COMMENT

The Standards in Admitting Expert Evidence in Ethiopia: Some Practical Discrepancies

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Abstract

Judges render justice based on the presented evidence justifying their decisions. In criminal cases, these decisions can have ramifications on an individual's right to liberty, life and property. Correctness of conviction much depends on the evidence presented to the courtroom and the interpretation of the evidence by judges. Expert evidence is particularly important because certain issues are beyond the expertise of judges in the current era of specialization and due to ever-expanding advances in technology. Expert evidence has to be used very cautiously based on a set of objective criteria that judges can use. This comment looks at the experience of other countries in relation to admission of expert evidence. It then assesses the current practice in Ethiopia by looking at a few cases and concludes that there is wide variation in admitting expert evidence and regarding the weight given to it by different courts.

Key terms

Expert Evidence, admission, weight of evidence, criminal justice administration, Ethiopia

Introduction

Expert witness is indispensable for the proper functioning of the criminal justice system. However, judges may sometimes be unsure about the procedures for admitting it and the weight that should be attached to it may be sometimes problematic to judges. Wrong convictions may ensue as a result of problems with scientific uncertainties on the side of psychologists and other behavioral science scholars. Expert testimony by such experts serves two principal goals: inform judges that eyewitnesses are significantly less reliable than common

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sense suggests, and also should educate judges about the nature of human memory and specific variables that affect the accuracy of identifications.[1]

In Ethiopia, judges may request expert evidence in criminal proceedings when they find that the evidence presented creates doubt. Professionals, on the other hand, are obliged (under article 448 of the FDRE Criminal Code) to aid justice and experts cannot generally refuse to testify. However, the admissibility, relevancy and weight of expert testimony may vary from case to case. Expert testimony as it relates to "definite scientific findings" is binding on judges in cases of assessing criminal responsibility and deciding on the sentence of young criminals.[2] The legal inference is left to courts taking the expert testimony into account. In evaluating the findings of expert witness, the judge may find it difficult to distinguish between personal appreciations and definite scientific findings.

Ethiopia has its law of evidence scattered in the various codes including the Civil Code of 1960, Criminal Code of the 2004, Criminal Procedure Code of the 1961, Civil Procedure Code of the 1965 etc. The scattered procedural rules of evidence in the various codes are vague, incomplete/incomprehensive or difficult to apply by courts. The Expert evidence is not different from the problems of other types of evidence. Expert evidence in Ethiopia is particularly problematic due to the advancement of technology and other scientific theories/pedigree.

The first section of this comment highlights the legal framework of expert evidence in Ethiopia followed by the burden of proof in criminal cases in Section Two. The third and fourth sections briefly state some experience in admitting expert evidence and standards for admitting expert evidence in Ethiopia. The last section highlights experiential safeguards against expert evidence.

1. Legal Framework of Expert Evidence in Ethiopia

Article 20(3) FDRE Constitution cum article 23(4) and article 57(1) of the FDRE Criminal Code clearly indicates that every person is presumed innocent until proven guilty. It is also further articulated under article 24 of the Criminal

[1] Daniel A. Bronstein. (2012), *Law for the Expert Witness*. Taylor and Francis Group, LLC, 4th ed.

[2] The FDRE Criminal Code, Proclamation No. 414/2004, Art. 51/3 "On the basis of the expert evidence the Court shall make such decision as it thinks fit. In reaching its decision it shall be bound solely by definite scientific findings and not by the appreciation of the expert as to the legal inferences to be drawn therefrom." Art. 54/3 contains a similar provision as regards expert testimony in assessing the sentence of young criminals (aged between 9-15).

Procedure Code that the investigating police officer shall keep all relevant evidences recorded. Moreover, article 42(1)(a)) clearly indicates the importance of evidence including expert evidence, against conviction where the public prosecutor[3] is prohibited from instituting a charge if there is no sufficient evidence to justify conviction.

The word expert witness, in Ethiopian legal framework, is understood as a natural person who is knowledgeable, having specialized knowledge, expert, trained, wise, educated, professional and skillful respectively).[4] The expertise of the witness involves specialized knowledge and training outside the common sense or knowledge of judges. The expert witness may provide his/her testimony before the court or send his/her finding as a report to the court requesting it. However, there is no clear provision as to when the court can ask the physical appearance of the expert. Article 136(2) cum 142(2) second *alinea* of the Criminal Procedure Code of Ethiopia clearly indicates that the public prosecutor shall call his/her witnesses and experts, if any, and the witnesses and experts shall be sworn or affirmed before they give their testimony. From this, it can be deduced that expert witnesses should appear before the court for testimony; the Code is silent about expert report.

2. Burden of Production and Degree of Proof in Criminal Cases

The public prosecutor, in Ethiopia, has the burden to prove his/her allegations beyond reasonable doubt by producing any relevant direct or indirect evidence as per articles 134(2) of the Criminal Procedure Code *cum* article 20(3) of the FDRE Constitution.[5] However, there are crimes in which the burden would shift to the suspect.[6] Expert evidence may be produced: (a) by accused persons (or their advocates for their defences), or (b) by public prosecutors to prove their

[3] The public prosecutor should prove the elements of crime: the legal element, material element and moral or mental element as per article 23(2) and (4) and article 48(1) cum 57(1) of the FDRE Criminal Code 2004 beyond reasonable doubt and article 130(1(g)) of the Criminal Procedure Code of the Empire and article 14(2) of the ICCPR and General Comment No. 13 on Issues of Criminal Proof and Degree of Proof.

[4] ዓለማየሁ ኃይሌ(1978)፣ የኤክስፐርት ማስረጃ በኢትዮጵያ ሕግ- በማነፃፀር የቀረበ፤ የኅብረተሰባዊት ኢትዮጵያ ጊዜያዊ ወታደራዊ መንግስት ፍ/ቤት፣ ሕግና ፍርድ መጽሔት፣ ቅፅ 3 ቁጥር 1 ከገፅ 56-74 አዋቂ፣ ልዩ ዕውቀት ያላቸው ሰዎች፣ ጠቢብ፣ ሥልጡን፣ ብስል፣ ምሁር ፣ ባለሙያ፣ የተካነና የመሳሰሉትም ቃላት ይጠቀማሉ።

[5] But the Supreme Court in its Cassation Bench under Cassation No. 104923 provides that the burden of proof is not beyond reasonable doubt but clear and convincing which is binding by the virtue of proclamation no.454/2005.

[6] Ethiopian Criminal Justice Policy 1997 in crimes of corruption, Concerted Crimes, Terrorism which are heinous by their nature to the public at large.

allegation[7] or (c) by judges before or during the proceedings. The production of evidence including expert evidence should meet the parameter of relevancy to be admissible.

3. Experience of Other Countries in Admitting Expert Evidence

Fundamental condition of admissibility is that evidence must be relevant.[8] That means it must be capable of rationally influencing the assessment of *facts in issue* (i.e., the contested or material facts). Admission of expert evidence depends on the application of the following criteria:

(a) *Relevance:* On behalf of the Court, Justice Sopinka explained that relevance is a broad inquiry, encompassing logical as well as legal relevance, and requiring a trial judge to assess the reliability of the putative evidence against its costs, including the risk of distortion or overvaluation;

(b) *Necessity in assisting the trier of fact*: Necessity was described as a standard that is higher than the "*helpfulness*" requirement set out in English precedent, but that should not be judged "by too strict a standard";

(c) *The absence of any exclusionary rule*; [and]

(d) *A properly qualified expert*:[9] The qualification requirement was described by Sopinka as a need for the expert to demonstrate "special or peculiar knowledge [acquired] through study or experience".[10] The expert witness must have undergone training (and received appropriate qualifications or certification) or have experience, and the opinion should be derived from a recognized "body of knowledge" (or "field'") or experience.[11]

An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside *the experience and knowledge of a judge* or jury. If

[7] for the interest of justice as per articles 142(2) second alinea of the Criminal Procedure Code of the Empire, 136(2) second alinea of the same code and 143(1) cum article 149(1) of the Criminal Procedure Code of the Empire respectively.

[8] James Bradley Thayer. (1898). A Preliminary Treatise On Evidence at the Common Law 485. As cited in Gary Edmond, Simon Cole and et al. (2013). Admissibility Compared: The Reception of Incriminating Expert Evidence (i.e., Forensic Science) in Four Adversarial Jurisdictions. University of Denver Criminal Law Review, Vol. 3, pp 31-109

[9] This is all about competence where it incorporates both the relevance of the qualification and the capability of the expert to provide the expert testimony. For example, the expert should have the sound mental capacity, as in any other witness, the expert should not be prohibited by law or the expert's public rights should not be taken away by punishment.

[10] Gary Edmond, Simon Cole and *et a*l. (2013). 'Admissibility Compared: The Reception of Incriminating Expert Evidence (i.e., Forensic Science) in Four Adversarial Jurisdictions.' *University of Denver Criminal Law Review*, Vol. 3, pp 31-109.

[11] Ibid.

on the proven facts a judge or jury can form their own conclusions *without help*, then the opinion of an *expert is unnecessary*.[12] (Italics added)

This principle emphasizes that courts should not demand expert evidence if the disputed fact can be addressed by the common knowledge of judges. However, different standards of tests have been utilized for the admission of expert evidence in two different very well-known landmark American cases: *Frye v. United States* (1923) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993). In *Frye*, courts were required to admit scientific evidence only as long as it was generally accepted by the scientific community.

Accordingly, experts were expected to explain why and how their work met the test of general acceptance. But the problem comes when the expert opinion deviates from the concept of scientific community irrespective of the merit of the expert's finding. Hence, experts should be bound only to the existing body of knowledge because introducing a new concept or theory demands the acceptance of the larger scientific community for possible acceptance by the judiciary. Thus, under *Frye*, emerging sound science that might have been of greater assistance to a jury was excluded.[13] This approach puts limits on accepting new developments in science.

Contrary to *Frye*, in the case of *Daubert*, judges were given a certain degree of flexibility in their determination to admit or reject expert testimony. A judge, in the *Daubert* case, is expected to inquire in some detail as to substance of those methodologies. A judge can exclude expert opinions as long as she or he does not "abuse discretion".[14] The focus in *Daubert* case is not the conclusion of the expert but the principles and methodologies of the expert to arrive at the conclusion and the conclusion and other aspects are left to the discretion of the court.

The *Daubert* test has also been criticized for requiring the judiciary to evaluate the merits of scientific theories or practices, a task for which it is not properly qualified—and the reason why expert testimony is required in the first place! This in turn may produce false conviction as it enables judges to evaluate issues for which the court is not properly qualified. Shortly after *Daubert*, the US Supreme Court decided two other cases; *General Electric v. Joiner* (1997) and *Carmichael v. Kumho Tire Company* (1998) which shaped the way courts

[12] *R. v. Turner*, [1974] QB 834 (England.), as cited in Gary Edmond, Simon Cole and *et al*. (2013). 'Admissibility Compared: The Reception of Incriminating Expert Evidence (i.e., Forensic Science) in Four Adversarial Jurisdictions'. *University of Denver Criminal Law Review*, Vol. 3, pp. 31-109.

[13] Jack v. Matson. (2013). *Effective Expert Witnessing: Practicing for 21st Century*. 5th edition. Taylor & Francis Group, LLC, pp. 23-25.

[14] Id., pp. 14-16.

evaluate expert evidence and expand the scope of *Daubert to* all experts, rather than only experts on scientific matters.

There is a growing tendency that in the majority of criminal cases, judges trust expert witnesses and tend to apply expert testimony without any further scrutiny. William O'Brian commented that "virtually all of the areas of 'forensic science', with the exception of DNA evidence, have quite dubious scientific pedigrees".[15] Likewise, Judge Andrew Gilbart QC, stated that he is often struck by "how poor some suggested scientific evidence is in criminal trials", adding that he is also frequently struck by "how ill equipped advocates are to challenge it when they have no experts of their own to advise them".[16]

4. Standards for Admitting Expert Evidence in Ethiopia

Relevancy is a prerequisite for the admission of evidence by courts; however, certain relevant evidences may not be admissible for reasons of exclusion[17] due to public policy and liberty of individuals. Moreover, the expert should be competent.[18] This requirement of competence of expert witnesses is equally applicable to evidence that is obtained through coercion in violation of Article 19(6) second *alinea* of the FDRE Constitution.

Another issue in the standard of admitting expert evidence emanates from the unique nature of expert evidence despite the fact that there is no clear stipulation of these criteria under the law other than the experience of courts. The *first* requirement for the admissibility of expert evidence is that the expert should provide evidence which cannot be discovered by common sense/knowledge. The *second* requirement is that the expert's finding must be supported by the scientific community.[19] As discussed earlier, the result of the expert witness must be processed by modern scientific theories, research methods, and technologies. But consideration must be given to the changing aspects of scientific researches and methods across time. Therefore, there can be differences among professionals but as long as expert finding does not

[15] Ibid.

[16] The Law Commission, Crown (2011). Expert Evidence in Criminal Proceedings in England and Wales. Law COM No. 325.

[17] Article 19(6) of the FDRE Constitution.

[18] Competence is not all about knowledge and training of the expert but also about the experts mental or any other kind of capacity, there should not be prohibition as a consequence of criminal violation as in article 123(a) cum article 448 of the FDRE Criminal Code and article 196 of the Civil Code of Ethiopia.

[19] Fred C. Inbau (1935), *Scientific Evidence in Criminal Cases. Law and Contemporary Problems*, Vol.2 , p. 501 as cited in ዓለማዮሁ ኃይሌ(1978). የኤክስፐርት ማስረጃ በኢትዮጵያ ሕግ-በማነፃፀር የቀረበ. የኅብረተሰባዊት ኢትዮጵያ ጊዜያዊ ወታደራዊ መንግስት ፍ/ቤት፣ ሕግና ፍርድ መፅሄት ፍ/ቤት፣ቅፅ 3 ቁጥር 1 ከገፅ 56-74

contravene the central pillars of accepted theories and does not deviate sharply from the normal understanding, the finding of an expert will be considered.

The weight of evidence attached to expert evidence in particular and evidence in general, in Ethiopia, is not adequately regulated. The weight of evidence attached to expert evidence is only cited in the investigation of mental status[20], age and sentencing and other measures that courts take in relation to a convicted person as indicated under legal provisions such as articles 51, 54 and 116(3) of the FDRE Criminal Code. In cases of determining criminal irresponsibility and of deciding on measures applicable to young criminals, expert evidence will be mandatory for judges to admit where the outcome of the investigation is scientifically definite. However, personal appreciation stated by the expert and the results obtained that are not scientifically definite may be accepted or rejected based on the discretion of judges as clearly stipulated under article 51(3) cum 54(3) of the FDRE Criminal Code. In reaching its decision, the Court *shall be bound solely by definite scientific findings*[21] and *not by the appreciation of the expert* as to the legal inferences to be drawn. (Emphasis added)

Courts in Ethiopia remain unsure about the weight and other aspects of expert evidence because the laws are not adequately comprehensive. In effect, courts have resorted to the experience of other countries to decide the admission of expert evidence. The Supreme Court in relation to this issue provides in the case of (አባተ ፊለቀና ዓቃቤ ሕግ, የወ/ይ/ መ/ቁ- 13/70) the following:

> ምንም እንኳን በአገራችን በተሟላ ሁኔታ ራሱን ችሎ የወጣ የማስረጃ ሕግ ባይኖርም አንድ ልዩ ዓዋቂ ወይም ኤክስፐርት ስለአንድ ጉዳይ በምስክርነት ወይም በልዩ ዓዋቂነቱ ነው ወይም አይደለም በማለት የሚሰጠው ምስክርነትም ቢሆን ፍ/ቤት ያለ አንዳች ጥያቄ ሊከተለው የሚገባ ነው የሚባል አይደለም፡፡ የኤክስፐርት ማስረጃም እንደማንኛውም ማስረጃ ሁሉ ይመዘናል፤ ለነቀፌታ ይቀርባል፤ ይቀበሉታል፤ ይጥሉትማል፡፡[22]

The weight of expert evidence depends on the discretion of courts. Courts may use expert evidence either as corroborative or conclusive. It should be noted that courts are not at liberty to arbitrarily reject or accept expert evidence, but they should rather respect the laws as per article 149(1) of the Criminal Procedure Code which requires them to attach reason for their decision. However, courts tend to be hasty in automatically admitting expert evidence. This may, for example, infringe the Constitutional right of the accused to defend

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[20] Article 48 cum 49 of the FDRE Criminal Code.

[21] However, it is difficult to judges to evaluate scientific definite findings which demands knowledge other than the legal knowledge as in *Daubert* case. The degree of difficulty of expert evidence is clearly shown in the case of *ዓቃቤ ሕግ እና ተከሳሽ ሼህ እንቶኔ የወንጀል መዝገብ ቁጥር 16/1977* as cited in ብ. ጄ. ታጠቅ ታደሰ (1996). የኢትዮጵያ የማስረጃ ሕግ መሠረተ ሓሳቦች. አዲስ አበባ ዩኒቨርሲቲ፣ አዲስ አበባ፣ ኢትዮጵያ፣ ገጽ 224-229.

[22] ዓለማየሁ ኃይሌ(1978). የኤክስፐርት ማስረጃ በኢትዮጵያ ሕግ- በማነፃፀር የቀረበ. የኅብረተሰባዊት ኢትዮጵያ ጊዜያዊ ወታደራዊ መንግሥት ፍ/ቤት፣ ሕግና ፍርድ መፅሔት፣ቅፅ 3 ቁ. 1፣ ገፅ 56-74.

and confront any opposing evidence.[23] On the contrary, courts sometimes restrict the submission of evidence by parties to defend their cases merely because the court has ordered expert evidence.[24] The Federal Supreme Court of Ethiopia, in its Cassation No. 92141[25] and 62041[26] has provided that expert evidence should not be automatically accepted but (like other evidence) it should be evaluated and assessed by courts using different criteria.

5. Safeguards against Expert Evidence

Ethiopian courts use various mechanisms to assess the credibility and validity of expert evidence which include cross-examining the expert, re-evaluating the expert evidence by another expert, seeking expert evidence to be verified by a board decision, and demanding help from professional associations to which the expert is member. Cross-examination, for example, can evaluate the credibility and validity of expert testimony but this only applies to experts who provide oral testimony before a court. However, most Ethiopian courts receive expert evidence in the form of report where cross-examination is impossible. Yet, the law clearly indicates that expert witness will provide his/her testimony after taking oath as per article 136(2) second *alinea* cum 142(2) second *alinea* of the Criminal Procedure Code.

Reevaluation by another expert is also a mechanism that is used by courts to examine expert evidence which is doubtful. According to article 143(1) of the Ethiopian Criminal Procedure Code, courts can call any witness including expert witness in the interest of justice. However, subjecting expert evidence to another expert for ascertaining its validity and reliability should be taken very cautiously not to defeat the Constitutional right to speedy trial under article 20(1) first *alinea* of the FDRE Constitution.

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[23] Article 20(4) of the FDRE Constitution.

[24] የኢፌዴሪ የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በሰበር መዝገብ ቁጥር 90121 መስከረም 28/2007 ዓ/ም በቅፅ 17 በሰጠው ውሳኔ የታችኛው ፍ/ቤት ስህተት መፈፀሙን የሚያሳይ ነው። ይህም የDNA ምርመራ እንዲደረግ ትዕዛዝ መሰጠቱ አንደኛው ወገን አሉኝ የሚላቸውን የመከላከያ ማስረጃዎች የማሰማት መብት የማይከለክል [መሆኑን ያሳያል]።

[25] አንድ የትራፊክ ባለሙያ የሚሰጠው ሙያዊ አስተያየት የማስረጃ ዋጋ የማይሰጠው አስተያየቱ ተገቢውን የሙያ ደንብ ተከትሎ ያልተሰጠና ያልቀረበ፣ በጊዜውና በቦታው ከነበሩት የዐይን ምስክሮች ቃል ጋር ተነፃፅሮ ሲታይ በመሠረታዊ ነጥቦች ላይ ልዩነት ያለበት መሆኑ ሲረጋገጥ እንጂ በጭፍጫፊ ነጥቦች ላይ ልዩነት ተከስቷል ተብሎ ሊሆን እንደማይገባ፣ የልዩ አዋቂዎች ምስክሮች ቃላቸውን ገለልተኛ ሆነው መስጠት እንደአስባቸውና ቃላቸው ያለ በቂ ምክንያት ልዩ አዋቂ ያልሆኑ ሰዎች በሚሰጡት የምስክሮች ቃል ውድቅ መሆን የሌለበት መሆኑን ተቀባይነት ያላቸው የማስረጃ ሕግ ደንቦች የሚያስገነዝቡ ስለመሆኑ የወ/መ/ሥ/ሥ/ሕ/ቁ 141፣142፣194 የወንጀል ሕግ ቁጥር 24፣59፣239(2)፣57፣543(2) (የደ/ብ/ብ/ህ/ክልል ዓቃቤ ሕግ እና አቶ ዓለማየሁ አስፋው የሰበር መዝገብ ቁጥር 92141፣መስከረም 30 ቀን 2007ዓ.ም)

[26] አባትነት በፍርድ ሊነገር የሚችልባቸው ሁኔታዎች ላይ ሳይንሳዊ የደም ምርመራ (DNA test) በማስተባበያ ማስረጃነት ሊቀርብ የሚችል ስለመሆኑና ፍ/ቤቶች ተከራካሪ ወገኖች በዚህ ረገድ የሚያቀርቧቸውን አቤቱታዎች በአግባቡ ሊያስተናግዱ የሚገባ ስለመሆኑ (የተሻሻለው የቤተሰብ ሕግ አዋጅ 213/1992 አንቀፅ 144፣ 143(ሠ) እና 145

As mentioned above, failure to testify truthfully and refusal to aid justice can entail criminal sanction. This is in addition to civil liabilities[27] and administrative liabilities which can be imposed upon a professional who has failed to discharge his/her duty, in compliance with the moral standard of the profession.

Courts may also use professional associations while recruiting an appropriate expert for inquiry. This can ensure the requisite professional standards in expert services thereby serving the interest of justice. Moreover, collective investigation by using board decisions in expert evidence can reduce the risks of bias and corrupt practices, in effect, increasing reliability and validity in expert evidence.

Conclusion

Justice administration organs in general and judges in particular have developed the habit of accepting expert evidence as conclusive without further scrutiny of its relevancy, materiality and validity. In criminal cases, for example, this can violate the fundamental due process rights including fair trial, the right to defend and confront opposite witness to the suspect. This in turn affects the quality of justice aspired by the FDRE Constitution.

Another issue of concern relates to taking expert evidence as documentary evidence where the weight of evidence hugely varies. Very few judges and public prosecutors consider expert evidence solely as oral evidence which can be subjected to oral examination to effectively evaluate the testimonies of expert witnesses.

Furthermore, there is a clear inconsistency between the existing laws of expert evidence and the practice in verifying, weighing and admitting expert evidence. Therefore, courts should be cautious, and it is only oral evidence that can be considered as expert evidence. Equally important is the need for rules on expert evidence which is long over due. ■

[27] Article 2031, 2130 cum article 2028 of the Civil Code of the Empire

CASE COMMENT

Comment on the
Cassation Division's Decision in File No. 80119

(February 18, 2013)

DOI http://dx.doi.org/10.4314/mlr.v11i1.10

Gebreyesus Abegaz Yimer ♣

Case Comment on Usury: Summary

The Cassation Bench of the Federal Supreme Court decided that a contract of loan with 10 per cent interest rate per month establishes a crime of usury as provided under Article 712 of the Criminal Code. The court reasoned out that 10% interest rate per month violates the official interest rate and therefore the creditor has committed the crime of usury. The court does not expressly mention which official rate it is referring to –in its decisions. Nevertheless, considering that there is no any other official interest rate that is provided by the law in Ethiopia, it can be easily inferred that the court was tacitly referring to the interest rate provided in the Civil Code. The question is therefore whether the interest rate provided under Article 2479 of the Civil Code overrides Proclamation No. 591/2008 (based on which the National Bank of Ethiopia issues directives on interest rates). Article 5(4) of the Proclamation has empowered the National Bank of Ethiopia to determine official interest rates and it is clear from the provisions of the Proclamation that this mandate includes the power to determine interest rates that are applicable in private loan agreements. Directive NBE/INT/11/2010/ has given financial institutions the authority to determine interest rates freely; whereas, it remains silent about the applicable maximum interest rate for private loans. I argue that Proclamation No. 591/ 2008 has repealed Article 2479 of the Civil Code and the silence of the directive with regard to private loans does not imply the revivication of Article 2479 of the Civil Code. Furthermore, the court has overseen the elements of Article 712 of the Criminal Code that establish the crime of usury. For a crime of usury to be established under the provision, the exorbitant interest rate should be the result of debtor's dependence on the creditor, material difficulty, inexperience, or weak character that is unfairly manipulated by the creditor.

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በሰበር መዝገብ ቁጥር 80119፣ በየካቲት 11/2005
የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በሰጠው ውሳኔ ላይ የቀረበ አስተያየት

DOI http://dx.doi.org/10.4314/mlr.v11i1.10

ገብረየሱስ ይመር ♣

መግቢያ- የውሳኔው ፍሬ ነገር

የአማራ ብሔራዊ ክልል መንግሥት ዐቃቤ ሕግ በተከሳሽ ላይ የመሠረተው የአራጣ የወንጀል ክስ ተከሳሽ በወር 10% ወለድ የሚታሰብበት ብድር በመስጠት ተበዳይ ያላቸውን ንብረት እና ቤት አስሸጠዋል የሚል ነው፡፡ ለዚህ ማስረጃ እንዲሆን ተከሳሽ በልጃቸው ስም ቼክ መቀበላቸው እንዲሁም ተበዳይን በፍርድ ቤት ከስሰው ቤታቸውን ማሸጣቸው በማስረጃነት ቀርቧል::

የሰበር ፍርድ ቤት ጉዳዩን በመመርመር የመረጃ ጉዳይን ለመመልከት ሥልጣን እንደሌለው በመግለፅ በተያዘው የሕግ ጉዳይ ላይ ውሳኔ ሰጥቷል:: በዚሁ መሠረትም ፍ/ቤቱ ተከሳሽ በወር 10% ወለድ እየተቀበሉ ማበደራቸው የተረጋገጠ ነው፣ ይህም በሕግ ከተደነገገው ወለድ መጠን በላይ ስለሆነ እንዲሁም በጠቅላላ ካበደሩት ገንዘብ ከእጥፍ በላይ ከተበዳይ የተቀበሉ መሆናቸው በበታች ፍርድ ቤት የተረጋገጠ በመሆኑ የአራጣ ወንጀል ፈፅመዋል የሚል ውሳኔ ሰጥቷል:: በዚህ አጭር ጽሁፍ በዋናነት ትኩረት የተደረገባቸው ሁለት ነጥቦች፣ አንደኛ በኢትዮጵያ ሕጋዊ የወለድ መጠን አለ ወይ? ሁለተኛ፣ ከፍተኛ የወለድ መጠን መጠየቅ ሌሎች ሁኔታዎች ሳያስፈልጉት ብቻውን የአራጣ ወንጀል የተፈፀመ መሆኑን ያመለክታልን? የሚሉ ናቸው:-

1. በኢትዮጵያ ሕጋዊ የብድር ወለድ መጠን መኖር አለመኖሩን በሚመለከት የቀረበ ምልከታ

በፍትሐብሔር ሕግ ቁጥር 2479 ከፍተኛው የወለድ መጠን 12% መሆኑ ተደንግጓል፡፡ እዚህ ላይ በፍ/ሕ የተደነገገው የወለድ መጠን በአዋጅ ቁጥር 591/2008 አንቀፅ 5 ንዑስ አንቀፅ 4 እና በመመሪያ ቁጥር NBE/INT/11/2010/ የተሻረ መሆን አለመሆኑን፣ እንዲሁም በወንጀል ሕግ በቁጥር 712 የአራጣ ወንጀልን በሚመለከት ለተጠቀሰው "official rate" አግባብነት ያለው መሆን አለመሆኑን መመልከት ተገቢ ነው:: የወለድን መጠን አወሳሰን እንዲሁም በዚህ ረገድ በኢትዮጵያ ሕጎች የተደነገገውን ከዚህ በታች እንመለከታለን::

ወደተያዘው ጉዳይ ከመግባታችን በፊት በወለድ ዙሪያ አጭር መንደርደሪያ እንደሚከተለው ቀርቧል:: ብድር ወይም መበዳደር የሰው ልጅ ከመሠረታቸው ጥንታዊ እሴቶች ወይም ግንኙነቶች አንዱ ሲሆን፣ ከብድር የሚገኝን ወለድ በተመለከተ ከጥንት ጀምሮ የተለያየ አስተሳሰብ እና ሕግጋት በተለያዩ ሥልጣኔዎች ተንፀባርቀዋል:: ለምሳሌ በጥንታዊ ግብጻዊያን ወለድ '*ms*' በመባል ይታወቅ ነበር፤ ይህም 'መውለድ' *(to give birth)* የሚል ትርጉም ካለው ቃል የተወሰደ ነው::[1] በጥንታዊ የሃሙራቢ ሕግም የወለድን መጠን የተመለከቱ

♣ ገብረየሱስ አበጋዝ ይመር፡- ኤል ኤል ቢ (ሐረማያ ዩኒቨርሲቲ)፣ ኤል ኤል ኤም (ሮተርዳም ዩኒቨርሲቲ)፤ በመቀለ ዩኒቨርሲቲ የሕግ ት/ቤት ረዳት ፕሮፌሰር፡፡ Email: gebreyimer@yahoo.com
በዚህ ጽሁፍ ዝግጅት ሂደት ከፕሮፌሰር ዊም ዴክክ፣ ከዶ/ር ኤልያስ ኑር እና ከምህረተአብ ገብረመስቀል ላገኘሁት ትብብር አመሰግናለሁ፡፡

[1] Sidney Homer, Richard Sylla (2005), *A History of Interest Rates*, Fourth Edition, John Wiley and Sons. Inc, p. 3.

ድንጋጊዎች የተካተቱ ሲሆን በዚህ ሕግ መሠረት በጥራጥሬ ብድር 33^{1}/2% ወለድ፣ በነሐስ ብድር ደግሞ 20% ወለድ እንዲከፈል ተደንግጎ ነበር:: የብድር ውል በጽሁፍ መሆን እንዳለበት እነዲሁም በሕግ ከተደነገገው የወለድ መጠን በላይ አበዳሪው ከሰበሰበ ዋናውን ብድር ጨምሮ እንዳይከፈል የሃሙራቢ ሕግ ይደነግጋል::[2] በአንዳሩ፣ ግሪካዊያን "*the Laws of Solon*" ተብሎ በሚታወቀው ሕጋቸው የወለድ መጠን ካለምንም ገደብ በተዋዋዮች እንዲወሰን ክፍት ተደርጎ የነበረ ከመሆኑም ባሻገር፣ ሰው ላልከፈለው ዕዳ በባርነት እንዳይያዝ አድርገዋል::[3] ሮማዊያንም እንዲሁ "*Twelve Tables*" ተብሎ በሚታወቀው ሕግ የወለድ መጠን 8^{1}/3% እንዲሆን ደንግገው፣ ከተፈቀደው የወለድ መጠን በላይ የሰበሰበ አበዳሪ ከሰበሰበው በላይ አራት እጥፍ እንዲከፍል ተደንግጓል::[4]

በመካከለኛው ዘመን በወለድ ዙሪያ ጥልቀት ያለው ክርክር ተካሂዷል፡፡ በዚህ ዘመን ኃይማኖትን መሠረት በማድረግ ወለድ መቀበል ሙሉ በሙሉ የተኮነነ ስለነበር አራጣ (usury) እንደ ኃጢያት ተደንግጎ ነበር:: ሆኖም በአራጣ ዙሪያ የሚደረገው ክርክር ለዘመናት ቀጥሏል፤ በተለይ በሰሜን አውሮፓ በተካሄደው ሪፎርሜሽን፣ ወለድ መቀበልን ከሚከለክለው ሕግ ይልቅ የሚፈቀድበት ሁኔታ እየበረከተ ሄዶ፣ ክርክሩ በኃይማኖት መሪዎች ሳይወሰን ወደ ፖለቲከኞች እና የኢኮኖሚ ምሁራን ተሸጋገረ:: በዚህም መሠረት በወለድ ላይ የሚደረግ ገደብ በዋናነት አገሮች በሚከተሉት የገንዘብ እና የኢኮኖሚ ፖሊሲ ላይ የተመሠረተ እየሆነ መጥቷል::[5] ከፍተኛ የወለድ መጠን የመኖሩን ያህል፣ በተቀራኒው ለምሳሌ በኒውዮርክ እጅግ በጣም ዝቅተኛ (0.01%፤ ነጥብ ዜሮ አንድ በመቶ) የወለድ መጠን ተመዝግቧል፡፡ ይህም የሚያሳየው ወለድ በተለያዩ የኢኮኖሚ ኩነቶች ላይ የተንጠለጠለ መሆኑን ነው::[6]

የወለድ መጠን በዋናነት የሚከተሉትን አራት መሠረታዊ ሁኔታዎችን ከግምት በማስገባት የሚወሰን ነው፡-[7]

ሀ) **የገንዘቡ አማራጭ ጥቅም** (*opportunity cost*):- የገንዘቡ አማራጭ ጥቅም ማለት ገንዘቡ ለሌላ አገልግሎት ቢውል የሚገኘው ጥቅም ማለት ነው::[8] አንድ ሰው ገንዘቡን ለሌላ ሰው የሚያበድረው በገንዘቡ ሊያከናውናቸው የሚችላቸውን ሌሎች ንግድ ወይም ጥቅሞች በመተው ነው:: ለምሳሌ አንድ ሰው በገንዘቡ ቤት ወይም መኪና መግዛት ይችላል:: ስለዚህ ቤት ገዝቶ በማከራየት ወይንም በቤቱ በመኖር የሚያገኘውን ጥቅም በመተው ስለሚያበድር ይህ የተተወ አማራጭ ጥቅም ከብድር ከሚገኘው ጥቅም (ወለድ) ውስጥ ይንፀባረቃል::

ለ) **ገንዘቡ ባይከፈል (በሙሉ ወይ በከፊል) ለሚደርስ ኪሣራ መድን የሚሆን ክፍያ** (*premium for risk*):- የወለድ መጠን ለመወሰን ከግምት ከሚገቡት ነጥቦች መካከል አንዱ በብድር የተሰጠው ገንዘብ ባይመለስ ለሚደርሰው ኪሣራ ማቻቻያ የማግኘት ጉዳይ ነው:: ብድር በባህሪው ለሌላ ሰው በውል አስገዳጅ በሆነ ቃል መሠረት ወደፊት

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[2] Ibid.
[3] Ibid.
[4] Ibid; *see* also: Armedariz, Beartiz and Morduch Jonathan, *The Economics of Microfinance*, MIT press, Cambridge USA, (2010), page 34.
[5] Id., p. 5.
[6] Ibid.
[7] Anthony Bottomley, (1975), I*nterest Rate Determination in Underdeveloped Rural Areas*, American Journal of Agricultural Economics Vol. 57, No. 2, page, 279-291.
[8] George Holmes (1982), *Usury in Law, in Practice and in Psychology*: Political Science Quarterly, Vol. 7, No. 3 (Sep., 1892), page 431-467.

ይከፍላል በሚል ተስፋ የሚሰጥ ገንዘብ፣ ንብረት ወይንም አገልግሎት ነው::[9] ስለዚህ አበዳሪው በተገባው ቃል መሠረት ብድሩ ስለመከፈሉ እርግጠኛ መሆን አይችልም:: ተበዳሪው ሆን ብሎ መክፈል ባለመፈለግ ወይም ከአቅሙ በላይ በሆነ ምክንያት በገባው ቃል (ውል) መሠረት ዕዳውን ላይከፍል ይችላል:: ስለዚህ ተበዳሪው ዕዳውን በሙሉ ወይንም በከፊል ሳይከፍል ቢቀር ለሚደርሰው ኪሣራ ማቻቻያ የሚሆን ክፍያ በወለዱ ውስጥ ይንፀባረቃል ማለት ነው:: በተለይ አበዳሪው ባንክ ወይም ተመሳሳይ ተቋም ሲሆን ብድር ለብዙ ሰው ስለሚሰጥ ከተበዳሪዎቹ የተወሰኑት ሰዎች በሙሉ ወይም በከፊል የተበደሩትን ብድር አይመልሱ ይሆናል የሚል እሳቤ ከግምት ውስጥ ይገባል። ከዚህ ግምት አኳያ የሚታሰበው የማካካሻ ዋጋ አበዳሪው በሚጠይቀው የወለድ መጠን ላይ ይካተታል::

ሐ) **የብድር ወጭ**፡- ብድሩን ለማከናወን የሚያስፈልጉ ወጭዎችን ለመሸፈን እና ብድሩን ለማስመለስ የሚያስፈልጉ ወጭዎች በወለድ መጠን አወሳሰን ወቅት ከግምት ውስጥ ይገባሉ:: ብድሩን ለመስጠት፣ ለመከታተል እንዲሁም ለማስመለስ የሚወጡ ወጭዎች አበዳሪው ከብድሩ በሚያገኘው ወለድ መሸፈን ይኖርባቸዋል:: ለምሳሌ ስለ ተበዳሪው ባህርይ፣ የገቢ ሁኔታ፣ ሀብት (assets)፣ ስለሌሎች ዕዳዎቹና ስለመሳሰሉት መረጃዎችን ለመሰብሰብ እንዲሁም መረጃን ለመጠቀም የሚወጣ ወጭ ተበዳሪው በሚከፍለው የወለድ ተመን ከግምት ውስጥ ይገባል፣ ወይም ደግሞ የተበደረው ወገን ላበዳሪው በሌላ መልኩ የሚከፍልበት ሁኔታ ይኖራል ማለት ነው::

መ) **የገበያ ግሽበት**:- የብድር ዋና ጥቅም ተበዳሪው የወደፊት ገቢውን አሁን እንዲጠቀምበት ማስቻሉ ነው:: ሆኖም፣ የገንዘብ የመግዛት አቅም በጊዜ ሂደት ሊለያይ ስለሚችል የሚጠየቀው የወለድ መጠን ይህንኑ የገንዘብ የመግዛት አቅም መዳከም ከግምት ያስገባል። ስለዚህ የገበያ ግሽበት ከፍተኛ ከሆነ የወለድ መጠኑም ከፍ እንዲል ይጠበቅበታል ማለት ነው:: ለምሳሌ የገበያ ግሽበት 10% ከሆነ የተለየ ምክንያት ከሌለ በስተቀር የሚጠየቀው ወለድ ከዚህ በላይ መሆን ይጠበቅበታል::

ወደ ኢትዮጵያ የወለድ ተመን ስንመለስ፣ በኢትዮጵያ ፍትሐብሔር ሕግ የተደነገገው የ12% ወለድ አሁን ካለው የአገሪቱ ሁኔታ አንፃር ሊተገበር የማይችል መሆኑን በመገንዘብ፣ በአዋጅ ቁጥር 591/2008 አንቀፅ 5 ንዑስ አንቀፅ 4 መሠረት የወለድን መጠን የመወሰን መብት ለኢትዮጵያ ብሔራዊ ባንክ ተሰጥቷል። በዚሁ ሥልጣን መሠረት የኢትዮጵያ ብሔራዊ ባንክ በመመሪያ ቁጥር NBE/INT/11/2010 የፋይናንስ ተቋማት የወለድ መጠን ገበያን መሠረት አድርገው እንዲወስኑ ለማስቻል፣ ተመኑን ካለምንም ገደብ ክፍት አድርጎ ትቶታል። በአንፃሩ ግን፣ የተቀማጭ ገንዘብ (saving account) የወለድ መጠን ከ5% ያነሰ እነዳይሆን መመሪያው ደንግጓል:: ይህም ማለት የፋይናንስ ተቋማት ያዋጣናል ባሉት የወለድ መጠን ማበደር የሚችሉ ከመሆኑ ባሻገር፣ ለተቀማጭ ገንዘብ ከ5% በላይ ያዋጣናል ባሉት መጠን መክፈል ይችላሉ:: ከዚህ በተጨማሪ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በሰ/መ/ቁ 62167 በ *መትክል ልምዓት ሁለገብ ማኅበር እና ቄስ ካሳየ ኪሮስ* መካከል በነበረ ክርክር በሰጠው ውሳኔ በፍትሐ ብሔር ሕጉ የተደነገገው የወለድ መጠን በቁጠባ ማኅበራት ላይ ተፈፃሚነት እንደሌለው ውሳኔ ሰጥቷል::

ብሔራዊ ባንክ የወለድ ተመንን በተመለከተ የተሰጠው ሥልጣን የገንዘብ ተቋማትን በተመለከተ የተወሰነ ሳይሆን በማንኛውም ግብይት ወለድን በተመለከተ ተመን የመወሰን ሥልጣን የተሰጠው መሆኑን መረዳት ያስፈልጋል:: "የገንዘብና ብድር አቅርቦት በተፈለገው መጠን መገኘቱን እንዲሁም የወለድ ተመንን እና ሌሎች ክፍያዎችን የመወሰን እና

[9] Glock Stephane (2005) , *The Property Law Project; France*, European University Institute (EUI) Florence/ European Private Law Forum Deutsches Notarinstitut (DNotI) Wurzburg, p. 14.

የመቆጣጠር" የሚለው አገላለፅ ባንኩ የተሰጠው ሥልጣን ሰፊ መሆኑን ለመገንዘብ ያስችላል:: ስለዚህ ለብሔራዊ ባንክ የወለድ ተመን የመወሰን ሥልጣን የሰጠው አዋጅ በፍትሐ ብሔር ሕጉ የተደነገገውን የወለድ መጠን የሻረው መሆኑን መገንዘብ ይቻላል:: ባንኩ የተሰጠውን ሥልጣን በተግባር አለመጠቀሙ በፍትሐ ብሔር ሕጉ የተደነገገው የወለድ መጠን ያልተሻረ መሆኑን አያረጋግጥም::

በፍትሐ ብሔር ሕግ የተደነገገው የወለድ መጠን በዋናነት በብድር ሥራ ላይ ለተሰማሩት ተቋማት ተግባራዊ የማይሆን ከሆነ፣ በየትኛውም ምክንያታዊ አስተሳሰብ በኢመደበኛ (informal) ተቋማት ወይም በግለሰብ ደረጃ ለሚሰጥ ብድር ተግባራዊ መሆን አለበት ብሎ መከራከር አይቻልም:: መጀመሪያ ግለሰቦች እና የገንዘብ ተቋማቱን ከግምት አስገብተን ስንመለከት ባንኮች ካላቸው መያዣ የመያዝ ሁኔታ አንፃር እንዲሁም ካላቸው ከፍተኛ አቅም አኳያ ሲታይ በግለሰብ ደረጃ የሚሰጥ ብድር ለትብብር የተደረገ ካልሆነ በስተቀር ግለሰቡ የሚጠይቀው ወለድ ከባንክ ወለድ በታች ሊሆን አይችልም:: ከሌሎች አገሮች ልምድም አንፃር ሲታይ ከባንክ ብድር ማግኘት ለማይችሉ ትናንሽ ነጋዴዎች ሲባል ኢመደበኛ (informal) አበዳሪዎች ለባንኮች ከተፈቀደው የወለድ መጠን በላይ ወለድ በማስከፈል ማበደር የሚችሉበት ሁኔታ በሕግ ተደንግጎ ይገኛል::[10] በዚህ ጉዳይ ምርምር ያካሄዱ ምሁራን የኢ-መደበኛ ብድር ወለድ ከፍተኛ ሆኖ መገኘቱን የሚመሰክሩ ሲሆን፣ ለምን የወለድ መጠን ከፍተኛ ሆነ ለሚለው ጥያቄ ግን የተለያየ መልስ ይሰጣሉ::[11]

በኢ-መደበኛ ብድር ውስጥ ወለድ ለምን ከፍተኛ ሆነ ለሚለው ጥያቄ ከሚሰጡ ግምቶች ውስጥ ከፍተኛ ያለመክፈል አደጋ፣ ሆን ብሎ ተበዳሪን የማክሰር ፍላጎት፣ በመደበኛ የብድር ተቋማት ያለው የተንዛዛ አሠራር፣ ወዘተ .. እንደ አንኳር ነጥቦች ይነሳሉ::[12] ያለመክፈል አደጋ (risk of default) የተመሠረተው በተሰጠው የብድር መጠን፣ በተበዳሪው ገቢ፣ በተበዳሪው ጠቅላላ ንብረት፣ ተበዳሪው ባለበት ሴላ ዕዳ መጠን፣ በመያዣ ዓይነት፣ በቀልጣፋና ውጤታማ ውል የማስፈጸም ሥርዓት መኖር አለመኖር፣ እንዲሁም በተበዳሪው አጠቃላይ ስብዕና ላይ ነው::[13] ከዚህ አንፃር ሲታይ ኢመደበኛ ብድር ከሚወስዱ ብዙ ሰዎች አብዛኞቹ ከመደበኛ ተቋማት ብድር ማግኘት የማይችሉ ናቸው:: ምክንያቱም፣ በነዚህ መደበኛ ተቋማት መመዘኛ ከፍተኛ ያለመክፈል አደጋ አለባቸው ተብለው የሚገመቱ ናቸው::[14]

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[10] Usury Act 73 of 1968 of South Africa provides as follows " (1)(a) No moneylender shall in connection with any money lending transaction stipulate for, demand or receive finance charges at an annual finance charge rate greater than the percentage determined by the Registrar by notice in the Gazette in accordance with the directions of the Minister. (b) Different percentages may be determined under paragraph (a) for money lending transactions where the total amount of money lent by a moneylender to a borrower within any period of three months, including disbursements made by him Within the said period and recoverable as part of the principal debt, is different. The minister annually determines the interest rate to be charged for credits by formal and informal financial institutions and the prescribed interest rate is always higher for informal financial institutions.

[11] Amit Bhaduri (1977), T*he Formation of Usurious Interest rates in Backward Agriculture,* Cambridge Journal of Economics Vol. 1, No. 4 (December 1977), pp. 341-352.

[12] Sarbaji Chaudhuri and Manash Ranjan Gubta (1996), *Delayed Formal Credit, Bribing and the Informal Credit Market in Agriculture: a Theoretical Analysis*, Journal of Development Economics, vol. 51, pp. 433-449.

[13] Beartiz Armedariz and Jonathan Morduch (2010), *The Economics of Microfinance*, MIT Press, Cambridge USA, p. 34.

[14] Ibid.

ሆኖም ግን አንዳንድ ፀሐፊዎች በኢመደበኛ ተበዳሪዎች ከፍተኛ ያለመከፈል አደጋ አለ በሚለው ሓሳብ አይስማሙም:: በኢመደበኛ ተበዳሪዎች ያለው ብድር ያለመክፈል አደጋ ከፍተኛ አይደለም ብለው በሚከራከሩ ሰዎች የሚያቀርቡት መከራከሪያ በኢመደበኛ ብድር አሰጣጥ ውስጥ ከፍተኛ ሚና የሚጫወተው የግለሰቦች ግንኙነት ነው፤ እንዲሁም ዕዳ የሚከፈለው በሚፈጠረው ማኅበረሰባዊ ተፅዕኖ አልፎ አልፎም ጉልበት በመጠቀም ስለሆነ ዕዳ አለመክፈል ያልተለመደና እጅግ ዝቅተኛ አደጋ ነው የሚል ነው::[15]

መንግሥት በኢመደበኛው ዘርፍ ያለውን ከፍተኛ ወለድ ለማስቀረት ወይም ለመቆጣጠር ሁለት አማራጮችን ይጠቀማል:: የመጀመሪያው አማራጭ መንግሥት ድጎማ የሚያደርግለት ርካሽ ብድር መስጠት ሲሆን፣ ሁለተኛው አማራጭ ደግሞ ከብድር የሚገኝ ወለድን በሕግ በመደንገግ፣ በሕግ ከተደነገገው ተመን በላይ ማናቸውም ወለድ በፍርድ ቤት ዋጋ እንዳይኖረው እንዲሁም በወንጀል እንዲያስጠይቅ ማድረግ ነው:: ሆኖም፣ በዚህ ጉዳይ ጥናት ያደረጉ ተመራማሪዎች በኢመደበኛ ብድር ረገድ ያለው ችግር የሚፈታው በዚህ ዙሪያ የሚሳተፉ ሰዎችን በወንጀል ተጠያቂ በማድረግ ሳይሆን ሁኔታውን በደንብ ተረድቶ ተገቢ የሕግ ማዕቀፍ እንዲዘጋጅለት በማድረግ ነው የሚል አቋም አላቸው::[16]

ከዚህ በላይ ከተነሱት ነጥቦች አንፃር፣ የሰበር ውሳኔው በወር 10% ወለድ እንዲሁም በብድር ከተሰጠው ገንዘብ ከእጥፍ በላይ ገንዘብ በወለድ መልክ መቀበልን እንደ አራጣ መደንገጉ፣ ወለድ ለመወሰን ሥልጣን የተሰጠውን ማለትም የኢትዮጵያ ብሔራዊ ባንክን ሥልጣን ፍርድ ቤቱ አልተጋፋም ወይ የሚል ጥያቄ ያስነሳል:: በዚህ ውሳኔ "በሕግ ከተፈቀደው የወለድ መጠን በላይ" የሚለው አገላለፅ አግባብነት የለውም፡፡ ምክንያቱም፣ በፍትሐ ብሔር ሕጉ የተወሰነው 12% በወንጀለኛ ሕጉ ለአራጣ ወንጀል ለተጠቀሰው "official rate" አግባብነት እንዳለው የሚያስረዳ ምንም ዓይነት የሕግ ትንታኔ ፍርድ ቤቱ አልሰጠም፣ ወይም ደግሞ ሌላ በሕግ የተወሰነ መጠን መኖሩን አላመለከተም፡፡

2. የወለድ መጠን ለአራጣ ወንጀል መፈፀም ብቸኛ ክፍለ ነገር (element) አለመሆኑን በሚመለከት

በዚህ ውሳኔ ላይ ሊነሳ የሚችለው ሁለተኛ ትችት የወለድ መጠን ለአራጣ ወንጀል መፈፀም ብቸኛ አመላካች ነው ወይ የሚለው ጉዳይ ነው:: የወንጀል ሕግ ቁጥር 712 የአራጣ ወንጀል ተፈፀመ ለማለት የሚያስችሉትን ክፍለ ነገሮች (constitutive elements) በግልፅ ያስቀመጠ ሲሆን በዚህ አንቀፅ መሠረት አንድ ሰው አራጣ አበድሯል ለማለት የሚያስችሉ ሁኔታዎች ተገልፀዋል:: በወንጀል ሕጉ መሠረት "ማንም ሰው የተበዳይን ችግርተኝነት፣ የበታችነቱን፣ ወይም የገንዘብ ችግሩን ወይም መንፈሰ ደካማነቱን ወይም ልምድ ወይም ችሎታ የሌለው መሆኑን መሠረት በማድረግ" ብድርን እንደመሣሪያ በመጠቀም የበዘበዘው እንደሆነ በወንጀል ተጠያቂ እንደሚሆን ይደነግጋል::[17]

የአራጣ ትርጉም አንድ ሰው ከሚጠይቀው ወለድ መጠን አንፃር ብቻ የሚታይበት አስተሳሰብ ተቀባይነት ያለው አይደለም:: በብዙ የሕግ ምሁራን አስተሳሰብ፣ አራጣ ከተገልጋዮች ጥበቃ (consumer protection) እንዲሁም ኃላፊነት ከጎደለው የብድር አሠራር (ir/responsible lending) ሥነ ሓሳብ ጋር የተቆራኘ ነው፡፡ አንድ ሰው እጅግ በከፋ ችግር ውስጥ ሆኖ ባለበት

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[15] Bhaduri, *supra* note 11.

[16] Simin Gao (2015), *Seeing Gray in a Black-and-White Legal World: Financial Repression, Adaptive Efficiency and shadow Baking in China*, Texas International Law Journal; Vol. 50, N0 1, (2015), page, 95.

[17] በወንጀል ሕግ ቁጥር 712 እና በቀድሞው የወንጀለኛ መቅጫ ሕግ ቁጥር 667መሠረት የተደነገገው ሙሉ በሙሉ ተመሳሳይ ነው፡፡

ጊዜ ለሚበላው፣ ለሚጠጣው፣ ለሚለብሰው፣ ለሕክምና እና ለመሳሰሉት ጉዳዮች ገንዘብ አስፈልጎት፣ ይህንኑ የሰውየውን ውጥረት በመጠቀም፣ በስግብግብነት ሰውን መበዝበዝ በወንጀልነት የሚፈርጅ ሲሆን በዚህ መሠረት የተደረገ የብድር ውል ጭምር ውጤት አይኖረውም::[18] ይሁን እንጂ የሰበር ችሎት የአራጣ ወንጀል ተግባር ተፈፅሟል በማለት የሰጠው ውሳኔ በወለድ መጠን ላይ ብቻ የተመሠረተ ነው፡፡ ይህም በወንጀለኛ መቅጫ ሕግ የተካተተውንና አበዳሪው ከሱ ባነሰ ሥነልቦናዊ፣ ማኅበረሰባዊ እንዲሁም ኢኮኖሚያዊ ሁኔታ የሚገኝን ሰው (ተበዳሪ) በሕግ ከተፈቀደው ወለድ መጠን በላይ በመጠየቅ ከበሰበዘው ድርጊቱ አራጣ እንደሚሆን የተደነገገውን ሓሳብ የሚጥስ ነው:: ከዚህ አንጻር ሲታይ፣ ፍርድ ቤቱ "10% በወር ወለድ መጠየቅ እና መቀበል የአራጣ ወንጀል ያቋቁማል" በማለት አለተጨማሪ ማብራሪያ የሰጠው ውሳኔ በሕጉ የተጠቀሰውን የአራጣ ወንጀል ዋና ባህርይ ያላመላከተ ነው::

ማጠቃለያ

የወለድ ተመን በሕግ መደንገግ በብዙ አገራት የተለመደ ሲሆን ከተደነገገው የወለድ መጠን በላይ መቀበል አንዳንድ ጊዜም በውል እንዲካተት ማድረግ በፍትሐ ብሔር ከሚኖረው የተለያዩ ቅጣቶች በተጨማሪ በወንጀል የሚያስጠይቅበት ሁኔታ ይኖራል:: በኢትዮጵያም የወንጀል ሕጉ በግልፅ በሕግ ከተፈቀደው የወለድ ተመን በላይ ማበደር የወንጀል ተጠያቂነት እንደሚያስከትል ይደነግጋል:: ይሁን እንጂ የወለድ ተመን የመወሰን ሥልጣን የተሰጠው የኢትዮጵያ ብሔራዊ ባንክ ባንኮች እና መሰል ተቋማት ገበያን መሠረት አድርገው ወለድ እንዲወስኑ ነፃነት የሰጠ ቢሆንም፣ በግለሰብ ደረጃ ወይም መደበኛ ባልሆነ የገንዘብ ቀመስ ሥራ ለተሰማሩ አገር በቀል ተቋማት ብሔራዊ ባንክ ያወጣው ሕግ የለም:: ስለዚህ ፍርድ ቤቶች አንድ ሰው በአራጣ ወንጀል ተጠርጥሮ በሚከሰስበት ጊዜ የትኛውን የወለድ ተመን መሠረት አድርገው መዳኘት አለባቸው የሚለው ነጥብ አከራካሪ ነው::

የጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በመዝገብ ቁጥር 80119፣ የካቲት 11 ቀን 2005 ዓ. ም. በሰጠው ውሳኔ ተከሳሽ በወር 10% ወለድ መቀበሉ እንዲሁም ካበደረው ከእጥፍ በላይ ገንዘብ ከተበዳሪው መቀበሉ በበታች ፍርድ ቤት የተረጋገጠ መሆኑን በመጥቀስ የአራጣ ወንጀል ፈፅሟል የሚል ውሳኔ ሰጥቷል:: ነገር ግን ፍርድ ቤቱ በሰጠው ውሳኔ የአራጣን ወንጀል የሚያቋቁሙ መሠረታዊ ጉዳዮች አልተተነተኑም:: ስለወለድ የጣሪያ መጠን ግልፅ የሆነ አረዳድ እንዲሁም የሕግ ድንጋጌ ባለመኖሩ፣ እንዲሁም ደግሞ የሰበር ፍርድ ቤት የሰጠው ውሳኔ በቂ የሕግ ማብራሪያና ትንታኔ ያልተሰጠበት ድፍን ውሳኔ በመሆኑ፣ የበታች ፍርድ ቤቶች በአራጣ ዙሪያ የሚሰጡት ውሳኔ ተገማችነት የሌለው እና ሰፊ የሕግ ስህተት የሚታይበት እየሆነ መጥቷል:: ለምሳሌ ያህል፣ በፍትሐ ብሔር ረገድ በፍርድ ቤት እውቅና ተሰጥቶት መብት ያስገኘ ውል፣ በሌላ በኩል በወንጀል ተጠያቂነትን ያስከትላል የሚል በተቃርኖ የተሞሉ ውሳኔዎች እየተበራከቱ ይገኛሉ:: ስለሆነም የጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በተመሳሳይ ጉዳይና ጭብጥ በሚሰጠው ውሳኔ ወይም አግባብነት ባለው የሕግ አወጣጥ ሥርዓት ይህ ችግር መፍትሔ ሊሰጠው ይገባል፡፡ ■

[18] For more discussion on why and how countries restrict interest rate see the Final Report on interest rate restrictions in the EU by *Institut für Finanzdienstleistungen*, available online at: http://ec.europa.eu/internal_market/finservices-retail/docs/credit/irr_report_en.pdf

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