.

84 Labor Proc.No. 1156/2019 *supra* note 61, Art. 60-65.

85 The criminal code FDRE proclamation No414/2004, Federal NegaritGazetta, 9th year , Addis Ababa, 9th May 2005,Art. 603

86 Sebastian Braun, *Core Labor Standards and FDI: Friends or Foes? The Case of Child Labor*, Available at;
<https://about.jstor.org/term> last accessed (Nov 13, 2019).

highlighting the trouble of working children and abolishing child labour. [87] ILO convention numbers, 138 on minimum age[88] and 182 on worst forms of child labour[89]deal with child rights and many countries have ratified these conventions. The convention requires ratifying States to make available access to free basic education and, wherever possible or appropriate, provide occupational training for children that are detached from the worst forms of child labour. It also calls for States to provide the means to remove children from the worst forms of child labour and for their rehabilitation and social integration.[90]

The abolition of child labour was also encompassed as a core labour standard first by the Organization for Economic Cooperation and Development (OECD) and the ILO. The International Convention on the Rights of the Child (CRC), which aims at abolishing child labour, provides the conditions in which children to be employed.[91] The committee on the rights of a child monitors its enforcement. CRC defines any person under the age of 18 as a child. Almost all states have ratified both the ILO and UN conventions and made laws that declaring a ban or semi ban on child labour.[92] A semi prohibition on child labour prevents young children from being employed only in hazardous industries.

In line with the international convention on protection of children the Ethiopian Constitution by virtue of article 36(1) on the Rights of the Child recognizes the rights of children not to be subjected to exploitative practices and works, which may be hazardous or harmful to the education, health or safety of children.[93] Further, the Ethiopian Labour Proclamation sets the minimum age for employment of children at 15 years. This is in line with the ILO Minimum Age Convention. Besides, the Proclamation prohibits employment of children aged between 15 to 18 years (Young Workers) in work that would endanger the life or health of children. Thus, young workers cannot

---

87 Zur Erlangung , *Child Labor, its Relation with Competitiveness of Labor Intensive Exports, its Determinants andEducation in India*(Feb. 02, 2008)

88 Minimum Age Convention, 1973, (N0. 138) Adopted: 26 June 1973 Entered into force: 19 June 1976.

89 Worst Forms of Child Labor Convention 1999, (No. 182) Adopted: 17 June 1999 Entered into force: 19 Nov. 2000.

90 *Id,* Art 7.

91 The International Convention on the Rights of the Child was adopted by the UN in 1989 and came into force inSeptember 1990.

92 *Id.*

93 FDRE Constitution *supra* note 58, Art.36.

be deployed to work in hazardous occupations or work environment except in the course of professional education in vocational schools that are approved and inspected by the competent authority. This exception, however, does not conform to the threshold stipulated in Article 3(3) of the ILO Convention No. 138 that provides 16 years as minimum admission age for young workers to engage in hazardous work in spite of the fact that the necessary care and precautions to safeguard the health and wellbeing of trainees is put in place, such as vocational schools.[94]

The Ethiopian Labour Proclamation by virtue of article 90 sets the maximum working hours for young workers. Unlike adult workers, the daily maximum working hours for young workers is 7 hours and as per article 91(1) these hours should not fall between 10 p.m. and 6 a.m. in any working day. Furthermore, the law also prohibits young workers from working overtime, on weekly rest days; or on public holidays. Ethiopian labour law has provided fine punishment for the failure of the employer to comply with these provisions though the deterrent effect is debatable.

### 4.4 Discrimination against Female Workers

As expressed in the preamble of ILO Constitution, protection of women's right is one of the major original objectives of ILO.[95] With the view to advance gender equality at workplace, ILO adopted the Equal Remuneration Convention No. 100 in 1951, and Discrimination (Employment and Occupation) Convention No. 111 in 1958. [96] In addition, elimination of discrimination (equal opportunity) is one of the four ILO declarations on fundamental rights and conditions at work, which sets out principles.

Although decades have passed since these Conventions have come into effect, gender-based inequality in remunerations and workplace discriminations against female workers, still a global

---

94 Jetu Edosa *supra* note 3, p. 121.

95 The International Labor Organization's Fundamental Conventions, Available at; <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_095895.pdf> last accessed (Feb 08, 2020).

96 The Equal Remuneration Convention No. 100 in 1951 and Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

problem. The problem is serious in EPZs. Countries specific reports indicate that female workers in most EPZs suffer from denial of access to jobs, insecure jobs, inadequate maternity protection, and sexual harassment.[97] The majority of workers in the industrial zones, especially in the garment and electronics sectors, are women. As women employees in EPZs are young ones, vulnerability of violation of the rights is so high. They are the most affected by the discriminatory practices and unequal treatment. Further, EPZ operators prefer young women employees because they are cheaper in terms of labour costs, show great fortitude in the repetitive production work, and are less prone to organize in trade unions and to have children.[98]

In protection of rights of women, Ethiopian legal regime is more specific and elaborative. In line with ILO Convention, in Ethiopia equal pay for equal work is constitutionally guaranteed, [99] maternity leave with full payment has been recognized,[100] discrimination in employment, payment disparity on account of sex is prohibited.[101] Further, the Labour Proclamation guarantees leaves for medical examination during pregnancy, 30 days prenatal leave and 90 consecutive days of postnatal leave.[102] In addition, a national policy on women that was issued in 1993, requires abolition of all discriminatory laws and regulations, and gears toward creating enabling environment for the full participation of all members of the society in the socio-economic and political sectors, with special focus on women.[103]

Ethiopia has a National Employment Policy and Strategy that provides guidelines for mainstreaming gender in employment generation in the country to promote social welfare and equity through poverty reduction.[104] Furthermore, Ethiopia adopted the Decent Work Country Programme (DWCP) in 2014-15.[105] The memorandum of understanding of the commitment to

---

97 Jetu Edosa s*upra* note 3, p. 122.

98 Pallavi Mansingh, et al. *Trade Unions and Special Economic Zones in* India (Geneva: International LabourOrganization), (2012), p. 31.

99 FDRE Constitution *supra* note 58, Art.36.

100 *Id*, art. 35; see also Labor Proclamation No. 1156/2019 *supra* note 61, Art. 88(3).

101 Labor Proclamation NO 1156/2019 supra note 61, Art. 87.

102 *Id*, Art. 88.

103 Decent Work Country Programme 2014-15 ETHIOPIA, International Labor Organization 2014

104 National Employment Policy and Strategy of Ethiopia, November 2009 Addis Ababa, p.45.

105 Decent Work Country Programme *supra* note 103.

collaborate in the implementation the Decent Work Country Programme was signed between representatives of the ILO, MOLSA, Ethiopian Employers Federation (EEF) and the Confederation of Ethiopian Trade Union (CETU). The Parties agreed on three pillars of Ethiopian DWCP priorities: improving implementation of international labour standards and social dialogue with an emphasis on compliance and coverage, promoting decent employment for poverty reduction, and improving social protection for sustainable development.[106]

## 5. An Appraisal of Core Labour Rights at Hawassa Industrial Park

This Section briefly examines the application of core labour rights that discussed above in Hawassa Industrial Park. Hawassa Industrial Park was established in 2015, and as of 2020 about 22 textile and apparel industries have been operating in the Park, and hired about 32,000 workers. Surprisingly, after five years of launching of the Park, there is no trade union which is set up in the Sheds.[107] Is the absence of unions triggered by unawareness of the workers, lack of interest from the workers, or explicit or implicit act of employers or Regional or Central Government? Given the educational standard of most of the workers in the Industrial Parks, and apparent interest of skilled labour in the Park, the first two issues are unlikely. Thus, actions and inaction of actors outside employees themselves of is the most highly suspected cause that calls for investigation. Moreover, this Section also assesses direct or indirect pressure that forces workers to carry out a work without their free is explored. Further, respect to right of women and young workers is briefly examined.

### 5.1.1. Exploration of Respect to Freedom of Association and Collective Bargaining in Hawassa Industrial Park

It is repeatedly said that said freedom of association and collective bargaining are among the core rights of workers that are spelled out in the national and international instruments. Having laws that explicitly recognize freedom of association and collective bargaining is one step, but not

106 *Id.*

107 Interview with Mengistu Yimer *supra* note 19.

sufficient – the laws should be enforced. This subsection assesses the extent in which the rights conferred on worker force are respected by multinational companies in Hawassa Industrial Parks.

As pointed out earlier Ethiopia has ratified numerous international conventions, including ILO Convention No 87 on Freedom of Association and Protection of Right to Organize and Collective Bargaining Convention No 98 which recognized the freedom of association and trade union. Despite the recognition of vital rights of workers in the Constitution, legislation and other national policy arrangements, the rights are poorly enforced, even if enforced produced little effect, and not supplemented by adequate mechanisms of enforcement. Though the government has taken positive policy and legislative actions to realize the right to freedom of association, in practice, however, no visible change is apparent.

The Ethiopian law prohibits employers from anti-trade union practices by using any means of pressure.[108] Despite the absence of trade union that would coordinate a huge body of workers, there is no plausible evidence suggesting direct or indirect influence of employers at Hawassa Industrial Park.[109] The absence of a clear evidence however does not prove that the workers freely chose to avoid an umbrella organization that would bargain for the protection of the rights and interests of workers. Though not substantiated by evidence, the Confederation of Ethiopian TradeUnion openly claims that workers who attempt set up trade union lost jobs. This claim contradicts with the absence of evidence clear. It may happen that workers may not wish to disclose the existence of actual or apparent pleasure not to think about setting up trade unions. If workers are already fired due to the claim to organize unions, there is sufficient evidence to claim violation on the part of employers. If the violation of employers is backed by Government officials, this is alsoviolation.

Further, interviews were conducted for the purpose this work indicates some sort of violation on the part of employers.[110] A threat to fire workers may discourage workers not to think about trade

---

[108] Labor Proc. No. 1156/2019 *supra* note 61, Art. 113.

[109] Snetsehay Assefa, *et al*, Workers' Rights Consortium Report, Grim Conditions And Miserable Wages Guide Apparel Brands In Their Race To The Bottom, available at; < https://www.workersrights.org/wpcontent/uploads/2019/03/Ethiopia_isa_North_Star_FINAL.pdf > last accessed (Feb 08, 2020).

[110] Dawit taye, ኢሠማኮ በኢንዱስትሪ ፓርኮች ውስጥ ሠራተኞችን ማደራጀት እንዳልቻለ ይፋ አደረገ, May 2, 2018 Availableat;<https://www.ethiopianreporter.com/article/10212 > last accessed (Feb 08, 2020).

union. Further, as revealed by the Confederation of Ethiopian Trade Union, some government officials expressed that it was not the right time to think about trade unions. This may be justifiedon work assumption that creating means of livelihood to needy workers, than seeking union protection. In this regard a trade union is viewed as something luxury. The Governments priority is attracting more FDI and creating more jobs by affording incentives to actual and potential inventors. Thus, at the cost of workers, the Government aspires to attract more inventors who wish to work freely in the Park without too much worry about granting more right to workers. In this regard the Government views that to think about trade unions is untimely. Despite the government officials' view, employers appear not satisfied by the subtle motives of State officials. The employers feel that they are more pressured by the officials than workers. As revealed in the interview, employers stated that they are facing more challenges from government officials than workers desire to set up trade unions in the Hawassa Industrial Park.[111]

Whatever the cause and justification is, the anti-union practice is expressed in the way of systematic avoidance. [112] The companies' through formal employment contract and with the informal orientation of the newly hired workers create pressure through broad ranges of confidentiality which hinders exercising the right to organize trade union. [113] Some of the companies in the employment contracts and others through orientation to employees with confidentiality provisions restricting workers' ability to communicate with other workers or outside parties about their working conditions. [114] In doing so, workers are forbidden from

---

[111] *Id*, የዓለም የሠራተኞች ቀንን በማስመልከት ኮንፌዴሬሽኑ ሚያዝያ 22 ቀን 2010 ዓ.ም. በሰጠው ጋዜጣዊ መግለጫ፣ በኢትዮጵያ የሠራተኞች የመደራጀት መብት ችግር ውስጥ እንደሚገኝ ይጠቁማል። በተለይም እየተበራከቱ በመጡት ኢንዱስትሪያፓርኮች አካባቢ ሠራተኞችን ማደራጀት አስቸጋሪ እንደሆነ‹‹አንዳንድ የመንግሥት የሥራ ኃላፊዎች በኢንዱስትሪ ፓርኮች ውስጥ ያሉ ሠራተኞች ለመደራጀት ገና ናቸው፣ አሁን መደራጀት የለባቸውም ብለው መመርያ የሚሰጡ አሉ፤›› ሲሉ የኢሠማኮ ፕሬዝደንት አቶ ካሳሁን ተናግረዋል። ‹‹እንደውም ከአሠሪዎቹ የበለጠ ፈተናው እየገጠመን ያለው (ስማቸውን ያልጠቀሷቸው) ከመንግሥት የሥራ ኃላፊዎች ነው፤›› ሠራተኞቹ የመብት ጥያቄ የሚያነሱ ከሆነም በቀጥታ ከሥራ እንደሚባረሩና በማኅበር ስለመደራጀት በየጊዜው በመነጋገር የመደራጀት ጥያቄ እያነሱ ስለመሆናቸው የተናገሩት ፕሬዚዳንቱ፣ ጥያቄያቸውን ለቀጣሪዎቻቸው ማቅረብ ሲጀምሩ ግን የመባረር ዕጣ ስለሚገጥማቸው መብታቸውን ለማስከበር አልተቻለም ብለዋል።በማለት አስተያየታቸውን ገልጸዋል።

[112] Snetsehay Assefa *supra* note 109, p. 14.

[113] Interview by the author with Asnake Demissie, Head of Legal Department and consultant of the president at Confederation of Ethiopian Trade Unions, (Addis Ababa 24 November 2019 at his office).

[114] Interview by the author with Yohanes Ezo Adulo, Claims Follow-up and Support Officer, at Directorate of Harmonious Industrial Relations in SNNPRS Bureau of labor and social affairs, (Hawassa 04 December 2019).

communicating, disclosing, and revealing, directly or indirectly, to any person, firm, corporation, or other entity any information concerning matters relating to the business of the employer.[115]

Furthermore, informants of FGD disclose that the employers warn employees by declaring that, failing to respect this rule results termination of employment contracts for bringing the company into disrepute.[116] These broad confidentiality terms of contract clearly violate relevant standards of workers' associational rights which recognized under international conventions as well as national laws.[117] Such restrictions preclude workers from communicating with each other and with representatives concerning issues workers must be able to discuss in order to carry out collective action.[118] Since the right of workers to speak freely is restricted, it also impedes exercising other labour rights related to working conditions in a meaningful manner. Moreover, the absence of trade unions at the factory level contributes to perpetrating labour and human rights violations of employees in Hawassa industrial park. Notably, workers in Hawassa industrial parks showed great hesitancy to speak about the factory's labour practices during interview.

The major reason attributed to this problem according to key informant interviews with officials of the MOLSA, CETU, managerial staff in Hawassa industrial park and Southern Labour and Social Affairs Bureau is employers' anti-union attitude who views the creation of trade union in their enterprise as a threat that result in unnecessary bargaining costs, fearing strikes and encumber output, therefore, degrading investment.[119] The interviewee of a key informant in CETU also indicated that the government is generally unwilling and reluctant in promoting and respecting workers' right to freedom of association despite several meetings and discussions with the concerned bodies.[120] Particularly, the key informants are deeply concerned about the rights of

---

115 *Id.*.

116 Focus Group Discussion with workers of Everest apparel (Ethiopia) S.C in Hawassa indusrial park, (at outside thecourtyard of the park) 05 December 2019.

117 Snetsehay Assefa s*upra* note 109, p. 14.

118 *Id*, p. 15.

119 Interview by the author with Hana Maru, Law and International Affairs Senior Expert, at Directorate of Harmonious Industrial Relations, in Ministry of Labor and Social Affairs, (Addis Ababa 31 January 2020 at her office).

120 Interview with Asnake Demissie, *supra* note 113. While CETU has a strong position that employees right to forma union is to be respected unconditionally in line with Convention no 87 and 98 that Ethiopia has ratified, but the government is unwilling to remove barriers to organizing in the industrial park by providing different prerequisite from the perspectives of attraction of investment only.

workers in Hawassa Industrial Park to set up trade unions challenged not only by the employers, but also by the government officials who wished to attract more FDI and more investors living workers at the mercy of employers.[121]

## 5.2 The Respect to Freedom from Forced Labour in Hawassa Industrial Park

Regarding respect to prohibition against exploitative and compulsory labour conditions, the practice of Hawassa industrial park is promising as compared to other standards, because cases of forced labour are nearly absent. Mainly in EPZs, forced labour occurs in the form of mandatory overtime work. As noted above, the Ethiopian labour proclamation does not allow overtime work in principle and in exceptional circumstances, overtime work is allowed in within confines of predetermined safeguards expressed by law.[122] The law requires overtime works to be done a voluntary basis. A worker may be required to work overtime only in exceptional situations that are unequivocally expressed by the labour proclamation. [123] Worker who participated in the questionnaire shows that companies' in the Park require workers to perform overtime as a mandatory aspect of employment. This illegal practice is explicitly codified in the employment contracts of some of the companies operate in the park. Everest Apparel Ethiopia is one of the major companies at the Hawassa Industrial Park, which issues employment contract to workers, and stipulates that reserve rights to the management to change workers' daily work schedules, including work starting and finishing times in accordance with business demands, with no caveat that such alterations are limited by the length of the statutory workday.[124] Additionally, it provides that employer may require workers to perform more than 8 hours per day when it is demanded by the nature of work. During the period in which the survey was conducted, the factory no one was working overtime. However, in prior months, workers stated that factory management required workers to performing overtime, typically amounting to six to eight hours of work per week, and workers were not allowed to decline.

---

121 *Id.*

122 Labor proc. 1156/2019 *supra* note 61, Art. 66-67.

123 *Id.*

124 Employees' terms of the contract with Everest Apparel Ethiopia S.C, are selected because of the availability of data and their labor intensive nature offering significant number of employment opportunities for domestic workers compared to other companies in the industry park.

## 5.3 Child Labour in Hawassa Industrial Park

Though tracking child labour cases based on minimum age requirement is extremely difficult due to the absence of birth certificates or any other reliable mechanism to trace the actual age of the workers, in an interview with the person in charge of labour inspection from SNNPR Labour and Social Affair Bureau in the Park indicated that most of the workers recruited in the park were mostly in age groups of 16-22 years.[125]The basis for his assertion is that workers completion of 8th grade has been ascertained by SNNPR Labour and Social Affair Bureau during recruitment. The whole information available so for suggest employers in the Park do not intentionally violate the minimum age stipulation in accordance with Ethiopian Labour law and Child Rights convention as well as ILO Conventions.[126]

### 5.3.1 Exploring the Prevalence of Discriminatory Practices against Female Workers in Hawassa Industrial Park

Again both the international instruments and the domestic legislations including the Constitution prohibit discrimination of all forms based on gender. Accordingly, employers are required to respect the workers' human dignity irrespective of gender difference. With a view to investigate treatment of workers on the basis of sex a survey was conducted through informal discussion with a small group of workers at Hawassa Industrial Park. The participants were asked to respond to questions like workplace sexual harassment or abuse, the practice of discrimination against women regarding employment recruitment and unequal pay for the same job.

The participants responded that in respect of recruitment mechanisms and employment criteria there was no apparent discrimination against female workers.[127] In line with this affirmation, the Park's monthly report released on October 30, 2019, shows that 90.2% of the 30,701 local workers are female.[128] Sewing production unit in apparel companies is the most female dominated

---

125 Interview by the author with Yohanes Ezo Adulo s*upra* note114.

126 *Id.*

127 Focus Group Discussion with female workers in Hawassa indusrial park, (at outside the courtyard of the park)December 06, 2019.

128 Mulu Beyene s*upra* note 21.

department. Women are considered more patient than men workers because sewing is a task that they can carry out while sitting. The Park administration confirmed also that employers prefer women to men because women are careful and tolerant that matches with the challenging nature of the work, while men are believed to be less tolerant and aggressive.[129]

The severe violation of fundamental female workers' rights in Hawassa industrial park is discrimination against pregnant female workers. Discrimination in employment on the basis of sexis prohibited by the Ethiopian Constitution and labour proclamation.[130] It is widely understood that such stipulation bars discrimination against women workers due to pregnancy.[112] Ethiopian law also specifically provides women to get 120 days of paid maternity leave and prohibits employers from terminating a worker during pregnancy.[131]Contrary to this rule, the JP factory at Hawassa Industrial Park practice of not hiring workers who are pregnant at the time they apply for work or who admit, in response to management questioning, a near-term intention of becoming pregnant.[132]A former nurse at Hawassa Industrial Park clinic testified that pregnancy tests were conducted in the recruitment process at some companies. [133] Without exception, all-female key informants interviewed by the author stated that they had been warned about pregnancy by management during the recruitment and screening sessions they suffered before commencing their jobs.[134]Several workers stated that managers go so far as to touch and inspect the stomachs of likely employees to check for signs of pregnancy.[135] The JP factory's open practice of not hiring pregnant workers constitutes violation of international conventions that Ethiopia has ratified and national law. This unlawful practice would jeopardize work opportunities for both pregnant women and creates a discriminatory practice. However, as a positive remark, there is no difference

---

129 Interview by the author with Yohanes Ezo Adulo s*upra* note 114.

130 FDRE Constitution *supra* note 58, Art. 35.

[131]Labour Proc. No.1156/2019 *supra* note 61art.

88(3).[132] Snetsehay Assefa *supra* note 109, p. 28.

133 Interview by the author with Betelhem Mekebib The former nurse at Hawassa industrial park vision clinic,(Hawassa 02 December 2019 at Hawassa Referral Hospital).

134 Focus Group Discussion with female workers in Hawassa indusrial park, (at outside the courtyard of the park)December 06, 2019.

135 *Id*.

between male and female workers in terms of wages for similar work in Hawassa Industrial Park.[136]

### 5.3.2 Maternity Leave

Women workers are entitled to the right to maternity leave with pay or without fear of loss of employment as per in the international legal instruments and the Ethiopian Constitution, as well as under labour proclamation. In addition to this, pregnant women have the right to get special protection during pregnancy depending upon the nature of work. [137] Participants of the FGD explained that in the employment contract the employer incorporates maternity leave by asserting leave entitlements.[138] In some cases, contrary to the requirements of law, pregnant women work in machines and are not allowed to follow up medical check-up.[139] This is contrary to the dictates of law which requires pregnant women's entitlement. This proves that there is critical problem in caring pregnant women at the Park.

## 6. Conclusion

As do other emerging economies, Ethiopia has been doing its level best to attract FDI and international companies that thought to create job, channel transfer of technology, increase Ethiopia's share in international market. With this view in mind the nation embarked on construction of industrial zones in all major cities of the country. Hawassa Industrial Park is one of earliest parks that has employed tens of thousands of Ethiopians and has started to play a great role in the Ethiopian economy. The Park has already started contributing a crucially needed hard currency to the Ethiopian treasury.

But economic goals cannot win the demands of period unless workers are humanely treated and their interest is respected. In disregard of workers interest either the employers and the Government that relentlessly work to usher FDI can gain temporary attainment but unless the very people who

---

136 Interview by the author with Rebeka Getahun, human resource officer at Everest Apparrel Ethiopia in Hawassaindustrial park, (Hawassa 02 December 2019 at Reception of Shed 50 in Hawassa industrial park).

137 Convention on the Elimination of All forms of Discrimination against Women, (CEDAW, 1981)

138 Employees' terms of the contract with Everest Apparel Ethiopia S.C.

139 Interview by the author with Asnake Demissie *supra* note 113.

take part in the production process are not treated well and their human and natural right is not respected in accordance with the dictates of the international instruments that Ethiopia has ratified and domestic legislations that are designed in the accordance with the Ethiopia's international commitments are respected the temporary gains will fade steadily fade and the whole process will end up at loss.

This works found that some of the core labour standards that Ethiopia committed to enforce and domestic legislations are not effectively enforced. Though the Park has created job opportunity to tens of thousands, there is no trade union in the Park. Employers express and subtle practices and the ambition to attract FDI and more international investors in the Parks have triggered the Government to keep silent. Though there is no apparent wrong on the part of employers with regard to young workers, failure to have clear evidence regarding true age of young workers has been a problem. There is no discriminatory practice among workers based on race, and gender but, some employer either exercise some discriminatory practice in filtering pregnant women during employment or through laboratory test or during interview. Further, some companies do not afford adequate protection to pregnant women in accordance with the dictates of the ILO Core Standards or respect the Labour Proclamation. Further, respect to the rights of pregnant women workers is respect to the future generation that needs all concerned to enforce in accordance with the dictates of the law.

The relationship between core labour standards and FDI is among the critical issues that caught concerns of human rights organizations and activists. Despite the fact that the proliferation of the textile and apparel factory at the industrial park has offered job seekers the opportunity to work, such job opportunities often come at the expense of fundamental rights of workers granted in the international, regional as well as national legal instruments. Employee's challenges continue at the companies operating in industrial park.

The International Labour Organization (ILO), through various conventions, has provided core labour standards, which are regarded as minimum rights that must be respected by all employers.

Ethiopia is among many countries that are parties to all of these conventions, but the problem remains on their implementation. Though there is no apparent forced labour in the Hawassa Industrial Park, indirect pressure through overtime is often practiced. Indirect or direct compulsion has the effect of enslaving a poor worker, this practice falls short of the dictates of Core Standards of ILO and domestic laws. Employers are suggested to respect rights of workers to choose whether take over time jobs or not. If an unwilling worker is coerced to work beyond the regular schedule, Ethiopia's international commitments and domestic laws would at stake. Though not all companies and in all times, such practice is apparent in Hawassa Industrial Park.

As a general remark this work concludes that the Ethiopian government has failed to strike a balance between protection ofcore labour rights standards and FDI. The interest to usher FDI is understandable but neglect to enforcement of right of workers cannot make the investment sustainable. Finally, it is suggested that the Government to change its stance with regard to the respect to the workers right to set up of trade unions. The crucial need for FDI and economic development cannot be sustainably acquired at the cost of rights of workers.

# Case Comments

## Case Comment 1

### Judicial Assumption of Fact to Enable Prosecution's Creeping Case to Stand

Dejene Girma*

#### 1. Introduction

Semper necessitas probandi incumbit ei qui agit is a Latin expression which essentially means he who asserts must prove. In justice systems around the world, it has been accepted that the burden of proof lies on someone who asserts something. Thus, in criminal cases, prosecutions must prove every fact they allege as bases of their cases and that are denied by the accused unless the burden of proof is expressly shifted to the accused by the law. For instance, if A claims that B intentionally killed C, A must prove that the act of B, which in reality was homicide, was committed intentionally. If this element is not proved, then the prosecution (A) will not have a case unless there is an alternative charge for negligence, which should also be proved in like manner. Now, in light of this mini introduction, the writer wants to present a comment on one case decided by the Federal High Court, Ledeta Bench, involving issuance of a cheque. In the case, the judge had to make a factual assumption to revive prosecution's dying case. Had it not been for that assumption, the accused would have been acquitted, which of course, should have happened given the prosecution's inability to prove the foundational fact it alleged for the existence of the alleged crime.

#### 2. Summary of the material facts of the Case

On 02/02/2011 EC, a certain prosecutor representing the Federal Attorney General (FAG) instituted a criminal case against Mr. FD, the accused. In the case, the prosecutor claimed that the accused issued a cheque to his victim with the knowledge that his bank account from which the cheque could be cashed was closed and hence he committed a crime against article 692(1) of the Criminal Code. On his part, the accused entered a not-guilty plea. First, the accused denied that he knew his account from which the cheque could be cashed was closed

* LL.B, LL.M. PhD, Assistant Professor, School of Law and Federalism

at the time the cheque was issued. Second, the accused argued that he did not give the cheque to the alleged victim to take to a bank for cashing but to keep it with himself as a guarantee. As a result, the Bench asked the prosecutor what he intends to do next and the prosecution requested the judge to hear his witnesses. On the date fixed for witness hearing, the prosecution's witnesses were heard (two in number). However, none of the witnesses testified that the accused knew that his bank account to which the cheque issued was related was closed. The witnesses, one of whom was the alleged victim, simply testified that the concerned bank told them that the accused's account was closed when they took the cheque to the bank. Moreover, none of the prosecution's documentary evidence showed that the accused know about the closure of his account when the cheque was issued. Yet, the judge convicted the accused for violating article 692(1) of the Criminal Code and sentenced him to two years and three months rigorous imprisonment and 500 Birr fine. In the case, the judge stated that, although the prosecutor did not prove that the accused knew his bank account was closed at the time he issued the cheque, it is assumed that the accused knew his account was closed because, first, he is a business person and business persons know about their bank accounts, and, second, the closure of his account was ordered by the National Bank of Ethiopia as the result of repeating issuance of cheques with no sufficient cover. It is this reasoning of the court/judge that is worth commenting on in this work.

## 3. Discussion: Exposing the Extent of Judicial Bias to Help A Prosecution's Case

As stated above, the judge in charge of the case clearly stated that the prosecutor did not prove that the accused knew his bank account, to which the issued cheque was related, was actually closed. Yet the foundation of the charge is the knowledge of the accused about the status of his bank account. In the charge the prosecutor stated, "ተከሳሽ የማይገባውን ብልፅግና ለራሱ ለማግኘት…..በማሰብ……ሂሳቡ…..የተዘጋ መሆኑን እያወቀ ለግል ተበዳይ…..ቼክ….ፅፎና ፈርሞ ከሰጠ በኋላ ተበዳይ ቼኩን….ለክፍያ ሲያቀርብ ሂሳቡ ተዘግቷል ተብሎ የተመለሰ በመሆኑ በፈፀመው የማታለል ወንጀል ተከስሰዋል።" On the other hand, Mr. FD, the accused, had denied the charge. In this case, the basic and only thing the prosecution had to do was to introduce its evidence to show that the accused indeed knew that his account was closed at the time the cheque was issued. That would have sufficed to shift the burden of proof from the prosecution to the accused. Nevertheless, the prosecution was unable to do this; none of the evidence produced could tell that there was such knowledge on the side of the accused. This leaves the concerned judge with only one option; which is, to rule that the prosecution has

not, beyond reasonable doubt, established his case, or the fact in issue, and order the acquittal of the accused in accordance with article 141 of the Criminal Procedure Code.

Lamentably, however, the judge made the accused to produce his defence evidence, in accordance with article 142 of the Criminal Procedure Code, and the accused did. In his defence, the accused made a personal statement arguing that he did not know that his account was closed; he also used the prosecution's documentary evidence to show that the concerned bank did not let him know that his account was closed. Yet, the judge was already pre-disposed and he was not ready to accept the accused arguments. Instead, the judge engaged in what could be called un-judge like work, which is assuming a fact to help the prosecution win the case. This is a quintessential case of how prosecution-biased some trials could be.

In reality, the accused may have committed the alleged crime. Yet, if the accused denies the made against him by the prosecutor, it is for the prosecutor to prove each and every key fact in his charge. The judge has no business to assume a fact and rehabilitate the prosecution's crippling case. The only assumption that a judge has to accept is the assumption made by the law. For example, under article 3, the Corruption Crimes Proclamation N o.881/2015 allows a presumption as to the intent to obtain for oneself or to procure for another an undue advantage or to injure the right or interest of a third person when the material element of the crime is proved. From this, we can understand that law-makers make express permission when they want factual assumption to be made. Yet, article 692(1) of the Criminal Code does not make any such assumption. Thus, in the case at hand, the judge was like a substitute player on the bench because at the point/time the prosecutor was unable to prove the key fact that was alleged in the charge, he jumped in and made an unwarranted factual assumption to score a last minutes goal to help the prosecution win the case. So, the judge in this case was not acting like a judge; indeed, he was a prosecutor in a judge's gown thereby defeating the purpose of the principle of semper necessitas probandi incumbit ei qui agit (he who asserts must prove).

## 4. Conclusion

The above brief case comment shows the extent to which some judges may not be objective in handling criminal cases. In the case at hand, the accused might have committed the said crime but it is not for the judge to convict him by making an unwarranted factual assumption. There is absolutely no justification for a judge to participate in a case as a litigant. Unfortunately this is the reality we see in some cases in our criminal and that may be one

reason why some experts say our criminal justice system is prosecution-biased. Indeed, such approach/practice has multiple disadvantages. First, it violates the accused person's right to presumption of innocence as accused persons are deprived of this right before the prosecution rebuts the presumption. Second, it makes prosecutors dependant on judges' support and this may cultivate the feeling of recklessness. Third, it will be against judicial impartiality. Therefore, judges must all the time be guided by the evidence and only evidence set out before them by the prosecutor. They should never take a side with prosecutors simply because they have a strong feeling that the accused has committed a crime as their feelings have no place at all.

# Case Comment 2

Misganaw Kifelew*

## Absract

*This comment criticizes the Federal Cassation Decision File No 188419 redered on September 25, 2012 Ethiopian Calendar and published on Federal Court Cassation Bench Decisions Vol 24 from page 251 to 256. The Case in brief was that the Employer of Ato Markos Gatro's sister in Lebanon had transferred money to Ethiopia via Abay Bank S.C.to the benefit of Ato Markos Gatero. But the money was paid to a wrong person who claimed to be the real Markos Gatero by producing a Kebele Identification Card which showed that he was Ato Markos Gatero. Although lower courts ruled that the Bank should still pay to the real receiver, the Supreme Cassation Division reversed the decision arguing that the Bank has done all that is expected of it. This critic argues that a debtor who pays to a wrong person can never escape liability by invoking its due diligence but only by showing that it paid to a legally entitled creditor. The Cassation erred because it applied an improper law (Banking Proclamation No.* 592/2000 as amended by Proclamtion No.1159/2011 *i.e. banking regulation which intends to govern the relationship between a bank and a government rather than a bank and its clients. The relationship between a bank and its client is governed by banking transaction law in particular and contract law in general. The relationship between Ato Markos Gatero and Abay Bank S.C. is a contractual relationship and therefore; governed by the Contract Law.Ato Markos Gatero's Sister through her agent entered into a contract of transfer of money with Abay Bank S.C. and in this transfer contract Ato Markos Gatero was stipulated as a beneficiary. Accordingly, the relationship between Ato Markos Gatero and Abay Bank falls under rules of Civil Codde of 1960 whereby Ato Markos was creditor and the bank was a debtor. The law that governs payment to unqualified person is Article 1743 of the Civil Code. According to this Article payment to unqualified person releases the debtor only when the payment was on the basis of documents which are apparently legitimate (the document is not forged but the holder is not the real creditor). In the case of Ato Markos Gatero payment is made against forged documents and therefore; the bank bears the responsibility to make the second payment. It is the nature of the document presented(forged vs genuine) that can release the debtor from the obligations of the law.*

### የገንዘቡ መክፈል ለማን እንደሚገባ

### 1. መግቢያ

ይህ ጽሁፍ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት የሰበር መ/ቁ/188419 መስከረም 25 ቀን 2012 ዓ.ም( የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ዉሳኔዎች

* LL.B, LL.M., PhD, Assistant Professor, School of Law and Federalism, ECSU.

ቅጽ 24 ከገጽ 252-256) በከሳሽ አቶ ማርቆስ ጋትሮ እና በተከሳሽ አባይ ባንክ አ.ማ መካከል በነበረዉ የፍትሀብሄር ክርክር ላይ የሰጠዉን የሰበር ዉሳኔ ላይ የሚቀርብ የፍርድ ትችት ነዉ።የሰበር አቤቱታዉን ያቀረበዉ ተከሳሽ ሲሆን የሰበር አቤቱታዉም ዋና ጭብጥ ባለእዳ እዳቸዉን(ገንዘብ) የከፈሉት የተጭበረበረ መታወቂያ በመያዝ ዋና ባለገንዘብ መስሎ ለተቀበለ ሰዉ ስለሆነ ክፍያዉን በመክፈል ሂደት ባንኩ ያጠፋዉ ጥፋት ስለሌለ ክፍያዉ ለትክክለኛዉ ባለገንዘብ እንደተከፈለ ይቆጠራል፤ምክንያቱም መታወቂያዉ የተጭበረበረም እንኳ ቢሆን ያ መሆኑን ማረጋገጥ የሚቻልበት መንገድ ስለሌለና ለመጭበርበሩ የባንኩ አስተዋጽኦ የለም የሚል ብቻ ሳይሆን ሊኖር የሚችልበት እድልም የለም፤ ይልቁንም መጭበርበሩ የተፈጠረዉ ትክክለኛ ባለገንዘብ ነኝ ባይ የሚስጥር ቁጥር አሳልፈዉ ለሌላ ሰጥተዉ ቢሆን ነዉ የሚል ነበር።ሰበር ሰሚዉም ይህንን ምክንያት ተቀብሎ በታችኞቹ ፍርድ ቤቶች የተሠጠዉን ዉሳኔ ሽሯል።ይህ የፍርድ ትችት የሰበር ሰሚዉ ዉሳኔ ህግን የጣሰ ነዉ የሚል ትችት ያቀርባል።

የትችቱም አጠቃላይ ይዘትም፡ የሰበር ሰሚዉ ፍርድ ቤት ጉዳዩን ለመፍታት የሚያስችል የህግ ምንጭ(appropriate source of law) አለልተከተለም የሚል ነዉ። ይህም ማለት ፍርድ ቤቱ ጉዳዩን ለመወሰን እንደመነሻ መያዝ የነበረበት የፍትሐ ብሔር ሕግ መሰረት መሆን ሲገባዉ የባንክ ስራ አዋጅን እንደ ዋና የሕግ ምንጭ መጠቀሙ ስህተት ነዉ የሚል ነዉ። ከዚሁ ጋር በተያያዘም ባለቤት መሰሎ ለታየ ሰዉ መክፈል ባለእዳዉን ከእዳዉ ነጻ የሚያደርገዉ ባለገንዘብ መስሎ የቀረበዉ ሰዉ ባለገንዘብ ያስመሰለዉ የያዘዉ ሕጋዊ ሰነድ(ያልተጭበረበረ ሰነድ) ሲሆን ብቻ ሆኖ እያለ የተጭበረበረ ሰነድ ላቀረበ ሰዉ መክፈልም ከእዳ ነጻ ያወጣል መባሉ መሰረታዊ የህግ ስህተት ነዉ የሚል ነዉ።

## 2. በክርክሩ በማስረጃ የተረጋጠ ፍሬ ነገር ጥቅል ይዘት

የሰበር አቤቱታ ተጠሪ የአቶ ማርቆስ ጋትሮ እህት ለተጠሪ(ለወንድሟ) ታህሳስ 1 ቀን 2011 ዓ.ም (እ.ኤ.አ በ10/12/2018) ከሊባኖስ ሀገር በአሰሪዋ በአቶ ኤሌያስ ኢሌሀበር አማካይነት በዌስተርን ዩኒየን ገንዘብ መሊኪያ አማካኝነት ስድስት መቶ ሰባ አምስት ዶላር ልካለት ነበር። የሚስጥር ቁጥሩንም ላኪ ለተቀባይ በስልካቸዉ ልካለት ነበር። ይህንኑ የሚያሳይ ማስረጃ ከኢትዮ ቴሌኮም ቀርቧል፤፤ነገር ግን ይህን ገንዘብ የተቀበለዉ ማርቆስ ጋትሮ ነኝ በማለት ሀሰተኛ መታቂያ ይዞ የቀረበ ሰዉ ነዉ።

### 3. ፍርድ ቤቱ ግምት የተወሰደባቸዉ ፍሬ ነገር

ማርቆስ ጋትሮ ነኝ በማለት የተጭረበረ የቀበሌ መታወቂያ አቅርቦ ገንዘቡን የተቀበለዉ ግለሰብ የሃዋላ ገንዘብ ላኪዎች ለገንዘብ ተቀባይ ብቻ እንዲገልጹ የሚገባቸዉን ትክክለኛ የሚስጥር ቁጥር ለባንኩ አሳይቷል።

### 4. የተከራካሪዎች ሙግት አጠቃላይ ይዘት

የአቶ ማርቆስ ጋትሮ(እዉነተኛ ባለገንዘብ) ክርክር ክፍያዉ የተከፈለዉ ሀሰተኛ ሰነድ(መታቂያ) ለያዘ ሰዉ ስለሆነ ባንኩ ግዴታዉን እንዳልተወጣ ይቆጠራል የሚል ነዉ። ባንኩ በበኩሉ ክፍያዉ የተከፈለዉ ትክክለኛ ላልሆነ ሰዉ መሆኑን አምኖ ጥፋተኛ ስላልሆነ ግን (ምክንያቱም ባንኩ በሀዋላ የተላከ ገንዘብ ለመክፈል ማድረግ ያለበትን ጥንቃቄ አድጓል-መታወቂያና የሚስጥር ቁጥር አረጋጧል።) በመክፈሉ ምክንያት ግዴታዉን እንደተወጣ ይቆጠራል፤ይልቁንም ለዚህ ችግር ተጠያቂዉ እራሱ አቶ ማርቆስ ጋትሮ በመሆኑ ክፍያዉን እንደተቀበለ ሊቆጠር ይገባል የሚል ነዉ። ባንኩ አቶ ማርቆስ ጋትሮ እንደጥፋተኛ የሚቆጥረዉ የሚስጥር ቁጥሩን ለሌላ ሰዉ የሰጠዉ እራሱ አቶ ማርቆስ ነዉ(በቸልተኝነት ወይም ሆን ብሎ) በሚል እምነት ነዉ።

### 5. ሰበር ሰሚዉ የመረመረዉ የህግ ጭብጥ ና የዉሳኔዉ ምክንያት

ፍርድቤቱ የመረመረዉጭብጥ ባንኩ ጥፋት አለበት ወይ የሚል ሲሆን ጥፋት መኖር አለመኖሩንም ለመወሰን ያጣራዉ “ባንኩ ክፍያዉን የፈጸመዉ የባንክ ስራ የሚጠይቀዉን አሰራርና ስርዓት በመከተል ነዉን?” የሚለዉን ነዉ።። ባንኩ ክፍያዉን የፈጸመዉ የባንክ ስራ የሚጠይቀዉን አሰራርና ስርአት በመከተል በመሆኑ በክፍያዉ ሂደት የፈጸመዉ ጥፋት የለም ስለዚህም የከፈለዉ ክፍያ ለትክክለኛዉ ባለመብት እንደተከፈለ ይቆጠራል በማለት ወስኗል።

6. ሰበር ሰሚዉ የፈጸማቸዉ የሕግ ስህተቶች

ከላይ በመግቢያዉ እንደተመለከተዉ ሰበር ሰሚዉ ፍርድ ቤት በሶስት ደረጃ የህግ ስህተት ፈጽሟል። የመጀመሪያዉ ክርክሩ ሊወሰንበት የሚገባዉን ሕግ ሲመርጥ ነዉ። ክርክሩ መፈታት የነበረበት በዉል ህግ መሰረት ሆኖ እያለ ፍርድ ቤቱ ግን የባንክ አስተዳደር አዋጅን መሰረት በማድረግ ክርክሩን መወሰኑ ነዉ። ሁለተኛዉ ስህተት ደግሞ ገንዘብ ከፋይ ጥፋት እስካልተገኘበት ድረስ ክፍያዉ ለትክክለኛዉ ባለገንዘብ ባይደርስም እንኳ እንደከፈለ

ይቆጠራል ማለቱ ነዉ፡፡ እንዚህን ነጥቦች እንደቅደም ተከተላቸዉ እንደሚከተለዉ ለማሳየት እሞክራለሁ፡፡

## 6.1 ክርክሩ ሊመራ ይገባ የነበረዉ በዉል ሕግ እንጂ በባንክ አስተዳደር አዋጅ መሰረት አለመሆኑን በሚመለከት

እንደሚታወቀዉ የባንክ ስራ በሁለት አይነት ህጎች ይገዛል፡፡ አንደኛዉ አይነት ሕግ የባንክ ስራዎች ዉል ሕግ ነዉ፡፡ የባንክ ስራዎች ዉል ሕግ በባንክና በደንበኞቻቸዉ መካከል ያለዉን ግንኙነት የሚገዛ ሕግ ነዉ፡፡ ይህ ግንኙነት የሚመራዉ በንግድ ሕግ ቁጥር 896 እስከ 976 ድረስ በተመለከቱት ድንጋጌዎች ሲሆን እነዚህ ድንጋጌዎች በቂ ካልሆኑ ደግሞ በፍትሐ ብሔር ሕግ ቁጥር 1676(1) በግልጽ እንደተመለከተዉ ከቁጥር 1675 እስከ 2026 ያሉት የፍትሐ ብሔር ሕግ ድንጋጌዎች እንደማሟያ ሆነዉ ያገለግላሉ፡፡ በመሆኑም አንድ የባንክ ደንበኛ በባንኩ ላይ በቀጥታ ለፍርድ ቤት የሚያቀርበዉ ክስ የሚመራዉ በባንክ ስራዎች ዉል ሕግ ነዉ ማለትም በንግድ ሕግ ቁጥር 896 እስከ 976 ድረስ በተደነገጉት ድንጋጌዎች ማለት ነዉ፡፡ እነዚህ ድንጋጌዎች በቂ ባልሆኑ ጊዜ ደግም ስለዉል በጠቅላላዉ የተደነገገዉ የፍትሐ ብሔር ሕግ ተፈጻሚ ይሆናል ማለት ነዉ፡፡ሰበር ሰሚዉ ፍርድ ቤት እንዳመለከተዉም በአቶ ማቲዎስ ጋትሮ(የሰበር ተጠሪ) እና በአባይ ባንክ አ.ማ. መካከል ያለዉ ክርክር የባንክ ስራዎች ዉል ክርክር ነዉ፡፡ አቶ ማቲዎስ ጋትሮ በቀጥታ በባንኩ ላይ ክስ ያቀረበ ከመሆኑም በተጨማሪ የክርክሩ መሰረት የሆነዉ ጉዳይ የገንዘብ ማስተላለፍ ዉል ነዉ፡፡በመሆኑም መመራት ያለበት በንግድ ሕግ ቁጥር 896 እስከ 976 ነዉ፡፡ ይህ የማይበቃ ከሆነ ደግሞ ጉድለቱ የሚሞላዉ በፍትሐ ብሔር ሕግ ስለዉል በጠቅላላዉ በሚለዉ ሕግ ነዉ፡፡

ሁለተኛዉ አይነት ሕግ የባንክ ስራ አስተዳደር ሕግ ሲሆን የባንክ ስራዎችን በሚመለከት መንግስት ስለሚያደርገዉ ቁጥጥርና ክትትል የሚደነግግ ሕግ ነዉ፡፡ ይህ ሕግ በባንክና በመንግስት መካከል ሊኖር የሚገባዉን ግንኙነት የሚመራ ሕግ ነዉ፡፡ ይህን የሚመለከተዉ ሕግ የባንክ ስራ አዋጅ ቁጥር 592/2000(በአዋጅቁጥር 1159/2011 እንደተሻሻለዉ) ነዉ፡፡ በዚህ ሕግ መሰረት የባንኮች ተጠያቂነት ለደንበኞቻቸዉ ሳይሆን ለብሔራዊ ባንክ ነዉ፡፡ባንኮች የባንክ ስራ አዋጅም ሆነ በአዋጁ መሰረት በሚኒስትሮች ምክርቤት የወጡ ደንቦችን ወይም በብሔራዊ ባንክ የሚወጡት መመሪያዎች ጥሰዉ ቢገኙ ተጠያቂነታቸዉ ለኢትዮጵያ ብሄራዊ ባንክ ነዉ እንጂ ለደንበኞቸዉ አይደለም፡፡ የሚወሰድባቸዉም እርምጃም አስተዳደራዊ ነዉ፡፡ ለምሳሌ በአዋጅ ቁጥር 592/2000 አንቀጽ 17፤እንደተመለከተዉ የባንክ አመራሮችን ማገድ ወይም በአንቀጽ 31 እንደተመለከተዉ ጥፋተኛዉ ባንክ አንዳንድ

የእርምት እርምጃዎችን እንዲወሰድ ወይም አንዳንድ የባንክ ስራዎችን እንዳይሰራ ማገድ ወይም በቁጥር 33 በተመለከተዉ መሰረት ባንኩ በሞግዚት እንዲተዳደር ማድረግ ናቸዉ፡፡ በፍትሐ ብሔር ሕግ ቁጥር 2035 መሰረት የባንክ አስተዳደር ሕጎችን መጣስ ጥፋት ቢሆንም ይህን ጥፋት እንደምክንያት በማንሳት ባንኩን ተጠያቂ እንዲሆን ማድረግ የሚችሉት በተጎዱበት ጉዳይ ጋር በተያያዘ ከባንኩ ጋር የዉል ግንኙነት የሌላቸዉ ሰዎች ብቻ ናቸዉ፡፡ በዚሁ በፍትሐ ብሔር ሕግ በቁጥር 2037 ላይ በግልጽ እንደተመለከተዉ ዉልን አለመፈጸም ከዉል ዉጭ ሃላፊነት ስለማያስከትል በተዋዋይ ወገኖች መካከል ያለዉ አለመግባባት የሚፈታዉ በዉል ሕግ መርሕ መሰረት ብቻ ነዉ፡፡በመሆኑም ሰበር ሰሚዉ ፍርድ ቤት የባንክ ስራ አዋጅን መሰረት በማድረግ የአባይ ባንክ አ.ማ. ሃላፊነት ለመወሰን መሞከሩ መሰረታዊ የህግ ስህተት ነዉ፡፡ ይህ ስህተት ነዉ ሰበር ሰሚዉን ፍርድ ቤት ሌሎቹን ከታች የምንመለከታቸዉን ተከታታይ ስህተቶች እንዲሰራ ያደረገዉ፡፡

### 6.2. በአቶ ማርቆስ ጋቴሮና በአባይ ባንክ አ.ማ.ያለዉ ግንኙነት የሚመራዉ በገንዘብ ማዘዋወር ዉል ሕግ እንጂ በገንዘብ ማስቀመጥ ዉል አለመሆኑን በሚመለከት

ክርክሩን ለመወሰን ወሳኝ ድርሻ ያልነበራቸዉ ቢሆንም ሰበር ሰሚዉ ፍርድ ቤት ሌሎች ሁለት መሰረታዊ የሕግ ስሕተቶችንም ሰርቷል፡፡ እነዚህም የሃዋላ ዉል ገንዘብ በአደራ የማስቀመጥ ዉል ነዉ ማለቱ ነዉ፡፡የሃዋላ አገልግሎት ዉል የሰበር ሰሚ ፍርድ ቤቱ እንዳለዉ ገንዘብ በአደራ የማስቀመጥ ዉል ሳይሆን የገንዘብ ማስተላለፍ ዉል ነዉ፡፡ ፍርድ ቤቱ የሃዋላ ገንዘብ ማስተላለፍ ዉል ገንዘብ በአደራ የማስቀመጥ ዉል ነዉ ብሎ ስለወሰደ በንግድ ሕግ ከቁጥር 896 እስከ 902 ያሉትን ድንጋጌዎች ለዉሳኔዉ እንደመንደርደሪያ ተጠቅሟል፡፡ በንግድ ሕግ ቁጥር 896 የተመለከተዉ የባንክ ስራ ዉል የገንዘብ ማስተላለፍ ዉል ሳይሆን የገንዘብ ማስቀመጥ ዉል ነዉ፡፡ይህም በተለምዶ የቁጠባ ሒሳብ (በጊዜ ገደብ ወይም ያለጊዜ ገደብ) ወይም በቼክ የሚንቀሳቀስ የሚችል የገንዘብ ማስቀመጥ ሊሆን እንደሚችል ከቁጥር 896 እስከ 902 ድረስ ያሉትን ይዘት በተለይ ደግሞ የቁጥር 897 እና 898 በመመልከት መረዳት ይቻላል፡፡ ገንዘብ የማስቀመጥና ገንዘብ ማስተላለፍ ሁለት የተለያዩ የባንክ ስራ አይነቶች መሆናቸዉን የባንክ ስራ አዋጅ ቁጥር 592/2000 አንቀጽ 2(2ሀ) እና አንቀጽ 2(2መ) በግልጽ ያመለክታል፡፡ በመሆኑም ሰበር ሰሚዉ ፍርድ ቤት በንግዱ ህጉ ከቁጥር 896 እስከ 902 ያሉትን ድንጋጌዎች መጥቀሱ በስህተት ነዉ፡፡ የአቶ ማርቆስ ጋትሮ እህት በአሰሪዋ በኩል ከአባይ ባንክ ጋር የገባችዉ የባንክ ስራ ዉል የገንዘብ ማስቀመጥ ዉል ሳይሆን የገንዘብ ማስተላለፍ ዉል(የሃዋላ አገልግሎት ዉል) ነዉ፡፡ የብሔራዊ ክፍያ አዋጅ ቁጥር 718/2003 አንቀጽ 2(13) ላይ በግልጽ እንደተመለከተዉ

ገንዘብ ማስተላለፍ ማለት በሀዋላ የሚደረግ ማናቸውም የገንዘብ ማስተላለፍንም ይጨምራል፡፡ ፍርድ ቤቱ ሃዋላ የገንዘብ ማስተላለፍ ወል መሆኑን ተረድቶ ቢሆን ኖሮ ክርክሩን ለመወሰን ይጠቀም የነበረዉ ሕግ የብሄራዊ ክፍያ አዋጅ ቁጥር 718/2003 ይሆን እንደነበር መገመት ይቻላል፡፡በነገራችን ላይ የኢትዮጵያ ብሄራዊ ባንክ የሃገር ዉስጥ ሃዋላ ከልክሏል፡፡ስለዚህም በተግባር አሁን እየተሰራበት ያለዉ የገንዘብ ማስተላለፍ አይነት በንግድ ሕግ ቁጥር 903 ላይ የተመለከተዉ ብቻ ነዉ፡፡

ምናልባት እንኳ የአቶ ማርቆስ ጋትሮ እህት ገንዘቡ እንዲላክላት ያዘዘችዉ በሊባኖስ ሀገር አባይ ባንክ ዉስጥ ከከፈተችዉ ሒሳብ ቢሆን እና ገቢ እንዲደረግ የታዘዘዉም አቶ ማቲዎስ በአባይ ባንክ በከፈቱት ሂሳባቸዉ ቢሆን ኖሮ ለዚህ ትክክለኛዉ የባንክ ስራ ወል ሕግ የባንክ ሂሳብ ስለማዘዋወር የሚለዉ ከቁጥር 903 እስከ ቁጥር 912 ያለዉ ድንጋጌ ነዉ፡፡በርግጥ የክሱ ዋና ጭብጥና ዉዝግብም የተከሰተዉ ገንዘቡ ወደ አቶ ማርቆስ ጋቴሮ ሂሳብ እንዲገባ ሳይሆን በእጃቸዉ እንዲሰጣቸዉ የታዘዘ በመሆኑ ነዉ፡፡ ወደ ሂሳባቸዉ እንዲገባ ቢሆን ኖሮማ ሃሰተኛ መታወቂያ የያዘ ሰዉ ገንዘቡን ባልወሰደና ክርክሩም ባልተነሳ ነበር፡፡በርግጥ የአትዮጵያ ባንኮች ዉጭ ሀገር ቅርንጫፍ መክፈት ስለማይፈቀድላቸዉ አባይ ባንክ ሊባኖስ ቅርንጫፍ አይኖረዉም፡፡ ለአቶ ማርቆስ የተላከዉ ገንዘብ ሊባኖስ ካለ ሌላ ባንክ ዉስጥ ካለ ሂሳብ ተቀንሶ ነዉ ሊያስብል የሚያስችል ማስረጃ በክርክሩ ላይ የማይታይ ከመሆኑም ባሻገር አባይ ባንክ አ.ማ. ባለ የአቶ ማርቆስ ቴሮ ሂሳብ ገቢ እንዳልተደረገ በክርክሩ ላይ በግልጽ የሚታይ ነዉ፡፡ከዚህም በላይ ንግድ ሕግ ቁጥር 903(1) በባንክ ያለዉን ሂሳብ ማዘዋወርን በጠባቡ በመተርጎም ገንዘብ የሚያዘዋወረዉ በአንድ ባንክ ዉስጥ ባሉ ሁለት ሂሳቦች መካከል እንደሆነ ስለሚደነግግ በአቶ ማርቆስ ጋቴሮና በአባይ ባንክ አ.ማ.መካከል ያለዉ ክርክር የባንክ ሂሳብ ስለማዘዋወር የሚለዉ ከቁጥር 903 እስከ ቁጥር 912 ባለዉ ድንጋጌ አይመራም፡፡ በአጭሩ በአቶ ማርቆስ ጋቴሮና በአባይ ባንክ አ.ማ. ያለዉ ግንኙነት የሚመራዉ በገንዘብ ማዘዋወር ዉል ሕግ መሰረት ነዉ፡፡

**6.3 ባለእዳ እዳዉን እንደከፈለ የሚቆጠረዉ ክፍያዉን ለመቀበል ሕጋዊ መብት ላለዉ ሰዉ ሲከፈል ነዉ፡፡**

ከላይ እንደተመለከተዉ በአቶ ማርቆስ ጋቴሮና በአባይ ባንክ አ.ማ. መካከል ያለዉ ክርክር የሚፈታዉ በገንዘብ ማዘዋወር ዉል ሕግ መሰረት መሆኑን ለማሳየት ተሞክሯል፡፡አሁን ደግሞ ለመሆኑ ጉዳዩ በገንዘብ ማዘዋወር ዉል ሕግ መሰረት ቢመራ ኖሮ ዉጤቱ የተለየ ይሆን ነበርን የሚለዉን እንመረምራለን፡፡

በኢትዮጵያ ንግድ ሕግ ውስጥ ስለ ገንዘብ ማዘዋወር ወል የሚደነግግ ሕግ የለም፡፡ የባንክ ስራ ወል ሕግ የሚመለከተዉ የንግድ ሕጉ አንቀጽ ሶስት ስር የተደነገጉት የባንክ ስራ ዉሎች ሰባት ብቻ ናቸዉ፡፡ እነዚህም ለባንክ የሚሰጡ አደራዎች ወል (ገንዘብን በአደራ ስለማስቀመጥ፡የባንክ ሂሳብን ስለማዘዋወር፡ሰነዶችን በአደራ ስለማስቀመጥ) የካዝና ኪራይ ወል፤ የተመላላሽ ሂሳብ ወል፤ የቅናሽ ወል እና ብድር ስለሚያሰጡ ግንኙነቶች ወል(የብድር መከፈት፡ ሰነድ አስይዞ ገንዘብ ስለመበደር፡በሰነድ ስለሚሰጡ ብድሮች)፡፡ በመሆኑም የገንዘብ ማስተላለፍ ወል በአጠቃላይ በሓዋላ ገንዘብ የማስተላለፍ ወል በተለይ በንግድ ሕግ ዉስጥ ሳይደነገጉ ቀርተዋል ማለት ነዉ፡፡ ምናልባትም ይህ ሊሆን የቻለዉ የንግድ ህጉ በወጣበት ጊዜ ገንዘብ የማስተላለፍ ስራ ብዙም ያልተለመደ የባንክ ስራ ስለነበረ ሊሆን ይችላል፡፡

በአሁኑ ጊዜ በተዘዋዋሪም ቢሆን በሃዋላ የገንዘብ ማስተላለፍ ወልን የሚመለከተዉ ሕግ የብሔራዊ የክፍያ ስርዓት አዋጅ ቁጥር 718/2003 ነዉ፡፡በዚህ አዋጅ አንቀጽ 2(16(ሀ) ስር እንደተመለከተዉ የብሄራዊ የክፍያ ስርዓት የሀገር ውስጥና የውጭ ሀገር ገንዘብ ወይም የክፍያ ትዕዛዞችን መላክ፣ መቀበል፣ ክፍያ ማካሔድ ወይም ማስተላለፍን በዋናነት ይመለከታል፡፡ በዚሁ አዋጅ አንቀጽ 2(13) ገንዘብ ማስተላለፍ ማለት በሓዋላ የሚደረግ የገንዘብ ዝዉዉርንም ይጨምራል፡፡ በዚሁ አዋጅ አንቀጽ 19 ላይ እንደተመለከተዉ ገንዘብ አስተላላፊ “ከ...ገንዘብ ማስተላለፍ ጋር... በተያያዘ ለሁሉም ተገልጋዮች በተመሳሳይ ሁኔታ ተፈፃሚ የሚሆን ግልጽና ወጥ የሆነ ናሙና የውል ግዴታዎች ተገልጋዮቹ መርምረው መስማማት እንዲችሉ አዘጋጅቶ ማቅረብ አለበት፡፡” ይህ የሚያመለክተዉ የገንዘብ አስተላላፊዉ ባንክና የገንዘብ አስተላላፊዉ ግንኙነት የሚመራዉ በገንዘብ ማስተላለፍ ወል መሰረት ነዉ ማለት ነዉ፡፡ በዚህም መሰረት የአቶ ማርቆስ ጋቴሮና የአባይ ባንክ አ.ማ. ክርክር መዳኘት የሚገባዉ በገንዘብ ማስተላለፍ ወላቸዉ መሰረት ነዉ፡፡ ተከራካሪዎቹም ሆኑ ሰበር ሰሚዉ ፍርድ ቤት(እንዲሁም የታችኞቹ ፍርድ ቤቶች) ይህን ሳያነሱ መቅረታቸዉና የባንክ ስራ አዋጅን በመጥቀስ ባንኩ ጥፋተኛ ነዉ ወይም አይደለም በማለት መከራከራቸዉ ስህተት ነዉ፡፡የባንክ ስራ አዋጅ ባንኮች ለደንበኞቻቸዉ ማድረግ ስለሚኖረባቸዉ ጥንቃቄ የሚናገረዉ ነገር የለም፤ሰበር ሰሚዉም ፍርድ ቤትም ይህን ያመለክታል ያለዉን አንቀጽ አልጠቀሰም፡፡

ለመሆኑ “በአቶ ኤልያስ ኢሌሀበር እና በአባይ ባንክ አ.ማ. መካከል ያለዉ የሃዋላ ወል ስለተፈጠረዉ ችግር ምን መፍትሔ ይሰጣል?” የሚለዉ በቀዳሚነት ሊመረመር የሚገባዉ ነዉ፡፡ ይህ ወል ለጉዳዩ እልባት የማይሰጥ ከሆነ የመጨረሻ አማራጭ የሚሆነዉ የፍትሐ

ብሔር ሕግ ስለዉል በጠቅላላዉ የሚለዉን ለመጠቀም እንገደዳለን፡፡በክርክሩ ሒደት ስለዉሉ ይዘት የቀረበ ነገር ስለሌለ ጉዳዩን ከፍትሐ ብሄር ሕግ መሰረት ይሆናል፡፡

በዚህም መሰረት አቶ ማርቆስ ጋቴሮ ባንኩን የመክሰስ መብት እንዴት ሊያገኝ እንደቻለ ስንመረምር መልስ ልናገኝ የምንችለዉ ከፍትሐ ብሔር ሕግ ቁጥር 1957 እና 1961 ነዉ፡፡ ይህ ማለት እነዚህ ሁለት ድንጋጌዎች አቶ ማርቆስን ባለገንዘብ ሲያደርጉት አባይ ባንክ አ.ማ. ደግሞ ባለእዳ ይሆናል ማለት ነዉ፡፡ባለእዳ እዳዉን መክፈል ያለበት ለማን እንደሆነ ለማወቅ ደግሞ የፍትሐ ብሔር ቁጥር 1741-1744 ያሉትን ድንጋጌዎችን መጠቀም ይቻላል፡፡በአቶ ማርቆስ ጋቴሮ እና በአባይ ባንክ አማ መካከል ያለዉን ግንኙነት በቀጥታ የሚመለከተዉ የመቀበል መብት ለሌለዉ ሰዉ ስለመክፈል የሚለዉ የፍትሐ ብሔር ሕግ ቁጥር 1743 ነዉ፡፡ በዚህ ድንጋጌ መሰረት የመቀበል መብት ለሌለዉ ሰዉ የተከፈለ ክፍያ ባለእዳዉን ከእዳዉ ነጻ የሚያወጣዉ ባለገንዘቡ ክፍያዉን ካጸደቀዉ ወይም ከክፍያዉ ተጠቃሚ ከሆነ ወይም **በማያጠራጥር አኳኋን ባለገንዘቡን መስሎ ለተገኘ ሰዉ በቅን ልቦና ከፍሎ የተገኘ** እንደሆነ ነዉ፡፡(ትኩረት በጸሃፊዉ)

በዚህ ድንጋጌ መሰረት ባለእዳዉ ከእዳዉ ነጻ እንዲሆን ከፈለገ እዳዉን ሲከፍል ሁለት መሰፈርቶችን በጣምራ እንዳሟላ ማስረዳት አለበት፡፡አንደኛዉ መስፈርት ክፍያዉን ሲከፍል እንዳይከፍል የሚያደርግ ምንም የሚያጠራጥር ነገር እንዳልነበር ማስረዳት ይኖርበታል፡፡ እዚህ ጋር የሚመጣዉ ጥያቄ “ባለእዳዉ ይህን እንዴት ሊያስረዳ ይችላል?” የሚለዉ ነዉ፡፡ በአቶ ማርቆስ ጋቴሮና በአባይ ባንክ መካከል ባለዉ ክርክር ባንኩ ይህን ያስረዳዉ ገንዘቡን የወሰደዉ ሰዉ ባለገንዘብ መሆኑን የሚያሳይ መታወቂያ እና ለተላከለት ሰዉ ብቻ በላኪዉ የሚሰጥ የሚስጢር ቁጥር አቅርቧል፡ በማለት ነዉ፡፡ነገር ግን ይህ ማስረጃ ገለልተኝነት(neutrality)ና ወጥነት(objectivity) ይጎድለዋል፡፡ገለልተኝነት የሚጎድለዉ መታወቂያዉን በደንብ አይቼዋለሁ እያለ ያለዉ እራሱ ባንኩ እንጂ ይህን ባግባቡ ስለማድረጉ ምንም ያቀረበዉ ማስረጃ የለም ፤ በአግባቡ አላየምም ሊሆን ይችላል፡፡ አይቶታል ቢባል እንኳ መታወቂያዉ የተጭበረበረ ሆኖ የተገኘ በመሆኑ ምናልባት መታወቂያዉን ክፍያዉን ከከፈለዉ ሰራተኛ ዉጭ ያለ ሌላ ሰራተኛ አይቶት ቢሆን ኖሮ የተጭበረበረ መሆኑን ሊረዳ ይችል ይሆናል፡ ምክንያቱም ሁላችንም እኩል ጉድለትን የማስተዋል ብቃትና ተሰጥኦ የለንምና፡፡ በመሆኑም አጠራጣሪ ነዉ ወይስ አያጠራጥርም ነበር የሚለዉ የግላዊነትማንነት(subjectivity) መስፈርት ላይ እንዲንጠለጠል ያደርጋል፡፡ በመሆኑም ባለእዳዉ ገንዘቡን የከፈለዉ ምንም ጥርጣሬ ሳይኖረዉ ነበር የሚለዉን በማያጠራጥር ሁኔታ ለማሰረዳት አስቸጋሪ ነዉ፡፡ ሌላዉ ለባለእዳዉ ለማስረዳት

የሚያስቸግረዉ ነገር ክፍያዉን የፈጸመዉ በቅን ልቦና መሆኑን እንዴት እንደሚያስረዳ ነዉ፡፡በቃለ መሃላ ነዉ የሚያስረዳዉ ወይስ ምስክሮችን በማቅረብ፡ምስክሮችስ ቀርበዉ ምንድነዉ የሚመሰክሩት?

ከዚህ በመነሳት በማያጠራጥር ሁኔታ ባለገንዘብ መስሎ ለተገኘ ሰዉ የሚለዉን ሀረግ ገለልተኛና ወጥነት ባለዉ ማስረጃ ማስረዳት ከተቻለ ብቻ ባለእዳዉ ከእዳዉ ነጻ ይወጣል ብሎ መተርጎም የበለጠ ወደ እዉነታዉ የተጠጋ ይሆናል፡፡የማስረዳት ሸክሙንም መጀመሪያ በባለእዳዉ ላይ ቀጥሎ ደግሞ በባለገንዘቡ ላይ በማድረግ ምክንያታዊ የሆነ መደምደሚያ ላይ መድረስ ይቻላል፤፤ በዚህም መሰረት ባለእዳ ማቅረብ ያለበት ማስረጃ ገንዘቡን የተቀበለዉ ሰዉ ገንዘቡን በተቀበለበት ወቅት ፍጹም ባለገንዘብ መስሎ እንዲታይ የሚያደርገዉ ህጋዊ ሰነድ ይዞ የቀረበ መሆኑን የሚያሳይ መሆን አለበት፡፡ ለምሳሌ ገንዘብ እንዲቀበል የተወከለበት ትክክለኛ የዉክልና ስልጣን ነገር ግን ለባለእዳዉ ባያሳዉቅም ባለገንዘቡ ክፍያዉን ተወካይ ከመቀበሉ በፊት ተሽሮ የነበረ ወይም ጠፍቶ የተገኘ ወይም የተሰረቀ ለታዘዘለት/ላምጪዉ የሚከፈል የንግድ ወረቀት፤የወራሽነት ማስረጃ ከመሻሩ በፊት ወይም መሻሩንም ባለእዳዉ የማያዉቅ ከሆነ፡፡

ባለእዳ በእነዚህ ህጋዊ ሰነዶች መሰረት እንደከፈለ ካስረዳ ክፍያዉ የተፈጸመዉ ከቅን ልቦና በተቃራኒ ነዉ የሚለዉን ደግሞ ባለገንዘቡ የማስረዳት ሃላፊነት ይወስዳል ማለት ነዉ፡፡ ባለገንዘቡም ይህንን በምስክርም ሆነ በማንኛዉም አሳማኒያዊ ማስረጃ ማስረዳት ይችላል፡፡ ለምሳሌ ዉክልናዉ እንደተሻረ በስልክ ወይም በኢሜል እንደነገረዉ፡ ቼኮቹ እንደተሰረቁበት/እንደጠፉበት እንደስታወቀዉ፤የወራሽነት ማስረጃዉን በስህተት የተገኘ መሆኑን እንደነገረዉ የመሳሰሉትን በማስረዳት ባለእዳዉ እኔ አልጠየቅም የሚል እምነት ይዞ(ሰነዶቹ ህጋዊ ስለሆኑ ብቻ) በግዴለሽነት ወይም ባለገንዘቡን ለመጉዳት በማሰብ ገንዘቡን ሰነዱን ለያዘዉ ሰዉ መክፈሉን በማሳየት  ባለእዳዉ ክፍያዉን ሲፈጽም ቅን ልቦና እንዳልነበረዉ ማሳየት ይችላል፡፡

የፍትሐ ብሔር ሕግ ቁጥር 1744 በዚሁ አተረጓጎ መሰረት የተደነገገ ድንጋጌ እንደሆነም መገንዘብ ይቻላል፡፡ በዚህ ድንጋጌ መሰረት ሁለት እና ከዚያን በላይ የሆኑ ሰዎች በየፊናቸዉ ገንዘቡ ይገባናል እያሉ የሚጠይቁ ከሆነ ባለእዳዉ ገንዘቡን መክፈል ያለበት ለፍርድ ቤት መሆን እንዳለበት ይደነግጋል፡፡ ይህ ሁኔታ የተጨበረበረ ሰነድ ያመጣን ሰዉ የሚመለከት ሳይሆን ህጋዊ ሰነድ የያዘን ገንዘብ ጠያቂ ላይ የቀረበን ተቃዉሞ የሚመለከት ስለመሆኑ ግልጽ ነዉ፡፡ ህጋዊ ሰነድ የያዘዉ አንደኛዉ ሆኖ ሌሎቹ ደግሞ ይህን ሕጋዊ ሰነድ መቃወም

የሚፈልጉ ሊሆኑ ይችላሉ ወይም ሁሉም ሕጋዊ ሰነድ ያላቸዉ ግን አንዳቸዉ የሌላዉን ሰነድ መብት ያሰጣል ብለዉ የማይቀበሉ ሊሆኑ ይችላሉ፡፡

### 6፡4 ባለእዳ እዳዉን መወጣቱን ማስረዳት ይኖርበታል (ለባለገንዘቡ መክፈሉን የማስረዳት ሸክም አለበት)

ይህን ጉዳይ ከማስረጃ ሕግ አኳያም መመርመር ተገቢ ነዉ፡፡በፍትሐ ብሔር ሕግ ቁጥር 2001(1) ላይ እንደተመለከተዉ በባለገንዘብ ግዴታ ዉል መኖሩን ማስረዳት ብቻ ነዉ፡፡ግዴታዉን ለባለገንዘቡ መፈጸሙን የማስረዳት ግዴታ የባለእዳዉ እንደሚሆን በዚሁ ሕግ ቁጥር 2001(2) ላይ ተመልክቷል፡፡ በአቶ ማርቆስ ጋቴሮና በአባይ ባንክ አ.ማ.መካከል ባለዉ ክርክር አቶ ማርቆስ ባለገንዘብ ሲሆን ባንኩ ደግሞ ባለእዳ ነዉ፡፡አቶ ማርቆስ ከባንኩ ላይ የሚጠይቀዉ መብት እንዳለዉ አስረድቷል፡፡ አቶ ማርቆስ ገንዘቡን መቀበሉን ማስረዳት የባንኩ ግዴታ ነዉ፡፡ ባንኩ ደግሞ አቶ ማርቆስ አለመቀበሉን አምኗል፤ይህ ማለት ለባለገንዘቡ መክፈሉን አላስረዳም፡፡ ታዲያ እንዴት ነዉ ከግዴታዉ ነጻ የሚሆነዉ? አንድ ባለእዳ ከእዳዉ ነጻ የሚሆነዉ እዳዉን ለባለገንዘቡ መክፈሉን በማስረዳት እንጂ ክፍያዉን ባይፈጽምም እንኳ ያልከፈለዉ በእርሱ ጥፋት አለመሆኑን በማስረዳት አይደለም፡፡ በመሆኑም ባንኩ ግዴታዉን ለባለገንዘቡ መወጣቱን ስላላረጋገጠ ከተጠያቂነት አያመልጥም፡፡

### 7. ማጠቃለያ

ይህ ክርክር ሲጠቃለል አቶ ጋትሮ ባለገንዘብ መሆኑ እየታወቀና ይህም ገንዘቡ በባለእዳዉ(በባንኩ) እጅ እያለ ስለተሰረቀ ኪሳራዉ ያንተ ነዉ መባሉ ትክክል አይደለም፡፡ በባንኩ ዘንድ ያለዉን ገንዘቡን በማሰረቅ አቶ ጋተሮ ተባብሯል ቢባል እንኳ(ይህ አልተረጋገጠም እንጂ) ክርክሩ መሆን የነበረበት ከክፍያዉ ተጠቅሚል ወይም ለደረሰዉ ጉዳት አስተዋጽኦ አድርጓል የሚል እንጂ ባንኩ ጥፋት የለበትም የሚል አይሆንም፤ይህ ማለት የፍርድ ቤቱ ዉሳኔ መሰረት ማድረግ የነበረበት የአቶ ጋትሮን ጥፋት እንጂ የባንኩን ታታሪነት መሆን አይገባም ነበር፡፡ ፍርድ ቤቱ ይህን የተሳሳተ ዉሳኔ ሊያስተላልፍ የቻለዉ ክርክሩን ተገቢ ባልሆነ ሕግ በመምራቱ ነዉ፡ ክርክሩ የዉል አለመፈጸም(የገንዘብ ማስተላለፍ ዉል) ሆኖ እያለ የባንክ ስራዎች አስተዳደር ሕግን(ባንኪንግ ቢዚነስ ሬጉሌሽን) መሰረት አድርጎ ክርክሩን በመወሰኑ ነዉ፡፡