የኢትዮጵያ ሕግ መጽሔት

JOURNAL OF ETHIOPIAN LAW

21ኛ ቮልዩም	በዓመት ቢያንስ አንድ ጊዜ የሚታተም	Vol. XXI
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በዚህ እትም፣

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አዲስ አበባ ዩኒቨርሲቲ የሕግ ፋኩልቲ

በ1956 ዓ.ም የተቋቋመው የአዲስ አበባ ዩኒቨርሲቲ የሕግ ፋኩልቲ የኤል.ኤል.ኤም እና የኤል.ኤል.ቢ ዲግሪዎችን ይሰጣል። እንዲሁም ዲፕሎማ የሚያስገኝ ፕሮግራም አለው። ለማንኛውም ጉዳይ መረዳት ቢያስፈልግዎ፣ ለሕግ ፋኩልቲ፣ አዲስ አበባ ዩኒቨርሲቲ፣ የመልዕክት ሣጥን ቁጥር 1176 ብለው ይጻፉ።

የሕግ መምህራን
1999 ዓ.ም

አንድርያስ እሸቱ	ቢኤ፣ ኤም.ኤ፣ ፒኤች ዲ፣ ፕሮፌሰርና የአ.አ.ዩ. ፕሬዚዳንት
መሀመድ ሀቢብ	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ረዳት ፕሮፌሰርና የአ.አ.ዩ.ቢዝነስና ልማት ም/ፕሬዚዳንት
ፍቅረ ማርቆስ መርሶ-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ፒ.ኤች.ዲ፣ ረዳት ፕሮፌሰርና የሕግ ፋኩልቲ ዲን
ዘካርያስ ቀንዓ	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ረዳት ፕሮፌሰር
ጥላሁን ተሾመ	ኤል.ኤል.ቢ፣ ተባባሪ ፕሮፌሰር
መክተ በቀለ	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ረዳት ፕሮፌሰር
ጌታቸው አበራ	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ተባባሪ ፕሮፌሰር
አበራ ደገፋ	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
ፀሐይ ዋዳ	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ረዳት ፕሮፌሰር
መሐሪ ረዳኢ	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ረዳት ፕሮፌሰር
ሞላ መንግሥቱ	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
ስዩም ዮሐንስ-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
አበበ አበባየሁ-	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
አማን አሰፋ -	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
ጌታቸው አሰፋ	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ረዳት ፕሮፌሰር
ማንደፍሮ እሸቴ	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ዶ/ር ዮር፣ ረዳት ፕሮፌሰር
ማርታ በለጠ	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
ሙራዱ አብዶ	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
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ወንደወሰን ደምሴ	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
ያዛቸው በለው	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
ዮናስ ቢርመታ	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር
ግርማቸው ዓለሙ	ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር (ለከፍተኛ ትምህርት በውጭ አገር)
ኤስ.ጃህዋሪ ሱዳርሳናም	ፒ.ኤች ዲ ተባባሪ ፕሮፌሰር
ኩሻል ቪብሁቴ	ፒ.ኤች.ዲ ፕሮፌሰር
በሕምፖሊ ሃይደርቫሊ	ፒ.ኤች ዲ ተባባሪ ፕሮፌሰር

የክፈል ጊዜ መምህራን

ፋሲል ናሆም ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ጂ.ኤስ.ዲ፣ ተባባሪ ፕሮፌሰር

አሰፋ ፍስሃ ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ፒ.ኤች.ዲ፣ ረዳት ፕሮፌሰር

ሰለሞን ንጉሴ ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ፒ.ኤች.ዲ፣ ረዳት ፕሮፌሰር

ፀጋዬ ረጋሳ ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ረዳት ፕሮፌሰር

ሰለሞን አባይ ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ረዳት ፕሮፌሰር

መስሰ ጳሞጤ ኤል.ኤል.ቢ፣ኤል.ኤል.ኤም፣ ረዳት ፕሮፌሰር

እምሩ ታምራት ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ረዳት ፕሮፌሰር

ኒሳን ዘሪያ ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር

አባድር መሀመድ - ኤል.ኤል.ቢ፣ ረዳት ሌክቸረር

ፍቃዱ ጴጥሮስ ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር

ታደሰ መሳኩ - ኤል.ኤል.ቢ፣ ረዳት ሌክቸረር

ላንቴራ ናደው ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር

ወልደሚካኤል ሚሴቦ ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር

ብርሃኑ ታዬ ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር

አመሃ ተስፋዬ - ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር

ምትኩ ማዳ - ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር

ኤልያስ ኑር - ኤል.ኤል.ቢ፣ ሌክቸረር

ስሜነህ ኪሮስ ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር

ወንደወሰን ሽዋረጋ ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር

ታከለ ሰቦቃ ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ረዳት ፕሮፌሰር

ዮሴፍ አይምሮ ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር

ቸርነት ወርዶፋ ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር

ፊሊጶስ አይናለም - ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር

ሰለሞን እምሩ ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር

ቲምድሮስ ምህረት ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር

አስቻለው አሻግሬ - ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም፣ ሌክቸረር

ADDIS ABABA UNIVERSITY

FACULTY OF LAW

Faculty
2006/07 Academic Year

Andreas Eshete- B.A, M.A, Ph.D; Professor and President of A.A.U
Mohammed Habib- LL.B, LL.M; Assistant Prof. and Bus. & Dev't Vice President, A.A.U
Fikre Markos Merso - LL.B, LL.M, Ph.D; Assistant Professor and Dean
Aman Assefa - LL.B, LL.M; Lecturer and Assistant Dean
Zekarias Keneaa - LLB, LL.M; Assistant Professor
Tilahun Teshome - LL.B; Associate Professor
Mekete Bekele - LL.B, LL.M Assistant Professor
Getachew Aberra LL.B, LL.M; Associate Professor
Aberra Degefa - LL.B, LL.M; Lecturer
Tsehay Wada - LL.B, LL.M; Assistant Professor
Mehari Redae - LL.B, LL.M; Assistant Professor
Molla mengistu LL.B, M.A, LL.M; Lecturer
Seyoum Yohannes LL.B, LL.M; Lecturer
Abebe Abebayehu LL.B, LL.M; Lecturer
Getachew Assefa LL.B, LL.M; Assistant Professor
Mandefro Eshete LL.B, LL.M, Dr. Iur., Assistant Professor
Martha Belete - LL.B, LL.M; Lecturer
Muradu Abdo - LL.B, LL.M; Lecturer
Tadesse Lencho LL.B, LL.M; Lecturer
Wondowssen Demissie LL.B, LL.M; Lecturer
Yazachew Belew LL.B, LL.M; Lecturer
Yonas Birmeta - LL.B, LL.M; Lecturer
Girmachew Alemu - LL.B, M.A; (on study leave)
Ben Iesman - B.A, J.D; Assistant Professor
Khushal Vibhute - Ph.D; Professor
Bohomepalli Hydervali - Ph.D; Associate Professor
S.Jahwari Sudarsanam - Ph.D; Associate Professor

Part-Time Faculty

Fassil Nahom- LL.B, LL.M, S.J.D., Associate Professor
Assefa Fisseha -LL.B, LL.M, Ph.D; Assistant Professor
Solomon Nigussie -LL.B, LL.M, Ph.D; Assistant Professor
Yohannes Hirouy LL.B, LL.M; Assistant Professor
Tsegaye Regassa - LL.B, LL.M; Assistant Professor
Solomon Abaye - LL.B, LL.M; Assistant Professor
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Emiru Tamrat LL.B, LL.M; Assistant Professor
Takele Seboka- LL.B, LL.M; Assistant Professor
Nisan Zeria LL.B, LL.M; Lecturer
Abadir Mohammed - LL.B; Assistant Lecturer
Tadesse Melaku - LL.B; Assistant Lecturer
Fekadu Petros LL.B, LL.M; Lecturer
Lantera Nadew - LL.B, LL.M; Lecturer
Woldemichael Missebo - LL.B, LL.M; Lecturer
Berhanu Taye LL.B, LL.M; Lecturer
Ameha Tesfaaye - LL.B, LL.M; Lecturer
Mitiku Mada - LL.B, LL.M; Lecturer
Elias Nour - LL.B, LL.M; Lecturer
Simeneh Kiros- LL.B, LL.M; Lecturer
Wondwossen Shewarega LL.B, LL.M; Lecturer
Kalkidan Negash LL.B; Assistant Lecturer
Yosef Aymero- LL.B; Lecturer
Chernet Wordofa LL.B; Lecturer
Filipos Aynalem - LL.B; Lecturer
Solomon Emiru - LL.B; Lecturer
Tewodros Mihret - LL.B; LL.M; Lecturer
Aschalew Ashagrie LL.B, LL.M; Lecturer

የኢትዮጵያ ሕግ መጽሔት

ከኢትዮጵያ ሕግና ተዛማጅነት ካላቸው ዓለም አቀፍ ሕጎች ጋር ተያይዘው የሚነሱ የሕግ ነክ፣ ፖሊቲካዊና ማሕበራዊ ጉዳዮችን የሚመለከቱ የምርምር ሥራዎች የሚታተሙባት መጽሔት ነች።

ሕግ ነክ የምርምር ጽሁፎችን፣ የመጽሐፍ ትችቶችን፣ እንዲሁም በፍርዶችና በሕጎች ላይ የተደረጉ ትችቶችን ብትልኩልን በደስታ እንቀበላለን። በተጨማሪም በኢትዮጵያ ሕግ መጽሔት ባለፈው ዓመት ታትመው የወጡ የምርምር ጽሁፎችን፣ የመጽሐፍ፣ የፍርድ ወይም የሕግ ትችቶችን በሚመለከት አስተያየትን ትጋብዛለች። በዚሁ መሠረት የሚቀርብ አስተያየት በግምት ከ5 ገጽ መብለጥ የለበትም። የተመረጡ አስተያየቶች በአስተያየቱ አዘጋጅ ትብብር አርትኦት ከተደረገባቸው በኋላ በመጽሔቱ ላይ ይታተማሉ።

አድራሻችን፣

ለዋና አዘጋጅ
የኢትዮጵያ ሕግ መጽሔት
የመ.ሣ.ቁ 1176
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JOURNAL OF ETHIOPIAN LAW

Is a scholarly publication devoted to the legal, political and social issues arising in relation to Ethiopian Law and related international Law.

The Journal invites the submission of unsolicited articles, essays, case comments, book reviews and comments on law/legislation. The Journal also invites letters in response to articles, essays, Case and legislation comments, book reviews and notes appearing in the Journal within the last year. Correspondence should be brief (about 5 pages). Selected letters will be edited with the cooperation of the author and published.

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Editor's Special Note

The Editor-in-Chief of J.Eth. L. would like to extend a special thanks to Ato Yohannes Hirouy, Chair of the Editorial Board of the Journal, for going far beyond his expected participation in the Editorial Board and undertaking painstaking editorial works. His assistance has contributed both to raising the quality of the published manuscripts and our ability to publish this Issue. Thank You, Gash Yohannes!

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Annual Report of the Dean (2006/2007)

By Taddese Lencho, Acting Dean 2006/2007 Academic Year

Introduction

The Dean's Report had been a regular feature of the Journal of Ethiopian Law since its first publication in 1964. The Report featured in the 1st to 12th Issues of the Journal and then unaccountably disappeared in the subsequent issues. To be sure, the fortunes of the Journal were never the same again since 1973 (when the 9th volume appeared in just nine years) and the disappearance of the Dean's Report might have something to do with the Journal's precarious publications after that year. Although there was an attempt to resuscitate the Report in the Journal in the 11th and 12th issues, that effort did not seem to hold. The Report never appeared again. The whys and wherefores of the disappearance of the Report might take several pages to report, as is the case of the publication of the Journal after 1973, but that is not the purpose of this Report.

The Reports that appeared in the successive issues of the Journal served as important means of communicating the Faculty's achievements and setbacks to the wider public. In retrospect, these Reports were windows to what the Faculty did to take off the ground and get to where it is today. Anyone who wants to appreciate the importance of the Report should try searching for it in other places, and finding dead ends in the process will realize how useful the Report has been. Yes, it is still possible to access information about the Faculty from the Minutes of the Academic Commission or from word of mouth, but how much easier, more accessible and reliable would it have been if the tradition of the Report had continued in all the issues of the Journal of Ethiopian Law? After all, it is not as if nothing worthwhile happened in those periods in which no report appeared on the Journal. Something worth reporting always happens in the Faculty, and it might as well appear in the Journal, which is available to the wider public.

I must admit that I have always regarded those reports with respect, and the report I am now presenting is in many ways a plea to reinstate that tradition, for whatever it is worth. I have always wanted to see the Report featured in the Journal, and now that I am in a position to do that, I have deemed it appropriate to resume the tradition with few pages of a report on the major

activities of the Faculty over the last year or so during which I served as an Acting Dean of the Faculty.

I cannot presume to cover everything in a space of few pages. I have chosen to incorporate what I personally think are significant events both in terms of their effect upon the Faculty and their impact upon the community. You can take what you may, and you are certainly at liberty to consign the rest to insignificance.

1. **Programs**

a. **The Undergraduate Program**

The Faculty runs undergraduate LL.B programs for regular day-time and evening/extension students. The day-time LL.B program is the longest running program of the Faculty, having been there since its establishment in 1963. For a greater part of the Faculty's history, the day time LL.B program was a five year study. The only exceptions were the end of the 1970s and most recently the first part of 2000s, when the LL.B program shrank to four years as a result of Government policy to reduce the period of study for degree programs to three years from four and four years from five. This academic year the pendulum has swung back again to the five year LL.B program as a result of the introduction of a new curriculum. All the public law schools in the country have started implementing a **five-year LL.B program** and it is expected that the **private** law schools and newly emerging public law schools in Ethiopia will follow suit as of the coming academic year **(for curriculum reform see below)**.

In the 2006/2007 daytime LL.B program, the Faculty admitted close to 120 students.[1] Of these, about 60% of them are female, which is a significant development in terms of narrowing the gender gap in the legal profession. The Faculty will not take credit for this development as placement is made by the Ministry of Education, but it could not have been less happy for that. The number of females admitted into the Faculty has seen a steady growth over the last decade **(see, table below)**. This demographic change in our student population can only be good for legal education and the legal profession, which has for a long time been dominated by males. It is quite ironic that the

[1] Placement for the day-time LL.B program is made by the Ministry of Education. This number does not include students who join the Faculty through inter-Faculty and Inter-University transfer.

statue of justice has been represented by a blind-folded female while males dominated the actual workings of the justice system so far.

The Faculty of Law also runs an evening LL.B program. The evening LL.B program was with the Faculty of Law on and off. Back in the 1960s, the Faculty had an evening LL.B program, which was well-sought out, as can be gathered from some illustrious graduates of the evening program. In 1981, the LL.B program was discontinued, and in its place, a diploma program became the trademark of the evening program. In 2003 (more than two decades later), the University decided to phase out diploma programs and adopt degree programs in their place. As part of the general shift in the policy of the University, the Faculty of Law reintroduced an evening LL.B program in place of the diploma program. Since then, the Faculty has admitted an average of 100 to 150 students in the evening program.[2]

The evening LL.B program admits students from all walks of life and ages, provided they meet the minimum requirements of admission. The diversity of the evening student body, particularly in terms of age and experience, has been its prime attraction. Ever since its reintroduction, however, it must be said that the evening LL.B program has suffered from lack of uniform policy and attention. Some of the students are admitted on the basis of their law diplomas, some are admitted either because they are members of the University staff or because they hold diplomas or degrees in other disciplines. Some are admitted straight out of high schools. This lack of uniformity in the academic background of the students has created an enormous administrative burden for the Faculty.

Since some of the evening students are admitted on the evidence of their law diplomas, the Faculty had to design an exemption policy to relieve them off courses they took while studying for their diplomas. The Faculty took the high ground of exempting students on the basis of their individual performance in each course. Our Faculty exempts students on law courses only if they have scored an A or B. Students must in addition establish substantial similarity between the courses taken in their diploma studies and the courses of the LL.B syllabus. The result is inevitably some students getting more exemptions than others. There is nothing wrong with that, except that, in such state of affairs, it is impossible to find an optimal number of courses which students can take at any given time. Although the Faculty tries its best to offer as many courses as

[2] The diploma program has been phasing out since 2003 and this year the Faculty will graduate the last batch.

it is optimally possible, at the end of the day, some students will end up taking fewer courses than they should with the inevitable prolongation of their years of study. There is only limited number of courses and of classes to go around. The evening LL.B program also suffers from shortage of experienced academic staff. Not that the day program is immune from this, but the problem seems to be more pronounced in the evening program.[3] This is for a number of reasons. In the first place, the evening program is totally dependent on the consent of the instructors. The full-time instructors of the Faculty are reluctant to take additional classes in the evening program, mainly because the pay for teaching evening classes is not attractive. For lack of interest on the part of the full-time staff, the Faculty now depends overwhelmingly on part-timers who come from other law Faculties or institutions. The students have expressed displeasure at various times, but unless the pay is somehow raised, there is no incentive for full-time instructors to take up additional classes in the evening program. If the pay remains at the current level, I am afraid fewer and fewer of them will be willing to take up additional classes in the evening program.

The other problem of the evening program is that it has never really been owned by the Faculty. To be sure, most of the work (the coordination, the assignment of classes and instructors) has been devolved to the Faculty. But the income (however small) derived from the running of the program has rarely trickled down to the Faculty. There is a general sense of discontent within the Faculty that the Faculty is made to bear the brunt of running the evening program without having to share from the dividends. The result is general indifference towards the evening program. It is a classic case of what economists would call 'externalities.'

In the strategic planning document, the Faculty has called for a decentralization of the continuing and distance education program (currently under the administration of the University Continuing and Distance Education) in order to improve the quality of education in its evening program. There is no body closer to the reality on the ground than the Faculty of Law to admit an optimal number of students for a high quality education. While that is true for all programs, it is even truer for the evening program, which should be governed by the laws of demand and supply.

b. The Postgraduate Program

[3] Of the twenty seven full-time staff members, only a maximum of four or five instructors are willing to take up evening classes at any one time.

The Faculty of Law is a late-comer to postgraduate programs in the University. While many Faculties of the University launched graduate programs in the 1980s, the Faculty of Law stuck to its original format of offering LL.B until 2003, when, under pressure from the University, the Faculty opened a graduate program in two loosely distinguished streams of 'public law' and 'private law.' An LL.M curriculum was quickly designed and the Faculty had postgraduate program before anyone noticed. The LL.M curriculum produced at the time showed all the signs of the haste and pressure the Faculty was under at the time of its launching. Most of the courses offered in the graduate program were already offered in the undergraduate program, creating problems of repetition for the instructors and *dè ja vu* for the students. And each course in the curriculum carried six credits and took a year to complete, which was quite a departure from the customary semester calendar of the Faculty and the University. This design was a constant source of worry for the instructors, who had to find ways of getting through the whole year for a course which normally should not have taken more than a semester. The postgraduate students had a leisure ride for a better part of the year as they had little work to do (and some of the part-timer students clearly wanted things to remain that way).

For these and many other reasons, it was clear that the LL.M curriculum needed an overhaul, which is exactly what the Faculty did two years after the introduction of the graduate program. In its place, the Faculty designed a new curriculum, creating four streams instead of two: Business Law, Human Rights Law, Constitutional and Public Law, and Public International Law.

The old LL.M curriculum has now fully phased out and the Faculty graduates its first batch from the new curriculum this academic year. The new curriculum has stayed clear from repetition of the courses in the undergraduate program. With the exception of some common courses, most of the courses in the new curriculum are carefully selected not only to keep distance from the courses in the undergraduate program but also to confer a fair amount of specialized knowledge upon graduate students. In place of a program which set students on wild-goose search, the new curriculum offers students an opportunity to study research methods before they write their LL.M thesis. Everyone involved in the graduate program could not help but notice that many of the students stumbled on the last hurdle: writing an LL.M thesis that could pass muster. While there are many reasons why graduate students failed in their research, it was recognized that lack of research experience might have something to do with it. That is why a course on research methods is included in the new curriculum. It is expected that the mandatory course on research methods will improve the quality of research produced by graduate students.

The biggest concern of the Faculty in running the LL.M program has been finding appropriate specialized staff to conduct classes and supervise graduate student researches. In some occasions, the Faculty has come close to removing some courses from the curriculum solely for reasons of not finding appropriate staff. In this regard, the Faculty is not fully out of the woods yet, but over the years, it has developed strategies for accessing appropriate staff for some of the courses. One strategy it has used to good effect is drawing from the specialized staff of the regional and international organizations headquartered in Addis Ababa, such as UNHCR Regional Office, the ICRC Regional Office and UN Regional High Commissioner for Human Rights. It is one of the pleasant surprises of the new graduate program that these organizations were excited to support the Faculty in every way they could. It would be remiss on my part to not mention some of the staff of these organizations who have made significant contributions to the graduate program so far. Mr. Patrice Vahard, from the UN High Commissioner for Human Rights, has been extraordinarily supportive in teaching in the postgraduate program since the introduction of the new curriculum and has been there for the Faculty ever since. So are Mr. Gert Westerveen and Ms Louis Aubin from the UNHCR Regional Office, Ms Ishoy Rikke from the ICRC Regional Office and Mrs. Mor Parnass from Israel Embassy here in Addis, Mrs Nadia Bassiwetz from the EU delegation and the USAID WTO-accession team in the Ministry of Trade and Industry. The Faculty is grateful to them all.

The biggest support to the graduate program, at least in terms of staff, came from the academic staff of the Ethiopian Civil Service College, some of whom obtained their PhDs with the requisite specialization just in time for the LL.M program to stand on its feet. In spite of the low pay and bureaucratic red tape in the University, all of them have kept faith in the utility of the graduate program. The involvement of the Ethiopian Civil Service College staff members is particularly critical in the design and implementation of the new LL.M curriculum. It would be quite wrong if Ato Tsegaye Regassa and Ato Solomon Abay were left unmentioned, for they were very closely involved in the design of the curriculum and provided invaluable services for the program to take off the ground. The Faculty is grateful to all of them.

c. Summer In-service Program

The summer In-service program was launched in the summer of 2006 as part of special arrangement entered into between the Faculty and Oromia Regional Justice Bureau. The Regional Justice Bureau received financial assistance from the World Bank to provide training to prosecutors working in the Region and

contacted the Faculty for provision of advanced training to the prosecutors, all of whom have law diplomas. Close to 240 students are now undergoing training for an LL.B degree in a curriculum which reflects their future professional direction and the need of the Region in upgrading their knowledge and skills in the area of public prosecution and criminal justice. This program is a test case for the Faculty, as it bids to collaborate with various government and non-government institutions in building the capacity of the justice sector.

Faculty of Law 2006/2007 Enrollment Summary

Program	Female	Male	Total
Undergraduate (day)	280 (45.5%)	332 (54.5%)	612
Undergraduate (Evening)	109 (22 %)	378 (78%)	487
Undergraduate (Summer In-Service)	31 (13%)	206 (87%)	237
Postgraduate	10 (9%)	106 (91%)	116
Total	430 (30%)	1022 (70%)	1452

Faculty of Law 2006/2007 Undergraduate (Day) Admission

Female	Male	Total
94 (61%)	60 (39%)	154*

* This number includes all day-time admissions, i.e., placements by the MoED, internal and external transfers

2. Curricular Reform

Curricular reform of the undergraduate LL.B program began back in 2004 when the Ministry of Capacity Building assembled a Steering Committee and Technical Committee[4] to coordinate and develop a legal education reform

[4] The members of the Steering Committee included the Minister of Capacity Building (His Excellency Ato Teferra Walwa), the Commissioner of the Federal Ethics and Anti-Corruption Commission, the Minister of Justice, the Vice-President of the Federal Supreme Court, the

program at the national level. The National Legal Education Reform. as it is sometimes dubbed, was an ambitious project of the Government that sought to reform not just the law curriculum but also the law school management and administration, the delivery, and research, publications and consultancy services in the law schools throughout the country.[5] After numerous meetings, discussions and tours of foreign countries, the Technical Committee, comprised of representatives of most of the Law Schools, finally developed a reform proposal in 2006, which was approved by the members of the National Steering Committee. The reform document was further enriched by discussions held with academic staff members drawn from several law schools of the country. The Faculty of Law took an active part in developing and enriching the reform document.

All public law schools in the country have started implementing the new curriculum developed in the reform program and, as of next year, all other law schools are expected to follow suit. The National Legal Education Reform document has developed standards and guidelines for all law schools in the country in the areas of curriculum, delivery, law school management and research/publications/consultancy services. To my knowledge, it is the first time that national standards and guidelines in legal education have been put in place.

In place of the four-year program (currently in place after the abolition of freshman programs in the Universities), the new curriculum envisions a five-year program for all law schools offering LL.B degrees in the country. The new curriculum is also notable for introducing several optional courses which students can take towards the end of their study. Perhaps the most radical

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Minister of Education, Presidents of the Supreme Courts of the Oromia Regional State and the Southern Nations, Nationalities and Peoples Regional State, head of the Amhara Regional State Justice Bureau and a representative of the Ethiopian Bar Association. The members of the Technical Committee were constituted from our Faculty, Faculty of Laws of Haromaya University, Jimma University, Hawasa University, Mekele University, Bahir Dar University, Saint Mary's University College, Gondar University, Ethiopian Civil Service College and Rift Valley University College, and representatives from the Federal High Court, Ethiopian Women Lawyers' Association (EWLA), Addis Ababa City Administration and a curriculum expert from the College of Education (AAU).

[5] The reform agenda of the Government embraced much more than legal education; indeed the reform of legal education was part of the broader project of the government to reform the justice system in the country. The four main planks of the Government Justice Reform program are: reform of the judiciary, reform of the law enforcement organs of the police, the prosecution and prison administration, the reform of the lawmaking bodies and the lawmaking process, and the reform of legal education.

proposition of the new curriculum is the introduction of a national exit exam, which is a mandatory exam for all law students in order to graduate with a degree in law. The aim of the exit exam is to ensure that all law schools in the country provide comparable knowledge and skills to their students, and that those entering the legal profession have the requisite knowledge and skills to practice law at all levels. As bar examinations have never been administered in Ethiopia, employers will be (if they have not already been) at a loss to judge the competence of those who graduate from several higher education institutions in the country. The results of the exit exam will be an important source of information for employers in this regard. The exam will also no doubt stir a spirit of competition among the law schools, seeing the exam as an opportunity to test how their students are performing vis-à-vis students of other law schools.(For curricular reform at the graduate level, see above).

3. Faculty Strategic Planning

The University had been working on university-wide strategic planning since January 2006, when a Strategic Planning Steering Committee was formed. The University Strategic Planning Office was established to develop strategic planning for the University and to coordinate strategic planning at the Faculty/Institute level. At the behest of the University, a strategic planning committee was formed in the Faculty of Law at the beginning of January 2007. The Faculty Strategic Planning Committee was composed of eleven members drawn from the academic management of the Faculty, academic and support staff representatives and three student representatives. The committee members met at least once a week and went on retreats in Akaki campus and Adama to complete all the phases of the strategic planning.

The final document, more than 100 pages, contains all the usual components of a strategic planning document, viz., internal situation analysis, SWOT analysis of the external environment, strategic issues, vision, missions and values of the Faculty, action plan, budget estimates and monitoring and evaluation schemes. The document has been sent to the University Strategic Planning Office for review and approval. Implementation will start as of September 2007. It is impossible to render justice to a hundred or so page document in a report of this size, but it will suffice to draw attention to some of its most significant proposals.

The strategic planning document, among other things, proposes:

i) the construction of a Law School Building fit for the teaching of law in the 21st century;
ii) the acquisition of financial and administrative autonomy by the Faculty;
iii) the establishment of a Legal Research Center with its own autonomy and management;
iv) the creation of a Law School Trust Fund with a view to supporting the development and expansion of the Law School;
v) the establishment of Faculty IT services and acquisition of large numbers of computers, printers, photocopiers and interactive technological gadgets;
vi) the development of Faculty research database accessible to all law schools; and
vii) the establishment of Legal Clinic.

These and many other proposals of the strategic planning will require close monitoring and evaluation from all parties involved in the implementation of the strategic planning. The development of strategic planning for the Faculty is one, and a small one as that, and its successful implementation is quite another.

4. Alumni Relations

The Faculty's Alumni Association was re-established in 1999, after fading into oblivion soon after its establishment in 1968. Since its re-establishment, the Association has been working with Faculty members and students to achieve one of its stated objectives of assisting 'the development of legal education, and raising the legal awareness of the society.' The other objective of the Association to 'assist the Law Faculty in publishing law journals and other related research activities' is yet to be realized. The Association had the aim of commemorating the 40th anniversary of the Faculty (which would have been in 2003) but that did not happen owing to lack of preparations and financial problems. Having missed that opportunity, the Association settled on commemorating the 40th anniversary of the graduation of the first batch from the Faculty (i.e. in 2007). Again the original idea was for the former professors to join in the celebration in a formal reunion of the professors with their former students. That didn't work out and finally it was decided to organize a panel discussion to mark the occasion. A one-day panel discussion was held on January 13, 2007 and more than one hundred members of the Association (graduates of the Faculty) attended the discussion held in the FBE hall.

Members of the Faculty and alumni working in different institutions presented papers reflecting on the role and contributions of the Faculty of Law. The occasion was an emotional reunion for the few surviving members of the first graduates. Ato Selamu Bekele, a long-time Faculty member and one of the first graduates, presented a paper on the 'History of the Faculty' in which he related his personal experiences of the early years of the Faculty. Flavored with wit and anecdotes, his presentation took the audience to the early days of the Faculty and the professors who are known by most of us through their books and teaching materials.

The occasion showed how little the Alumni members did for the Faculty and how much they could do, if only they could come together and think about the welfare of the Faculty. In the future, the Association and the Faculty should work more closely in order to realize the aspirations of the Faculty and its graduates.

5. Moot Court

The Faculty of Law began sending teams to international moot court competitions in 1971, and since then, the Faculty teams have earned some notable results in the prestigious International Jessup Moot Court Competition. Although nowhere near the performance of the 1972 and 1974 teams (the Faculty was runner-up twice in the International Jessup Competitions, the first from Africa), successive teams from the Faculty have tried to emulate the performances of those teams. For a long time, the International Jessup was the only competition on the calendar of the Faculty's Moot Court Competition.

In recent years, the Faculty has diversified its participation in moot court competitions around the world, with notable results. In 2004, for example, the Faculty team comprising then students Abadir Mohammed, Desta G/Michael and Legesse Alemu participated in the 5th International Moot Court competition on International Humanitarian Law held in Arusha, Tanzania. The team brought a trophy for the Faculty as runner-up.

In 2006, the Faculty went from sending teams to hosting one: the 15th African Human Rights Moot Court Competition. Organized by the Center for Human Rights of the University of Pretoria in collaboration with another African host University, the African Human Rights Competition has become a premiere moot court competition in Africa, drawing teams from all across Africa and from three language zones: English, French and Portuguese. In the 15th African Moot Court Competition, a record 61 teams from universities all across Africa came to the Faculty and took part in competitions from August 28 to

September 2 of 2006. The final competition was held in the Africa Hall of the African Union Building to celebrate and coincide with the 20th anniversary of the coming into force of the African Charter for Peoples' and Human Rights. The symbolic significance of the final competition was not lost on anyone.

Hosting a competition of this size presents enormous challenges for any organization, let alone for our Faculty, which, prior to this, had little experience in organizing or hosting any competition, big or small. If it hadn't been for the last minute financial commitment by the United Nations Development Program (UNDP) and the Finnish Embassy, the hosting would have been called off and moved to another venue. As it turned out, the whole organization of the Moot was a resounding success. Some people who participated in other Moots called it the 'best Moot Court Competition ever.' The Faculty would like to express its sincere gratitude to the Ministry of Capacity Building, the United Nations Development Program (UNDP), the Finnish Embassy, the American Embassy and the Rwandan Embassy for their financial support of the competition. It would have been such a great shame if the hosting had been cancelled for lack of funds! That it didn't was in large part due to the support of the sponsors.

The anxiety of the Faculty on securing funding for the event was more than compensated by the approbation of the participants. And that is in large part due to the enthusiastic support of staff and student volunteers who for well over a week stood on duty to ensure the safety and comfort of the guests. The instinctive hospitality of Ethiopians was out there for everyone to see throughout the competition. The team from the Faculty did not disappoint either. Our team, of Blen Asemrie and Gedeon Timotheos, worked hard to make sure that our hosting efforts were crowned with a win. They made it to the best ten in all categories: 3rd for the written memorials, 6th for the oral competition and 4th overall. This is the best showing of the Faculty in as many years.

The hosting of the Moot Court Competition by the Faculty and the spirited performance of our Team has stirred renewed interest in moot court competitions. Many students are now more eager than ever to participate in moot competitions to show their mettle. But the students need lots of support and exposure. The regular curriculum has very little in the way of preparation for students who want to take part in moot court competitions. The Faculty needs to include a calendar of events which prepare students for competitions abroad. National Moot Court Competitions, like the one organized annually by

the Action Professionals Association for People (APAP), will in the future produce teams that will mount serious challenges in international competitions. The Faculty has been more than pleased to send teams to these national competitions, and so far the future seems promising for the Faculty. The Faculty team (of Blen Asemrie and Gedeon Timotheos again) won the first National Moot Court Competition (2005) and the Faculty team (of Michael Sehul and Timkher T/Haimanot) was runner-up in 2006. We will need more of these kinds of competitions in order to produce teams which mount serious challenges in international and continental moot court competitions. Perhaps we should start our own.

6. Law School Building

For more than forty years, the activities of the Faculty of Law have been confined to the architecturally beautiful but old and inadequate law school building. Lack of space for classes and offices has to date remained our biggest challenge. As space was a university-wide problem (although admittedly our Faculty was the most affected), the University set out to address the problem of space by constructing additional buildings for some Faculties. The University built a large building next to the Law School Building in order to overcome the space problems of the Faculty of Law and College of Education. But by the time the construction of the new building was complete, the new Faculties of Journalism, Rural and Local Development Studies (RLDS) and School of Social Work sprang up in the University to claim space from the new building at the expense of our Faculty. Although the Faculty of Law managed to get few offices for its staff and some classrooms, the Faculty's chronic problems in this regard have remained unsolved to this date.

The Faculty is forced to run its postgraduate program outside the university campus simply because of lack of space within the University. In the main campus, classes are centrally managed by the Registrar, and as a result, it has become nearly impossible to get free classes to conduct make-up classes or arrange additional classes for the students. A substantial number of academic staff members do not have their own offices to prepare for classes and conduct research. The old law school building has been falling down for quite sometime, and many of the occupants continue to operate from the old building in spite of the dangers involved.

At the time of writing, the old Law School Building is being renovated. The Law Library has already been moved to a makeshift building nearby to make

way for the renovation. Unfortunately, the building to which the Library has been moved is four times less than the size of the space in the old building, exacerbating the serious problem of space in the Library. There was already a complaint by users of the library that the library was too small to provide service to users. Now, with a size four times less and student population quadrupling, one can understand the gravity of space problem in the law library.

There is only one way out for the Faculty: its own building. The law school building should be constructed either near the old building or even outside of the main campus to accommodate the growing demands upon the Faculty. Only a building built for the law school can meet the needs of the law school. Both the strategic planning document and the National Legal Education Reform program have incorporated the need for a law school building, and if they are carried out, the problems of the Faculty regarding space will have been solved.

7. Legal Clinic

Legal clinic is one of the subjects that I report with a shudder. Over the years, attempts to institutionalize clinical programs in the Faculty have ended in failure. Back in the 1990s, there were attempts by the Northwestern University Law School to start clinical programs in the Faculty, but those attempts went nowhere. Most recently, a local NGO named Organization for Social Justice in Ethiopia (OSJE) expressed interest in collaborating with the Faculty in order to establish clinical programs in the Faculty. The Organization went further than anyone else in covering the initial costs of a clinical program but even that was not enough to launch a clinical program in the Faculty. The Organization and others are still committed to supporting a clinical program if and when it becomes operational. The good news is that the new LL.B curriculum requires the Faculty to provide a legal clinic to all students that graduate from the Faculty. The bad news is that we are still ill prepared for a legal clinic. After so many starts and failures, it is now not a question of if but when.

8. Partnerships

The Faculty of Law is one of seven partner Law Faculties in Africa of the Center for Human Rights of the University of Pretoria.[6] Our Faculty

[6] The others are 1) American University in Cairo, Egypt; 2) Catholic University of Central Africa, Cameroon; 3) Universidade Eduardo Mondlane, Mozambique; 4) Faculty of Law,

collaborates with the Center on a number of programs, of which the hosting of the 15th African Human Rights Moot Court Competition was an illustrious example. Each year, the Faculty accepts exchange students from the LL.M program of the Center. The students spend six months with the Faculty where they write their LL.M thesis (under the supervision of Faculty member), attend LL.M classes (when available), take French/English lessons (depending on their background) and go through internships in some of the Regional and/or international organizations headquartered in Addis Ababa. In the first year of its partnership with the Center for Human Rights, three exchange students came to the Faculty in June 2006 and spent six months writing their LL.M thesis, attending language classes and interning in the African Union. The exchange students were: Anganille Mwefinimbo (from Malawi), Maindi Grace Wakio (from Kenya) and Thabang Masingi (South Africa).

And this year (2007), four exchange students have joined the Faculty in August. They are: Ruth Esemeje from Nigeria, Horace Sgnonna from Benin, Ololade Olakitan from Nigeria and Tanoh Armand from Cote d'Ivoire. Located in Addis Ababa, the seat of the African Union and many other regional and international organizations, the Faculty of Law is one of the major attractions for exchange students from the Center.

So far, the Faculty has only received exchange students from the Center, without sending its students the other way. The Faculty has not had the means to do it. If the exchange is to be strictly exchange, however, the Faculty will need to find ways of sending its students to the Center in order to do what the exchange students from the Center do at the Faculty.

The Faculty has also signed a memorandum of understanding with the ILO Skills and Employability Department to incorporate Legislative Guidelines for Employment of People with Disabilities in its undergraduate and postgraduate courses. The program, funded by the Irish Government, is part of a world-wide effort of the Department to incorporate disability issues in the curricula of Law Faculties. The ILO has agreed on its part to supply technical assistance in this regard, send guest lecturers and allocate funding for research on training and employment of persons with disabilities.

Partnerships with other organizations and universities are likely to expand in the future as the Faculty diversifies its programs and increases its visibility in the community.

University of Ghana; 5) Faculty of Law, Makerere University, Uganda; and 6) Community Law Center, University of Western Cape, South Africa.

9. Visitors to the Faculty

2006/2007 was a fairly busy year for the Faculty. Hosting more than 250 visitors as a result of the 15th African Human Rights Moot Court Competition, the record for the year is unlikely to be broken any time soon. Our location in the capital, nonetheless, makes us an attractive stop over for those coming to Addis for business or just personal visit. In June 2006, members of the National Bar Association (the largest and oldest association of attorneys, judges and legal scholars of color in North America) paid a visit to the Faculty. The President of the Association, Mr. Reginald Turner, delivered a public lecture to our students and staff on the topic 'Legal Aid and Community Service.'

Professor Norman Singer, formerly a professor of law in the early years of the Faculty, and now a professor of Law and Anthropology at the University of Alabama Law School, visited the Faculty in December 2006. He came to participate in the 40th Anniversary celebration of graduation by the Law Faculty and reunite with his former students (as was originally planned by the Alumni Association). Although he was not able to participate in the Anniversary, he used his time to visit some of the newly established law schools in the country and gave a lecture to students of legal history on the subject of 'legal transplantation.' His personal experiences in the early days of the codification process in Ethiopia and his background in anthropology threw some fresh light on the path Ethiopia took to modernize its legal system.

Professor Singer also brought the news of the establishment of a Fund, known as the Tides Fund, to benefit certain research projects in the Faculty of Law. The fund, being administered by the Tides Foundation in Washington D.C., (after which it has been named) can be used to finance research on issues of federalism, access to courts, police reform, civic education at grass roots level and other areas of the rule of law, among other things. The first dean of our Faculty, Professor James C.N. Paul, was the originator of the idea and he managed to assemble other former professors to create the Fund. He is also the principal contributor and directed all the fees that he received from the Ethio-Eritrea Claims Commission (of which he was a member) for the setting up of the Fund. The other contributors are Professors Norman Singer, Peter Strauss, Stanley Z. Fischer, and William Ewing. If properly used, the Fund can become an important precursor for the creation of a Trust Fund for the Faculty in the future. The Faculty is obviously grateful that the former professors have not forgotten it.

A team from DLA Piper LLP and the Northwestern University Law School visited the Faculty at the beginning of May 2007. DLA Piper LLP is one of the largest law firms in the world, with more than 3500 partners and offices in 59 countries throughout the world. Northwestern University Law School is one of the top ten law schools in the United States. The team members are keen on finding ways of helping the Faculty, in particular by sending some highly specialized academics and practitioners to teach and do some research in the Faculty. The Faculty used their presence to organize public and guest lectures on areas of their specialization. Mr. Sheldon Kranz (a partner of DLA piper) spoke on 'White Collar Criminality'; Mr. Gary Klein (also partner) spoke on 'Government Regulation of Business' and Professor Geragthy (from Northwestern University Law School) spoke to students on topics of 'Juvenile Justice' and 'Legal Clinic.' Mr. Harry McPherson (a partner of DLA Piper and a one-time counsel to American President Lyndon Johnson) spoke on 'Possible Shifts in American Foreign Policy after 2008 US election.' All of the speakers were well received in their lectures. The tripartite relationship between our Faculty, DLA Piper LLP and the Northwestern University Law School might turn out to be one of the most exciting partnerships to have ever happened to the Faculty.

10. Looking Ahead: Challenges and Prospects for the Faculty

A cliché of the times is to raise the 'millennium' as a standard-setter for everything, big or small, permanent or ephemeral. There is no denying that a 'millennium' is an epoch of great proportions, and those of us who accidentally find ourselves at such a juncture should be grateful just for that. As the cliché has it, 'as the new millennium unfolds,' our Faculty faces enormous challenges as well as prospects.

Even for such a small Faculty, the challenges are very many to count (and recount), but not so overwhelming as to cut and run. Some of these challenges have been with the Faculty from its very inception. Such is the case for example of facilities. The Faculty started business in a building which was not meant for running classes, no matter how compelling the architecture might be. Almost half a century later, the Faculty is unable to construct its own building or find one appropriate for teaching and legal research. The Faculty will not be able to run its business effectively until its problem of space is solved, and this should be its first priority over the next five, and at the latest ten years.

The other challenge is the quality of its programs. To be sure, the Faculty has added new programs, including a graduate program. With the new wave of

PhD programs in the University, the Faculty might even launch a PhD in the near future. But, what of these new programs? Quality is quite a subjective matter, of course, as controversies everywhere indicate. And we are not alone in this, if that is a consolation at all. Almost everywhere one goes, one hears the now familiar complaint about the decline in quality of education at all levels. The complaints about the decline in quality are so common and persistent; one cannot dismiss them as cries sounded by those nostalgic about the past (there are always those, although their numbers and influence are clearly exaggerated).

There are many factors out there why the quality of the programs in the Faculty is a cause for concern. Take the undergraduate LL.B program. Before the Freshman programs were taken away from the University, the Faculty managed to admit only the best performing students in the Freshman program. When the Freshman program was removed from the University, the Ministry of Education took over admission completely, and many in the Faculty suspect that the quality of students admitted into the Faculty (placed by the MoED) is not on par with those admitted from the Freshman program. Although the Government insists the courses offered in the Freshman program are now being offered in the preparatory schools, there are many in the University who rue the absence of freshman programs. Whatever the truth may be, the Faculty has lost one of its most cherished powers (its crown jewel) over admission of students, and with it may have gone the quality of students.

The number of students admitted each year has also affected the quality of education in the Faculty. In the undergraduate program alone, the number of students admitted each year has tripled. This is without counting the new programs opened over the last five years. The Faculty has added the evening LL.B program and LL.M programs in this period, and the total student population in the Faculty has quite simply exploded over a very short period of time. The Faculty has not made adequate preparations for the increase in student population. The facilities meant for few hundred students at best are now being used by more than one thousand students at one time. The number of staff has not shown any marked rise over the last five years in spite of the exponential increase in the number of students. Nothing eloquently expresses the direness of the problem as the Law Library. The Library, meant for a student population of fewer than two hundred, is now 'serving' more than one thousand and a half. To use the term 'congestion' in such a case is clearly an understatement. Because of lack of space, the library is now 'open' only to 'active' students and staff of the Faculty. External users can no longer access

the library. Many of us (by 'us' I mean staff members) are repulsed by the awful congestion in the library and rarely visit it.

These and many other challenges facing the Faculty would be enough to bring down the Faculty, if it were not for the prospects. There is no doubt in my mind that the Faculty would be able to overcome the challenges. Just what are its prospects?

Our Faculty is the oldest, and arguably the best law school in this country. Although the reputation built by the hard work of the early Faculty is quickly fading away, the Faculty still commands a prestige which it can easily exploit to regain and even scale its former achievements. In spite of the low pay, the best and the brightest in the profession are still willing to work for or with the Faculty in order to improve the quality of programs. Although our library leaves much to be desired (as mentioned above), it is still the best law library in the country. In spite of its problems, the library is not beyond recovery.

As the oldest and most famous Faculty in this country, our Faculty still attracts partners and well-wishers from around the world. All that the Faculty needs is to be proactive in its relationships with other universities and institutions around the world, and there is no reason why it cannot achieve its objective of being a premier center of excellence in legal scholarship.

The reforms the Faculty undertook recently also promise a brighter future for the Faculty. The Faculty five-year strategic planning can take the Faculty to the next level if it is fully implemented. The introduction of new and better curriculums in both undergraduate and postgraduate programs of the Faculty is another evidence of a rosier prospect for the Faculty. When all is written down, the future of the Faculty of Law is not so gloomy after all, but a lot needs to be done, sooner.

የኢትዮጵያ ፌዴራል ጠቅላይ ፍርድ ቤት
ሰበር ሰሚ ችሎት

አመልካች፣ ኢስት አፍሪካን ግሩፕ /ኢትዮ/ ሊሚትድ፣ ዘላለም ዋቀዮ ቀረበ
መልስ ሰጭ፣ አቶ አድማሱ አርገጤ ቀረበ

የስ/መ/ቁ/7634

የአሰሪና ሰራተኛ ጉዳይ ሕግ፦ ስለሥራ ውል መቋረጥ፦ የሥራ ውልን ሕጋዊ በሆኑ ምክንያቶች ስለማቋረጥ፦ ከሕግ ውጭ የሆነ የሥራ ውል መቋረጥ የሚያስከትላቸው ውጤቶች፦ የሥራ ውል ከሕግ ውጭ ሲቋረጥ ሠራተኛውን ወደ ሥራው ስለመመለስ ወይም ካሣ ስለመክፈል። የአሰሪና ሰራተኛ ጉዳይ አዋጅ ቁ. 42/85፣ አንቀጽ 27፣ 28፣ 35፣ 43 እና 44።

ውሳኔ፦ የመጀመሪያ ፍ/ቤት እና የከፍተኛው ፍ/ቤት ውሳኔዎች ተሻረው፣ ተጠሪ ወደ ስራ በመመለሳቸው ምትክ ካሣ እንዲከፈላቸው ተወስኗል።

ፍ ር ድ

ዳኞች፣ አቶ ከማል በድሪ፣ አቶ አብዱልቃድር መሐመድ፣ ወ/ሮ ስንዱ ዓለሙ፣
ወ/ሮ ደስታ ገብሩ፣ አቶ አስግድ ጋሻው

መዝገቡ ተመርምሮ የሚከተለው ውሣኔ ተሰጥቷል።

ይህ አቤቱታ የቀረበው የፌዴራል ከፍተኛ ፍርድ ቤት በሥ/ክ/ይ/መ/ቁ 871/93 ሕዳር 26 ቀን 1994 ዓ.ም ከሰጠው ትእዛዝ ሳይ ነው።

ጉዳዩ የተጀመረው በፈዴራል የመጀመሪያ ደረጃ ፍርድ ቤት የሥራ ክርክር ችሎት ሲሆን የአሁን መልስ ሰጭ በአሁን አመልካች ላይ በመሰረተው ክስ ነው። በመልስ ሰጭ የተመሰረተው ክስ ይዘት በአጭሩ፣ በተከሣሽ መ/ቤት ከ12/2/1989 ዓ.ም ጀምሮ የሕግ አገልግሎት ኃላፊ ሰሌሎች እህት ኩባንያዎች ደግሞ የሕግ አማካሪና ጠበቃ በመሆን በወር ብር 2250.00 ደመወዝ እና ብር 250.00 የትራንስፖርት አበል እየተከፈለኝ አገልግያለሁ። ይሁን እንጂ ተከሣሽ በ7/9/92 ዓ.ም በተጻፈ ደብዳቤ ስራው በሪቴንሽን ሲሰራ ይችላል ሲል የስራ ውሴን አቋርጦታል። ይህ ተገቢ ባለመሆኑ ወደ ስራ ሊመልሰኝ አለዚያም ውሉ በሕገ ወጥ መንገድ በመቋረጡ ምክንያት በአዋጅ ቁ. 42/85 አንቀጽ 43/4/ /ሀ/ መሰረት ደመወዜ በ180 ተባዝቶ በአንቀጽ 35/4/ መሰረት በማስጠንቀቂያ ጊዜ ሊከፈል የሚገባውን የትራንስፖርት አበል ብር 250 x 2= ብር 500.00፣ ፕሮቪደንት ፈንድ ለማስጠንቀቂያ ጊዜ

ከሚከፈለው የሁለት ወር ደመወዝ ውስጥ በግብር ስም ቀንሶ ያስቀረውን ብር 746.00፣ ክፍያ በማዘግየቱ የአንድ ወር ደመወዝ፣ ሰብአዊ ክብሬን ባለመጠበቁ ብር 1000.00 ወለድ፣ የጠበቃ አበልና ወጭና ኪሣራ ጭምር ሊከፍለኝ ይገባል የሚል ነው። አመልካችም በበኩሉ ከሣሽ የስራ መሪ በመሆኑ በአዋጅ ቁ. 42/85 አይሸፈንም፣ ይህ ቢታሰፍ ከሣሽ ከስራ እንዲሰናበት የተደረገው በተከሣሽ ስር የነበሩት የንግድ የኢንዱስትሪ እና የእርሻ አካላት ራሳቸውን ችሰው የሕግ ሰውነት በማግኘታቸው እና የነበረው የሕግ አገልግሎት ክፍል ያከናውነው የነበረው ስራ እጅግ በመቀነሱ ሲሆን ስራውን በራቴንሽን በሕግ አማካሪ ማሰራቱም አላስፈላጊ ወጭን የሚቀንስ ሆኖ በመገኘቱ ነው፣ አስሪ ምርታማነትን ለማሳደግ ቅነሳ ማድረግ እንዲሚችል ደግሞ በአዋጁ አንቀጽ 28/2/ሐ/ ላይ ተመልክቷል፣ አሰሪው የሚሰራለትን ሰው ለመምረጥ ሙሉ መብት ያለው እንደመሆኑም ከሣሽ የመመረጥ ቅድሚያው ለእኔ ሊሰጥ ይገባዋል ሊል አይችልም፣ ስለሆነም ከሣሽ ወደ ስራ ልመለስ በማለት ያቀረበውን ክስ ተቀባይነት ሊያገኝ አይገባም በክሱ የጠየቀው ክፍያም በሕግ የተደገፈ ስላልሆነ ውድቅ ይደረግልን በማለት መልሱን ሰጥቶ ተከራክሯል።

ፍርድ ቤቱም ግራ ቀኙን ከአከራከረ በኋላ በአዋጅ ቁ. 42/85 እንደተመለከተው የሰራተኛ ቅነሳ ማለት ከድርጅቱ ስራተኞች ቢያንስ ከመቶ አስር የሚያክለውን የሰራተኞቹ ቁጥር ከሃያ እስከ ሃምሣ በሆነበት ድርጅት ቢያንስ አምስት ሰራተኞቹን ከአስር ተከታታይ ቀናት ላላነሰ ጊዜ መቀነስ ሲሆን በዚህ ጉዳይ ተከሣሹ የተጠቀሰው ሁኔታ መሟላቱን አላስረዳም። ስለሆነም ስንብቱ የግል ስራ ውል መቋረጥ እንጂ ቅነሳ ሊባል የሚችል ሆኖ አላገኘነውም። የስራ ውል የሚቋረጠው ደግሞ በአዋጅ ቁጥር 42/85 ከአንቀጽ 24 30 ድረስ በተመለከተው ምክንያት ነው። ተከሣሹ ከሣሽን ወጭን ለመቀነስ ሲል ማሰናበቱን ቢገልጽም የሕግ እውቀትን የሚጠይቁ ስራዎችን ሲያከናውን እንደነበር አልካደም። ስራውም አመርቂ እንደነበር ከተሰጠው የምስጋና ደብዳቤዎች ላይ መረዳት የሚቻል ነው።

እንዲሁም ራሳቸውን ችሰዋል የተባሉት ድርጅቶች ጠበቃ በመቅጠር ስራቸውን በማከናወን ላይ እንዳሉ በተከሣሹ ታምኗል፣ ከሣሽ ተሰማርቶበት የነበረው ቦታ ክፍት ሆኖ እያለም ተከሣሽ የመምረጥ መብት አለኝ በሚል ሌላ ሰው ቀጥሮ ከሣሹን ማሰናበት በአዋጅ ቁ. 42/85 የተደገፈ አይደለም፣ ስለሆነም በአዋጁ አንቀፅ 42 መሰረት የስራ ውሉ በሕገ ወጥ መንገድ የተቋረጠ ነው፣ ተከሣሽ ከሣሽን ወደ ስራው ሊመልስ የማይችልበትን በቂ ምክንያት ስላላስረዳ በአንቀጽ 43/2/ መሰረት ወደ ስራው እንዲመልሰው፣ ከሣሽ ስራውን ያልሰራው በእራሱ ጉድለት ባለመሆኑም ተከሣሹ በአዋጁ አንቀፅ 54/2/ መሰረት ውዝፍ ደመወዙን እንዲከፍለው ተወስኗል፣ ሌላው የጥቅማ ጥቅም ክፍያ ጥያቄ በግልጽና በዝርዝር ሁኔታ ስላልቀረበ ፍርድ ቤቱ አልተቀበለውም፣ ከሣሽ ወደ ስራ እንዲመለስ የተወሰነ በመሆኑም በአማራጭ የተነሱት የክፍያ ጥያቄዎች መመልከቱ አስፈላጊ አልሆነም፣ ስለሆነም ከሣሹ ወደ ስራው እንዲመለስና የስራ ውሉ ከተቋረጠበት ከግንቦት 7/1992 ዓ.ም ጀምሮ ያለውም ደመወዝ እንዲሁም ብር 150.00 ወጭና ኪሣራ እንዲከፈለው ተወስኗል በማለት ውሳኔውን ሰጥቷል። ተከሣሽ ከሣሽ የስራ መሪ ነው በማለት ያቀረበው መቃወሚያ የከሣሽ የስራ ድርሻ ሕግ ነክ ጉዳዮችን መፈጸም ብቻ ነው፣ የሕግ

አገልግሎት ኃላፊ መባሉ ብቻውን የስራ መሪ አያሰኘውም በሚል ምክንያት በ25/5/93 ዓ.ም በዋለው ችሎት ተቃውሞው ውድቅ መደረጉም በዚሁ ውሣኔ ላይ ተመልክቶ ይኖራል።

ከዚህ ውሣኔ ላይ በአሁን አመልካች አማካኝነት ይግባኝ የቀረበለት የፌዴራል ከፍተኛ ፍርድ ቤትም በአዋጅ ቁ. 42/85 አንቀጽ 3/2/ሐ/ መሰረት የስራ መሪ ለመባል የድርጅቱን ዋና ዋና ተግባራት በቀጥታ ማከናወን እና ውሳኔ መስጠት መቻልም ያስፈልጋል፣ የመልስ ሰጭ የስራ ድርሻ በሕግ አገልግሎት ሙያ ሕግ ነክ በሆኑ ጉዳዮች ላይ ምክር መስጠት እንጂ ፖሊሲዎችን መንደፍና የአመራር ውሳኔዎችን መንደፍን የሚመለከት አይደለም፣ ስለሆነም የስር ፍርድ ቤት መልስ ሰጭ የስራ መሪ ሲባል አይችልም ማለቱ የሚነቀፍ አይደለም፣ እንዲሁም ይግባኝ ባይ በመልስ ሰጭ ቦታ ላይ ሌላ ሰራተኛ ቀጥሮ በማሰራት ላይ እንደሆነ በመልስ ሰጭው የተገለጸ እና በይግባኝ ባዩም የታመነ ነው፣ ይግባኝ ባይ መልስ ሰጭው ከይግባኝ ባይ ድርጅት በተጨማሪ የሕግ አገልግሎት ይሰጡባቸው የነበሩት ሌሎች ድርጅቶች በአራሳቸው ተደራጅተዋል በሚል ብቻ የስራ ውሉን ማቋረጡ ተገቢ አይደለም፣ ስለሆነም የስር ፍርድ ቤት መልስ ሰጭ ወደ ስራ እንዲመለስ በሚል የሰጠው ውሣኔ እንዲሻር በመጠየቅ የቀረበውን ይግባኝ አልተቀበልነውም በማለት የይግባኙን መዝገብ በፍ/ሥ/ሥ/ሕ/ቁ. 337 መሰረት ዘግቷል።

በመቀጠልም አመልካች የተጠቀሰው ውሣኔ መሰረታዊ የሆነ የሕግ ስህተት የተፈጸመበት ነው በማለት አቤቱታውን ለዚህ ችሎት አቅርቧል። የአቤቱታው ፍሬ ነገር በስር ፍርድ ቤቶች መልስ ሰጭ ወደ ስራ ሊመለስ አይገባም በማለት ያቀረብነው ክርክር ውድቅ በመደረጉ ምክንያት በአሁኑ ጊዜ በድርጅቱ ክፍት ሆኖ በማይገኝ የስራ መደብ እንዲሁም የአገልግሎት ካሣቸውን በፈቃደኝነት ተቀብለው ከተሰናበቱ ረጅም ጊዜ የሆናቸውን መልስ ሰጭ ወደ ስራ እንድንመልስ ተገደናል። በተጨማሪም የአዋጅ ቁ. 42/85 አንቀጽ 53/1/ እና 54/1ን በሚቃረን ሁኔታ ለበርካታ ወራት ያልሰሩበትን ደመወዝ እንድንከፍል ተገደናል። ስለሆነም መልስ ሰጭ ላልሰራበት ጊዜ ደመወዝ ሊከፈለው አይገባም፣ የመልስ ሰጭ የስራ ውል የተቋረጠው ቤሕጋዊ መንገድ በድርጅቱ ውስጥ በተፈጠረው የመዋቅር ለውጥ ምክንያት በመሆኑ እና መልስ ሰጭ የአገልግሎት ካሣቸውን በፈቃደኝነት የተቀበሉ በመሆኑም አመልካች በሌለው የስራ መደብ መልስ ሰጭን ወደ ስራ መልስ ሊባል አይገባም በማለት እንዲወሰንለት የሚጠይቅ ነው።

መልስ ሰጭም በአቀረበው መልስ አመልካች በስር ፍርድ ቤት ለአቀረብኩት ክስ የሰጠው መልስ ከሣሽ የቅጥረኛ ስር የነበሩትን የንግድ፣ የኢንዱስትሪ እና የእርሻ አካላትን የሕግ ነክ ጉዳዮች ለማከናወን ሲሆን እነዚህ አካላት ከተከሣሹ ስር ወጥተው የየራሳቸው ሕጋዊ ሰውነት እንዲኖራቸው በመደረጉ ምክንያት የከሣሹ ስራ በእጅጉ ቀንሷል፣ ከሣሽን አገልግሎት ይዞ መገዙ ለአላስፈላጊ ወጭ ይዳርገናል የሚል ይዘት እንደነበረው ግልጽ ነው፣ አሁን ደግሞ ውሉ የተቋረጠው በድርጅቱ ስር የታቀፉት ተቋሞች ወደ ኩባንያ በመቀየራቸው ምክንያት መሆኑን በመግለጽ

ግልጽነት በሌለው ሁኔታ ክርክሩን ማቅረቡ ይታያል፣ አመልካቹ ይህን ያደረገው አዲስ ክርክር ለማቅረብ አስቦ ከሆነ በዚህ ደረጃ አዲስ ክርክር ሊቀርብ አይገባም ተብሎ እንዲሰረዝልኝ እጠይቃለሁ፣ እንዲሁም መልስ ሰጭ አመልካች ድርጅት አንድ ኩባንያ አሁን ራሳቸውን ችለው ወደ ኩባንያነት ተቀይረዋል የተባሉት አህት ኩባንያዎች ደግሞ በአመልካቹ ስር ይሰሩ በነበረበት ጊዜ ተቀጥሬ በሕግ ጉዳዩ ላይ ተገቢውን አገልግሎት ስሰጥ ቆይቻለሁ፣ የተጠቀሱት የስራ ክፍሎች በአራሳቸው ሕጋዊ ሰውነት እንዲያገኙ ሲወሰንም በሙያዬ የሚገባኝን አገልግሎት ሰጥቻለሁ፣ የአመልካች አህት ኩባንያዎች በራሳቸው ከተቋቋሙ በኋላም የስራ ውሌ እስከተቋረጠበት ጊዜ ድረስ ለሁሉም /ለአመልካችና ለአህት ኩባንያዎቹ/ የሕግ ሙያ አገልግሎት ስሰጥ ቆይቻለሁ፣ እንዲህ በመሆኑም አመልካች የስራ ውሉን መቋረጥ ከአህት ኩባንያዎቹ ሕጋዊ ሰውነት ማግኘት ጉዳይ ጋር ለማገናኘት መሞከሩ ተገቢ ካለመሆኑም በላይ ሐሰት ስለሆነ ተቀባይነት ሊያገኝ የሚገባው አይደለም፣ አመልካች የመልስ ሰጭን የስራ ውል ያቋረጠበት ምክንያት የሰራተኛ ቅነሳ ሊባል የማይቻል በመሆኑ ክርክሩን በዚህ ረገድ ማቅረቡም በሕጉ የተደገፈ አይደለም፣ የስራ ውሉ የተቋረጠበት ምክንያትም በአዋጅ ቁ. 42/85 አንቀጽ 28/2/ሐ/ ወይም በንዑስ አንቀጽ /ሀ/ እና /ለ/ የሚሸፈን አይደለም፣ የስራ ውሉ የተቋረጠው አመልካቹ እንደሚለው ወጭን ለመቀነስ አይደለም፣ አስቀድሞ አንድ የነበረው ድርጅት ወደ አምስት/ስድስት ኩባንያነት የተቀየረው ስራው በመስፋፋቱ ነው፣ የመልስ ሰጭም የስራ ጫና በዚሁ አይነት ይጨምራል እንጂ የሚቀንስ አይደለም፣ እኔም የስራውን ጫና ተቋቁሜ ግዴታዬን እየተወጣሁ ሳለ አመልካቹ ያለማስጠንቀቂያ በሕገ ወጥ መንገድ የስራ ውሉን ማቋረጡ ተገቢ አይደለም፣ እያንዳንዱ ኩባንያ በራቴንሽን ጠበቃ ቀጥሮ ያሰራ መባሉም ወጭን የሚያበዛ አንጂ የሚቀንስ አይደለም፣ የኩባንያዎቹ ስራ በራቴንሽን ይሰራ ቢባል ደግሞ መልስ ሰጭው ከማንም አስቀድሞ እጩ ልሆን ይገባኛል፣ መልስ ሰጭ የታደለ እንደኛ ደረጃ የጥብቅና ፈቃድ እንዳለኝ እየታወቀ በራቴንሽን ለመስራት መፈለግ አለመፈለጌን ሳልጠየቅና የቅድሚያ እድልም ሳይሰጠኝ በድንገት የስራ ውሌ እንዲቋረጥ መደረጉ ቅን ልቦና የጎደለው አሰራር መሆኑን የሚያረጋግጥ ነው፣ አመልካች የመልስ ሰጭን የስራ ውል ከአቋረጠ በኋላ ደግሞ ለእራሱና የእህት ኩባንያዎቹ የሕግ ባለሙያ ለመቅጠር በተደጋጋሚ ጊዜ ክፍት የስራ ቦታ ማስታወቂያ አውጥቷል፣ እንዲሁም ከሁለት በላይ የሆኑ የሕግ ባለሙያዎችን ቀጥሮ በማሰራት ላይ ይገኛል፣ የስራ ውሉ በተቋረጠ ጊዜ በአመልካች ድርጅት ውስጥ የተደረገ ምንም አይነት የመዋቅር ለውጥ አልነበረም፣ በሌላም በኩል አመልካች የመልስ ሰጭ የደመወዝ ክፍያ ጥያቄ ውድቅ እንዲደረግለት ከመጠየቅ በቀር ይህ ክርክሩ የሚደገፍበትን ሕግ ለስር ፍርድ ቤት አላስረዳም፣ በስር ፍርድ ቤት ያልተነሳን ክርክር ሰበር ችሎቱ ሊቀበለው የማይገባ በመሆኑም ውድቅ ሊደረግልኝ የሚገባ ነው፣ ይህ ከታሰፈ አመልካች በዚህ ረገድ የአዋጅ ቁ. 42/85 አንቀጽ 53ን ጠቅሶ ያቀረበው አቤቱታ ከጉዳዩ ጋር የማይገናኝ ስለሆነ ተቀባይነት ሊያገኝ የማይገባ ነው፣ መልስ ሰጭ ስራዬን እንዳልሰራ የተደረገኩት አመልካቹ በወሰዳቸው ሕገ ወጥ እርምጃዎች ስለሆነ በአንቀጽ 54 መሰረት ደመወዝ የማግኘት መብቴ የተጠበቀ ነው፣ መልስ ሰጭ የስራ ውሉን መቋረጥ ተቀብሎ የአገልግሎት ክፍያውን በፈቃደኝነት ወስዷል፣ የስራ መደቡም አሁን ክፍት ሆኖ አይገኝም በማለት አመልካች ያቀረበው አቤቱታም በስር ፍርድ ቤት ያልቀረበ የክርክር ነጥብ ስለሆነ ተቀባይነት ሊያገኝ

አይገባም፣ የስራ ውል መቋረጥ በሕገ ወጥ መንገድ የተደረገ ከሆነ ደግሞ ሰራተኛው በአዋጅ ቁ. 42/85 አንቀጽ 43 መሰረት የተቋረጠበት ደመወዝ ተከፍሎት ወደ ስራው ሊመለስ ይገባል፣ ይህ የማይሆን ከሆነም ሰራተኛው ካሣ ተከፍሎት ከስራ ሊሰናበት ይገባል፣ የስር ፍርድ ቤት ከእነዚህ ሁለት አማራጮች የመጀመሪያውን ተቀብሎ መወሰኑ የሚነቀፍ አይደለም፣ አመልካች በሁለተኛው አማራጭ እንዲወሰንለት ከፈለገ ክርክሩን በምክንያት አስደግፎ ሊያቀርብ በተገባው ነበር፣ ስለሆነም በስር ፍርድ ቤቶች የተሰጠው ውሳኔ እንዲፀናልኝ እጠይቃለሁ፣ ውሣኔው ሙሉ በሙሉ አይፀናም ከተባለ ደግሞ በአቀረብኩት አማራጭ ክርክር መሰረት እንዲወሰንልኝና ወጭና ኪሣራም እንዲከፈለኝ አመለክታለሁ በማለት ተከራክሯል።

አመልካችም የመልስ መልሱን በማቅረብ በደርጅቱ በተፈጠረው የመዋቅር ለውጥ መነሻ የሕግ አገልግሎት በኮንትራት እንዲሰራ በመወሰኑ ምክንያት የተጠሪ የስራ ውል መቋረጡን በመግለጽ ተከራክረናል፣ በሌላ በኩል ደግሞ ይህ ችሎት ታኅሣሥ 11/1994 ዓ.ም በዋለው ችሎት የሰጠው የእግድ ትእዛዝ የመልስ ሰጭን ወደ ስራ መመለስ አይመለከትም በማለቱ ተጠሪ ከታኅሣሥ 25/1994 ዓ.ም ጀምሮ "ወደ ቀደሞ ምድብ" ስራው እንዲመለስ ብንጽፍለትም ደብዳቤውን ሳይቀበለን ቀርቷል፣ ስራውን አልጀምርም በማለቱም ጉዳዩን አፈጻጸሙን ለያዘው የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት አቅርበን በውሣኔው መሰረት መፈጸማችን ተረጋግጦ መዝገቡ ተዘግቷል፣ ስለሆነም ተጠሪው ወደ ስራ የመመለሱን ጉዳይ በፈቃዱ የተወው በመሆኑ ላልሰራበትም ጊዜ ደመወዝ እንዲከፈለው መወሰኑ የሕግ ስህተት ሰላለበት ውሳኔው ውድቅ ተደርጎ እና መዝገቡም ተዘግቶ እንድንሰናበት እጠይቃለሁ በማለት ተከራክሯል።

የግራ ቀኙ ክርክር ከላይ የተመለከተው ሲሆን ከተገቢው ሕግ ጋር ተገናዝቦ ተመርምሯል።

እንደተመረመረው በጉዳዩ ሊታይ የሚገባው የመጀመሪያው ነጥብ አመልካች የመልስ ሰጭን የስራ ውል ማቋረጡ በሕግ የተደገፈ ነው? ወይስ አይደለም? የሚለው ሆኖ ተገኝቷል።

አመልካች የመልስ ሰጭን የስራ ውል ያቋረጠው በድርጅቱ ላይ የተደረገው የመዋቅር ለውጥ የሕግ አገልግሎቱ ስራ እንዲቀንስ አድርጎታል፣ በዚህ ምክንያት በሕግ ረገድ ያለው ስራ በኮንትራት እንዲሰራ ተወስኗል የሚል ምክንያትን ተመስርቶ መሆኑን ክርክሩ ያስረዳል። ይህ በአመልካች የተጠቀሰው ምክንያት በአዋጅ ቁ. 42/85 አንቀጽ 27 ላይ ያለማስጠንቀቂያ የስራ ውል ሊያቋርጡ ከሚችሉ ምክንያቶች ውስጥ ያልተካተቱ መሆኑ ግልጽ ሲሆን በማስጠንቀቂያ የስራ ውል ሊያቋርጡ ይችላሉ ተብለው በአዋጅ ቁ. 42/85 አንቀጽ 28 ስር ከተዘረዘሩት ምክንያቶችም ውስጥ ታዛማጅነቱ ከአዋጅ አንቀጽ 28/1/መ/ ጋር ብቻ መሆኑ ይታያል። ይሁን እንጂ በአዋጅ ቁ. 42/85 አንቀጽ 28/1/መ/ መሰረት የስራ ውልን በማስጠንቀቂያ ለማቋረጥ ደግሞ የሰራተኛው "የስራ መደብ በበቂ ምክንያት" የተሰረዘና ሰራተኛውንም "ወደ ሌላ ስራ" ለማዛወር የማይቻል ሲሆን ይገባዋል። አመልካች የመልስ ሰጭን የስራ ውል

ሲያቋርጥ የስራ መደቡ ተሰርዟል፣ መልስ ሰጭውን ወደ ሌላ ስማዛወር ደግሞ አይቻልም የሚል ግልጽ ምክንያትን መሰረት አላደረገም። አመልካቹ በድርጅቱ የተደረገው የመዋቅር ለውጥ የሕግ ስራው እንዲቀንስ አድርጎታል፣ ስራውን በኮንትራት ማሰራቱ የተሻለ ሆኖ አግኝተነዋል ማለቱም የመልስ ሰጭ የስራ መደብ መሰረዙን አለዚያም መልስ ሰጭውን በሌላው አማራጭ ቦታ አዛውሮ ስማሰራት የማይቻል መሆኑን የሚያረጋግጥ አይደለም። እንዳውም አቤቱታው በቀረበበት ውሣኔ አመልካች በመልስ ሰጭ ቦታ ላይ ሌላ ሰራተኛ ቀጥሮ እያሰራ መሆኑ የተገለጸ ሲሆን ይህም የመልስ ሰጭ የስራ ቦታ አለመሰረዙ በስር ፍርድ ቤትም የተረጋገጠ መሆኑን ያሳያል። በተጨማሪም ምንም እንኳን አመልካች በሌላ የስራ መደብ መልስ ሰጭውን ወደ ሥራ መልሱ መባላችን ተገቢ አይደለም ሲል ለዚህ ችሎት በአቀረበው አቤቱታ የተከራከረ ቢሆንም በመልስ መልሱ ደግሞ መልስ ሰጭን "ወደ ቀድሞ ምድብ" ስራው እንዲመለስ ብንጠይቀው ፈቃደኛ ሳይሆን ቀርቷል ማለቱ የመልስ ሰጭ የስራ ቦታ አለመሰረዙ በእርሱ ዘንአመልካቹ/ ጭምር አለመካዱን የሚያመላክት ሆኖ አግኝተነዋል። በሌላ በኩል አመልካች መልስ ሰጭው የስራ ስንብት ክፍያ፣ የፕሮቬደንት ፈንድ ክፍያ እንዲሁም የእረፍት ፈቃድ ክፍያ ተቀብሎ ከስራ የተሰናበተ ስለሆነ ወደ ስራ መልሱኝ ሲል አይችልም በማለት ተከራክሯል። የስራ ውሉ የተቋረጠበት ሰራተኛ የስራ ስንብት ክፍያ ማግኘት እንዲሚገባው በአዋጅ ቁ. 42/85 አንቀጽ 39/1 ላይ ተመልክቷል። ይሁን እንጂ የስራ ስንብቱንም ሆነ ከፍ ሲል የተጠቀሱትን ክፍያዎች የተቀበለ ሰራተኛ የስራ ውሉ የተቋረጠው በሕጋዊ መንገድ ነው ሊባል ይገባዋል ወደሚል መደምደሚያ ላይ የሚያደርስ የሚችል ሕጋዊ መሰረት ያለ ሆኖ አላገኘነውም። መልስ ሰጭ የተጠቀሱትን ክፍያዎች ተቀብሎም አልተቀበለም የስራ ውሉ መቋረጥ ሕጋዊነት በተናጥል ተመርምሮ ምላሽ ሊሰጥበት የሚገባ ይሆናል። የመልስ ሰጭ የስራ ውል የተቋረጠበት ምክንያት በማስጠንቀቂያ ሆነ ያለማስጠንቀቂያ የስራ ውል ሊያቋርጡ ከሚችሉ ምክንያቶች ውስጥ የማይወድቅ ስለሆነ የስራ ውሉ መቋረጥ በሕግ የተደገፈ አይደለም ብለናል።

የመልስ ሰጭ የስራ ውል የተቋረጠው ከሕግ ውጭ ነው ከተባለ በውጤቱ መልስ ሰጭ ወደ ስራ ሊመለስ ይገባዋል? ወይስ ካሳ ተከፍሎት እንዲሰናበት ሊደረግ ይገባዋል? የሚለው ነጥብ በሁለተኛ ደረጃ ሊመረመር የሚገባው ይሆናል።

የስራ ውሉ ከሕግ ውጭ የተቋረጠበት ሰራተኛ አንድም ወደ ስራው ሊመለስ አለዚያም ካሳ ተከፍሎት ከስራ ሊሰናበት እንዲሚችል በአዋጅ ቁ. 42/85 አንቀጽ 43 ላይ ተደንግጎ ይገኛል። የስር ፍርድ ቤቶች የስራ ውሉ ከሕግ ውጭ የተቋረጠበትን መልስ ሰጭ ወደ ስራው ሊመለስ ይገባል በማለት ወስነዋል። አመልካች መልስ ሰጭው ወደ ስራው ሊመለስ አይገባም ሲል ለዚህ ችሎት አቤቱታ ያቀረበ ሲሆን በመልስ መልሱ ደግሞ መልስ ሰጭን ወደ ስራው እንዲመለስ ብንጠይቀው ፈቃደኛ ስላልሆነ ወደ ስራ የመመለሱን ጉዳይ በፈቃዱ እንደተወው ችሎቱ ሊረዳልን ይገባል በማለት ተከራክሯል። በመሰረቱ አመልካች መልስ ሰጭው ወደ ስራው ለመመለስ ፈቃደኛ አልሆነም ማለቱ ይህ ችሎት መልስ ሰጭው ወደ ስራ ሊመለስ ይገባልን ወይስ አይገባም? የሚለውን ነጥብ ከመመርመር የሚያግደውም ሆኖ አመልካቹ እንደሚከራከረው እንደስር ፍርድ ቤት ውሳኔ እንደፈጸመ የሚያረጋግጥለት

አይደለም። ይልቁንም የመልስ ሰጭ ወደ ስራ ለመመለስ ፈቃደኛ አለመሆን ነጥቡ ከአዋጅ ቁ. 42/85 አንቀጽ 43/3 አኳያ እንዲታይ የሚያደርገው ሲሆን በዚህም መልስ ሰጭውን ወደ ስራው ከመመለስ ይልቅ ካሣ ተከፍሎት እንዲሰናበት መወሰኑ ተገቢ እንደሚሆን ከድንጋጌው መረዳት ይቻላል። ስለሆነም ችሎቱ ከፍ ሲል የተመለከተውን ምክንያትና መልስ ሰጭው አመልካቹ ወደ ስራ የማይመልሰኝ ቢሆን ካሣ ከፍሎ ሊያሰናብተኝ ይገባል ሲል ከስር ጀምሮ ያቀረበውን ክርክር በመመሰረት አመልካች በአዋጅ ቁ. 42/85 አንቀጽ 43/4/ሀ መሰረት የመልስ ሰጭን የቀን ደመወዝ በ180 አባዝቶ በክሳ መልክ በመክፈል እንዲሁም በዚሁ አዋጅ አንቀጽ 44 መሰረት በማስጠንቀቂያ ጊዜ ሊሰጠው ይገባ የነበረውን የሁለት ወር ደመወዝ በመክፈል መልስ ሰጭውን ከስራ ሊያሰናብተው የሚገባ መሆኑን ተቀብሎታል።

በመጨረሻም ችሎቱ መልስ ሰጭ ያልሰራበት ጊዜ ደመወዝ እንዲከፈለው በስር ፍርድ ቤቶች መወሰኑ ተገቢ መሆን አለመሆኑን መርምሯል። ደመወዝ የሚከፈለው ለተሰራ ስራ ብቻ መሆኑ በአዋጅ ቁ. 42/85 አንቀጽ 54/1 ላይ ተደንግጓል። መልስ ሰጭ ከግንቦት 7/1992 ዓ.ም በኋላ በስራ ገበታው ላይ ያልነበረ በመሆኑ ሳይሰራ የዋለው በአሰሪው ጥፋት ነውና ከአዋጁ አንቀጽ 54/2 አኳያ ባይሰራም ደመወዝ ሊያገኝ ይገባዋል ሊሰኝ የሚችልም አይደለም። በዚህ ምክንያት የስር ፍርድ ቤት መልስ ሰጭ የስራ ውሉ ከተቋረጠበት ከግንቦት 7/1992 ዓ.ም ጀምሮ ያለው ውዝፍ ደመወዝ ሊከፈለው ይገባል ሊሉ መወሰናቸው የሕግ ድጋፍ ያለው ሆኖ አላገኘነውም።

በጥቅሉም ይህ ችሎት የመልስ ሰጭው አማካኝ የቀን ደመወዝ በ180 ተባዝቶ እንዲሁም የሁለት ወር ደመወዝ የማስጠንቀቂያ ጊዜ ክፍያ በአመልካቹ ተከፍሎት ከስራው ሊሰናበት ይገባል በማለት ወስኗል። በዚህም መልስ ሰጭ ወደ ስራው እንዲመለስና ውዝፍ ደመወዝም እንዲከፈለው በስር ፍርድ ቤት የተሰጠውን ውሳኔ በፍ/ብ/ሥ/ሥ/ሕ/ቁ/ 348/1 መሰረት በድምጽ ብልጫ ሽሮታል። ይፃፍ። መዝገቡ ወደ መዝገብ ቤት ይመለስ።

ታኅሣሥ 8 ቀን 1995 ዓ.ም

<u>የሀሳብ ልዩነት</u>

እኔ በተራ ቁጥር 5 ላይ የተሰየምኩት ዳኛ የሀሳብ ልዩነቴን እንደሚከተለው አሰፍራለሁ።

አመልካች የህግ ስህተቱ ይታረምልኝ ሲል ያቀረበው አቤቱታ የተጠሪው የሥራ ውል የተቋረጠው በድርጅቱ ውስጥ በተፈጠረ የአሰራርና የመዋቅር ለውጥ ምክንያት በመሆኑ ህጋዊ ሆኖ ሳለ ውዝፍ ደመወዝ ተከፍሎት ወደ ሥራው ይመለስ የተባለው ያላግባብ ነው በማለት ነው።

ይህንን አስመልክቶ በውዝፍ ደመወዝ አከፋፈሉ ላይ በአብላጫው ድምፅ በተሰጠው ውሳኔ ላይ የሀሳብ ልዩነት የለኝም።

ወደ ስራ ይመለስ አይመለስ በሚለው ክርክር ላይ ግን ከላይ እንደተጠቀሰው የአመልካቹ ጥያቄ ሲታይ የሥራ ውሉን ያቋረጥኩት በአግባቡ ስለሆነ ወደ ስራው ይመለስ ተብሎ የተሰጠው ውሳኔ ያላግባብ ነው የሚል ሲሆን ቁጥሪው በኩል ደግሞ ወደስራው እንዲመለስ የተሰጠው ውሳኔ ባግባቡ መሆኑን ጠቅሶ የአመልካች አቤቱታ ውድቅ እንዲሆንለት የሚከራከርበት ነው።

በዚህም መሠረት ሲታይ የሚገባው ነጥብ የስራ ውሉ የተቋረጠው ከህግ ውጪ ነው ተብሎ ተጠሪን ወደ ስራው እንዲመለስ የተሰጠው ውሳኔ እግባብ ነው አግባብ አይደለም? የሚለው ነው። ይህንን አስመልክቶ የሥር ፍርድ ቤቱ ጉዳዩን በመመርመር አመልካቹ የስራ ውሉን ለማቋረጥ በቂ ምክንያት ለመኖሩ አሳስረዳም በማለት የስራ ውሉ የተቋረጠው ከህግ ውጪ ስለሆነ ተጠሪው ወደ ስራው እንዲመለስ የወሰነበት ነው። በበኩሌም በዚህ ውሳኔ ላይ መሠረታዊ የህግ ስህተት አለው አልልም።

ለልዩነቱ ምክንያት የሆነኝ ጉዳይ፣ አመልካች የስራ ውሉን ለማቋረጥ የቻለበትን ምክንያት ጠቅሶ ውሉ የተቋረጠው በሀጋዊ ምክንያት ነው ለሚለው ክርክር የስር ፍርድ ቤቱ የሰጠው ውሳኔ እግባብ አይደለም ከሚል በስተቀር የስራ ውሉ መቋረጥ የለበትም ቢባል እንኳን ተጠሪው ወደስራው ሊመለስብኝ ስለማይገባ በአዋጁ አንቀጽ 43/3 መሰረት በአማራጭ ለተጠሪው ካሣ ተከፍሎት እንዲሰናበት ሲል ያቀረበው አቤቱታ የለም። በተጠሪም በኩል የስር ፍርድ ቤት በሰጠው ውሳኔ መሠረት ወደ ሥራዬ ልመለስ ይገባል፣ የአመልካች አቤቱታ ውድቅ መሆን አለበት አለ እንጂ ከአሁን በኋላ ወደ ስራ መመለስ ስለማልፈልግ በአማራጭ ካሳው ተከፍሎኝ ልሰናበት አላለም።

ከዚህም ባሻገር ተጠሪው ወደ ስራው ከሚመለስ ይልቅ ካሣ ተከፍሎት ከሥራ እንዲሰናበት ብሎ ለማለት በአዋጁ አንቀጽ 43/3 ቡተደነገገው መሠረትም አማራጩን መንገድ ለመከተል በቂና ህጋዊ ምክንያት መኖሩን የሚያረጋግጥ ነገር የለም።

ስለዚህ አመልካቹ ካቀረበው አቤቱታ በተጠሪውም በኩል ከተነሳው ክርክር በመነሳት ወደሥራ የመመለሱን ክርክር አስመልክቶ የስር ፍርድ ቤቱ የሰጠውን ውሳኔ የሚያስለውጥና በአዋጁ አንቀጽ 43/3 መሰረትም ተጠሪው ወደ ስራው ከሚመለስ ይልቅ ካሣ ተከፍሎት ከስራ እንዲሰናበት ብሎ ለመወሰን የሚያስችል በቂ የሆነ ህጋዊ ምክንያት አላገኘሁለትም። በመሆኑም በዚህ ረገድ አብላጫው ድምጽ ከሰጠው ውሳኔ በመለየት የስራ ውሉ የተቋረጠው ከህግ ውጪ ስለሆነ ተጠሪውን ወደ ስራው እንዲመለስ በማለት የስር ፍርድ ቤት በሰጠው ውሳኔ ላይ መሠረታዊ የህግ ስህተት የለበትም በማለት ብቻ ጉዳዩ ሊቋጭ ይገባዋል ስል በሀሳብ ተለይቻለሁ።

አለግድ ጋሻው

በኅብረተሰብአዊት ኢትዮጵያ
ጊዚያዊ ወታደራዊ መንግሥት
በሚኒስትሮች ምክር ቤት ሰብሳቢ ጽ/ቤት
የማዕከላዊ አስታራቂ ኮሚቴ

አመልካች:- የኢትዮ ጵያ መድን ድርጅት
ተጠሪ:- የኢትዮጵያ ንግድ መርከብ ድርጅት

የማ.አ.ኮ.መ.ቁ.71/77

የተጫኑ ዕቃዎች ስሚደርስባቸው ጉዳትና ጥፋት አመላለሹ በኃላፊነት የሚጠየቅበት ሂሳብ:- የእሽግ ገደብ መብት (Global statuary Limitation of Liability) ተፈጻሚ የማይሆንባቸው ሁኔታዎች:- የሐግ ደንቦች:- የአገር ውስጥ ሕጎች በማሚያነት ስሰሚያገለግሉበት ሁኔታ:- በማስጫኛ ውል ውስጥ ስሰሚጸፉ ልዮ ድንጋጌዎች (clause paramount):- የባሕር ሕግ ቁ.198::

አመልካች የመድን ድርጅት ደንበኞቹ ከውጭ አገር ለሚያስመጧቸው ልዩ ልዩ ዕቃዎች የባሕር ጉዞ የመድን ዋስትና ስመስጠት በገባው ግዴታ መሠረት የደንበኞቹ ንብረት የሆኑ የተሰያዩ ዕቃዎች ከእንግሊዝና ጀርመን ወደ ኢትዮጵያ በመርከብ በመጓንዝ ላይ እንዳሉ በመጥፋታቸው ብር 3804.61 (ሶስት ሺህ ስምንት መቶ አራት ከስልሳ አንድ ሣንቲም) ለደንበኞች በመክፈሉ ይህንኑ ገንዘብ ለማስመለስ በመተካት መብቱ በአጓዡ ላይ ያቀረበው ክስ ነው:: ተጠሪም (አጓዡ) ዕቃዎቹ መጥፋታቸውን ሳይክድ የክፍያውን መጠን ቡተመለከተ የኢትዮጵያ ሕጎች አግባብነትና ተፈጻሚነት የሚናራቸው በማስጫኛ ሰነዱ ላይ በግልጽ ላልተመለከቱ ጉዳዮች በማሚያነት በመሆኑና አመልካችም ከአስጫኞች የተሻለ መብት ስለሌለው በማስጫኛው ሰነድ ላይ በግልጽ ከተመለከተው በጥቅል 100 ፓውንድ የክፍያ መጠን በላይ ሲጠይቅ አይችልም በማለት ተቃውሚል::

ውሳኔ:- ተጠሪው ለአያንዳንዱ ጥቅል ከ100 ፓውንድ በላይ የመክፈል ኃላፊነት እንደሌለበት ተወስኗል::

የኮሚቴ አባላት

1.	አቶ ሥዮም ተሰማ	ሰብሳበቢ
2.	አቶ ረዳ ከሲል	አባል
3.	አቶ ደበበ ሞገስ	አባል
4.	አቶ አብዱራሂም አህመድ	ፀሐፊ

ኮሚቴው መዝገቡን መርምሮ የሚከተለውን ውሳኔ ሰጥቷል::

ው ሣ ኔ

አመልካች ታኅሣሥ 1 ቀን 1977 ዓ.ም ባቀረበው አቤቱታ ፣
አመልካች የተለያዩ ደንበኞቹ ከውጭ አገር ለሚያስመጧቸው ልዩ ልዩ ዕቃዎች የባሕር ጉዞ የመድን ዋስትና መስጠቱን ፣
ተጠሪው ዕቃዎቹን በባሕር እንጉዞ ለባለንብረቱ ለማስረከብ የውል ግዴታ መግባቱን ፣
ተጠሪው የተረከባቸውን ዕቃዎች በተረከበበት ሁኔታ መልሶ ማስረከብ ሲገባው የተወሰኑ ዕቃዎች በመጥፋታቸው የተነሳ ግዴታውን ሳይወጣ በመቅረቱ አመልካች ለደንበኞቹ ብር 3804.61 (ሶስት ሺህ ስምንት መቶ አራት ከስልሳ አንድ ሣንቲም) መክፈሉን ፣
ተጠሪው ዕቃዎቹ ከላይ በተገለጸው መሠረት መጥፋታቸውን አምኖ ለእያንዳንዱ ጥቅል እስከ 100 ፓውንድ ለመክፈል መተማመኛ መስጠቱን ፣
ተጠሪው ግዴታውን ላለመወጣት ያቀረበው ምክንያት ለጠፋው ዕቃ ለእያንዳንዱ ጥቅል ኃላፊነቱ ቢበዛ እስከ 100 ፓውንድ ብቻ ነው ቢልም ተጠሪው ራሱ ፈርሞ በሰጠው የባሕር ጉዞ ውል (ቢል ኦፍ ሊዲንግ) አንቀጽ 2(ለ) በግልጽ እንደተመለከተው የሔግ ሩልስ ስምምነት በውሉ ላይ ተፈጻሚ እንዲሚሆን ገልጾ በጉዞ ላይ ለጠፋ ዕቃ ለእያንዳንዱ ጥቅል ስለሚከፈለው መጠን ፣

ሀ ዕቃው የሚጫንበት አገር የሔግ ሩልስ ስምምነት በሕግ ተደንግጎ ከሆነ መክፈል ያለበትም መጠን በዚሁ ስምምነት መሠረት እንዲሚሆን ፣

ለ የሔግ ሩልስ ስምምነት ዕቃው በሚጫንበት አገር ሕግ በሥራ ላይ ከሌለ ደግሞ ዕቃው በሚጫንበት አገር ሕግ መሠረት የሚከፈለው የክፍያ መጠን መሆን እንደሚገባው ፣

ሐ ዕቃው በሚጫንበት አገር ያስገዳጅነት ኃይል ያለው ሕግ ከሌለ ደግሞ ከላይ የተጠቀሰው የሔግ ሩልስ ስምምነት ተፈጻሚ እንደሚሆን መጻፉን ፣

ለአሁኑ ክስ ምክንያት የሆኑት የጠፉት ዕቃዎች የተጫኑት ሁለቱ ከእንግሊዝ አገር አንዱ ደግሞ ከምዕራብ ጀርመን ሲሆን በጉዞ ላይ እንዳለ ለጠፋ ዕቃ ለእያንዳንዱ ጥቅል በእንግሊዝ አገር 471.96 ፓውንድ በምዕራብ ጀርመን 1250 ዶች ማርክ እንደሚከፈል ፣

ገልጾ ተጠሪው በገባው የውል ግዴታ መሠረት ክፍያውን መፈጸም ስላለበት በክሱ የተመለከተውን ገንዘብ መክፈል ከሚገባው ቀን ጀምሮ ከሚታሰብ ሀጋዊ ወለድና ኪሣራ ጭምር እንዲከፍል ይደረግ ዘንድ አመልክቷል::

የማዕከላዊ አስታራቂ ኮሚቴም ይህ የአመልካች አቤቱታ እንደቀረበለት በቅድሚያ ግራ ቀኙ ተገናኝተው ለጉዳዩ አንድ የጋራ መፍትሔ እንዲሹለት በማለት መመሪያ ሰጥቶ ነበር በዚህም መሠረት ሁለቱም ተገናኝተው ውይይት ካካሄዱ በኋላ ባቀረቡት ቃለ ጉባዔ ሊስማሙ ያለመቻላቸውን ገልፀው ጉዳዩን ለኮሜቴው ስለመለሱለት በቀጥታ ወደ ክርክር እንዲገቡ ተደርጓል::

በዚህ መሠረት ተጠሪው ሚያዚያ 7 ቀን 1977 ዓም በተፃፈ መልሱ ፣

አመልካች ለክሱ መሠረት በማድረግ ያቀረበው የማስጫኛ ሰነድ (ቢል አፍ ሊዲንግ) አንቀጽ 23 ሁለተኛው ፓራግራፍ በአንድ ዓመት ጊዜ ውስጥ ክስ ካልቀረበ አጓጓዡ ወይም መርከቡ ከማናቸውም ኃላፊነት ነጻ እንደሚሆን ስለሚደነግግና ይህም ክስ የቀረበው ከአንድ ዓመት በላይ ቆይቶ ስለሆነ ክሱ ከኪሣራ ጋር እንዲዘጋለት ፣

- ይህ ቢታለፍ ግን አመልካች እንዳለው በማስጫው ውል ቁጥር 2(ለ) የሔግ ቪዝቢ ስምምነት ያለመጠቀሱንና የተጠቀሰው የሔግ ሩልስ መሆኑን፣ የሔግ ሩልስንም በሚመለከት እነዚህ ደንቦችም ሆኑ በማስጫኛው ሰነድ በአንቀጽ 29 ላይ የተጠቀሰው የኢትዮጵያ ሕጎች አግባብነትና ተፈጻሚነት የሚኖራቸው በማስጫኛ ሰነድ ላይ በግልጽ ላልተመለከቱት ጉዳዮች በማሚያነት ብቻ መሆኑን እና በማስጫኛው ሰነድ ላይ በግልጽ ዕልባት ለተበጀላቸው ጉዳዮች፣ ውል ቡተዋዋዮች መካከል ሕግ ስለሆነ (1731) አግባብነትና ተፈጻሚነት የሚኖረው በውሉ ስምምነት ላይ የሰፈሩት ድንጋጌዎች መሆናቸውንና ዳኞች እንኳን በትርጉም ሳቢያ ለተዋዋዮች አዲስ የውል ቃል ሊፈጥሩ እንደማይችሉ ፣

አጓጓዡ (ተጠሪ) ኃላፊ ሰሚሆንባቸው ጉዳዮች ስለሚከፍለው የጉዳት ካሣ መጠን በአንቀጽ 24 ላይ በግልጽ የተመለከተ ሲሆን አመልካች ግልጽ የሆነን ድንጋጌ (የፍ.ሕ.ቁ 1733) በመዝለል ያቀረበው ክስ ተቀባይነት ሲኖረው እንደማይገባ ፣

አመልካች የማስጫኛ ሰነድን አንቀጽ 2(ለ) "Paramount Clause" ነው በማለት የራሱን አስተያየት ካከለበት በኋላ አንቀጽ 2(ለ) በማስጫኛው ሰነድ ላይ በግልጽ ያሰፈሩትን የውል ቃሎች ሁሉ ይሽራል ከሚል የተዛባ መደምደሚያ ላይ ቢደርስም አንቀጽ 2(ለ) ወይም አንቀጽ 29 በማስጫኛ ሰነድ ላይ ያልተመለከቱ ሁኔታዎች ቢያጋጥሙ ተፈጻሚ ስለሚሆኑት ድንጋጌዎች የሚናገር ሲሆን ይህም ያልተለመደ አሰራር መሆኑን ፣

- ከሁሉም በላይ ግን ፣

ሀ. ለሰሚከፈለው የጉዳት ካሣ በአንቀጽ 24 ላይ በግልጽ የተደነገገ ሲሆን ትርጓሜ ላያሻው ተፈጻሚ መሆን ስለሚገባው፣

ለ. አንቀድ 2(ለ) እና አንቀጽ 24 አይጋጩም እንጂ ቢጋጩም እንኳን ውጤት ያለው ትርጓሜ ሊሰጣቸው ስለሚገባ (1737) ፣

ሀ. ሰለሚከፈለው የጉዳት ካሣ በአንቀጽ 24 ላይ በግልጽ የተደነገገ ሲሆን ትርጓሜ ሳያሻው ተፈጻሚ መሆን ስለሚገባው፣

ለ. አንቀድ 2(ለ) እና አንቀጽ 24 አይጋጩም እንጂ ቢጋጩም እንኳን ውጤት ያለው ትርጓሜ ሊሰጣቸው ስለሚገባ (1737) ፣

ሐ. አንቀጽ 24 ልዩ ድንጋጌ አንቀጽ 2(ለ) ግን አጠቃላይ ድንጋጌ ሲሆን በሕግ አተረጓጎም ደንብ ልዩው ድንጋጌ አጠቃላዮን ድንጋጌ የሚሽር ስለሆነ ፣

መ. ተጠሪ ሲከፍል የቆየው በጥቅል የእንግሊዝ ፓውንድ 100 ሰለሆነ አመልካች አስጫኙች ከነበራቸው የተሻለ መብት ስለሌለው በቢል ኦፍ ሊዲንጉ አንቀጽ 24 ከተመለከተው የክፍያ መጠን ከፍ እንዲልለት መጠየቅ እንደማይችል እና የኢትዮጵያ ፍርድ ቤቶችም ሆኑ የመዳኘት ሥልጣን የተሰጣቸው አካሎች አመልካች በጠቀሳቸው የውጭ አገር ሕጎች እንዲፈረድ የቀረበው ጥያቄ ተቀባይነት ሊኖረው እንደማይገባ በመግለጽ ክሱ የቀረበው በጊዜው ነው ተብሎ የሚበየን ቢሆን ለእያንዳንዱ ጥቅል የሚከፈለው በአንቀጽ 24 መሠረት የእንግሊዝ ፓውንድ 100 ነው ተብሎ እንዲወሰንና የኪሣራ መብቱም እንዲጠበቅ አመልክቷል::

... 1977 ዓም በተጻፈ የመልስ መልሱ :-

ተጠሪው ዕቃዎቹ መጥፋታቸውን አምኖ መተማመኛ የሰጠ ስለሆነ የይርጋ ጥያቄ መነሳት የሌለበት መሆኑን ፣

የማስጫኛው ሰነድ አንቀጽ 29 የኢትዮጵያ ሕጎች ተፈጻሚነት የሚኖራቸው በማስጫኛው ሰነድ ላይ በግልጽ ላልተመለከቱ ጉዳዮች ሲሆን አንቀጽ 2(ለ) ግን በውሉ ላይ የሔግ ሩልስ ተፈጻሚ እንደሚሆን በማያሻማ ሁኔታ እየጠቀሰ የሔግ ሩልስ ዕቃው በሚጫንበት አገር ሕግ በሥራ ላይ ከሌለ ደግሞ ዕቃው በሚጫንበት አገር ሕግ መሠረት የሚከፈለው ክፍያ መጠን መሆን እንደሚገባው እንደሚያመለክትና የአመልካች ጥያቄም በዚሁ ውል መሠረት እንዲፈጸምለት መሆኑን ፣

የጉዳት ካሣውን አከፋፈል በሚመለከት በማስጫኛው ሰነድ አንቀጽ 2(ለ) እና አንቀጽ 24 መካከል ግጭት መኖሩንና የማስጫኛ ሰነዱ በተጠሪ የተዘጋጀ ስለሆነ በፍ.ብ.ሕ.ቁ. 1738 መሠረት ለውል ተቀባይ ምቹ በሚሆን አኳኋን መተርጎም እንዳለበትና አጠቃላይ ድንጋጌና ልዩ ድንጋጌ የሚለውም ሁለቱም አንድ ዓላማ ያላቸው ሲሆኑ ብቻ መሆኑንና አመልካች በዚህ በኩል አንቀጽ 24 ልዩ

ድንጋጌ፣ አንቀጽ 2(ለ) ደግሞ አጠቃላይ ድንጋጌ ብሎ ያቀረበው ክርክር ተቀባይነት የሌለው መሆኑን ፣

አመልካች ባጠቃላይ ያቀረበው ጥያቄ የኢትዮጵያ ሕጎች ተፈጻሚነት ሊኖራቸው ይገባል ወይንም በውጭ አገር ሕጎች መሠረት እንዲፈጸምለት ሳይሆን የማስጫኛው ሰነድ አንቀጽ 2(ለ) የሔግ ሩልስ ተፈጻሚነት እንዳለው የሚጠቅስ በመሆኑና ውል ደግሞ በተዋዋይ ወገኖች መካከል ሕግ ስለሆነ በዚሁ መሠረት እንዲፈጸምለት መሆኑን ገልጾ በክሱ መሠረት ይወሰንለት ዘንድ አመልክቷል::

የግራ ቀኙ ክርክር አጠቃላይ ገጽታ ከላይ እንደተመለከተው ሲሆን ጭብጡም ተፈጻሚነት ሊኖረው የሚገባው በማስጫኛ ሰነዱ የተጠቀሰው አንቀጽ 2(ለ) ወይስ አንቀጽ 24 የሚለው ይሆናል::

በመሠረቱ በሁለት ተዋዋይ ወገኖች መካከል ውል በሚደረግበት ጊዜ ተዋዋዮች መብትና ግዴታቸውን በውሉ ውስጥ እንደሚያሰፍሩ ግልጽ ሲሆን በዚህ በተያዘው ጉዳይ ሳይም ይህንኑ በሚገባ ያሰፈሩ መሆኑ ይታያል። ሆኖም አንዳንድ የውል ቃሎች አልፎ አልፎ በተዋዋይ ወገኖች መካከል የተሰያየ ትርጉም እየተሰጣቸው አከራካሪ ሆነው ይቀርባሉ። በዚህ ጉዳይ ላይ አከራካሪ ሆነው ከቀረቡት ነጥቦች መካከል በማስጫኛው ሰነድ አንቀጽ 2(ለ) የተጠቀሰው ነው። የዚህ አንቀጽ ድንጋጌም ዕቃው በተጫነበት አገር የሔግ ሩልስ በሥራ ላይ የዋለ ከሆነ ይኸው ተፈጻሚ እንደሚሆን፣ ይህ ከሌለ ደግሞ ዕቃው የሚጫንበት አገር ሕግ ተፈጻሚ እንደሚሆንና ዕቃው በሚጫንበት አገር ያስገዳጅነት ጠባይ ያለው ሕግ ከሌለ ደግሞ የሔግ ሩልስ ስምምነት ተፈጻሚነት እንዳለው የሚገልጽ ነው:: ሌላው አከራካሪ ነጥብ ደግሞ የዚሁ የማስጫኛ ሰነድ አንቀጽ 24 ሲሆን የዚህም ድንጋጌ አጓዡ ለጠፋ ወይም ለጎደለ ዕቃ ኃላፊ በሚሆንበት ጊዜ ሊክፈል የሚገባው የካሣ መጠን 100 ፓውንድ መሆኑን የሚገልጽ ነው:: እንግዲህ ሁለቱም በተናጠል ሲታዩ የመጀመሪያው የማስጫኛ ሰነዱን በሚመለከት ተፈጻሚ መሆን ያለባቸውን ሕጎች ሲገልጽ ሁለተኛው የካሣውን ክፍያ መጠን የሚገልጽ ነው:: በዚህም ረገድ ምንም እንኳን በማስጫኛ ሰነዱ ለሚነሱ ክርክሮች ተፈጻሚነት ያሳቸውን ሕጎች አንቀጽ 2(ለ) ቢገልጽም በአንቀጽ 24 የካሣውን ክፍያ መጠን በሚመለከት ግልጽ ባለ ሁኔታ አጓዡ ለአንድ ጥቅል ከ100 ፓውንድ በላይ የመክፈል ኃላፊነት እንደሌለበት ገልጾታል። ከዚህም ለመረዳት እንደሚቻለው የማስጫኛው ሰነድ አንቀጽ 2(ለ) አጠቃላይ ድንጋጌ መሆኑንና አንቀጽ 24 ደግሞ ልዩ ድንጋጌ መሆኑን ሲሆን ይህም የተባለበት ምክንያት አንቀጽ 24 በተለይ የካሣ ክፍያውን መጠን በሚመለከት በግልጽ የሚደነግግ በመሆኑ ነው:: አመልካች በሚለው ዓይነት አንቀጽ 2(ለ) "Paramount Clause" ስለሆነ በማስጫኛ ሰነዱ በግልጽ የተጻፉትን ሁሉ ይሽራል በማለት የሚከራከረው አግባብነት የለውም:: ምክንያቱም አንቀጽ 2(ለ) በአጓዡና በአስጫኙ መካከል ላለው ውል ብቸኛ ተፈጻሚ ነው የሚባል ከሆነ በማስጫኛ ሰነዱ የሰፈሩትን

የውል ቃሎች በሙሉ አስፈላጊ ያልሆኑና በወረቀት ላይ በደፈናው ተፈጻሚነት ላይኖራቸው የሰፈሩ ስለሚያደርጋቸው ነው:: ስለዚህም ተዋዋይ ወገኖች ውሉን በሚያሰፍሩበት ጊዜ እያንዳንዱን የውል ቃሎች የራሳቸው ተፈጻሚነት እንደሚኖራቸው በመገንዘብ የሚያስገቧቸው በመሆኑ የአንቀፅ 2(ለ)ም ተፈጻሚነት እንደ አንቀጽ 29 በማስጫኛ ሰነዱ ያልተጠቀሱ ቢኖሩ በማሚያነት የገባ ነው ከማለት በስተቀር ሌላ ትርጉም የሚሰጠው አይሆንም። በዚህም ረገድ በማስጫኛ ሰነዱ አንቀጽ 24 የሰፈረው ድንጋጌ ግልጽ በመሆኑ ሉትርጉም የሚጋብዝ ሳይሆን ኮሚቴው እንዳለ የወሰደው ግንዛቤ ነው::

ስለዚህም አመልካች የማስጫኛ ሰነዱ አንቀጽ 2ለን ተመርኩዞ ያቀረበው ክስ አግባብ የሌለው ስለሆነ ክሱን ውድቅ አድርገን ተጠሪም ለእያንዳንዱ ጥቅል ክ100 ፓውንድ በላይ የመክፈል ኃላፊነት እንደሌለበት ወስነናል።

መስከረም 15 ቀን 1977 ዓ.ም

<u>የኢትዮጵያ ሕዝባዊ ዲሞክራሲያዊ ሪፐብሊክ</u>
<u>የአዲስ አበባ ከፍተኛው ፍርድ ቤት</u>

ከሣሽ:- ግርማ ከበደ
ተከሳሾች:- 1. የኢትዮጵያ ንግድ መርከብ ድርጅት
2. የባሕርና ትራንዚት አገልግሎት ኮርፖሬሽን

<u>የፍ.መ.ቁ. 689/78</u>

በመርከብ ለመገልገል ስለሚደረጉ ውሎች:- ስለ ጭነት ኪራይ ውል:- በመርከቡ ደጅ (ዴክ) ላይ ስለሚጫኑ ዕቃዎች አጓዥ/አመላላሹ (ትራንስፖርተር) ስላለበት አላፊነት:- በባሕር ሕግ ቁ. 180(4) ላይ በሕጉ የአማርኛውና የእንግሊዝኛው ቅጂዎች መካከል ስላለው ልዩነት:- የተጫኑ ዕቃዎች ለሚደርስባቸው ጉዳትና ጥፋት አመላላሹ በኃላፊነት የሚጠየቅበት ሂሳብ:- የባሕር ሕግ ቁ.180(4)፣ 197 እና 198። በማመላለሻ (ጭነት) ውል ውስጥ የተገኙ መብቶች የይርጋ ዘመን:- በሕግ የተመለከተውን የይርጋ ዘመን በጭነት ማመላለሻ ደረሰኝ በተሪጋገጠ የማመላለሻ ውል (ቢል ኦፍ ሊዲንግ) ስለማሻሻል:- የባሕር ሕግ ቁ. 203 እና 205። ስለትራንዚትና የመርከብ ሥራ ወኪሎች ተግባርና ኃላፊነት::

ከውጭ ሀገር የገዛሁትን መኪናና ልዮ ልዮ ዕቃዎች እንደኛ ተከሳሽ ወደ ኢትዮጵያ እንዲያጓጉዝልኝ ባደረግነው ውል መሠረት ዕቃዎቹ አስብ ወደብ ደርሰው ሲራገፉ በጭነት ማመላለሻው ደረሰኝ ላይ (ቢል ኦፍ ሊዲንግ) ዝርዝራቸው ከተመለከተው ዕቃዎች ውስጥ እምስት 5 ካርቶን ዕቃዎች ጎድሰው ስለተገኙ እንደኛው ተከሳሽ ለዕቃዎቹ ጉዞ ተገቢ ጥንቃቄ ባለማድረጉ፣ ሁለተኛወም ተከሳሽ ዕቃዎቹ ሊጠፉ ተከታትሎና የጠፋውንም ዕቃ ፈልጎ ለማግኘት ያደረገው ሙከራ ባለመኖሩ፣ ሁለቱም ተከሳሾች ለጥፋቱ ኃላፊ ስለሆኑ የመጨረሻው ኃላፊ ማን እንደሆነ ለመለየት ባለመቻሉ ፍ/ቤቱ አጣርቶ ዕቃዎቹ እንዲተኩልኝ ወይም ዋጋቸው እንዲከፈለኝ በማለት የዕቃዎቹ አስጫኝ የሆነው ከሳሽ ያቀረበው ክስ ነው::

<u>ውሳኔ</u>:- 1ኛው ተከሳሽ ኃላፊ ሆኖ ሲገኝ 2ኛው ተከሳሽ ከክሱ በነፃ ተሰናብቷል።

- የባሕር ሕግ ቁ. 180(4) አጓዙ ለጫናቸው ዕቃዎች ከተጫኑበት እስከሚራገፉበት ጊዜ ድረስ ኃላፊ ቢሆንም በመርከቡ ደጅ (ዴክ) ላይ ስለተጫኑት እንስሶች ኃላፊነት እንማይኖርበት የአማርኛው ሕግ ሲጠቅስ የእንግሊዝኛው ደግሞ ዕቃዎችንም ይጨምራል:: ይህ አንቀጽ በመርከብ ደጅ ላይ የተጫኑ ዕቃዎች ከባሕር ላይ የጉዞ ጠባይ የተነሳ ዓይነታቸው በመቀነሱ ለሚደርስባቸው ጉዳት አመላላሹን ከኃላፊነት ነፃ ለማድረግ የታቀደ እንጂ ከመነሻ ቦታው ሙሉ በሙሉ ተንቀሳቅሰው ለጠፉ (ለተሰወሩ) ዕቃዎች አመላላሹን ከኃላፊነት ነፃ ለማድረግ ታስቦ የተቀረፀ ነው ማለቱ የሚታሰብ አይሆንም:: በዚህ በኋለኛው ይዘቱ የሚተረጎም ቢሆን የአመላላሹን ሠራተኞች ያለገደብ ለምግባረ ብልሹነት ለሚያጋልጣቸውና ለአስጫኙም አንዳችም የሕግ ጥበቃ አልተደረገለትም ለሚያሰኝ አተረጓጎሙን የተዛባ ያደርገዋል::

- አስጫኝ ዕቃውን በመርከብ ላይ በሚየስጭንበት ጊዜ በጭነት ማረጋጫው ደረሰኝ ላይ የዕቃውን ዓይነትና ብዛት ከመግለጽ ጋር የአያንዳንዱ ዕቃ ግምት ተመልክቶ ከሆነ ዕቃው ቢጠፋ አስጫኝ ይህንኑ ግምት የማግኘት መብት ይኖረዋል:: ግምቱ ካልተመለከተ ግን የአመላላሹ የኃላፊነት መጠን የዕቃው የገበያ ዋጋም ሆነ ከአምራቹ ድርጅት የሚሸጥበት የጅምላ ዋጋ ከግምት ውስጥ ሳይገባ በዕቃዎቹ ጥቅል ቁጥር ተሰልቶ በጥቅል እስከ ብር 500.00 ድረስ ብቻ እንደሆነ በሕግ ተወስኗል::

<u>ፍ ር ድ</u>

<u>ዳኞች</u>:- ኃይሉ አስምር፣ ረዳኢ ባራኪ፣ አብደላ አሊ::

ከሳሽ ከውጭ የገዛቷቸውን የግል መኪናና ልዩ ልዩ ዕቃዎች ወደ አገር ውስጥ ለማስገባት የኢትዮጵያ ንግድ መርከብ ድርጅት ንብረት በሆነች መርከብ ተጭኖ እንዲላክልኝ የ5 ካርቶን ልዩ ልዩ ዕቃዎች በአንድ ቶዮታ ኮሮላ ስቴሽንዋገን መኪና ውስጥ እና አንድ ካርቶን ከመኪና ውጭ ሆነው ለአመላላሹ ወኪል ኩባንያ መስከረም 7 ቀን 1977 ዓ.ም አስረክብኩ:: እንዲላክልኝ ለኩባንያው ያስረከብኩት ዕቃ መኪናውና በውስጡ ያሉት ልዩ ልዩ ዕቃዎች ጭምር በሙሉ ለኢትዮጵያ ንግድ መርከብ ድርጅት ደርሰውት የተረከበ ለመሆኑ ቁጥር 001 የሆነ የጭነት ማስታወቂያ ደረሰኝ (ቢል ኦፍ ሊዲንግ) ሰጥቶኛል:: በመኪናው ውስጥ ሆነውና ዝርዝራቸው በቢል ኦፍ ሊዲንግ ላይ የተመለከቱት ዕቃዎች አሰብ ወደብ ደርሰው ሲራገፉ 5 ካርቶን ዕቃዎች ጎድለው ተገኙ:: ዕቃዎቹ መጉደላቸው በጉምሩክ ዲክለራሲዮን ቁ. 001608 ሰለተገለጸ በተገኙት ከፊል ዕቃዎች ላይ የትራንዚትና የመርከብ ውክልና ሥራ በሚሰራው በሁለተኛ ተከሳሽ በኩል ማናቸውም ቀረጥና ግብር በመክፈል ከፊሎቹን ዕቃዎች ተረከብኩ::

በመኪናው ውስጥ ከነበሩት ዕቃዎች መካከል የሚከተሉት አልደረሱኝም:: አንድ ጂ.ቪ.ሲ መልታይ ሲስተም ቪዲዮ ካሴት ዋጋው ብር 6000.00 (ስድስት ሺህ)፣ አንድ አካይ ራክማውንት ኮ.ኢ.ቲ ከ1 ኤልተርነር ራዲዮ፣ ከኪ.ኤ.ፒ 1ሲ ተርንቲብል፣ ከኤች ኤክስ ካሴት ሪከርደር፣ ከኤች 41 አምፕሊፋየር ጋር ዋጋው ብር 6000.00 (ስድስት ሺህ)፣ በድምሩ ብር 12000.00 (አሥራ ሁለት ሺህ) የሚያወጡ ናቸው::

ስለዚህ አንደኛ ተከሳሽ ለዕቃዎቹ ጉዞ የሚገባውን ጥንቃቄ ባለማድረጉና የጠፉትን ዕቃዎች ፈልጎ ለመመለስ ጥረት ባለማድረጉ ለደረሰብኝ ጉዳት ኃላፊ ሲሆን፣ ሁለተኛው ተከሳሽ ደግሞ የትራንዚትና የመርከብ ሥራ ወኪል በመሆኑ ለሚሰጠው አገልግሎት ኮሚሽኑን በቅድሚያ ከተቀበለ በኋላ ዕቃዎቹ ወደብ ሲደርሱ ከወደብ አንስቶ ለእኔ ለባለንብረቱ የማስረከብ ግዴታ አለበት፣ ዕቃዎቹም ሲጠፉ ተከታትሎና የጠፋውን ዕቃ ፈልጎ ለማግኘት ያደረገው ሙከራ ባለመኖሩና ይህን ኃላፊነቱን ባለመወጣቱ ለደረሰብኝ ጉዳት ተጠያቂ ነው::

ሰለዚህ ሁለቱም ተከሳሾች ለጥፋቱ ኃላፊ ሲሆኑ፣ የመጨረሻ ኃላፊ ግን ማን እንደሆነ ለመለየት ባለመቻሌ ፍርድ ቤቱ እጣርቶ ዕቃዎቹ እንዲተኩልኝ ወይም የዕቃዎቹ ዋጋ ብር 12000.00 (አሥራ ሁለት ሽህ) ክስ ከቀረበበት ጊዜ ጀምሮ ከሚታሰብ ሕጋዊ ወለድ ጋር እንዲሁም ወጭና ኪሣራ ጭምር እንዲከፍሉ ይፈረድልኝ በማለት ፍርድ ቤቱን ጠይቋል:: ክክስ ማመልከቻውም ጋር የተለያዩ የጽሁፍ ማስረጃዎች ቀርበው ከመዝገቡ ጋር ተያይዘዋል::

የክሱ ማመልከቻ ለተከሳሾች ደርሷቸው መጋቢት 9 ቀን 1978 ዓ.ም በተጻፈ ማመልከቻ የየራሳቸውን መልስ አቅርበዋል::

እንደኛ ተከሳሽ ባቀረበው ተቃውሞ በመጫኛ ሰነዱ አንቀጽ 23 መሠረት ክሳሽ ጠፋብኝ የሚሉትን ዕቃ በ 3 ቀናት ውስጥ ማስታወቅ ነበረባቸው ካለ በኋላ ይህ ቢታለፍ በማለት የሚከተለውን ሙሉ መልስ አቅርቧል::

1. በመኪና ውስጥ የተቀመጡትን ዕቃዎች በሚመለከት አጓጓዡ ወይም መርከቡ ኃላፊነት የሌለበት መሆኑ በመጫኛ ሰነዱ ማለትም በቢል አፍ ሲዲንግ ፊት ለፊት ላይ ተገልጿል::

2. በመርከቡ ደጅ (ዴክ) ላይ ለሚጫኑ ዕቃዎች መርከቡ ኃላፊነት የለበትም፣ በዚህም ጉዳይ ቁ. 001 በሆነው የመጫኛ ሰነድ ላይ በመርከቡ ዴክ ላይ የተጫኑ ዕቃዎች ቢጠፉ ወይም ጉዳት ቢደርስባቸው አጓጓዡ ወይም መርከቡ ኃላፊነት የሌለበት መሆኑ ተገልጿል:: አስጫኙ እንዲዚህ ዓይነት ዕቃዎች ቢጠፉና ጉዳት ቢደርስባቸው በግሉ የመድን ዋስትና ከሚገባ በስተቀር ከመርከቡ ሊጠይቅ አይችልም::

3. ተከሳሽ ኃላፊ ነው ቢባል እንኳ በውልና በሕግ ኃላፊ ለሚሆንባቸው ለሚጠፉና ጉዳት ለሚደርስባቸው ዕቃዎች ስለሚከፍለው የካሳ መጠን በመጫኛ ሰነዱ ቁ. 24 ላይ እንደተገለጸው ተከሳሽ ሊከፈል የሚገባው ቢበዛ ብር 200.00 (ሁለት መቶ) የአንግሊዝ ፓውንድ ብቻ ነው::

4. የክሳሽና የተከሳሽ ግንኙነት በውል ላይ የተመሠረተ ስለሆነ ሊከፈለው የሚገባው የጉዳት ካሣ መጠን በደንበኛው የኪሣራ አቆራረጥ (ኖርማል ዳሜጅ) መሠረት ስለሆነ በክሳሹ በኩል የቀረበው የዋጋ ማቅረቢያ ደረሰኝ ተቀባይነት ሊያገኝ አይገባውም በማለት መልስ ሰጥቷል::

ሁለተኛው ተከሳሽም በበኩሉ በሰጠው መልስ፣ የ2ኛው ተከሳሽ ተግባርና ኃላፊነት የመርከብና የትራንዚት ውክልና አገልግሎት መስጠት ነው:: ወደ አገር ውስጥ

ስለሚገቡ ዕቃዎች ጉዳይ የ2ኛ ተከሳሽ ኃላፊነት ከዕቃ አስመጭዎች በሚደርሱት መረጃና ሰነዶች መሠረት ዕቃዎችን ከጉምሩክ ጣቢያዎች ማስለቀቅ፣ ዕቃውን ለባለዕቃው በተገኘው ማመላለሻ መላክ ሲሆን ዕቃዎቹ ጎድለው ወይም ተበላሽተው ሲገኙ ሰባለዕቃው ከመድን ድርጅት ካሣ ሊያስጡ የሚችሉትን ሰነዶች ማለትም የመድን ምርመራ (ሰረቬይ ሪፖርት) ወይም የእጥረት ማረጋገጫ የምስክር ወረቀቶች (ሾርት ላንዲንግ ሠርተፊኬት) መስጠት ነው። በዚህም መሠረት በዚህ ጉዳይ ላይ የጠፋውን ዕቃ በማመን መርከብዋ ባለፈችባቸው ወደቦች ለማፈላለግ ሞክሯል። ሆኖም ዕቃዎቹ ሊገኙ ባለመቻላቸው የእጥረት ማረጋገጫ የምስክር
ወረቀት ለከሳሽ ሰጥቷል። ስለዚህ 2ኛ ተከሳሽ በውልም ሆነ በሥራ ልምድ የሚጠበቅበትን ኃላፊነት የተወጣ ሲሆን፣ መርከቧ ያራገፈችውን ዕቃ አፈላልጎ የመስጠት ቢጠፋም የመክፈል የሕግም ሆነ የውል ግዴታ የለበትም። 2ኛ ተከሳሽ ኃላፊ ነው ከተባለም ደግሞ፣ ከሳሽ የጎደለባቸው ዕቃ ዋጋ የኢት. ብር 12000.00 (አሥራ ሁለት ሺህ) ነው በማለት የቀረበው በጭነት ማስታወቂያ ላይ ቪዲዮም ሆነ የራዲዮው ዓይነት ስላልተገለጸና የትምሩክም ቀረጥ ስላልተከፈለበት የቀረበው የዋጋ ተመን ተቀባይነት ሊኖረው አይችልም በማለት መልስ ሰጥቷል።

ከሳሽ ግንቦት 15 ቀን 1978 ዓ.ም በተጻፈ ማመልከቻ ሁለቱም ተከሳሾች ለሰጡት መልስ የመልስ መልስ ሰጥቶበታል።

አንደኛ ተከሳሽ ለሰጠው መልስ ከሳሽ በሰጠው የመልስ መልስ፣ በመጫኛ ሰነዱ ማለትም በቢል አፍ ሊዲንግ የመጀመሪያ ገጽ ላይ የተጨመሩት ቃሎች በሰነዱ ላይ አንደኛ ተከሳሽ ያገባቸው በመሆናቸው ስምምነት እንደተደረገባቸው አይቆጠሩም። በሰነዱ ግራ ጠርዝ የተጻፈው በውስጡ ምን እንዳለ ተገልጾ ያልታወቀውን ወይም በቢል አፍ ሊዲንግ ተዘርዝሮ ያልተመዘገበውን የሚመለከት ነው፣ የከሳሽ ዕቃ ግን የዕቃው ዓይነትና ምንነት ተገልጾ ሰለተመዘገበ በአንደኛ ተከሳሽ የተጠቀሰው ለክርክሩ አግባብ የለውም። በመጫኛ ሰነዱ ላይ በትልልቅ የተጻፈው ደግሞ "ያልተጠቀለለ ሽቀጥ ለሚደርስበት ማናቸውም ጉዳት መርከቡ አይጠየቅም" ይላል እንጂ የከሳሽ ዕቃ ግን በካርቶን ውስጥ ነበር። በሰነዱ ላይ የሰፈረውም በመርከቡ ዴክ ላይ የሚጫን ዕቃ ጉዳት ቢደርስበት አጓዡ ተጠያቂ አይሆንም ይላል እንጂ ለጠፋ ዕቃ አጓጓዡ ተጠያቂ አይደለም አይልም በማለት ተከራክሯል።

ሁለተኛው ተከሳሽ የሰጠውን መልስ በሚመለከት ከሳሽ ፀሰጠው የመልስ መልስ፣ 2ኛ ተከሳሽ የዕጥረት ማስታወቂያ (ሾርት ላንዲንግ ሰርተፊኬት) በመስጠት ብቻ ከኃላፊነት አይድንም። የማፈላለጊያ ሰነድ (ካርጎ ትሬሰር) ልኬያለሁ ያለውንም ማስረጃ አላቀረበበትም፣ ለከሳሽም አልሰጠም። የ2ኛ ተከሳሽ ተግባር ሾርት ላንዲንግ ሰርተፊኬት መስጠት ብቻ ሳይሆን ዕቃ ከመርከብ ሲጫንና ሲራገፍ ማስተባበር፣ ለማንኛውም ዓይነት የማጓጓዣ ተግባር የሚፈለገው

ሰነድ ጊዜን የሚቆጥብና አስተማማኝነት ያለው እንዲሆን ማድረግን፣ እንደ አስመጪው ሆኖ አስፈላጊውን ፎርማሊቲ ፈጽሞ ለደንበኛው ዕቃውን ማስረከብን ያጠቃልላል። ስለዚህ 2ኛ ተከሳሽ ተግባሩን በጥንቃቄና በትጋት ስላልፈጸመ

ከኃላፊነት አይድንም በማለት እንደክስ አቀራረቡ እንዲወሰንለት በመጠየቅ ክርክሩን አጠቃሏል::

ፍርድ ቤቱም የግራ ቀኙን የጽሁፍ ክርክር በመመርመር በየደረጃው አስፈላጊ የሆኑ የጽሁፍ ማብራሪያዎች እንዲያቀርቡ ጠይቆ አግባብነት አላቸው የተባሉ የጭነት ማስታወቂያ ደረሰኝ (ቢል አፍ ሊዲንግ) እና ዓለም አቀፍ የባሕር ደንብ ተገልብጠው እንዲያያዙ ተደርጓል::

ከተደረጉት ማጣሪያዎች ባሻገር መዝገቡን አግባብነት ካላቸው ድንጋጌዎች ጋር አገናዝበን የፍርድ ቤቱን ምላሽ የሚጠይቁት የክርክር ነጥቦች፣

በከሳሽ የክስ አመሰራረት ተጠያቂ የሚሆነው ማነው? በመርከብ ደጅ ተጭነው የጠፉ ዕቃዎችን በተመለከተ በማስረጃነት የተጠቀሱት ድንጋጌዎች ኃላፊ ነው በሚባለው ወገን ያላቸው ተፈጻሚነት እስከምን ድረስ ነው? የሚሉትንና ክሱ በጭነት ማስታወቂያው ቁ. 23 መሠረት በሶስት ቀን ጊዜ ውስጥ ባለመቅረቡ ከሳሹ ውጤቱን ያጣል አያጣም? የሚሉትን በየተራ እንመለከታለን::

በባሕር ሕግ ቁ. 205 ላይ የተከሳሽን ኃላፊነት በሕግ ከተመለከቱት ባነሰ ሁኔታ የሚቀጥሉ ሁኔታዎች ሁሉ ተፈጻሚነት እንደሌላቸው ተጠቅሷል:: ከዚህ ድንጋጌ አገላለጽ በጭነት ማስታወቂያ ቁ. 23 ላይ ከሳሽ ክሱን በሶስት ቀን ጊዜ ውስጥ ማቅረብ ሲችል ካላቀረበ ክሱን ይለቃል በሚለው ተጠቃሚ ነኝ በማለት የቀረበው መከራከሪያ ነጥብ በባሕር ሕጉ በቁ. 203 ላይ የተጠቀሰውን የአንድ ዓመት የይርጋ ጊዜ የሚቀንስ ስለሆነ የተከሳሽ መከራከሪያ የሕግ ድጋፍ የሌለው ነው::

የጠፉት ዕቃዎች በመኪና ላይ ሆነው በመርከቡ ደጅ ተቀምጠው እያሉ ስለሆነ በጭነት ማስታወቂያው ሰነድ ላይ በመኪና ላይ ሆኖ በመርከብ ደጅ ለተጫነ ዕቃ ተከሳሽ ኃላፊነት እንደሌለበት ያመለክታል ለተባለው፣ በጭነት ማስታወቂያው ደረሰኝ ላይ የከሳሽ ዕቃዎች በዓይነት፣ በመጠንና በጥቅል ተዘርዝረው የተመለከቱና 1ኛ ተከሳሽ በጭነት ውሉ መሠረት በባሕር ጉዞ ከተወሰነለት መድረሻ ሊያደርሰለት ግዴታ ገብቷል፣ የአገልግሎት ዋጋውም ተሰልቶ የተከፈለው ለመሆኑ አልተካደም:: የተከሳሽ መሥሪያ ቤት አደረጃጀትና አወቃቀር ይህን ለመሳሰሉት የመጓጓዣ አገልግሎቶች በመስጠት ላይ የተመሠረተ ለመሆኑ ተጨማሪ ማብራሪያ የሚያስጠው አይደለም:: የአገልግሎት ዋጋ ተከፍሎት ለማጓጓዝ የተረከበውን ንብረት በሕጉ ላይ በግልጽ ከተመለከቱት ልዩ መብቶች ውጭ ተከሳሽ ያላንዳች ጉድለት አጓጉዞ ለከሳሽ ለማስረከብ የሕግም ሆነ የርትዕ ግዴታ አለበት::

በሕጉ ለተከሳሽ በግልጽ የተሰጡት መብቶች በቁጥር 197 ላይ ተዘርዝረዋል:: በዚህ ድንጋጌ ከተጠቀሱትና ተከሳሽን ከኃላፊነት ነፃ የሚያደርጉት ሌሎች ግድፈቶች በሕጉ የሚካተቱ ባለመሆናቸው ይህ ድንጋጌ ለተከሳሽ ዋቢ አይሆንም:: በቁጥር 197 ላይ የተመለከቱት ዝርዝር ሁኔታዎች አጓዡ (አመላላሹ) ኃላፊ የማይሆንባቸው በሰው

ሰራሽ ወይም በተፈጥሮ አደጋ በሚደርሱ አደጋዎች ላይ ተሰይተው የተመለከቱ በመሆናቸው ከከሳሽ አቤቱታ ጋር ተገናዛቢነት የላቸውም::

የባሕር ሕግ ቁ. 180(4) አንዙ ለጫናቸው ዕቃዎች ከተጫነብት እስከሚራገፉበት ጊዜ ድረስ ኃላፊ ቢሆንም በመርከቡ ደጅ ላይ ስለተጫኑት እንስሶች ኃላፊነት እንደማይኖርበት የአ ማርኛው ሕግ ሲጠቅስ የእንግሊዝኛው ደግሞ ዕቃዎችንም ይጨምራል:: በዚህ ሕግ ክፍል በግራ ቀኙ የተነሳው ክርክር ተከሳሽ በመርከቡ ደጅ ላይ ለተጫኑ ማንኛውም ዕቃ ኃላፊነት የለብኝም ባይ ሲሆን ከሳሽ ደግሞ የአማርኛው ትርጉም በእንግዚዝኛው ላይ የበላይነት ስላለውና የተከሳሽን ኃላፊነት በዴክ በተጫኑ እንስሶች ብቻ ነፃ ስለሚያደርገው በዕቃዎች አደራረስ ሰሚያደርሰው ጉድለት ነፃ አያደርገውም ባይ ነው::

ስለ ቁጥር 180(4) ጥቂት ማለት በማስፈለጉ በሚከተለው ሁኔታ ተገንዝበነዋል:: በመሠረቱ በባሕር ሕጉ ላይ የአመላላሽ (የአንዙ) ኃላፊነት በመርከብ የውስጥ ክፍል እና የውጭ (ዴክ) ክፍል በሚጫኑ ንብረቶች ላይ የአንዙን ኃላፊነት ሲያበላልጥ ሕግ አውጭው መመዘኛ አድርጎ የወሰደው ነጥብ ምንድነው የሚለውን ለይቶ ለማስቀመጥ መሞከር እንጂ የአማርኛው ትርጉም ዕቃን አልጨመረም ወይም በትርጉም መጨመር አለበት የሚለው አከራካሪ ነጥብ አይደለም::

የመርከብ ደጅ (ዴክ) ምንድነው? ከመርከቡ የውስጥ ክፍል የሚለይበት አመላላሹ በዴክ ላይ ለተጫኑ ዕቃዎች ለሚደርስ ጉዳት ኃላፊነት የለበትም ሲባል የሚጠፉትንም ይጨምራል አይጨምርም? ለሚሉት ነጥቦች ከሕጉ ጋር በተገናዘበ ሁኔታ ጥቂት ማለት አስፈላጊ ይሆናል::

መርከብ የውስጥና የውጭ ክፍሎች አሉት:: የውስጥ ክፍል የሚባለው የጭነት ዕቃዎችን ከዝናብና ከሞቃት አየር፣ ከዕቃዎች ተፈጥሮአዊ ፀባይ አኳያ በተመጣጠነ መቀት የሚቆዩበት ለዚሁ ዓላማ ተሰይቶ የተዘጋጀ ቦታ ሲሆን፣ የመርከብ ደጅ (ዴክ) የሚባለው ከ1ኛ ተከሳሽ መኪል በቃል ማጣሪያ ባገኘነው ምላሽ መሠረት ለተለዋዋጭ የአየር ፀባይም ሆነ ለውቅያኖስ ጨዋማ ውሃ ዕቃው ተጋልጦ የሚገኝበት ክፍት የሆነ የመርከብ ክፍል መሆኑን፣ ግዙፍና በቀላሉ የማይበላሹ ዕቃዎች የሚጫኑትም በዚሁ የመርከብ ውጭአዊ ክፍል (ዴክ) ሰለሆነ ከተጫነበት እስከሚራገፍበት ቦታ ድረስ የወራት ጊዜ ስለሚወስድ ዕቃው ጥራቱን ከሚቀንሱ ነገሮች፣ በመነካካት ለሚደርስበት የዋጋ ማሽቆልቆል ሙሉ ለሙሉ ከአገልግሎት ውጭ የመሆን ጉዳት ሊኖር እንደሚችል በመታሰቡ አመላላሹን ከእንዲህ ዓይነቱ ታሳቢ የጉዳት ኃላፊነት ሕጉ ነፃ ያደርገዋል::

የቁጥር 180(4) ትኩረት በከፊል ወይም ሙሉ ለሙሉ ጉዳት ለደረሰበት ዕቃ አመላላሹን ነፃ የሚያደርገው ሲሆን፣ የጭነት ማስታወቂያ ደረሰኝ ቁጥር 12 ይህንኑ በጭነት ላይ ከተፈጥሮአዊ ፀባያቸው የተነሳ ሙሉ ለሙሉ ወይም ከፊል ጉዳት ላጋኖቸው ዕቃዎች አመላላሹ ኃላፊ እንደማይሆን ነው::

የከሳሽ ጥያቄ አመሠራረት ግን በዴክ በመጫኑ ጉዳት ለደረሰበት ዕቃ ካሳ ይክፈለኝ ሳይሆን ከመነሻ እስከ መድረሻ ቦጥንቃቄ ተከሳሹ ሊያደርስ ኃላፊነት ወስዶ ከጫናቸው ዝርዝር ዕቃዎች በክሱ ላይ የተገለጹት ያልደረሱኝ ስለሆነ (በመጥፋታቸው) ግምቱን አለያም ዕቃው ይክፈለኝ ነው::

በሕጉም ላይ የተመለከተው "ከፊል ወይም ሙሉ ጉዳት" የተሰመረ (የጠፋን) ዕቃ ይጨምራል አይጨምርም የሚለው ነጥብ የሚነሳውም በዚህ ደረጃ ነው::

የሕጉ አንላለጽም ቢሆን ቀደም ሲል ለማሳየት እንደተሞከረው አመላላሹ በዴክ ላይ የጫናቸው ዕቃዎች ከባሕር ላይ የጉዞ ፀባይ የተነሳ ዓይነታቸው በመቀነሱ ለሚደርስባቸው ጉዳት ከኃላፊነት ውጭ መሆኑ እንደተጠበቀ ሆኖ ከቦታው ሙሉ ለሙሉ ተንቀሳቅሰው ለተሰወሩ ዕቃዎች ግን ተከሳሽን ከኃላፊነት ነፃ ለማድረግ ታስቦ የተቀረጸ ነው ማለት ጨርሶ የሚታሰብ አይሆንም:: ተከሳሹ ባቀረበው ክርክር ይዘት ሕጉ የሚተረጎም ቢሆን የአመላላሹን ሠራተኞች ያለገደብ ለምግባረ ብልሹነት ሰለሚያጋልጣቸውና ለአጫኙ አንዳችም የሕግ ጥበቃ አልተደረገለትም ሰለሚያሰኝ አተረጓጎሙን የተዛባ ያደርገዋል:: ወደተዛባ ትርጉም የሚያደርሰን ሰለሚሆን የተከሳሽ ጥያቄ የሕግ ድጋፍ የሌለው ነው:: አመላላሹ የአገልግሎት ዋጋውን ተቀብሎ ከማድረሻው ድረስ ለማድረስ የተረከበውን ዕቃ በአመላላሹ ሠራተኞች አንቀሳቃሽነት ወይም በሌላ በግልጽ በማይታወቅ ምክንያት ቢሰወር ተከሣሽ ነፃ የሚሆንበት ሕጋዊ ምክንያት አይኖርም:: በመሆኑም 1ኛ ተከሳሽ ከሮተርዳም እስብ ድረስ ለማድረስ በጭነት ማስታወቂያው ደረሰኝ መጠኑና ዓይነቱ በዝርዝር ተገልጾ የተረከበውን ከጉድለት ነፃ አድርጎ ለከሳሹ ያሳስረከበው ስለሆነ በጉድለቱ መጠን ሙሉ ለሙሉ ኃላፊነት አለበት::

የጉድለቱ መጠን ሲባል የዕቃው ግምት ወይም በዓይነት ዕቃውን ለማለት እንዳልሆነ ለማሳየት እንሞክራለን::

ተከሳሽ ኃላፊ ነው የተባለበት ዕቃ እምስት ጥቅል መሆኑ በከሳሽ የተገለጸ ሲሆን በተከሳሽ በኩል የጥቅሉ ብዛት የተሰየ ባለመሆኑ አከራካሪ አይሆንም:: የኃላፊነቱን መጠን በተመለከተ ግን ከሕጉ ጋር ሲገናዘብ የሚከተለውን እናገኛለን::

ከላሽ ዕቃውን ከማስጫኑ በፊት በጭነት ማረጋገጫው ደረሰኝ ላይ የዕቃውን ዓይነትና ብዛት ከመግለጽ ጋር የእያንዳንዱ ዕቃ ግምት ተመልክቶ ቢሆን ይህን ግምት የማግኘት መብት የነበረው ሲሆን ግምቱ ባለመመልከቱ ግን ተከሳሽ ኃላፊ ሊሆንበት የሚገደድበት በዕቃዎች ጥቅል ቁጥር ተሰልቶ እስከ ብር 500.00 (አምስት መቶ) የኢትዮጵያ ብር ድረስ እንደሆነ በመመልከት የኃላፊነቱ መጠን ዕቃው በገበያ ዋጋ ሆነ ከአምራቹ ድርጅት የሚሸጥበት የጅምላ ዋጋ ከግምት ውስጥ ሳይገባ በሕግ ተወስኗል:: ቁጥር 198 ይመለከታል:: በኃላፊነቱ መጠን ላይ ሕጉ

ያስቀመጠው መጠን ግልጽ በመሆኑና ከሳሽ ያቀረበውን የግምት ማስረጃ ሳንቀበል ካሳው አነሰ በዛ ወደሚል አስተያየት የሚጋብዝ ባለመሆኑ የምንሰው ተጨማሪ አስተያየት አይኖረንም:: በመሆኑም 1ኛ ተከሳሽ ክስ በቀረበበት አምስት ጥቅል ዕቃ በእያንዳንዱ ጥቅል ብር 500.00 (አምስት መቶ) በድምሩ ብር 2500.00 (ሁለት ሺህ አምስት መቶ) ክስ ከቀረበበት ተከፍሎ እስካለቀ ድረስ 9% ወለድ በተፈረደው ላይ እየታሰበ፣ እና ወጭና ኪሳራ ክርክሩ ከፈጀበት ጊዜ አኳያ ተመዝኖ ብር 500.00 (አምስት መቶ) ጨምሮ ለከሳሽ ይከፍላል ብለን በሙሉ ድምጽ ወስነናል::

2ኛውን ተከሳሽ በተመለከተ ለደረሰው ጉዳት ወይም ለዕቃው መጥፋት ምክንያት መሆኑ ወይም አስተዋጽኦ ማድረጉን ከሳሽ በሚገባ ያላስረዳ ስለሆነ ከክሱ ውጭ አድርገነዋል::

ውሳኔው ግራ ቀኙ ባሉበት በዛሬው ቀን ግንቦት 11 ቀን 1981 ዓ.ም ተነቦ ወደ መዝገብ ቤት ተመልሷል::

Federal Supreme Court of Ethiopia
Cassation Division

Justices: Kemal Bedri
Abdulkadir Mohammed
W/ro Sinidu Alemu
W/ro Desta Gebru
Ato Assegid Begashaw

East African Group (Eth.) Ltd v. Ato Admassu Irgete
Cass/File No. 7634

Labour Law – Termination of Contracts:- Lawful Grounds for Termination:- Consequences of Unlawful Termination:- Reinstatement or Compensation:- Labour Proclamation No. 42/93,[1] Arts. 27, 28, 35, 43, 44

Held: Decisions of First Instance and High Court reversed and compensation in lieu of reinstatement awarded.

Judgment

This case began in the Federal First Instance Court where the respondent sued appellant for unlawful termination of his employment contract. Respondent served in the appellant company as head of legal services and represented its sister companies before courts since 12/2/89. On 7/9/92, the appellant sent a letter to respondent notifying the latter that his contract of employment with the company was terminated. The reason stated in the letter was that the work hitherto performed by the respondent could be done through retention agreements. Objecting to the termination of his contract, the respondent took his case to the Federal First Instance Court and sought reinstatement or compensation and a payment in lieu of notice pursuant to Articles 43(4) and 35(5) of the Labour Proclamation No. 42/93.

In the First Instance Court, the present appellant contended that the respondent is a member of the management staff and therefore not covered by the

[1] Translator's note: Labour Proclamation No. 42/1993 has been replaced in 2003 by Labour Proclamation No. 377/2003, but the provisions of the 2003 Labour Proclamation are substantially similar to the 1993 Labour Proclamation in respect of the issues addressed in this case. The articles cited by the court affecting the merits of the case have not changed.

provisions of the Labour Proclamation, and even if he were, that the appellant had the legal support in Article 28(2)(c) of the Labour Proclamation to terminate the contract in order to reduce costs and increase productivity. The appellant argued that it ended the contract with the respondent and decided to obtain legal services through retention agreements as a result of reduction of the need for legal services in the company, which was recently reorganized after its industrial and agricultural units were split from it and became independent companies.

The Division of First Instance Labour Court ordered reinstatement of the respondent to his work and reserved to the appellant the right to show that reinstatement was likely to give rise to difficulties. The Court also awarded back payment of salary to the respondent. Rejecting appellant's contention that the respondent was a member of the management staff, the court ruled that the fact that the respondent was head of legal services was not sufficient to make him a member of managerial staff. In support of its decision the court gave the following reason:

> *We do not believe this is a case of reduction of work force as the appellant would have us pursue. Proclamation No. 42/1993 deems it a reduction of workforce only where a termination of a contract affects at least ten percent of the number of the workers employed in the undertaking, or where the total number of workforce in an undertaking is between twenty and fifty, a reduction affecting at least five employees over a continuous period of not less than ten days. We think this is a case of termination of a single contract of employment and the applicable provisions are Articles 24-32 of Proclamation No. 42/1993. The company alleges that the termination was motivated by its need to cut costs. But it does not deny that it continued to receive legal services from the respondent. As a matter of fact, it wrote letters to the respondent expressing its gratitude for the performance of work by the latter. In addition, the appellant admits that the enterprises that split from the appellant company and obtained separate legal personality have hired their own legal advisors.*

The case was taken on appeal to the Labour Division of the Federal High Court. The High Court also rejected the contention of the appellant that the respondent is a member of the management staff. Citing Article 3(2)(c) of Proclamation No. 42/1993, the Court held that the respondent's work did not amount to management and merely consisted in offering legal services to the appellant. The Federal Court noted that a managerial employee is one who is vested with powers or prerogatives to lay down or execute policies by law or delegation of employer. The High Court confirmed the decision of the First Instance Court on finding evidence that the appellant continued to receive legal services even after terminating the contract with the respondent. The High

Court ruled that the recent separation of certain enterprises from the former company was not a sufficient ground for terminating a contract of employment under the Labour Proclamation.

The appellant then brought the case before this court alleging a fundamental error of law in the judgment of the High Court. The fundamental error of law in the judgment, according to appellant, was committed when the Court ordered reinstatement of respondent to a position long cancelled by the Company and payment of back pay for several months during which the respondent was out of work. The appellant submits that this decision of the lower courts was contrary to Articles 53(1) and 54(1) of Labour Proclamation No. 42/93.

The respondent complains that the appellant changed the theory for termination of the contract.

> *In the lower courts, the appellant contended that the termination was to reduce costs but in this court, the appellant is arguing that it was the division of the previous company into smaller independent companies that led to the termination of the contract. The appellant cannot change theory at this stage of the proceedings. The respondent performed work not just for the previous company but also for other sister companies until his contract was terminated by the appellant. This case is not covered by Article 28(2)(c) or sub-articles (a) or (b) of the same Article. The contract was terminated not to reduce costs, as the appellant alleges. The previous company was split into five/six companies because of the expansion of work and because the load of work of the respondent has increased as a result. The performance of legal services through retention increases cost, not reduce it. Even if retention were the way to go, the respondent should receive priority over others. The appellant knew that respondent had a license to practice law and should have consulted the latter whether he wanted retention or not. That the appellant announced vacancies for a position the respondent vacated immediately after the termination of the contract showed its bad faith. And it has hired two legal professionals to do its work. At the time of termination of the contract, no reorganization or restructuring occurred in the company to warrant a cancellation of a post.*

The appellant claimed that it invited the respondent to resume his work after the court ordered his reinstatement but this was rebuffed by the respondent, and it then moved the First Instance Court to dismiss the case, which it did.

We have examined the arguments of both parties. We believe that the issue in this case is whether the appellant had the legal support to terminate the contract as it did.

The appellant claims that the termination of the contract was the result of reorganization of the company and the resulting reduction in the volume of

work. This reason for termination is not mentioned in any of the provisions of Article 27 of the Proclamation which list the grounds for termination without notice. It appears that the case might fall under article 28(1)(d) of the same Proclamation. However, this provision permits an employer to terminate a contract of employment with notice only where "the post of the worker is cancelled for good cause and where the worker cannot be transferred to another post." The appellant did not ground its action for termination on the cancellation of a post or the impossibility of transferring the respondent to another post. The contention of the appellant that there was a reorganization of the company resulting in reduction of volume of work indicates neither the cancellation of the post of the respondent nor the impossibility of transferring him to another post. In fact, the appellant hired another person for the post of the respondent, which shows that the post was never cancelled. That the appellant later called upon the respondent to resume work is another proof that the post was never cancelled. The appellant argues that the respondent waived his right to reinstatement when he sought severance payment after termination of the contract. Under the current Labour Proclamation, any worker whose contract of employment is terminated may claim severance payment upon termination (see Art. 39(1) of Proclamation No. 42/1993).[22] A worker who does so is not thereby said to have endorsed the legality of the termination. The legality of the termination is quite separate from the consequences flowing from termination. We hold that the termination of the contract does not fall under any of the grounds listed for termination with or without notice and is therefore illegal.

If the termination is deemed illegal, the next question is whether the respondent should be reinstated to his post or allowed compensation in lieu of reinstatement.

Article 43 of Proclamation No. 42/93 states that a worker whose contract of employment is terminated illegally may either be reinstated or allowed compensation in lieu of reinstatement. The lower courts ruled in favour of reinstatement of the respondent to his work. The appellant contends that the respondent refused to be reinstated upon being called upon to do so by a letter addressed to him. This does not prove that the appellant complied with the

[2] Translator's note: The rules of severance payment have undergone amendment by the coming into force of Proclamation No. 377/2003. Severance payment is no longer available for every worker whose contract is terminated. Art. 39 of Proclamation No. 377/2003 lists the grounds of termination which may entitle a worker the right to claim severance payment from employer.

decisions of the lower courts, but it does force this court to consider this case in light of Article 43(3) of the Proclamation. This provision allows termination of the contract upon payment of compensation where a worker, after obtaining a judgment of reinstatement in his favor, declines to be reinstated. The respondent has been seeking payment of compensation in the alternative from the very beginning, and we order the payment to respondent of compensation amounting to one-hundred eighty (180) multiplied by the average daily wage of the respondent pursuant to article 43(4)(a) of the Proclamation. We also order a payment of two months wages to the respondent by appellant in lieu of notice as provided in Article 44 of the Proclamation.

Finally, we examine the issue of whether it was appropriate for the lower courts to award back pay to the respondent. Article 54(1) of Proclamation No. 42/1993 states that wages may only be paid for work done. The respondent is not entitled to back pay pursuant to article 54(2) simply because he was forced out of work by appellant beginning from Ginbot 7/1992. We do not believe the lower courts had any legal basis to award back pay to the respondent. We therefore reverse the decision of the lower courts that both reinstated the respondent and awarded him back pay. The decision was passed by a majority of the Bench pursuant to Article 348(1) of the Ethiopian Civil Procedure Code.

Tahsas 8, 1995 (E.C.)

Dissenting Opinion

The appellant brought the case before this court alleging a fundamental error of law in the judgment of the lower courts ordering reinstatement of the respondent and awarding him back pay. My opinions are not different from the majority on the question of back pay. The appellant contends that the termination of the contract was legitimate and that the lower courts erred in their judgment to reinstate the respondent.

The issue is whether the judgment reinstating the respondent as a result of unlawful termination of the contract was justified. In this respect, the lower courts held that the appellant was unable to prove that it had any legal ground for terminating the contract. In this, I believe the lower courts have not committed any fundamental error of law. My dissent is that the majority accepted to a decision that the appellant did not apply for. The appellant did not apply to this court to reject reinstatement of respondent and award the latter

compensation pursuant to article 43(3). The respondent on his part insisted on his reinstatement and has not requested compensation.

I am not convinced that this court has found any ground for pursuing the route of compensation as an alternative to reinstatement as is provided in Article 43(3). I have not seen any evidence both in the applications of the appellant and replies of the respondent or in the provisions of Article 43(3) for this court to revert to compensation in lieu of reinstatement as the majority has done. It seems to me that the majority should have simply found no error in law in the judgments of the lower courts and ended the matter right there and then. I therefore dissent.

Assegid Begashaw.

The Provisional Military Government of Ethiopia
The Central Arbitration Committee
At the Council of Ministers
Addis Ababa

Applicant: Ethiopian Insurance Corporation

Respondent: Ethiopian Shipping Lines Corporation

File of the Central Arbitration Committee No 71/77

The amount of liability for which a carrier will be liable for loss of or damage to goods loaded on board a ship:- conditions under which global statutory limitation of liability are not applicable:- conditions under which the Hague Rules can serve as supplements to local laws:- clause paramount inserted in bills of lading:- and Art. 198 of the Maritime Code.

This is a claim in which the applicant Insurance Corporation claims for the reimbursement of Birr 3804.61 which it paid to its clients as indemnity for goods lost during voyage from England and Germany to Ethiopia, and the action is brought based on its right of subrogation. The Respondent carrier has argued that though it admits the loss of the goods, as regards the amount of damage to be paid, Ethiopian laws are applicable to situations not expressly provided in the bill of lading; the applicant has no better right than the shippers and that it cannot be liable for more than 100 Pounds per bundle or package as expressly provided in the bill of lading.

Held - it is decided that the respondent shall not be liable for more than 100 pounds for each bundle.

Committee members

1. Ato Seyoum Tessema - chairman
2. Ato Ridda Kelil - member
3. Ato Debebe Moges - member
4. Ato Abdurahim Ahmed – secretary

The Committee has rendered the following judgment after studying the case.

Judgment

The Applicant, in its statement of claim submitted on Tahsas 1, 1977 has stated that:

- it has issued marine insurance policies for different goods imported from abroad by its clients;

- the applicant has entered into a contractual agreement to transport the goods and deliver the same to the owners;

- it has paid Birr 3804. 61 to its clients as a result of failure on the part of the respondent to deliver the goods as it received them, as a result of which some goods were lost showing that the respondent has failed to discharge its obligations;

- the respondent has admitted the loss of the said goods and gave a guarantee to pay 100 Pounds for each bundle;

  though the respondent cites that the cause for its failure to discharge its obligation is its contention that its liability cannot exceed beyond 100 Pounds per bundle, however, as clearly provided under Art. 2 (b) of the bill of lading issued by itself, it is provided that the Hague Rules apply to the contract and as regards the amount to be paid for loss of goods, it shall be determined:

  a. as per the Hague Rules, if this is provided under the law of the country of shipment or origin;

  b. if the rules are not provided in the laws of the country of origin, as per the laws of this country;

  c. if there is no enforceable law in this country, the Hague Rules will be applicable.

- two of the lost goods that caused the institution of this claim were loaded from England, while the other one was loaded from Germany and in these countries, package limitations are 471.96 Pounds and 1250 Duetch Marks, respectively.

It, therefore prayed that the respondent be ordered to pay the sum stated in the claim plus interest from the due date onward for it has the duty to pay.

The Central Arbitration Committee has given an instruction to the parties to find a common amicable solution to their difference. However, according to their minutes submitted to the Committee, it is indicated that the parties have

failed to reach at an agreement and the case is referred back to this Committee and they are now invited to present their arguments.

Accordingly, the respondent in its statement of defense submitted on Miazia 7, 1977 stated that:

> according to Art.23, second paragraph of the bill of lading submitted by the applicant, if an action is not brought within one year neither the carrier nor the ship shall be liable for any liability and this claim is brought after over one year and the case should be dismissed by allowing it to claim costs;

- if the above may be found to be untenable, the Hague Visby Rules are not cited, and those cited are the Hague Rules and as regards the latter, it argued that the rules as well as those cited under Art. 29 of the bill of lading are applicable and serve as supplements to situations not expressly mentioned in the bill of lading; that a contract is binding between contracting parties (Art. 1731 of the Civil Code); that the applicable provisions are those contained in the contract and therefore even judges cannot create new contracts by way of interpretation.

  the applicant's claim is groundless, for the amount of the carrier's liability is clearly indicated under Art. 24 and the claim is contrary to Art. 1733 of the Civil Code;

  though the applicant has reached at a flawed conclusion by arguing that Art. 2(b) prevails over all provisions of the bill of lading and adding its own view that Art 2(b) of the bill of lading is a paramount provision, Arts. 2(b) and 29 are applicable to situations not indicated on the bill and this is an unusual working practice;

- more than anything else:

  a. as regards the amount of damage to be paid, since it is clearly indicated under Art. 24, it should be made applicable without any interpretation;

  b. Arts. 2(b) and 24 are not contradictory, even if they were found to be contradictory, they should be interpreted positively (1733);

  c. Art. 24 is special while Art. 2(b) is general and the special prevails over the general;

d. the applicant's working practice is paying 100 Pounds for each bundle; since the applicant cannot demand better rights than other shippers, it cannot demand payment in excess of what is provided under Art. 24; Ethiopian courts as well as other judicial organs cannot apply those foreign provisions cited by the applicant ;in case if it may be concluded that the action is not barred by limitation, it should be decided that the amount of liability is 100 Pounds per bundle as provided under Art.24.

The applicant in its response written on --- 1977 has stated that:

since the respondent has issued a guarantee admitting the loss of the goods, period of limitation is not at issue;

as per Art.29, Ethiopian laws are applicable to situations not expressly provided in the bill of lading, while Art. 2(b) clearly provides that the Hague Rules are applicable, if the Hague Rules are not applicable in the country of origin, the law of this country is applicable and the amount is determined by the latter and the applicant's claim is for the execution of this contract;

as regards the determination of the amount, there is conflict between Arts. 2(b) and 24 of the bill, since the bill is prepared by the respondent, per Art. 1738 – of the Civil Code – it should be interpreted in favor of the applicant; as regards the difference between the general and special provisions, both have the same objectives and respondent's argument over the issue is unacceptable;

- respondent's overall claim is not whether Ethiopian laws prevail over foreign laws or vice versa, but that since Art. 2(b) of the bill provides that the Hague Rules are applicable, and since contracts are binding between contracting parties, the case should be decided in light of these.

The overall arguments of the parties being as presented above, the issue is whether the applicable provision is Art. 2(b) or 24 of the bill of lading.

In principle, it is clear that contracting parties state their rights and obligations in their contract and it is shown in the case at hand that they have done the same. None the less, some contractual terms are some times given different interpretations by the contracting parties. One of the points of contention in this case is what is provided under Art. 2(b) of the bill of lading.

The article provides that if the Hague Rules are applicable in the country of origin, they should be applicable, if this is not so, the law of the country of origin will be applicable, and if there is no enforceable law in the country of origin, the Hague Rules will apply. The other contentious provision is Art. 24, which provides that the amount of liability to be paid by a carrier for loss of goods shall be 100 Pounds. When these two provisions are viewed separately, the first one is applicable to matters contained in the bill of lading, and the second refers to the amount of compensation. Accordingly, though Art. 2(b) provides for those laws that are applicable to disputes regarding issues that may arise from bills of lading, it is clearly provided under Art. 24 that the carrier's liability cannot exceed 100 Pounds. It can, therefore, be understood that Art. 2(b) is a general provision while Art. 24 is special. This is said so, because Art. 24 specifically provides for the amount of payment.

The applicant's argument that Art. 2(b) is a paramount clause and it prevails over all other provisions of the bill is unfounded, because, if it can be argued that Art. 2(b) is the only provision applicable on the contract between contracting parties, it will make all other provisions of the bill useless and inapplicable. Thus, when contracting parties make their contracts, they insert each term with the understanding that they will have their own applicability. Accordingly, the applicability of Art. 2(b) is to supplement for those situations not provided in the bill of lading just as in the case of Art. 29, but not to be interpreted otherwise. Thus, the Committee has taken Art. 24 as it is, for it is clear and raises no issue of interpretation.

Accordingly, dismissing the applicant's claim that is based on Art. 2(b), because it is groundless, we have hereby decided that respondent's liability should not exceed 100 Pounds per bundle.

Meskerem 15, 1978

The Ethiopian Peoples Democratic Republic
Addis Ababa High Court

Plaintiff: Girma Kebede

Defendants: 1. Ethiopian Shipping Lines Corporation
2. Maritime and Transit Services Corporation

Civil file number 699/78

Contracts for the service of ships: contract of carriage: - the duty of the carrier for goods carried on deck: - the difference between the Amharic and English versions of Art. 180/4 of the Maritime Code of Ethiopia: - the amount of liability of the carrier for loss of or damage to goods carried on board ships: the periods of limitation regarding rights arising out of contracts of carriage under Arts. 180/4, 197 and 198: - amendment of legal periods of limitation by bills of lading: the duties and responsibilities of shipping and clearing and forwarding agents under Arts. 203 & 205 of the Maritime Code.

This is a case in which the plaintiff alleges that he had delivered a car and different items, which he purchased from abroad to Defendant No. 1, so that the latter shall transport them to Ethiopia based on the contract; that out of the goods listed in the bill of lading, five cartons of goods were found missing while the ship unloaded at Assab Port; that Defendant No 1 has failed to take proper care for the goods and Defendant No 2 has done nothing by way of searching and following the lost goods; that both defendants are liable for the loss; that he cannot identify the party liable for the loss; and praying that the court shall identify the party that is liable and order it to replace the lost items or pay compensation.

Held – The first Defendant is found to be liable while the second Defendant is set free.

- Though the Amharic version of Art. 180/4 of the Maritime Code provides that the carrier is liable for damage or loss of goods it carries from the time of loading till discharge, and that it is not liable for live animals carried on deck, the English version includes goods. This Article is designed to exonerate the carrier from liability when goods carried on deck are damaged due to the very nature of sea voyage and it is unimaginable to conclude that it is designed to exonerate the carrier from liability for loss of goods that have left their original positions and went issing. If the article is to be interpreted in the latter sense, it can expose the servants of the carrier to unchecked indiscipline and leaves the shipper without any legal protection and this makes the interpretation flawed.

- When a shipper loads goods on board a ship, in addition to stating the types and quantity of goods, if it has also stated the value of each good, and this good is lost, the carrier will have the right to claim the value. But if the value is not indicated, it is provided under the law that the liability of the carrier is limited to 500.00 Birr per package without taking into account the market value of the good or the wholesale price of the manufacturer.

Judgment

Judges - Hailu Asmir, Redaée Baraki and Abdella Ali

The plaintiff alleged that he had delivered on Meskerem 7, 1997 to the agent of first Defendant, five c artons of different items locked in a Toyota station wagon car and one more carton of items, all purchased from abroad with the intention of transporting the goods to Ethiopia on board a ship owned by the Ethiopian Shipping Lines Corporation. I have received bill of lading No 001, from the Ethiopian Shipping Lines Corporation that evidences the fact that it had taken delivery of the car and items locked therein. However, upon discharge of the goods at the port of Assab, it was found out that five cartons of goods were missing. Since the loss of the goods was mentioned in declaration No 001608, I have paid duty on the remaining items and cleared them through second Defendant, who is a shipping and clearing agent.

Out of the goods that were locked in the car, I have not received the following items: a multi system JVC video cassette estimated at 6,000 Birr, an Akai rack mount Co ET with one L turner radio, a KAP 1c turn table KXH cassette recorder with a KH 41 amplifier estimated at 6000 Birr and their total estimate is 12, 000 Birr.

Thus, since first Defendant has failed to take proper care for the goods and did not attempt to search and return the goods, it is liable for the loss sustained and the second Defendant, as a transit and shipping agent that collects advance commission, has the duty to collect goods from their port of discharge and hand them over to me, the owner. However, since it has not attempted to search for the lost goods and failed to discharge this obligation, it is liable for the loss sustained.

Accordingly, both defendants are liable, but I cannot identify the party that is liable ultimately. Thus, I pray that the court identify this and order it to replace the lost items or pay 12,000 Birr which is the cost of the lost items, interest to be calculated from the date of the institution of this case and expense and cost incurred. The plaintiff has annexed different written evidences with his statement of claim and submitted the same to this court.

Defendants have received the statement of claim and submitted their respective statements of defence written on Megabit 9, 1978.

First Defendant submitted a preliminary objection on the ground that per Art. 23 of the bill of lading the plaintiff should have notified the defendant, about the loss within three days. It has also presented the following defenses, alternatively, in case the court may find the preliminary objection to be untenable.

1. It is indicated on the front page of the bill of lading that neither the carrier nor the ship will be liable for goods put in a car.
2. The ship has no liability for goods carried on deck and in this regard, bill of lading No 001 provides that neither the carrier nor the ship shall be liable for loss of or damage to goods carried on deck. A shipper cannot claim anything from the ship in this regard but take out insurance policies for such losses or damages.
3. If at all the defendant is said to be liable for losses or damages to goods, in accordance with its contract and the law, as provided under Art. 24 of the bill of lading, its liability is limited to a maximum of 200 UK Pounds only.
4. Since the relationship between the plaintiff and the defendant is based on contract, the amount of damage to be paid is to be calculated based on normal damage. Thus the invoices submitted should not be accepted / to determine the amount of damage.

The second Defendant on its part has argued that its duties are limited to providing shipping and transit agency services. Accordingly, as regards import items, its duties are to clear goods through customs based on documents it receives from its customers or clients; send the same to the customer by any means of transport available; and provide the customer with survey reports or short landing certificates in cases when goods are lost or damaged. In the case at hand, it has admitted the loss of the goods and attempted to search for the goods at all ports visited by the ship but to no avail. It has thus, given to the plaintiff a short landing certificate. Since it has discharged all its contractual as well as customary duties it has no contractual or legal duty to search for and deliver goods lost after discharge nor to pay compensation when goods are lost. In case if defendant can be made liable, plaintiff's claim that the value of the items amount to 12, 000 Birr is unacceptable, for the types of the video as well as the radio are not mentioned on the bill of lading and no tax is paid on them.

The plaintiff has submitted its response to defendants' defenses on Ginbot 15, 1978.

As regards the first Defendant defence, the terms added to the first page of the bill of lading are inserted by it and do not form part of the contract; the statement written on the left hand margin of the bill pertains to [packages] whose contents are not specified or not listed in the bill of lading. This is not relevant, however, for the identities and types of Plaintiff's goods are specified and registered. Though the provision written in bold on the bill of lading provide that the ship will not be liable for any damage sustained on goods that are not in bundles, plaintiff's goods were packed in cartons. Moreover, though the bill provides that the carrier will not be liable for damages sustained by goods carried on deck, it does not provide that it will not be liable for loss.

As regards the defenses of the second Defendant, the plaintiff responded that: the defendant cannot escape liability by the mere fact of giving short landing certificate; its allegation that it has sent cargo tracers is not substantiated by evidence and it did not give the document to the plaintiff; its duties are not limited to giving short landing certificates, but also includes: coordinating the loading and unloading of goods on board or from ships respectively, and making sure that documents of transportation are time saving and dependable. Thus, it cannot escape liability for it has failed to discharge its duties with efficiency and care. The plaintiff thus concluded its submission by praying for a decision as stated in the statement of claim.

The court has thus studied the written arguments of the parties and ordered at different stages of the proceeding for the submission of written explanations and the annex of copies of the bill of lading and international conventions with the file.

In addition to the verifications, we will look into the issues as to who should be liable per the plaintiff's statement of claim, the applicability of the provisions cited by the first Defendant regarding the loss of goods carried on deck, on the party to be made liable and whether the plaintiff forfeits his right for not instituting his claim within three days, in light of the relevant provisions.

It is provided under Art. 205 of the Maritime Code that any clause that relieves a carrier from the liabilities imposed on the carrier by the provisions of the law shall be null and void. Per the provision, first Defendant's argument that the plaintiff will forfeit its right to bring action unless he institutes an action within three days as provided under Art. 23 of the bill of lading limits the right to bring action within one year and as provided under Art. 203 of the Maritime Code and is thus untenable in the eyes of the law.

As regards the claim that the carrier is not liable for loss of goods that are carried on deck, the types/ nature, quantities and bundles of plaintiff's goods are stated in detail in the bill of lading. The first Defendant has imposed on itself a contractual duty to transport the goods to their port of destination and it has not denied that it has received the amount due for this service. The fact that defendant's institution is organized and structured to provide such types of transport services demands no further explanation. The defendant has the duty that emanate from the law as well as equity, to deliver the goods for which it has collected its own service charge, as it received them, except in those cases in which it is accorded special rights.

The rights of the defendant are listed expressly under Art. 197 of the Code. Other defects or grounds that can exempt the defendant from liability except those listed in the Article cannot be incorporated into the law thus, the defendant cannot avail them. The grounds that can exempt a carrier from liability and listed under Art. 197 are based on natural or man made causes and they have no relevance with defendant's pleas.

The Amharic version of Art. 180(4) provides that though the carrier is liable for the goods from the time they are loaded till the time they are discharged, it is not liable for live animals carried on deck, the English version includes goods. The contentions of the parties in dispute are that while the first Defendant argues that it has no liability for any good carried on deck, the plaintiff however, contends that the Amharic version prevails over the English and since the former limits the exemption to live animals only, the defendant cannot be exempted from liability for other goods.

It appears proper to say something about Art. 180(4) and the following are to be taken into account. It will be proper to determine why the law makes a distinction between the carrier's liabilities for goods carried under or on deck and the argument that the Amharic version prevails over the English is not at issue here.

What is deck? What makes it different from the hatches (holds) or the inner part of the ship? When the law provides that the carrier is not liable for damages to goods carried on deck, does this include loss of goods? It will be necessary to see these issues in light of the law and say something.

A ship has an inner and outer part. The inner part – hatch/ hold – is a place designed to keep goods protected from rain and hot air, and to keep them in a

balanced temperature adequate to their nature. According to the oral statement that this court gathered from an agent of the first Defendant: the deck is that part of a ship wherein goods are exposed to shifting weather conditions and salty waters of the oceans; bulky and durable cargoes that cannot be easily damaged by such elements are usually loaded on this part. As it takes months for the ship to travel from her port of shipment to discharge and during this time, there is a likelihood that goods carried on this part may come into contact with contaminants that may reduce their value and may even make them totally useless; and the law exempts a carrier taking all these into account.

The focus of Art.180 (4) is exonerating a carrier from liability for total or partial damages to goods, and that of Art. 12 of the bill of lading is exonerating the same for total or partial damages to goods resulting from their natural characteristics.

The plaintiff's claim, however, is not a claim for compensation for damage to goods carried on deck but, compensation for the value of or replacement of goods which the carrier has accepted for safe transport from port of loading to discharge and listed in the bill, but are lost during voyage.

The point regarding the law as to whether partial or total damage includes goods that have disappeared or are lost has to be raised at this stage. The statement of the law, as discussed above, is, notwithstanding the fact that a carrier is relieved from liability for damages to goods carried on deck and resulting from the elements of the sea which may reduce their value, it will be unthinkable to conclude that [the spirit of the law] is to relieve the carrier from liability for goods that have disappeared totally by leaving their original positions. If the law is to be interpreted in light of the contents of defendant's arguments, it can expose the servants of the carrier to unchecked indiscipline and leaves the shipper without any legal protection and this makes the interpretation flawed. Since Defendant's argument leads to a flawed interpretation, it has no legal basis. There cannot be any legal ground that can relieve a carrier from liability for goods which it has received for safe transport and on which it collected the service charge and that have disappeared either due to the acts of the servants of the carrier or any other unknown cause. Thus, since first Defendant has failed to handover the goods that it has received to transport from Rotterdam to Assab and whose quantity and type are stated in the bill of lading issued to the plaintiff it is fully liable to the extent of the damage suffered.

We shall try to show that the extent of damage does not mean the value of the property or replacing the goods in kind.

Had the plaintiff stated on the bill of lading the value of the goods, in addition to their nature and quantity before shipment, he would have been entitled to claim this amount. However, since he did not do that, the extent of the defendant's liability is determined by law to be 500 Birr per bundle or package without taking into account the market price or the wholesale price of the goods. See Art. 198.

Since the legal position is clear, we have not accepted plaintiff's estimated amount of damage. Thus, this cannot lead us to the issue of determining the amount of damage and we have nothing to add in this regard. Accordingly, it is hereby unanimously decided that the first Defendant shall pay: 500 Birr for each bundle of the goods in dispute and a total of 2,500 Birr, plus 9% interest to be calculated from the date of the institution of this claim till final payment and taking into account the length of time taken in this litigation, a lump sum of 500 Birr as cost and expenses.

As regards the second Defendant, since the plaintiff has failed to prove that it is the cause for or has a role in the damage sustained or loss of the goods, it is sent away freely.

This judgment is read today, Ginbot 11, 1981, in the presence of all parties to the dispute.

የእሽግ ገደብ በዓለም አቀፍ ሥምምነቶችና በኢትዮጵያ የባሕር ሕግ፣ የጸሰሳ ጥናት።

ፀሐይ ወዳ*

1. መግቢያ

የንግድ ዕቃዎችን ከአንድ ቦታ ወደ ሌላ በመርከብ የማጓጓዝ ሥራ አንድን መርከብ በሙሉ በመከራየት (ቻርተር ፓርቲ) ወይም የመርከብ ማሰጫኛ ሰነድ (ቢል ኦቭ ሌዲንግ) በሚሰጥበት ውል ሊፈጸም ይችላል። መርከብን መከራየት ብዛት ያላቸውን ዕቃዎች በአንዴ ለመጓጓዝ ተስማሚ ሲሆን በሌላ በኩል በማስጫኛ ሰነድ የሚፈጸም ሥራ የተለያዩ ሰዎች ንብረት የሆኑ ልዩ ልዩ ዕቃዎችን በአንድ መርከብ ለማጓጓዝ ተስማሚ ነው።[1] የመርከብ ኪራይ ውል በአንድ የመርከብ ባለንብረትና በተከራይ መካከል ሲኖር የሚገባውን ግንኙነት (መብትና ግዴታ) የሚወስን ሲሆን በማስጫኛ ሰነድ የሚደረገ ውል ግን በቀጥታ ተዋዋይ የሆኑትን የዕቃዎቹን አስጫኝና የመርከቡን ባለቤት እንዲሁም በውጭ አገር ያለው የዕቃው ተረካቢ ወይም መብቱ የተላለፈለት ሌላ ሰው እንዲሁም በተወሰነ ደረጃ ሰነዱን በመያዣነት ተቀብሎ ብድር የሠጠ ባንክን መብትና ግዴታ ይወስናል።[2] በመርከብ ዕቃ የሚያሥጭኑ ሰዎች በአብዛኛው ለዕቃዎቻቸው የመድን ሽፋን ስለሚገቡ ዕቃዎቹ ሲጠፉ ወይም ሲበላሹ ከመድን ሰጭዎቹ ካሣ ይቀበላሉ። መድን ሰጭዎችም የመተካት መብታቸውን በመጠቀም የከፈሉትን ካሣ ሀላፊነት ካለበት ወገን ያስመልሳሉ። በመሆኑም መድን ሰጭዎችና ከእነሱ ተቀብለው የመድን ሽፋን የሚሰጡ ወገኖች (ሪኢንሹረርስ) በማስጫኛ ሰነድ በሚፈጸሙ ውሎች ላይ መብትና ግዴታ ይኖራቸዋል።

መርከብ ከጥንት ጀምሮ ዕቃዎችንና ሰዎችን በርቀት ወደሚገኙ ቦታዎች ለማጓጓዝ በዋነኛነት ያገለገለ መሣሪያ ሲሆን የሮዲያን ሕግ የሚባለው የመጀመሪያው የባሕር ሕግ የታወጀው እ.ኤ.አ. በ900 ከክ.ል.በ. ነው።[3] ይህ የረጅም ጊዜ ታሪክ ቢኖርም በመርከብ ሥራ ልምድ የረዥም ጊዜ ልምድ ባላትና ከታወቁት የባሕር ጠረፍ ሀገሮች አንዷ በሆነችው እንግሊዝ ለምሣሌ ፓርላማው ለመጀመሪያ ጊዜ በባሕር ማጓጓዝ ንግድ ጣልቃ የገባው (ሕግ ያወጣው) በ18ኛው ክፍለ ዘመን ነው።[4] ከዚህ ጊዜ በኋላ ይህን የንግድ ዘርፍ የሚመለከቱ ብዛት ያላቸው ሕጎች ታውጀዋል። የእንግሊዝ የ1894 የንግድ መርከብ አዋጅ የ1971 በባሕር ላይ ዕቃዎችን የማጓጓዝ አዋጅ፣ የአሜሪካ የ1893 የሐርተር አዋጅና የ1936 በባሕር ዕቃዎችን የማመላለስ አዋጅ ይህን በማስመልከት የሚጠቀሱ ዋና ዋና ሕጎች ናቸው።

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* ረዳት ፕሮፌሰር፣ ኢ.ሲ.ዩኒቨርሲቲ፣ ሕግ ፋኩልቲ።ይህ ጽሑፍ የእንግሊዝኛውን ጽሑፍ ፍሬ ሀሳብ የተከተለ ቢሆንም ቃል በቃል ትርጉም ግን አይደለም።

[1] Thomas J. Schoenbaum, Admiralty and Maritime Law, 2nd Ed., West Publishing Co., St. Paul, Minn. (1994), P. 491

[2] N.J. Gashell, C. Debattista and R.J.Swatton, Chosley and Giles' Shipping Law,

[3] Grant Gilmore and Charles L. Black Junior, The Law of Admiralty the Foundation Press Biruklen (1957) Page 2 & 3.

[4] Gaskel, Supra Note 2, P.168

መርከቦች በባሕር ላይ ሲንዙ ብዛት ያላቸውና የተለያዩ አደጋዎች ሊያጋጥማቸው ስለሚችሉ የመርከብ ሥራ በአደጋ የተከበበ ሥራ ነው። በመሆኑም የብዙ አገሮች የባሕር ሕጎች ለመርከብ ባለ ሀብቶች ልዩ ድጋፍ ይሠጣሉ። በዚሁም መሠረት አንድ የመርከብ ባለቤት በቸልተኛነት ከተፈጸመ የመርከብ ጉዞ ወይም የሥራ አመራር የተነሳ ሊሚደርሱ ጥፋቶች ወይም ጉዳቶች ከመርከቡ መጠን አንጻር በሚለላ ገንዘብ ሀላፊነቱን እንዲወሰን የተለያዩ የባሕር ሕጎች ይፈቅዳሉ።[5] በተጨማሪም ከሌሎች አጓጓዦች በተለየ ሁኔታ ብዛት ካላቸው ምክንያቶች የተነሳ በዕቃዎች ላይ ሊሚደርሱ ጉዳቶች የመርከቢቷ ባለቤትም ሆነ መርከቢቷ የሕግ ሀላፊነት የለባቸውም።[6] የመርከብ ባለቤቶች እንዲህ ባለ አደጋ በበላበት የንግድ ዘርፍ እንዲሠማሩ ለማበረታታት ሲባል ጄኔራል አቨሬጅ በመባል የሚታወቀው የአደጋ (ጉዳት) መጋራት ዘዴ እና የእሽግ ገደብ (ፓኬጅ ሊሚቴሽን) በመባል የሚታወቀው ከእሽግ ወይም ከሌሎች የዕቃዎች መጠን መለኪያዎች አንጻር ሀላፊነትን የመገደብ መብት በብዙ አገሮች የባሕር ሕጎች ውስጥ ተካትተው ይገኛሉ።

የኢትዮጵያ የባሕር ሕግም በአንቀጽ 80 እና በተከታተዮቹ በሰዎች ወይም ዕቃዎች ላይ ከሚደርሱ ጥፋቶች ወይም ጉዳቶች የተነሳ የሚከፈል ካሣን የመገደብ መብት በአንቀጽ 251 እና በተከታዮቹ የጉዳት መጋራት መብትን በመደንገግ ለመርከብ ባለቤቶች ልዩ ድጋፍ ያደርጋል። ቦማስጫኛ ሰነድ አማካይነት የሚፈጸሙ ውሎችን በተመለከተ ሕጉ ከሌሎች አጓጓዦች በተለየ ሁኔታ የመርከብ ባቤቶችን ብዛት ካላቸው ምክንያቶች የተነሳ ከሚደርሱ ሀላፊነቶች ነጻ ያወጣቸዋል። (አን. 197) ።[7] አንድ የመርከብ ባለቤት በአን. 197 መሠረት ከሀላፊነት ነጻ ሊሆን ካልቻለ ለደረሰው ጥፋት ወይም ጉዳት ለእያንዳንዱ እሽግ ወይም ለሞነት ክፍያው በተሰላው በእያንዳንዱ አሀዝ ሀላፊነቱ አምስት መቶ ብር ነው። (አን. 198)። ይህ የሕግ መብት "የእሽግ ገደብ" ወይም በሕጉ አጠራር "በሕግ የሚወሰን የሀላፊነት ግምት" በመባል ይታወቃል።

የእሽግ ገደብ ለመርከብ ባለቤቶች የተሠጠ ልዩ ድጋፍ ቢሆንም በመርከብ ባለቤቶችና በዕቃዎች ባለቤቶች መካከል ያለውን ተጻራሪ ፍላጎት ለማስተካከል (ሚዛናዊ ለማድረግ) አልቻለም። የእሽግ ገደብ ዋነኛ ደካማ ጎኖች ለገደቡ መነሻ የሆነው ብሔራዊ ገንዘብ ወይም ወርቅ መሆን ነው። ብሔራዊ ገንዘቦች ከዋጋ ማሽበት የተነሳ ዋጋቸው መቀነሱና ክንቴይነሮች (ትላልቅ የዕቃ ማሸጊያ ብረት ሣጥኖች) የተለመዱ የዕቃዎች ማሸጊያዎች መሆናቸው የእሽግ ገደብን ጊዜው ያለፈበት ዘዴና የዕቃ ባለንብረቶችን ጥቅም የሚጎዳ ዘዴ አድርጎታል። በመሆኑም የሁሰቱንም ወገኖች ጥቅም ለማቀራረብ ይቻል ዘንድ አዲስ ቅምር መፈለግ ግድ ሆኗል። በዚሁም በሠረት አዳዲስ ሁኔታዎችን ግምት ውስጥ ማስገባት ይቻል ዘንድ ዓለም አቀፍ ስምምነቶችም ሆኑ ብሔራዊ የባሕር ሕጎች በየጊዜው ተሻሽለው (ተከልሰው) ወጥተዋል። በ1952 ዓም በታወጀው የባሕር ሕግ ውስጥ የተካተተው የእሽግ ገደብ ግን ከአርባ ዓመት በላይ ያልተቀየረ ሲሆን አግባብነት ያለው አንቀጽ የትርጉም ስህተት ያለበትና ሕጉን በሚጠቀሙበት አካላት ፍርድ ቤቶችን ጨምሮ ተገቢ ግንዛቤ አላገኘም።

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[5] ዝኒ ከማሁ ገጽ 394።

[6] Gilmore and Black, Supra note 3, P. 663

[7] የባሕር ሕጉን አን. 197 (በየብስ መጓጓዝ) ከአን. 589-600 የንግድ ሕግ(የአየር ማጓጓዝ) አን.630-.439

የንግድ ሕግ ጋር ያነጻጽሩ።

ከላይ ከተጠቀሱት ሁኔታዎች በመነሳት የእሽግ ገደብን በተመለከተ በዓለም አቀፍ ደረጃ የተከሰቱ ለውጦችንና የኢትዮጵያ የባሕር ሕግ በጉዳዩ ላይ የደነገገው አንቀጽ ዋና ዋና ደካማ ጎኖችን በማመልከት በዚህ ጽሁፍ ማብራሪያ ለማቅረብ ይሞከራል። ሕጉን በሥራ ላይ ለማዋልና ለመተርጎም በተደረጉ ጥረቶች ያጋጠሙ ችግሮችን ለማሳየት ሲባል በተለያዩ ጊዜያት በኢትዮጵያ ፍርድ ቤቶች የተሰጡ ሶስት ውሳኔዎች በዚህ ጽሁፍ ውስጥ ተካትተው ተብራርተዋል። ወደፊት ሕጉን በትክክለኛው መንፈስ መሠረት ለመተርጎም የሚያስችሉ ጥቂት ሀሳቦችን በማቅረብ ጽሁፉ ይጠናቀቃል።

2. <u>የእሽግ ገደብ በዓለም አቀፍ ስምምነቶች</u>

2.1. የእሽግ ገደብ ሕግ ታሪክ

አንዲት መርከብ የአንድ አገር ዜጋ ንብረት ብትሆንም የብዙ አገሮች ዜግነት ያላቸው ሰዎች ንብረት የሆኑ ዕቃዎችን ለማጓጓዝና ዕቃዎችን ለመጫንና ለማራገፍ ወደ ተለያዩ አገሮች ወደቦች ውስጥ መግባትና ከዚያም መውጣት (መልቀቅ) ትችላለች። በመሆኑም በባሕር ዕቃን ማጓጓዝ በአብዛኛው ዓለም አቀፋዊ ሥራ ነው። ከነዚህ ምክንያቶች የተነሳ በማስጫኛ ሰነድ የሚፈጸሙ ውሎች በተለያዩ አገሮች ሕጎች ላይ የተመሠረቱ በመሆናቸው የሕጎች ግጭትን ሊፈጥሩ ይችላሉ። በባሕር ዕቃን የማጓጓዝ የስራ ዘርፍን በተመለከተ ከፍተኛ ሚና ያላቸው አገሮች እኤአ ከ1882 ጀምሮ ይህን ዘርፍ የሚመለከቱ ሕጎች አንድ ዓይነት (ተመሳሳይ) የሚሆኑት በአያንዳንዱ አገር ሕግ በሚደረግ ለውጥ ላይ ሳይሆን ዓለም አቀፍ ስምምነቶችን በመፈረም እንደሆነ እምነት አሳድረዋል። ተመሳሳይ ሕጎች መኖር እንዳለባቸው ከሚያስገድዱ ሁኔታዎች አንዱ የእሽግ ገደብ ነው።

በማስጫኛ ሰነድ ላይ የተመሠረቱ ውሎችን በማስመልከት ከሚነሳው የሕጎች ግጭት በተጨማሪ በዚሁ ሰነድ ላይ ጥቅም ያላቸው ሁለት ወገኖች መብቶች ተመጣጣኝ ያለመሆናቸው ሕጎችን ተመሳሳይ ለማድረግ ለተደረገው ጥረት በምክንያትነት አገልግሏል። በአንድ ፀሐፊ አባባል ከሕጎች ተመሳሳይነት በፊት ያለው ሁኔታ እንደሚከተለው ተገልጿል።

> በ19ኛው ክፍለ ዘመን አጋማሽ ላይ በዕቃዎች ላይ ከሚደርሰው መጥፋት ወይም መበላሸት የተነሳ አንገዙ ያለበት መሠረታዊ የውል ሀላፊነት በአብዛኛው ተሸርሽሮ ነበር። በወቅቱ የነበረውን አንደ ፈለጉ ማድረግ (ሌዜ ፌር) ፍልስፍናንና የተመቸ ገበያን በመጠቀም አንገዦች የመደራደር ሀይላቸው እስከፈቀድላቸው ድረስ ሀላፊነታቸውን የሚቀንሱ ልዩ ሁኔታዎችን (በማስጫኛ ሰነድ ውስጥ) ለማስገባት ሞክረዋል። ከዚሁም የተነሳ ከዕቃ አስጫኞች ባንኮች የመድን ድርጅቶች ሕጉ በሚጫኑ ዕቃዎች ላይ መብት ያላቸውን ወገኖች ጥቅም አያስጠብቅም የሚል ቅሬታንና አጸፋዊ መልሥን አስከትሏል።[8]

[8] John F. Wilson, <u>World Shipping Laws</u>, International Conventions, preface, carriage by sea, oceania publications inc., Dobbs Ferry, New York (1986), P.V.

በሁለቱ ወገኖች መካከል የተጀመረው ትግል ጉዳዩ በተሰይ በዓለም አቀፍ ስምምነት ተስማሚ የሆነ መፍትሔ ሊገኝለት እንደሚገባ የግድ ብሏል። በዚሁም መሠረት ቀዳሚ ከነበሩት ስምምነቶች አንዱ የሆነው ዘ ሲቨርፑል ኮንፈረንስ ፎርም ቢል ኦቭ ሌዲንግ በመባል የሚታወቀው በ1882 በኢንተርናሽናል ሎው አሶሲዬሽን ሲቨርፑል ላይ ጸድቆ በ1883 በኒው ዮርክ ፕሮፍዮሥ ኤክስቼንጅ ኮፒቂት ማሻሻያዎች ጋር በሥራ ላይ እንዲውል ተደርጓል። ስምምነቱ የእሽግ ገደብ ለእያንዳንዱ እሽግ 100 ፓውንድ መሆን እንዳለበት ይገልጻል።[9]

ከላይ የተጠቀሰው ስምምነት የእሽግ ገደብን በተመለከተ ሰፊ ተፈጻሚነትን ሊያስከትል ባለመቻሉ ከዚህ ጊዜ በኋላ በተደረጉት ጥረቶች በ1924 ኮንቬንሽን ፎር ዘ ዩኒፊኬሽን አቭ ሠርተን ሩልስ ሪሌቲንግ ቱ ቢልስ አቭ ሌዲንግ ወይም ዘ ሄግ ሩልስ በመባል የሚታወቀው ዓለም አቀፍ ስምምነት በአገሰት 5 1924 ብራስልስ ላይ ተፈርሟል።

ይህ ዓለም አቀፍ ስምምነት ከደነገጋቸው ሁኔታዎች ጥቂቶቹ የእሽግ ገደብ ለእያንዳንዱ እሽግ ወይም ቁጥር 100 ፓውንድ ስተርሊንግ መሆኑ የዕቃዎች ተፈጥሮ እና ዋጋ ተገልጾ ከሆነ ወይም እነዚህ ሆን ተብለው በአስጫኙ በሰሀተት ተገልጸው ከሆነ ገደቡ ተፈጻሚነት እንደማይኖረውና ሁለቱ ወገኖች ከተስማሙ የእሽግ ገደቡ ከፍ ባለ ዋጋ ሊወሰን እንደሚችል ናቸው።[10]

ስምምነቱ ከላይ ከተጠቀሱት በተጨማሪ አጓጓዡን ከሀላፊነት ነጻ የሚያደርጉ ልዩ ልዩ ሁኔታዎችን ደንግጓል። በመሆኑም ስምምነቱ ካሳካቸው ጉዳዮች ዋና ዋናዎቹ ጉዳትና ጥፋትን በአስጫኞችና አጓጓዦች መካከል ማከፋፈል የአጓጓዡን መሠረታዊ ሀላፊነቶች መወሰን እና ይህ ሀላፊነት በሁለቱ ወገኖች ስምምነት ምን ያህል ሊወሰን ወይም ሊተው እንደሚችል ናቸው።[11]

ይህ ስምምነት በወቅቱ በንግድ ዘርፉ ተግባራዊነት ላይ የተመሠረተና የተዋጣለት ነው ተብሎ በአንዳንድ ጸሐፍት ቢወደስም በ1950ዎቹና ከዚያም በኋላ ለተከሰቱት አዳዲስ ሁኔታዎች ግን መፍትሔ ሊያስገኝ አልቻለም። የስምምነቱ ዋና ዋና ችግሮች የፓውንድ ስተርሊንግ ዋጋ መቀነስና እሽጎች ከቴክኖሎጂ ዕድገት ጋር መለወጣቸው ናቸው። በመሆኑም፦

> ከጊዜ በኋላ የ100 ፓውንድ ስተርሊንግ ዋጋ ከግሽበት የተነሳ በመቀነሱ የሕግ ግጭትን ሲፈጥር ዓለም አቀፋዊ ልዩነት ተፈጥሯል። እንዲሁም ከቴክኖሎጂ ዕድገት የተነሳ በሁለት ሰዎች ብቻ ሊያዙ ይችሉ የነበሩ እሽጎች 40 ጫማ ያህል (ርዝማኔ) እና

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[9] J.C. Moore, The Hamburg Rules, Journal of Maritime Law and Commerce, Vol. 9 (1977-78) P.1.

[10] የስምምነቱ አንቀጽ 4 (5)። አንቀጽ 9 የሀላፊነቱ መጠን በወርቅ መሰከት እንዳለበት ይደነግጋል። የአንቀጾቹን ሙሉ ቃል አንግሊዝኛው ጽሑፍ ገጽ...ግርጌ ማስታወሻ ላይ ይመልከቱ።

[11] Wilson, Supra note 8, P.V.

እስከ 35 ቶን ክብደት ያላቸው ኮንቴነሮች ስለሆኑ እሽግ ማለት ምን ማለት ነው የሚለውን ጭብጥ ሊያስነሱ ችለዋል::[12]

ከእነዚህና ሌሎች ምክንያቶችም የተነሳ ስምምነቱን ለማሻሻል ከ1959 ጀምሮ በተደረገ ጥረት ይህ ስምምነት በ1963 ካቪዝቢ አሜንድመንትስ (ቪዝቢ ሩልስ) ተተክቷል::

የቪዝቢ ደንቦች ተፈጻሚ የሆኑት ከ1977 ጀምሮ ነው:: ደንቦቹ ከፈጠሯቸው ለውጦች ውስጥ ዋና ዋናዎቹ 100 ፓውንድ ስተርሊንግ በወቅቱ ማሸጊያ እያስጋውም ተብሎ ተገምቶ በነበረው ወርቅ መተካቱ የእሽግ ገደቡ በአማራጭ በዕቃዎች ክብደት ሊሰላ መቻሉ እሽግ ኮንቴይነሮችን ሲያካትት መቻሉ እና ጉዳት የደረሰው አጓጓዡ ሆን ብሎ ወይም በቸልተኝነት ከፈጸመው ድርጊት የተነሳ ከሆነ የእሽግ ገደብ መብት ተፈጻሚ ያለመሆኑ ናቸው::[13] የፓውንድ ስተርሊንግ ዋጋ መቀነሥ የሔግ ደንቦችን ዋጋ ቢስ እንዳደረገው ሁሉ ወርቅ በገንዘብ መለካቱ በመቅረቱና በአንዳንድ አገሮችም የታወቀ ዋጋ የሌለው መሆኑ[14] ለእሽግ ገደብ ትክክለኛ የዕቃዎችን ዋጋ ሊያመለክት የሚችልና ሁሉንም ሊያሥማማ የሚችል ዘዴ መፈለግ እንዳለበት ግድ ብሏል::

ከ1970ዎቹ መጨረሻ ጀምሮ ፓውንድ ስተርሊንግ እና ወርቅን ከተመለከተው ክርክር በተጨማሪ በአጓጓዦችና በአስጫኞች መካከል ያለው ግንኙነት ሚዛናዊነትን የተመለከቱ ክርክሮች መነሳት ጀመሩ:: በዚሁም መሠረት ታዳጊ አገሮች የሔግ ደንቦች በአስጫኞች ላይ አግባብ ያልሆነ ጫናን በመፍጠር አጓጓዦችን ይጠቅማል::[15] እንዲሁም እንደ ዓለም አቀፉ የባሕር ድርጅት (አይ ኤም ኦ) የመሰሰሉ ድርጅቶች በዓለም ላይ ያሉ አብዛኛዎችን መርከቦችን በባለቤትነት ለያዙ አገሮች ስለሚያደሉ የታዳጊ አገሮችን ፍላጎት አያሟሉም የሚል አቋም ወሰዱ::[16] በዚሁም መሠረት የታዳጊ አገሮችን ጥቅም ያስጠብቃሉ ተብለው በሚገመቱት በዩናይትድ ኔሽንስ ኮንፈረንስ ፎር ትሬድ ኤንድ ዴቨሎፕመንት አንክታድ) እና ዩናይትድ ኔሽንስ ኮሚሽን ኦን ሲንትርናሽናል ትሬድ ሎው (ዩ ኤን ሲ አይ ቲ አር ሴ ኤል) አማካይነት የቀድሞ ደንቦችን ለማሻሻል በተደረገው ጥረት በ1978 ሀምበርግ ጀርመን ላይ የሀምበርግ ደንቦች በመባል የሚታወቅ ስምምነት ታውጇል::[17] ይህ ስምምነት በአጓጓዦች ሀላፊነቶች ላይ መሠረታዊ ሊባል የሚችል ለውጥ ያመጣ ሲሆን ከነዚህ ለውጦቹ ዋነኛው በፍራንክ ወይም በወርቅ ይሰላ የነበረውን የእሽግ ገደብ በኢንተርናሽናል ሞኒተሪ ፈንድ በሚወሰነው ስፔሻል ድሮዊንግ ራይት (ኤስ. ዲ. አር.) መተካቱ ነው::[18] ስምምነቱ በሥራ ላይ የዋለው በአብዛኛው አፍሪካውያን

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[12] Moore, Supra note 9, P.3.

[13] የደንቦቹ አንቀጽ 2። ሙሉ ቃሉን እንግሊዝኛው ጽሑፍ ላይ የግርጌ ማስታወሻ ቁጥር 13 እና ከሱ ጋር የተያያዘውን ዋና ጽሁፍ ይመልከቱ::

[14] Schoenbaum, Supra note 1, P.525.

[15] Gakel, Supra note 2, P. 321

[16] Shoenbaum, Supra note 1, P. 525

[17] ይህ ስምምነት የተባበሩት መንግሥታት በባሕር ላይ ዕቃዎችን የማጓጓዝ ስምምነት 1978 በመባልም
ይጠራል::

[18] <u>የስምምነቱ አንቀጽ 6፣</u>
"በዚህ አንቀጽ መሠረት የእሽግ ገደብ 835 ነጥብ በእሽግ ወይም ሌላ አሀዝ ወይም ከጠፉት ወይም

የሆኑ 20 አገሮች ከተፈረመ በኋላ በኖቬምበር 1 1992 ነው። የበለጸጉት አገሮች የሀምበርግ ደንቦችን ስምምነት ለመፈረም ፍላጎት ባይኖራቸውም የእሽግ ገደብ ስሌት በወርቅ መሆኑ ቀርቶ በኤስ ዲ አር መተካት እንዳለበት በመስማማታቸው ቀደም ሲል የነበሩትን ሁለት ስምምነቶች የሚያሻሽል የማሻሻያ ፕሮቶኮል በዲሴምበር 21 1979 ፈርመዋል። ቀደም ሲል እንደተገለጸው የዚህም ፕሮቶኮል ዋና ዓላማ የእሽግ ገደብ ስሌትን ከጊዜው ጋር ተለማሚ በሆነ መመዘኛ ለመተካት ነው።

2.2. የእሽግ ገደብ ዋና ዋና ጠቢያት

የእሽግ ገደብ ከሁለት የተለያዩ አቅጣጫዎች ሊታይ የሚችል ጉዳይ ነው። በአንድ ወገን ገደቡ አጓጓዡ ከዕቃዎች መጥፋት ወይም ጉዳት የተነሳ ሊደርስበት ይችል የነበረውን አስከፊ ኪሣራ ለመቀነስ ለአጓጓዡ የተሰጠ ሕጋዊ ድጋፍ ተደርጎ ይታያል። ይህ ድጋፍ ባይኖር ኖሮ አጓጓዡ ለጠፉ ወይም ለተበላሹ ዕቃዎች ሙሉ ዋጋቸውን የመክፈል ሀላፊነት ይኖርበት ነበር። በሌላ ወገን ደግሞ የእሽግ ገደብ በአጓጓዡ ሀላፊነትን የመቀነስ መብት ላይ የተጣለ ገደብ ነው። በመሆኑም አጓጓዡ እንደ ቀድሞው በሕግ ከተፈቀደው ገደብ በታች የሆነን ሀላፊነት የሚገልጽ አንቀጽ በማስጫኛ ሰነድ ውስጥ ማካተት አይችልም። ሆኖም አጓጓዡ ከአነስተኛው ገደብ በላይ የሆነ ሌላ ተጨማሪ ሀላፊነት ለመውሰድ (ገንዘብ ለመክፈል) ሊስማማ ይችላል። በተጨማሪም አጓጓዦች ሙሉ በሙሉ ከሀላፊነት ነጻ ሊሆኑ የሚችሉባቸው የተለያዩ ሕጋዊ ሁኔታዎች ስላሉ የእሽግ ገደብ መብትን መጠቀም የሚችሉት እነዚህ ሁኔታዎች ሳይኖሩ ብቻ ነው።

ለምሳሌም ያህል፣ በሔግ ደንቦች አንቀጽ 4 (2) መሠረት አንድ አጓጓዥ በዕቃዎች ላይ ሰሚደርሱ ጥፋቶች ወይም ጉዳቶች ምንም ሀላፊነት እንደሌለበት የሚደነግጉ አሥራ ሰባት ልዩ ሁኔታዎች ተዘርዝረዋል።[19] እነዚህም ሁኔታዎች በኢትዮጵያ የባሕር ሕግ አንቀጽ 197 ከተደነገጉት ጋር አንድ ዓይነት በመሆናቸው ስለይዘታቸው በበለጠ ለመረዳት ይህንኑ አንቀጽ መመልከቱ ጠቃሚ ነው። ከዚህ በተጨማሪ በአንቀጽ 4(4) ላይ ሕይወትን ወይም ንብረትን ከአደጋ ለማዳን ከሚደረግ የአቅጣጫ ለውጥ የተነሳ ለሚደርስ ነገር አጓጓዡ ሀላፊነት የለበትም። በአንቀጽ 4(5) መሠረት ደግሞ አስጫኙ የዕቃዎቹን ተፈጥሮ ወይም ዋጋ ሆን ብሎ አሳስቶ ገልጾ ከሆነ አጓጓዡ ሀላፊነት አይኖርበትም። በመሆኑም እነዚህ ሁኔታዎች ሲከሰቱ አጓጓዡ የእሽግ ገደብ መብቱን በመጥቀስ መከራከር አያስፈልገውም።

የሐምበርግ ደንቦች እነዚህን የአደጋ ምንጮች አላካተቱም። በዚህ ስምምነት መሠረት "የዕቃዎች መጥፋት ወይም ጉዳት የደረሰው በአጓጓዡ ጥፋት ወይም ቸልተኛነት ነው ተብሎ ስለሚገመት... ይህ አለመሆኑን የማስረዳት ሸክም የአጓጓዡ ነው።"[20] በዚህ ስምምነት አንቀጽ 5 መሠረት፣

ከተጎዱት ዕቃዎች ጠቅላላ ክብደት 2.5 ኖጥብ ለእያንዳንዱ ኪሎ ግራም ከሁለቱ የበለጠው ነው።"

[19] የአደጋ ምንጮች ከኢትዮጵያ የባሕር ሕግ ኢ.197 ከተደነገጉት ጋር አንድ አይነት ናቸው

[20] የስምምነቱ የጋራ መግባቢያ ሰነድ።

> አጓጓዡ ራሱ፣ ሠራተኞቹ ወይም ወኪሎቹ ሁኔታው እንዳይከሰትና ውጤቱም እንዳይከተል አስፈላጊ የሆኑትን በቂ ጥንቃቄዎች ማድረጉን ካላረጋገጠ በስተቀር ዕቃዎች በይዞታው ሥር ባሉበት ጊዜ ስሚደርሰው ጥፋት ወይም ጉዳት ወይም የርክክብ መዘግየት ሀላፊ ነው።

ከዚህ በተጨማሪ በአንቀጽ 5(6) መሠረት አስፈላጊ ከሆነ ከአቅጣጫ መቀየር የተነሳ ስደረሰ ነገር አጓጓዡ ሀላፊነት የለበትም። ስለዚህም በዚህ ስምምነት መሠረት አጓጓዡ በዕቃዎች ላይ ጥፋት ወይም ጉዳት እንዳይደርስ በቂ ጥንቃቄዎችን ከወሰደ ምንም ሀላፊነት የለበትም።[21] የእሽግ ገደብን በማንሳት መከራከርም አያስፈልገውም።

2.3. የእሽግ ገደብ መብት ተፈጻሚ የማይሆንባቸው ልዩ ሁኔታዎች

ቀደም ሲል እንደተገለጸው፣ የእሽግ ገደብ መብት በሕግ ድንጋጌዎች ተለይቶ የተሰጠ ልዩ መብት ነው። በመሆኑም ተግባራዊ ሊሆን የሚችለው በሕጉ ላይ በተመለከተው ሁኔታና በየቀመጠው ገደብ መሠረት ብቻ ነው። ስለዚህም የተወሰኑ ሁኔታዎች በሚያጋጥሙበት ጊዜ አጓጓዡ ኃላፊነቱን ለመገደብ መብት አይኖረውም። ይኸው የእሽግ ገደብ መብት ተፈጻሚ የማይሆንባቸው ዋና ዋና ሁኔታዎችም የሚከተሉት ናቸው።

በሐግ ደንቦች አንቀጽ 4(5)፤ እና በሐግ ቪስቢ ደንቦች አንቀጽ 2(ሀ) መሠረት አስጫኙ የዕቃዎቹን ጠባይና ዋጋ ገልጾ ከሆነና ይኸው በማስጫኛ ሰነዱ ውስጥ ተካትቶ ከሆነ አጓጓዡ የእሽግ ገደብ መብቱን ሊጠቀምበት አይችልም።[22] በተጨማሪም አጓጓዡ መብቱን አልተጠቀመበትም በማለት ሊተወው ይችላል። ስለሆነም አጓጓዡ በሕግ ከተወሰነው ገደብ በላይ ካሣ ለመክፈል ከተዋዋለ መክፈል ያለበት በተዋዋለበት መጠን መሆን ይኖርበታል። [የሐግ ደንቦች አንቀጽ 45፣ የሐግ ቪስቢ ደንቦች አንቀጽ 2 (ሠ)] በመጨረሻም የዕቃዎች መጥፋት ወይም ጉዳት የደረሰው አጓጓዡ ሆን ብሎ ወይም በቸልተኝነት ከፈጸመው ድርጊት ወይም አለማድረግ ከሆነ በገደብ መብቱ ሊጠቀም አይችልም። [የሐግ ቪስቢ ደንቦች አንቀጽ 4(ሰ)፤ የሐምበርግ ደንቦች አንቀጽ 8] ::[23]

ከዚህ በተጨማሪ በጥቂት አገሮች ሕግ፡ በተለይም በአሜሪካ፣ አስጫኙ በጣም አስፈላጊ ከሆነ አንቀጽ (ክሎዝ ፓራማውንት) ገደቡ በሱ ላይ ተፈጻሚ እንዳይሆን ተጨማሪ የጭነት ዋጋ በመክፈል ዋጋውን እንዲገልጽ የሚያስችለው ማሳሰቢያ ካልተሰጠው አጓጓዡ በእሽግ ገደብ መብቱ ሊጠቀምበት አይችልም።[24]

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[21] የአንቀጽ 5 ግልባጭ (አስንተራሪዮ) ንባብ።

[22] በሐምበርግ ደንቦች ውስጥ ተመሳሳይ ድንጋጌዎች አልተካተቱም

[23] የሐግ ደንቦች ይህን ሁኔታ አያካትቱም።

[24] Schoenbaum, Supra note 1, P.613.

ሆኖም ይህ የተለየ ሁኔታ አግባብነት ባለው የአሜሪካ ሕግ (COGSA) በግልጽ የተደነገገ ሳይሆን በፍርድ ቤቶች ውሳኔዎች የተፈጠረ ነው። አንገዥ ማሳሰቢያውን እንዴት መስጠት እንዳለበትና የዚህ ልዩ ሁኔታ አስፈላጊነትን በተመለከተም የህሳብ አንድነት የለም።[25]

2.4. የእሽግ ገደቦች የስሌት መመዘኛዎች (መለኪያዎች)

2.4.1. የስሌት ማባዣዎች (ዩኒትስ ኦቭ አካውንት)

አንድ አንገዥ በእሽግ ገደብ መብቱ ለመጠቀም የሚያስችሉት ሁኔታዎች ሲፈጠሩ ሀላፊነቱ በሕግ ደንቦች መሠረት በፓውንድ ስተርሊንግ በቪዝቢ ደንቦች በፍራንክና ወርቅ[26] በሕምበርግ ደንቦችና በ1979 ማሻሻያ ፕሮቶኮል መሠረት በኤስ ዲ አር አሃዞች ተባዝቶ ይወሰናል። የገደቡ ታሪክ እንደሚያመለክተው ሥሌቱ ብዙ ደረጃዎችን አልፎአል። አሁን የተደረሰበት ብቸኛ አሀዝ ደግሞ ኤስ ዲ አር ነው። ኤስ ዲ አር በአይ ኤም ኤፍ የሚወሰን አሀዝ ነው። በዚህም መሠረት፣

> ከጃላይ 1 1974 ጀምሮ የሚሠራበት ዘዴ የአሥራ ስድሥት አገሮች ገንዘቦችን በመደመር የሚገኘውን ውጤት ከኤስ ዲ አር ጋር በማገናኘት ይህንኑ ዋጋ በመወሰን ነው። ፈንዱ ይህንን የዋጋ ተመን በየቀኑ በመወሰንና በማተም ለአባላት አገራት ያስታውቃል።[27]

አባል አገራት በፈንዱ በተወሰነው ዋጋ መሠረት የገንዘባቸውን ምንዛሪ ማስተካከል ሲችሉ አባል ያልሆኑ አገራት ግን ገንዘባቸውን አባል ከሆነ አገር አንዱን በመውሰድ ይህ ገንዘብ በኤስ ዲ አር ሊመነዘር ያለውን ዋጋ እንደ መነሻ በመውሰድ[28] ወይም በሕምበርግ ደንቦችና በ1979 ፕሮቶኮል በተወሰኑት ሌሎች አሀዞች በመጠቀም መመንዘር ይችላሉ። የሕምበርግ ደንቦች ከ1979 ፕሮቶኮል አንጻር ለአስጫኞች የተመቹ ናቸው። ኤስ ዲ አር እንዳለቃት የስሌት ማባዣዎች ሁሉ ከጊዜ በኋላ ቀር ሊሆን እንደሚችል በመገመት በሕምበርግ ደንቦች አንቀጽ 33 መሠረታዊ ለውጥ ሊኖር ከፈራሚ አገሮች በትንሹ አንድ አራተኛው በጠሩት ስብሰባ በሌላ አሐዝ እንዲተካ ሊወስኑ እንደሚችሉ ተደንግጓል።

2.4.2. እሽጎችና ሌሎች የመጠን መለኪያ አሀዞች።

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[25] ዝኒ ከማሁ ገጽ 613 እና 614። ለተጨማሪ ማብራሪያ የሚከተለውን ጽሁፍ ይመልከቱ፣ Michael F. Sturley, The Faire Opportunity Requirement under COGSA Section 4(5): A case study in the Miscaterpretation of the carriage of Goods by sea Act, Journal of Maritime Law and Commerce Vol. 19, No. 1 (1988), PP. 1-35, and (part II) Vo. 19, No. 2, (1988), PP. 157-206

[26] የሕግና የቪዝቢ ደንቦች በ1979 ማሻሻያ ተተክተዋል።

[27] Stephen A.Silard, "Cassiage of the SDR by Sea: The Unit of Account of the Hamburg Rules," Journal of Maritime Law and Commerce, Vol.9 (1977-1978), P.18.

[28] ዝኒ ከማሁ ገጽ 33።

የእሽግ ግድብ ከሚሰላባቸው መመዘኛዎች አንዱ እሽግ ነው። የእሽግ ትርጉም ጥብቅነት የለውም። በሚከተለው አኳኋን መተርጎም ይቻላል፣

> ዕቃዎችን ለማጓጓዝ አያያዛቸውን ለማመቻቸት የሚረዳ ሆኖም ዕቃዎችን ሙሉ በሙሉ ወይም በከፊል የግድ መሸፈን የሌለበት ነገር ሁሉ እሽግ ነው። በዚሁም መሠረት ሣጥኖች፣ በአንድ ላይ የታሠሩ ዕቃዎች (እሥሮች)፣ የእንጨት ማስቀመጫዎች፣ እንደ እሽግ ሊቆጠሩ ይህ ትርጉም ፈሣሽችን፣ በብዛት የሚጫኑ ጭነቶችን (bulk cargo) እና ዓሣን ግን አያጠቃልልም።[29]

በዚህም መሠረት በሌላ ነገር ውስጥ ሳይገቡ የሚጓጓዙና ሙሉ በሙሉ ያልተሸፈኑ ዕቃዎች ብቻ እንደ እሽግ አይቆጠሩም።[30] የኤስ ዲ አር ሌሎች ማጥቀሻዎች፣ ቁጥር ወይም የመርከብ ማጓጓዣ ቁጥር (Shipping unit) እየተባሉ የሚጠሩት እና የዕቃዎች ክብደት ናቸው።

ኮንቴይነሮች እሽጎች ናቸው ወይስ አይደሉም የሚለው ነጥብ ሰረዝም ጊዜ አስራካሪ የነበረ ቢሆንም አሁን ግን በሥራ ላይ ያሉት ስምምነቶች መፍትሔ የሰጡት ጉዳይ ነው። በዚህም መሠረት በቪዝቢ ደንቦች አንቀጽ 2(ሐ) እና ሐምበርግ ደንቦች አንቀጽ 6 (2) (ሀ) መሠረት ዕቃዎችን አንድ ላይ ለመያዝ ጥቅም ላይ የዋለው ኮንቴይነር ወይም የእንጨት ማስቀመጫ ወይም ተመሳሳይ ነገር ከሆነ በማስጫኛ ሰነዱ የተጠቀሰው የእሽጉ ወይም ቁጥሩ ብዛት በእነዚሁ ውስጥ ታሽገው የሚገኙት ናቸው።

ከዚህ ውጭ ከሆነ ግን [ኮንቴይነሩ ... ወዘተ] ራሱ እንደ እሽግ ወይም ቁጥር ይወሰዳል።[31] ዕቃዎች ታሽገው የተጓጓዙ ቢሆንም አስጫኙን አስከጠቀመ ድረስ ኤስ ዲ አርን በጠፉት ወይም በተጎዱት ዕቃዎች ክብደት በማባዛት አጓጓዡ እንዲከፍል ሊወሰን ይቻላል።

3. <u>የእሽግ ገደብ በኢትዮጵያ</u>

3.1. የሕጉ ምንጮች

የኢትዮጵያ የባሕር ሕግ የተረቀቀው ሃን ኤሥካራ እና ጀፈሬት በተባሉ ፈረንሣውያን ነው። ሚስተር ኤሥካራ የንግድ ሕጉን የማርቀቅ ሥራ ጀምረው

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[29] Schoenbaum, Supra note 1, P.606.

[30] ዝኒ ከማሁ፣ ገጽ 605።

[31] ከላይ የግርጌ ማስታወሻ ቁ. 13 ይመልከቱ።

ሳያጠናቅቁ በመሞታቸው ሚስተር ጆፍሬት ተክተዋቸው የንግድ ሕጉ ክፍሉ ሕጉ ጋር በ1952 ዓ.ም. (እ.ኤ.አ.) ታውጇል።

በንግድ ሕጉ ረቂቅ ላይ የተደረገው ውይይት በቃለ ጉባዔ ተይዞ ተመዝግቧል። ይህ ሰነድ በፕሮፌሰር ፒተር ዊንሸፕ በእንግሊዝኛ ተተርጉሞ በመጽሐፍ መልክ ወጥቷል።[32] የባሕር ሕጉን በተመለከተ ግን የኮሚሽኑ ቃለ ጉባዔዎች አልተመዘገቡም። ተመዝግበው ከሆነም የት እንዳሉ አይታወቅም። የእነዚህ ሰነዶች አለመኖር የሕጉን ምንጭ ለማወቅ የሚደረገውን ምርምር ፍጹም የማይቻል ባይሆንም አስቸጋሪ ግን ያደርገዋል። ሆኖም አርቃቂውም ሆኑ ኮሚሽኑ የባሕር ሕጉን የሚመለከቱ ጉዳዮችን ለንግድ ሕጉ በተያዘው ቃለ ጉባኤ ላይ አልፎ አልፎ አስፍረዋል። እነዚህ ጉዳዮች ተነስተው የነበሩት ከሌሎች ጉዳዮች ጋር በመዛመድ ቢሆንም የባሕር ሕጉን ምንጭ ለማወቅ ፍንጭ ሊሰጡ ስለሚችሉ ከነዚሁ በመነሳት አንዳንድ አጠቃላይ አስተያየቶችን መሰንዘር ይቻላል።

የኢትዮጵያ የባሕር ሕግ የባሕር ንግድን የተመለከቱ ብዙ ድንጋጌዎችን አካቷል። ከእነዚህ ጥቂቱ የባሕር ላይ ቅጥር፣ የመርከብ ኪራይ፣ በማሥጫኛ ሰነድ ላይ የተመሠረቱ ውሎች፣ የጋራ ጉዳትና፣ የባሕር መድን ናቸው። የጋራ ጉዳትን በተመለከተ ሕጉ የደንጋጌው አንቀጾች በደንብ ሲታዩ በአብዛኛው ከዮርክ አንትወርፕ ደንቦች ጋር ተመሳሳይ መሆናቸውን መገንዘብ ይቻላል።[33]

የባሕር ሕጉ አንቀጽ 180-209 በማስጫኛ ሰነዶች ላይ የተመሠረቱ ውሎችን የሚደነግገውን የባሕር ሕጉን ክፍል (ቁ.180-209) ምንጭ በእርግጠኛነት መገመት ባይቻልም የሔግ ደንቦች ናቸው ተብሎ ይገመታል። በቁ. 197 ላይ የተዘረዘሩት ከሐላፊነት ነጻ የሚያወጡ ሁኔታዎች እና በቁ. 200 ስለ አደገኛ ዕቃዎች የተደነገገው ከደንቦቹ ተመሳሳይ አንቀጾች ጋር አንድ አይነት ናቸው። እነዚህን ተመሳሳይነቶችና አርቃቂዎቹ ከዚህ በላይ እንደተጠቀሰው ያቀረቧቸውን አስተያየቶች[34] ግምት ውስጥ በማስገባት ይህንኑ የተመለከተው የሕጉ ክፍል ምንጭ የሔግ ደንቦች ናቸው ብሎ መደምደም ይቻላል። ከላይ እንደተመለከተው በ1968 በሺዝቢ ደንቦች ከመተካቱ በፊት የባሕር ሕጉ በ1952 (እ.ኤ.አ) በታወጀበት ወቅት የሔግ ስምምነት ሰፊ ተቀባይነትን ያገኘ ስምምነት ነበር።

3.2. የእሽግ ገደብን የሚመለከቱ ድንጋጌዎች

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[32] Peter Winiship, Back ground Documents of the Ethiopian Commercial Code of 1960, H.S.I.U., Faculty of Law (un published), (1972) PP. 7-8; 84.

[33] የዮርክ አንትወርን ደንቦች በመጀመሪያ የጸደቁት በ1864 ሲሆን እስከ 1974 ድረስ በተደጋጋሚ ተከልሰዋል። የኢትዮጵያ የባሕር ሕግ የጋራ ጉዳት አንቀጾች ምንጭ የደንቦቹ የ1949 ክለሳ ሊሆን ይችላል።

[34] ቃለጉባዔዎቹ ሕጉን ማን እንዳረቀቀው በግልጽ አያመለክቱም። ሆኖም ይህን ሥራ ሚስተር ኢስክራ ጀምረውት ሚስተር ጃውፍሬት አጠናቀውታል ተብሎ ይገመታል።

አግባብነት ያለቸው የሔግ ደንቦችና የኢትዮጵያ የባሕር ሕግ አንቀጾች እንደሚከተለው ይነበባሉ፡፡

> አስጫኙ የዕቃዎቹን ጠባይና ዋጋቸውን ከጉዞ በፊት አስታውቆ ይኸው በማስጫኛ ሰነዱ ውስጥ እስካልተካተተ ድረስ ለማናቸውም የዕቃ መጥፋት መጎዳት ወይም ከዕቃዎቹ ጋር ለተገናኙ ጉዳዮች የአጓጓዡ ወይም የመርከቧ ሀላፊነት በማናቸውም ሁኔታ ለአያንዳንዱ አሸግ ወይም ቁጥር ከ100 ፓውንድ ስተርሊንግ ወይም የዚህ ልክ በሌላ አገር ገንዘብ ሊበልጥ አይችልም፡፡

የሔግ ደንቦች አንቀጽ. 4(5)

የኢትዮጵያ የባሕር ሕግ (1952)

ቁ. 198 በሕግ የሚወሰን የሀላፊነት ግምት፡፡

1. የንግድ ዕቃዎቹ ለሚደርስባቸው ጉዳት ናጥፋት አመላላሹ በሀላፊነት የሚጠየቅበት ሂሳብ በማናቸውም ሁኔታ ቢሆን ከአምሥት መቶ የኢትዮጵያ ብር የበለጠ ሊሆን አይችልም፡፡

2. ይህ የሕግ ኪሣራ አወሳሰን የሚታሰበው በዕቃዎቹ ጥቅል ብዛትና ዕቃዎቹ የተጫኑት በጅምላ ተጠቃለው እንደ ሆነ ለጭነቱ ዋጋ መወሰኛ በሆነው ልክ መሠረት በዚህ ግምት መጠን ነው፡፡

3. ዕቃ አስጫኙ የንግድ ዕቃዎቹን በመርከቡ ላይ ከማስፈሩ በፊት የዕቃዎቹን ዓይነትና የዋጋቸውን ልክ ካስታወቀና ይህም መግለጫ በጭነት ማስታወቂያው ደረሰኝ ላይ ተጽፎ እንደሆነ ይህ የሕግ ኪሣራ አወሳሰን መከራከሪያ ሊሆንበት አይችልም፡፡

የእንቀጹ የአማርኛና የእንግሊዝኛ ቅጂዎች በአብዛኛው ተመሳሳይ ቢሆኑም የሀላፊነቱ ወሰን በአማርኛው ቅጂ መሠረት አምሥት መቶ ብር ሲሆን በእንግሊዝኛው ቅጂ መሠረት ግን አንድ ሺህ ብር ነው፡፡ ጉዳዩን የተመለከቱ ሠነዶች ባለመኖራቸው ልዩነቱ ሆን ተብሎ ወይም በአጋጣሚ የተፈጸመ መሆኑን ማወቅ አይቻልም፡፡ ሆኖም በእንግሊዝኛው ቅጂ "ማረሚያ" ላይ መስተካከል ያለባቸውን አንቀጾች በሚዘረዝረው ክፍል ውስጥ ይህ ነጥብ ባለመጠቀሱ ምናልባት ጉዳዩ ሆን ተብሎ የተፈጸመ ነው ሊያስብል ይችላል፡፡ ከዚህ በተጨማሪ በእንግሊዝኛው ቅጂ "አሸግ" ተብሎ የተጠቀሰው በአማርኛ ቅጂው ላይ "ጥቅል" ተብሎ ተገልጿል፡፡

የሔግ ደንቦችና የኢትዮጵያ የባሕር ሕግ አንቀጾች ከጥቂት ልዩነቶች በስተቀር በአብዛኛው ተመሳሳይ ናቸው፡፡ በመሆኑም የአሸግ ገደቡ ወሰን በሁለቱ ሕጎች የተለያየ ከመሆኑ በተጨማሪ የገንዘቡ ማጣቀሻ በሔግ ደንቦች መሠረት አሸግ ወይም "ቁጥር" ሲሆን በባሕር ሕጉ መሠረት ግን አሸግ "ወይም ... ዕቃዎቹ የተጫኑት በጅምላ ተጠቃለው እንደሆነ ለጭነቱ ዋጋ መወሰኛ በሆነው ልክ ..." ነው፡፡ ከእነዚህ ልዩነቶች በመነሳት የባሕር ሕጉ አንቀጽ 198 ከሔግ ደንቦች ይልቅ ኮግሣ በመባል

ከሚታወቀው የአሜሪካ ዕቃዎችን በባሕር ላይ የማጓጓዝ አዋጅ ጋር ተቀራራቢነት እንዳለው መገንዘብ ይቻላል። የአዋጁ ክፍል 1304(5) እንደሚከተለው ይነበባል።

> አስጫኙ የዕቃዎቹን ጠባይና ዋጋቸውን ከጉዞ በፊት አስታውቆ ይኸው በማስጫኛ ሰነዱ ውስጥ እስካልተካተተ ድረስ ለማናቸውም የዕቃ መጥፋት መጎዳት ወይም ዕቃዎቹን ከማጓጓዝ ጋር ለተገናኙ ጉዳዮች የአጓጓዡ ወይም የመርከቢቷ ሐላፊነት በማናቸውም ሁኔታ ለአያንዳንዱ እሽግ ወይም <u>ዕቃዎቹ</u> ሳይታሸጉ ተጓጉዘው ከሆነ ለአያንዳንዱ የተሰመደ የጭነት ቁጥር ከ500 የዩናይትድ ስቴትስ ሕጋዊ ገንዘብ ዶላር ወይም የዚህ ልክ በሌላ አገር ገንዘብ ሊበልጥ አይችልም። (ሥርዝ የተጨመረ)።

የእሽግ ገደብ ወሰን በሁለቱም ሕጎች 500 ነው።[1537] በተጨማሪም በባሕር ሕጉ በ "ጅምላ" ተብሎ የተገለጸው በኮግሣ "ሳይታሸጉ የተጓጓዙ" ተብሎ ከተገለጸው ጋር ተመሳሳይ ነው። የጭነት ክፍያ የእሽግ ገደብ መሆኑ በሁለቱም ሕጎች ውስጥ ተጠቅሷል። እነዚህን ተመሳሳይነቶች ግምት ውስጥ በማስገባት፣ እርግጠኛ መሆን ባይቻልም የባሕር ሕጉ አንቀጽ 198 ምንጭ ኮግሣ ነው ብሎ መገመት ይቻላል።

3.3. አተገባበር

በዚህ ክፍል የኢትዮጵያ ንግድ መርከብ ድርጅት አጓጓዥና ተከራካሪ በመሆን የቀረበባቸውና የእሽግ ገደብ መብቱን በማንሳት የተከራከረባቸው ሦስት ክሶችን፣ የኢትዮጵያ ፍርድ ቤቶች በእነዚህ ክሶች ላይ የሠጧቸውን ውሳኔዎችና የእሽግ ገደብን በተመለከተ በአጓጓዡ የሚዘጋጁ የማስጫኛ ሰነዶች ያካተታቸውን አንቀጾች እንመለከታለን። በማስከተልም በእነዚህ ነጥቦች ላይ አስተያየቶችና ሒሶች ይቀርባሉ።

3.3.1. የክሶች ሪፖርት[1538]

ክስ ቁጥር አንድ

ግንቦት 11 ቀን 1981።
የአዲስ አበባ ከፍተኛ ፍ/ቤት
የፍ. መ. ቁ. 689/78
ከሣሽ፡- ግርማ ከበደ

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[35] የሐግ ደንቦች ወሰኑን በራሳቸው ገንዘብ መንዝረው መደንገግ ህሰሚፈቅዱና አሜሪካ ደንቦቹን ባጸደቀችበት ዓመት 1925 የ100 ፓውንድ ስተርሊንግ ምንዛሬ በአማካይ 482.89 ዶላር ስለነበረ ኮግሣ በ500 ዶላር እንዲወሰን ደንግጓል። ሚካኤል ኤፍ ስተርሊ፣ ከላይ ቁ.29፣ ገጽ 177፣ የግርጌ ማስታወሻ ቁ.321 እና 322።

[36] ከዚህ በታች የቀረቡት የሦስቱ ክሶች ሪፖርቶች ክስ የቀረበባቸውን ጉዳዮች ፍሬ ነገሮች፣ ጭብጦችና ፍቤቶች በተሰይ በእሽግ ገደብ ላይ የሰጧቸው ውሣኔዎች አጭር ቁም ነገሮች ናቸው። በተግባር እንደሚታየው በድርጅቱ ላይ መብት አለን የሚሉ ወገኖች በተለይም የመደን ድርጅቶች ክሣሣ ክፍል በሕግ የተወሰነውን ገንዘብ በመቀበል ጉዳያቸውን ከሰሚዉርሱ ተመሳሳይ ጉዳዮች ብዙ ጊዜ ሰፍሊቶች አይቀርቡም። በመሆኑም እነዚህ ክሶች በቁጥር ሦስት ብቻ ቢሆኑም የሕጉን አተገባበርና የውሳኔ አቅጣጫዎችን ሊያመለክቱ ይችላሉ።

ተከሣሾች፡- 1. የኢትዮጵያ የንግድ መርከብ ድርጅት
2. የባሕርና ትራንዚት አገልግሎት ኮርፖሬሽን[737]

የክሱ ፍሬ ጉዳዮች

ከሣሽ የተለያዩ በመኪና ውስጥ የተቆለፈባቸው ዕቃዎችን የያዙ አምስት ካርቶኖች አንድ ሌላ ካርቶን ዕቃና አንድ መኪና 1ኛ ተከሳሽ ከሮተርዳም ወደ አሰብ በመርከቡ እንዲያጓጉዝለት አስረከበ። 1ኛ ተከሳሽም መረከቡን ለማረጋገጥ ቁ. 001 የሆነ የጭነት ማስታወቂያ ደረሠኝ ሠጠ። ዕቃዎቹ መድረሻ ወደቡ ላይ ሲደርሱ በአምስቱ ካርቶኖች ውስጥ ከነበሩት ዕቃዎች ዋጋቸው 12000 ብር ነው ተብሎ የተገመተ ዕቃዎች ጠፍተዋል። ከሣሽ ይህ ገንዘብ በሙሉ እንዲከፈለው ክሱን አቀረበ።

<u>የተከሣሽ ክርክር</u>

1ኛው ተከሣሽ ብዙ የመከራከሪያ ነጥቦችን ያነሳ ሲሆን ዋና ዋናዎቹ ግን ዕቃዎቹ በመርከቡ ደጃፍ (ዴክ) ላይ የተጫኑ ስለነበሩ ለደረሰው መጥፋት ሐላፊነት የለብኝም በአማራጭ ሐላፊነት ቢኖርብኝ እንኳን ከ200 ፓውንድ ስተርሊንግ ሊበልጥ አይችልም የሚሉ ናቸው።

<u>የፍ/ቤቱ ውሳኔ</u>

በባሕር ሕጉ አንቀጽ 180 (4) መሠረት አንጓዡ ለጉዳት ተጠያቂ የማይሆነው እንደ ጨዋማ የባሕር ውሃ የተነሳ ለደረሰ ጉዳት እንጂ ለዕቃዎች ሙሉ በሙሉ መጥፋት አይደለም። በመሆኑም ለጥፋቱ ሐላፊነት ያለበት ሲሆን መጠኑም ለእያንዳንዱ እሽግ 500 ብር ሆኖ ለአምስቱ እሽጎች 2500 ብር መክፈል ይኖርበታል።

የክሱ <u>ፍሬ ጉዳዮች</u>

ከሣሽ አንድ መኪና ከጂዳ ሣውዲ አረቢያ ወደ አሰብ እንዲጓጓዝላቸው ለተከሣሽ አስረክበው ተከሣሽም ቁ 25 የሆነ የማስጫኛ ለነድ ሰጥቷቸዋል። ተከሣሽም መኪናዋን ለወደብ ባለሥልጣን ካስረከበ በኋላ በቦታው ጦርነት በመነሳቱ ባለሥልጣኑ መኪናዋን ለባለንብረቱ ማስረከብ አልቻለም። የመኪናዋ ዋጋ 40000 ብር ነው ተብሎ በመገመቱ ተከሳሽ ይህን ገንዘብ በሙሉ እንዲከፍል ክሱ ቀረበ።

<u>የተከሣሽ ክርክር</u>

ተከሣሽ መኪናዋን በመድረሻ ወደቡ ላይ በማራገፍ የውል ግዴታውን ተወጥቷል። ርክክቡ ሊፈጸም ያልቻለው ከጦርነት የተነሳ በመሆኑ ለመጥፋቱ ሐላፊነት የለበትም።

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[737] ሁለተኛው ተከሣሽ ያቀረባቸውን መከራከሪያዎችና ፍቤቱም በእነዚህ ነጥቦች ላይ የሰጣቸው ውሳኔዎች ከእሽግ ገደብ ጋር ተዛማጅነት ስለሌላቸው ታልፈዋል።

ሐላፊነት አለ ኩተባለም ከ500 ብር ወይም 100 ፓውንድ ስተርሊንግ ሊበልጥ አይችልም።

የፍ/ቤቱ ውሳኔ

ተከሣሽ መኪናዋን በደንብ ሊጠብቃት ለሚችል ሦስተኛ ወገን ባለማስረከቡ፣ በቦታው ጦርነት የነበረ ቢሆንም ወደ ወደፊት ሲገባም ሆነ ከወደቡ ሲወጣ ሠላም እንደነበረና ቦታውን በያዘው ሐይል ጭነቱን እንዲያራግፍ መገደዱን ባለማረጋገጡ ለደረሰው መጥፋት ሐላፊ ነው። መጠኑን በተመለከተ የማስጫኛ ሰነዱ አንድ መኪናን ከመጥቀሱ ውጭ የባሕር ሕጉ በአን. 198 (3) በደነገገው መሠረት የዕቃውን ጠባይና ዋጋ በአንድነት ባለማመልከቱ ተከሣሽ 500 ብር መክፈል ይኖርበታል።

ክስ ቁጥር ሦስት

ጥቅምት 12፣ 1978
የፍመቁ 71/77
የማዕከላዊ አስታራቂ ኮሚቴ[38]
ከሣሽ፡- የኢትዮጵያ መድን ድርጅት
ተከሣሽ፡- የኢትዮጵያ ንግድ መርከብ ድርጅት

የክሱ ፍሬ ጉዳዮች

ንብረትነታቸው የተከሣሽ ደንበኞች የሆኑ ሦስት ዕቃዎች ከእንግሊዝና ጀርመን ወደ ኢትዮጵያ በመጓጓዝ ላይ እንዳሉ በመጥፋታቸው ተከሣሽ ብር 3804.61 ካሣ ከፍሉ ይህን ገንዘብ ለማስመለስ በመተካት መብቱ ይህን ክሥ አቀረበ። ተከሣሽ ለእያንዳንዱ እሽግ 100 ፓውንድ ስተርሊንግ ለመክፈል ቢስማማም በማስጫኛ ሰነዱ አንቀጾች መሠረት የሔግ ደንቦች ተፈጻሚ ስለሚሆኑ ሐላፊነቱ እንደሚከተለው ሊሰላ ይገባል።

ሀ. የሔግ ደንቦች በማስጫኛው አገር ተፈጻሚ ከሆኑ በዚሁ መሠረት
ለ. ደንቦቹ ተፈጻሚ ካልሆኑ በዚሁ አገር ሕግ መሠረት
ሐ. ይህን ጉዳይ የሚመለከት ሕግ ከሌለ በደንቦቹ መሠረት

ሁለቱ ዕቃዎች የተጫኑት ከእንግሊዝ በመሆኑ በዚህ አገር ሕግ መሠረት የእሽግ ገደብ 471.69 ፓውንድ ስተርሊንግ በእሽግ ሲሆን አንዱ ዕቃ የተጫነው ከጀርመን በመሆኑ በዚህ አገር ሕግ መሠረት ገደቡ 1250 ዳች ማርክ በእሽግ ነው። ስለዚህም ተከሣሹ በእነዚህ ስሌቶች መሠረት ሊከፍል ይገባል።

የተከሣሹ ክርክር

[38] ይህ አካል ቀደም ሲል በመንግሥት መቤቶች መካከል የሚነሱ የፍትሐ ብሔር ጉዳዮችን ለማየት የተቋቋመ ነበር። አሁን ግን ኮሚቴው ተበትኗል።

በማስጫኛ ሰነዱ አንቀጽ 24 መሠረት የከሣሽ ሐላፊነት 100 ፓውንድ ስተርሊንግ በእሽግ ነው። በተከሣሽ የተጠቀሰው አንቀጽ 2(ለ) ጠቅላላ ሁኔታን የተመለከተና በማስጫኛ ሰነድ ያልተሸፈኑትን የተመለከተ በመሆኑ አግባብነት የለውም።

<u>የፍርድ ቤቱ ውሳኔ</u>

አንቀጽ 2 (ለ) ጠቅላላ ሲሆን አንቀጽ 24 ደግሞ ልዩ አንቀጽ ነው። ልዩ አንቀጹ ከጠቅላላ አንቀጹ የበለጠ ተፈጻሚነት ስላለው የተከሣሽ ሐላፊነት በእሽግ 100 ፓውንድ ስተርሊንግ ሊሆን ይገባል።

3.3.1. የመጠን መለኪያ አሀዞች

3.3.1.1. በክሶች ላይ የቀረበ አስተያየት

ከላይ ከቀረቡት ሦስት ክሶች ውስጥ ዕቃዎች በእሽግ (ካርቶን) ውስጥ ተጓጉዘው እንደነበር በግልጽ የተመለከተው በክስ አንድ ብቻ ነው። በክስ ሦስት ይህን የተመለከተ ነገር ባይኖርም ተከራካሪ ወገኖች ይህን በተመለከተ ልዩነት ያላቸው አይመስልም። በክስ ሁለት መኪናው በእሽግ ስለመጓዙ የተገለጸ ነገር የለም። ሆኖም በተግባር እንደሚታየው መኪኖች የሚጓጓዙት በአብዛኛው ሳይታሸጉ በመሆኑ በዚህም ጉዳይ የተፈጸመው ይኸው ነው ተብሎ ይገመታል።

በክስ ሁለት ላይ መኪናው በእሽግ ካልተጓጓዘ የመጠኑ መለኪያ እሽግ መሆኑ ቀርቶ በሕጉ አንቀጽ 198 (2) የተመለከተው አማራጭ ማለትም "ለጭነቱ ዋጋ መወሰኛ በሆነው ልክ መሠረት" መሆን ነበረበት። የአንቀጹ አማራጭ ሌሎች ሕጎች አዘውትረው በሚጠቀሙበት "የተለመደ የጭነት ክፍያ ቁጥር" ከሚለው አገላለጽ ያልተለየ ነው ተብሎ ይገመታል። በመሆኑም

> የተለመደ የጭነት ክፍያ ቁጥር ተፈጻሚ የሚሆነው ሳልታሸጉ፣ በጅምላ ለሚጫኑ ዕቃዎች ለማሽነሪዎችና መሣሪያዎች ነው። ይህ አገላለጽ በአንድ ጉዳይ ላይ የጭነት ክፍያ የተሰላበትን ቁጥር የሚያመለክት ስለመሆኑ አከራካሪ አይደለም። በመሆኑም ከዕቃው ዋጋ ጋር ግንኙነት የሌለው ሆኖ በክብደት፣ ኪዩቢክ ሬት፣ ቁጥር የሚሰላ ነው።[39]

በተጨማሪም የድርጅቱ ሰነድ አንቀጽ 12 የጭነት ክፍያ በክብደት መጠን (ምናልባት ቮልዩም) እና በዕቃዎች ዋጋ መሠረት ሊሰላ እንደሚችል ያመለክታል። ከእነዚህ ነጥቦች በመነሳት በክስ ሁለት ላይ አማራጩ ከሣሹን ቢጠቅመውም ወይም ቢጎዳውም የእሽግ ገደቡ በአማራጩ መሠረት ሊከፈል እንደሚገባ ፍ/ቤቱ መወሰን ነበረበት።

3.3.1.1.2. የሐላፊነት መጠን

[39] Schoenbaum, Supra note 1, P 612

አጓጓዡ ሐላፊነቱ በክስ አንድ ላይ 200 ፓውንድ በክስ ሁለት 500 ብር ወይም 100 ፓውንድ እና በክስ ሦስት 100 ፓውንድ መሆኑን በመግለጽ ተከራክሯል። ፍርድ ቤቶቹም በክስ አንድና ሁለት ሐላፊነቱ 500 ብር በክስ ሦስት 100 ፓውንድ መሆን እንዳለበት ወስነዋል።

በክስ አንድ ላይ አጓጓዡ ሐላፊነቱ ከ200 ፓውንድ ሊበልጥ አይችልም በማለት ያቀረበው ክርክር ይህ መጠን እሽጎች ግምት ውስጥ ሳይገቡ ያሰበትን ጠቅላላ ሐላፊነት ወይም መጠኑ ለእያንዳንዱ እሽግ መሆኑን በግልጽ አያመለክትም። በክርክሩ ለማለት የተፈለገው በማናቸውም ሁኔታ አጠቃላይ ሐላፊነቱ ከ200 ፓውንድ ሊበልጥ አይችልም የሚል ከሆነ በአንቀጽ 198 የተወሰነው የእያንዳንዱ እሽግ የገደብ መጠን አነስተኛው ብቻ ሰለሆነ በሕግ ተቀባይነት ያለው ክርክር አይሆንም።

በተጨማሪም አጓጓዡ ይህን ክርክር ያቀረበው በሰነዱ አንቀጽ 24 ላይ በመመሥረት መሆኑን ገልጿል። ሆኖም በወቅቱ የነበረው ሰነድ ይህን ወሰኖ ከሆነ[40] አንቀጹ በሕግ የተወሰነውን አነስተኛ ገደብ ሊቃረን ስለማይችል ተቀባይነት ያለው አይሆንም። የአጓጓዡ ክርክር ሐላፊነቱ ለእያንዳንዱ እሽግ ከ200 ፓውንድ በላይ ሊሆን እይችልም የሚል ከሆነ ከሣሹ ሊከፈለው የሚገባው በእሽግ 500 ብር ሳይሆን ይኸው መጠን መሆን ነበረበት። ይህን በተመለከተ የባሕር ሕጉ አንቀጽ 206 (1) የሚከተለውን ደንግጓል።

<u>አንቀጽ 206 ዕቃ አመላላሽ ግዴታዎቹን ለማብዛት ነፃነት ያለው ስለ መሆኑ።</u>

> (1) ዕቃ አመላላሽ ያሉትን መብቶቹንና ከሐላፊነት መብት በሙሉ ወይም በከፊል ለመተው ወይም በዚህ ክፍል እንደተመለከተው ያሉበትን ሐላፊነቶችና ግዴታዎችን ለመጨመር ይህ የመብት መተው ወይም ግዴታን የመጨመሩ ጉዳይ ለሚኙ በሚሰጠው በጭነት ማስታወቂያ ደረሠኝ በተገፈ አመላላሹ የተባለውን ለማድረግ [ይችላል]።

በሕጉ መሠረት አጓጓዡ ለእያንዳንዱ እሽግ 500 ብር መክፈል የሚኖርበት እሽጉ ወይም በውስጡ ያሉት ዕቃዎች ሙሉ በሙሉ ሲጠፉ ብቻ ነው። በክስ አንድ ላይ ዕቃዎቹ የጠፉት በከፊል ብቻ በመሆኑ የተገኙት ዕቃዎች ዋጋ ሊከፈል ከሚገባው ገንዘብ መቀነስ ነበረበት። ሆኖም አጓጓዡ ይህን ነጥብ በክርክሩ ስላላነሳው ፍርድ ቤቱም ውሳኔ አልሠጠበትም።

በክስ ሁለት ላይ አጓጓዡ ሐላፊነቱ 500 ብር ወይም 100 ፓውንድ መሆኑን ገልጾ እያለ ፍ/ቤቱ ከ100 ፓውንድ ይልቅ 500 ብር እንዲከፍል የመረጠበት ምክንያት ግልጽ አይደለም። በአሁን ጊዜ አንድ ፓውንድ በ12.25 ብር ይመነዘራል።[41] (ክስ በቀረበበት ጊዜ ምንዛሪው 10 ብር ይሆን ነበር ተብሎ ይገመታል)። ስለዚህም ከሣሹ

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[40] በአሁን ጊዜ በድርጅቱ የሚዘጋጁት ሰነዶች ተመሳሳይ ሁኔታን አያካትቱም።

[41] ምንጭ፡- የኢትዮጵያ ብሔራዊ ባንክ የየቀኑ የምንዛሪ መጠን ማስታወቂያ።ሆኖም ይህ ፅሁፍ ለሀተመት በሚዘጋጅበት ወቅት የምንዛሪ መጠኑ ትንሽ ከፍ ብሏል።

በአማራጩ እንዲከፈለው ተወስኖ ቢሆን ኖሮ እንድ ሺህ ብር ያገኝ ነበር። ሆኖም ከሣሹ በማወቅም ይሁን ባለማወቅ የመኪናዋ ጠቅላላ ዋጋ እንዲከፈለው ብቻ በመጠየቁ ፍ/ቤቱ በጭብጥነት አልያዘውም። በመሆኑም ፍ/ቤቱ ሊወቀስ አይገባውም።

3.3.2. <u>የኢትዮጵያ ንግድ መርከብ ድርጅት የአሠራር ልማድ</u>

በኢትዮጵያ ንግድ መርከብ ድርጅት የሚዘጋጁ የማስጫኛ ሰነዶች የእሽግ ገደብን የሚመለከቱ የተለያዩ አንቀጾችን አካተዋል። በዚሁም መሠረት የአጓጓዡሐላፊነት ዕቃዎች የጠፉበት ወይም የጎደሉበትን ጊዜና ቦታ ግምት ውስጥ በማስገባት በተለያዩ ሕጎች ይመራል። ይህንንም ኃላፊነቱ የሚወሰኑት ሕጎች አራት ሲሆኑ፡ እነዚህም የአንድ አገር ሕግ (local laws) የሔግ ደንቦች፣ የቪዝቪ ደንቦች እና የ1936 የአሜሪካ አዋጅ ናቸው። ከላይ እንደተመለከተው የእሽግ ገደብን በማስመልከት በዓለም ላይ ከተደረሠበት የአንድነት ስምምነት አንጻር ሰነዶቹ አራት የተለያዩ ሕጎችን ተፈጻሚ ያደረጉበት ምክንያት ግልጽ አይደለም። በተጨማሪም የሔግ ደንቦች በሔግ ቪዝቪ ደንቦች ተተክተው እያለ ሰነዶቹ የሔግ ደንቦች ተፈጻሚነት እንዳላቸው በመደጋገም የደነገጉበት ምክንያት ግልጽ አይደለም። ይህን በማስመልከት ሊሰጥ የሚችለው ምክንያት በሔግና በቪዝቪ ደንቦች አንቀጽ 10 አንዲሁም በሐምበርግ ደንቦች አንቀጽ 21 መሠረት የእያንዳንዱ ስምምነት የተፈጻሚነት ወሰን የተለያየ መሆኑ ነው። ስለዚህም የሁለቱ ደንቦች በአንድነት መካተት አስፈላጊነቱ አባልነታቸው ከሁለት ለአንዱ ስምምነት የሆኑ አገሮችን ፍላጎት ለማሟላት ነው ተብሎ ይገመታል። በዚህም መሠረት ድርጅቱ እንደ አጓጓዥ ያለበት ሐላፊነት ሰነዱ በተሰጠበት ቦታ (አገር)፣ ይህ አገር የዚህ ወይም የሌላ ስምምነት ፊራሚ መሆኑ... ወዘተ ላይ የተመሠረተ ይሆናል።

ማጠቃለያ

የባሕር ንግድ በአደጋ የተከበበ ሥራ በመሆኑ የመርከብ ባለንብረቶች ለሚያጓጉዟቸው ዕቃዎች መጥፋት ወይም ጉዳት ሙሉ በሙሉ ሐላፊ ከሆኑ ሊደርስባቸው የሚችለውን አስከፊ ኪሣራ ለማቃለል ሕጉ ከቀየሳቸው ዘዴዎች አንዱ የእሽግ ገደብ መብት ነው። በመሆኑም የመርከብ ባለንብረቶች ሐላፊነታቸውን በእሽግ ወይም በሌላ የመጠን መለኪያ መባዛት በሚችል የልውውጥ አሀዝ የመገደብ ሕጋዊ መብት አግኝተዋል። የእሽግ ገደብ ሕግ ታሪክ እንደሚያመለክተው በዓለም አቀፍ ደረጃ ሐላፊነቱን በአንድ አገር ገንዘብ ወይም በሌላ ነገር መወሰን አስቸጋሪ እንደነበርና ፓውንድ ስተርሊንግና ወርቅ ቀደም ሲል እንደ መለኪያ ሥራ ላይ ውለው ቢሆንም የዕቃዎችን ትክክለኛ ዋጋ ሊያሳዩ ስላልቻሉ አሁን በኤስ.ዲ.አር. ተተክተዋል።

በኢትዮጵያ የባሕር ሕግ አንቀጽ 198 የተደነገገው የ500 ብር ገደብ ሕጉም ሆነ አንቀጹ ባሰፉት አርባ ሁለት ዓመታት ባለመከለሳቸው የብር ዋጋም በዚሁ ጊዜ ውስጥ ከግሽበት የተነሳ በመቀነሱ በአንቀጹ የተ መለከተው ገደብ አሁን ያለውን

ዕውነታ የሚያንጸባርቅ ሊሆን አልቻለም። በመሆኑም የብር ዋጋ መቀነስ የመርከብ ባለንብረቶችን ሲጠቅም የዕቃ ባለንብረቶችን ግን አላግባብ ጎድቷል።

የአንቀጽ 198 ምንጭ ኮሚሣ በመባል የሚታወቀው የአሜሪካ ሕግ ነው ተብሎ ይገመታል። በሁለቱም ሕጎች ላይ የገደቡ መጠን 500 ሲሆን በ1952 (የባሕር ሕጉ ሲታወጅ) በብርና በዶላር መካከል ያለው ልዩነት የጥቂት ሣቲሞች ልዩነት ብቻ እንደነበር ጉዳዩን የሚያውቁና ሥልጣቸውን መግለጽ ያልፈለጉ ለምች ለዚህ ጸሐፊ ገልፀውለታል። ይህ እርግጠኛ ቢሆንም ወይም ባይሆንም አሁን ያለው የብር ዋጋ በ1950ዎቹ መጀመሪያ ከነበረው በጣም ያነሰ መሆኑ እጠራጣሪ ባለመሆኑ ይህን በእርግጠኝነት ማጣራት አስፈላጊ አይሆንም።

በአሁኑ ጊዜ የብር ምንዛሪ በዩ.ኤስ.ዶላር 8.86፣ በፓውንድ ስተርሊንግ 16.05 እና በኤስ.ዲ.አር 12.86 ነው=[42] በዚህ የልውውጥ መጠን መሠረት በአንቀጽ 198 የተደነገገው የ500 ብር የገደብ መጠን 56.43 ዶላር 31.15 ፓውንድ ወይም 45.54 ኤስ. ዲ. አር. ይሆናል። በዓለም አቀፍ ደረጃ በተደረሰበት ስምምነት መሠረት ግን ገደቡ በሐምበርግ ደንቦች መሠረት 835 በ1979 ፕሮቶኮል መሠረት 666.67 ኤስ.ዲ.አር. መሆን ነበረበት። ሆኖም ኢትዮጵያ የማናቸውም ስምምነት ፈራሚ ባለመሆኗ ኢትዮጵያዊ አስጫኞች/ተቀባዮች በዚህ መብት ሊጠቀሙ አይችሉም። አጓጓዦችም በእነዚህ ስምምነቶች አይገደዱም።[43] ሰለዚህም፣ ኢትዮጵያዊ አስጫኞች/ተቀባዮች በአንቀጽ 198 በተደነገገው የማይለወጥ ገደብ በጣም ተጎድተዋል። በመሆኑም ከአጓጓዦች የሚያገኙት ካሣ በሐምበርግ ደንቦችና በ1979 ፕሮቶኮል ከተደነገጉት እንደ ቅደም ተከተላቸው 5.45% እና 6.85% ብቻ ነው።

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[42] ዝኒ ከማሁ።

[43] ኢትዮጵያ የሐምበርግ ወይም 1979 ፕሮቶኮል ፈራሚ ብትሆን ኖሮ አስጫኞች/ተቀባዮች በአሽግ የሚያገኙት ካሣ እንደ ቅደም ተከተሉ ብር 9168.3 ወይም 7370.04 ይሆን ነበር

STATE OF EMERGENCY AND HUMAN RIGHTS UNDER THE 1995 ETHIOPIAN CONSTITUTION

Yebenew Tsegaye Walilegne*

Introduction

The universal and transcendental nature attributed to human rights norms has been the object of great controversies amongst human rights lawyers, academicians and policymakers.[1] One of the controversies involves the question of the derogability of human rights norms in situations of emergency.

In their day-to-day life, societies face exigencies that necessitate the derogation or suspension of human rights. In fact, judging by what has happened across the globe over recent decades, it can be safely said that exigencies and tensions are almost inevitable in the experience of any country. According to a Report prepared by the International Commission of Jurists in 1983, "at any given time in recent history a considerable part of humanity has been living under a state of emergency."[2]

The 1997 Annual Report of the UN Special Rapporteur on States of Emergency noted that "[i]f the list of countries that have proclaimed, extended

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[1] There is a veritable mass of literature on states of emergency. For some of the most comprehensive scholarly works on the subject, *see* Fitzpatrick: Human Rights, supra note 1; ANNA-LENA SVENSSON-MCCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATE OF EXCEPTION WITH SPECIAL REFERENCE TO THE *TRAVAUX PREPARATOIRES* AND CASE-LAW OF THE INTERNATIONAL MONITORING ORGANS (1998) [hereinafter Svensson-McCarthy: Human Rights]; JAMIE ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 1(1992) [hereinafter Oraa: Human Rights]; INTERNATIONAL COMMISSION OF JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS, 413(Geneva, 1983) [hereinafter ICJ: States of Emergency].

[2] ICJ: States of Emergency, *supra* note 1, at 413.

or lifted a state of emergency during the last 10 years ... were transposed onto a world map it would be disturbing to note that it would cover almost three quarters of the Earth's surface, and that no region would be left out."[3] Similarly, in his Tenth Annual Report, the Special Rapporteur states that:

> [A]t the very time these normative achievements [the generation of human rights norms] came into effect, the world found itself in the grip of what amounted to an institutional epidemic of states of emergency, which, like a contagious disease infecting the democratic foundations of many societies, were spreading to countries in virtually all continents, particularly from the 1970s onwards.[4]

In 2001, the United Kingdom, following the 9/11 terrorist attacks on the United States, declared a state of emergency and suspended the application of Article 5 of the ECHR, which ensures the right to liberty and security of individuals.[5] Likewise, as recently as September 2005, the USA was forced to declare a state of emergency to address the aftermath of the devastating destruction caused by hurricanes Katrina and Rita in New Orleans and Texas, respectively. What is more, some countries like Israel live in a perpetual state of emergency.[6]

By definition, state of emergency challenges the very foundations and threatens the existence of a nation.[7] When exigencies occur, international human rights instruments and domestic legislation give States a limited "grace period" of exemption from their obligations to respect and ensure human rights. Thus, in such unfortunate circumstances the State is allowed to take

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[3] UN Doc. E/CN.4/Sub.2/1995/20, 5 at para. 11.

[4] UN Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities Forty-ninth session Agenda item 9(a), The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency, Tenth Annual Report, E/CN.4/Sub.2/1997/19 (June 23, 1997).

[5] Virginia Helen Henning, *Anti-Terrorism, Crime and Security Act 2001: Has The United Kingdom Made a Valid Derogation From The European Convention on Human Rights?* 17 AM. U. INT'L L. REV., 1263, 1264-1265(2002); UN Doc. E/CN.4/Sub.2/2003/39, para.8.

[6] Adam Mizock, The *Legality of the Fifty-Two Years State of Emergency in Israel*, 7 U.C. DAVIS J. INT'L L. & POL'Y, 223, 225 (2001)[hereinafter Mizock: State of Emergency in Israel]. *See also* UN Doc. E/CN.4/2003/NGO/233, 1 at para. 1; Gross et al argue that "[a] state of emergency has become the norm, the ordinary state of affairs, in Northern Ireland." Oren Gross et al, To Know Where We Are Going, We Need to Know Where We Are: Revisiting States of Emergency in HUMAN RIGHTS: AN AGENDA FOR THE 21ST CENTURY 79, 95(Angela Hegarty et al., eds., 1999) [hereinafter Gross et al: Revisiting State of Emergency].

[7] The Report by the International Commission of Jurists likened states of emergency to the notion of self-defense in penal law. *See* ICJ: States of Emergency, *supra* note 3, at 413.

limited measures to meet the demands of states of emergency as and when they occur.[8] Such measures may, *inter alia*, entail restrictions or suspension of some human rights and freedoms for a limited time.[9]

In a bid to arrest potential abuses, both international and regional human rights instruments as well as domestic legislation ostensibly provide for the situations that warrant declaration of a state of emergency, the impact of emergencies on rights and freedoms as well as procedural requirements to declare a state of emergency.[10] They also expressly outlaw any derogation from what are commonly known as non-derogable rights.

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[8] Different statespersons, political philosophers and scholars have emphasized the right of a State to use emergency powers in order to save itself from destruction. Thomas Jefferson thought that "[t]he laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and those who are enjoying them with us; thus absurdly sacrificing the end to the means." *See,* THE WRITINGS OF THOMAS JEFFERSON 279-280(P. L. Ford, ed., 1893). Machiavelli maintained that "a strict observance of established laws [at all times] will expose her [the Republic] to ruin." Discourses, XXXIV as quoted in Venkat Iyer, *States of Emergency-Moderating their Effects on Human Rights*, 22 DALHOUSIE L.J. 125, 128 &189(Fall 1999) [hereinafter Iyer: States of Emergency]; Clinton Rossiter referred *de jure* states of emergency as "constitutional dictatorship" suggesting that in certain instances even democratic governments have to make use of emergency powers in order to be able to return to their regular constitutional order. CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP- CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES, 5 (1948) as quoted in Svensson-McCarthy: Human Rights, *supra* note 3 at 2; Margaret Thatcher is quoted as saying: "To beat off your enemy in a war, you have to suspend some of your civil liberties for a time. Yes, some of those measures do restrict freedom. But those who choose to live by the bomb and the gun, and those who support them, can't in all circumstances be accorded exactly the same rights as everyone else. We do sometimes have to sacrifice a little of the freedom we cherish in order to defend ourselves from those whose aim is to destroy that freedom altogether." *as quoted* in Oren Gross, *"Once More unto the Breach": The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT'L L, 437, 501 n.6 (1998) [hereinafter Gross: Once More unto the Breach]. However, "the well-known English constitutional scholar, Professor A.V. Dicey, was hostile to the idea of constitutional guaranties of fundamental rights because the same constitution that guaranteed those rights provided for their suspension in time of national emergency and allowed to determine the existence of such emergency-the very government against whom the right were most needed." Warbrick, The Protection of Human Rights, *supra* note 3, at 160.

[9] Svensson-McCarthy: Human Rights, *supra* note 3, at 1-2.

[10] National laws and international instruments contain what is known as derogation clause which regulates the impact of emergency on human right. Some consider the derogation clause "as the 'cornerstone' of the system of human rights protections, and as the most important provision of human rights treaties." *See* Oraa: Human Rights, *supra* note 3, at 1, n.1 citing the remarks made by Mr. Prado Vallejo, a member of the UN HR Committee, in CCPR/C/SR.35 (1982), at 8, para.32.

This article seeks to review the impact of states of emergency on human rights under the Ethiopian legal structure. It makes a modest attempt to assess the adequacy of the Federal Constitution in preserving human rights in a state of emergency, a situation that warrants their derogation.

The piece has two parts. Part I provides a brief discussion of the attempts made to define the term state of emergency and the situations that justify declarations of states of emergency. In addition, it highlights the governing principles that come into play once a state of emergency is declared.

Part Two presents a critical overview of the constitutional and institutional framework of state of emergency under the Ethiopian legal system. This part also attempts to elucidate the organs of government with whom the power to declare emergencies resides, the preconditions that need to be fulfilled for a valid declaration, and the protections against the abuse of emergency measures. The nature of non-derogable rights and the role of the Ethiopian courts in checking emergency powers are also discussed and analyzed.

Before proceeding any further, the writer wants to make one preliminary remark. There exists a multiplicity/duplicity of terms used to describe emergency situations.[11] Phrases such as "state of siege," "states of exception," "martial law," "suspension of guarantees," "state of emergency," "public emergency," "state of alarm," "state of defense," and others are used in different countries to describe a lack of normalcy in the political state of affairs of a country.[12] As a result, it has become a common practice for writers to make their preferences of terminology at the outset. For instance, Joan Fitzpatrick favors the term "state of emergency" as it "possesses the advantage

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[11] Svensson-McCarthy: Human Rights, *supra* note 3, at xxvi. For a very interesting discussion concerning the terminology that better describes the 'crisis situation' common to emergencies, *see* Fitzpatrick: Human Rights, *supra* note 1, at n.1 (1994); Svensson-McCarthy: Human Rights, *supra* note 3, at xxiv; Iyer: States of Emergency, *supra* note 10, at 130-132. *See also* SUBRATA ROY CHOWDHURY, RULE OF LAW IN A STATE OF EMERGENCY 12-15 (1989) [hereinafter Chowdhury: Rule of Law]. The Canadian Emergency Act recognizes four different types of emergencies: "public welfare emergency, public order emergency, international emergency and war emergency. *See* Peter Rosenthal, *The New Emergencies Act: Four Times the War Measures Act*, 20 MANITOBA L. J. 563, 565-573(1991).

[12] Gross: Once More unto the Breach, *supra* note 10 at 501 n.4; Chowdhury: Rule of Law, *supra* note 16, at 12.

of breadth of reference to a wide variety of factual circumstances..."[13] This is also the term preferred by the FDRE Constitution and will be used throughout this Paper, save in cases where the context demands otherwise.

I. STATE OF EMERGENCY: AN INTERNATIONAL PERSPECTIVE

1. Scope of Application

All the major international and regional human rights instruments, with the notable exception of the African Charter on Human and Peoples' Rights (hereinafter the ACHPR), recognize the right of States to suspend human right norms contained therein in cases of exigencies that threaten the life of the nation.[14] Similarly, these instruments lay down conditions and requirements for a valid derogation, as well as enumerate certain rights that may not be suspended or derogated even during the gravest of emergencies.

These instruments, however, differ both in their use of terminology of the situations that justify derogation and their listing of non-derogable rights. The ICCPR refers to "public emergency which threatens the life of the nation," the European Convention on Human Rights (hereinafter the ECHR) to "war or other public emergency threatening the life of the nation," while the Inter-American Convention on Human Rights (hereinafter the IACHR) to "war, public danger, or other emergency that threatens the independence or security of a State Party."[15] All the same, the derogation clauses in the above instruments are "essentially equivalent in criteria, theory, and purpose."[16]

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[13] Fitzpatrick: Human Rights, *supra* note 1, at 1; Oraa: Human Rights, *supra* note 3, at 2-3.

[14] Nicholas Haysom, *States of Emergency in a Post-apartheid South Africa* 21 COLUM. HUM. RTS. L. REV. 139, 142(1990) [hereinafter Haysom: States of Emergency].

[15] Article 4 of the ICCPR, International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967), 999 U.N.T.S. 171; Article 15 of the ECHR, European Convention for the Protection of Human Rights and Fundamental Freedoms, done Nov. 4, 1950, Eur. T.S. No. 5, 213 U.N.T.S. 221, and Article 27 of the IACHR, American Convention on Human Rights, done Nov. 22, 1969, O.A.S.T.S. No. 36 at 1, OEA/Ser.L/V/II.23, doc.2, rev.6, OASOR OEA/Ser.K/XVI/I.1, doc.65, rev.1, corr.2 (Jan. 7, 1970), *reprinted in* 9 I.L.M. 673 (1970).

[16] Joan Hartman, *Derogation from Human Rights Treaties in Public Emergencies* 22(1) HARV. INT'L. L. J., 1, 3 (1981); Ronald St. J. Macdonald, *Derogations under Article 15 of the European Convention on Human Rights*, 36 COLUM. J. TRANSNAT'L L. 225, 231(1997) [hereinafter Macdonald: European Convention]. *But see*, Mizock: State of Emergency in Israel, *supra* note 10, at 231. He points out there main differences between the derogation clauses of the ICCPR and the ECHR, namely the ICCPR has three more non-derogable rights that are not included in the ECHR; it also requires official declaration of state of emergency and it obliges states not to discriminate in taking emergency measures.

States of emergency trace their origin back to the Roman Empire and found their way almost in all contemporary political systems and international human rights instruments.[17] They portray one of the instances of a "head-on collusion between state sovereignty and national security on the one hand, and the growing international involvement in protecting individual human rights against state encroachment on the other hand."[18] In order to deflect this tension, both international human rights and national constitutions or subsidiary laws lay down provisions, known as derogation clauses, which regulate exigencies.[19]

Accordingly, ICCPR recognizes the right of States Parties to derogate from their treaty obligations in certain circumstances. Article 4 states that:

> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
> 2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

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[17] Iyer: States of Emergency, *supra* note 10, at 128; Oraa: Human Rights, *supra* note 3, at 7; Svensson-McCarthy: Human Rights, *supra* note 3, at 9. For a detailed discussion of the history of states of emergency *see* Svensson-McCarthy: Human Rights, *supra* note 3, at 9-45.

[18] Gross: Once More unto the Breach, *supra* note 10 at 441.

[19] *Ibid.* There are three main differences between the derogation clauses of the ICCPR and the ECHR, namely the ICCPR has three more non-derogable rights that are not included in the ECHR; it also requires official declaration of state of emergency and it obliges states not to discriminate in taking emergency measures. *See*, Mizock: State of Emergency in Israel, *supra* note 10, at 231. For the legislative history of Article 4 of the ICCPR and Article 15 of the ECHR see, Svensson-McCarthy: Human Rights, *supra* note 3; Manfred Novak, *supra* note 31.

Similarly, Article 15 of the ECHR states that "in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation."[20]
Article 27(1) of the IACHR states that:

> [i]In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

As opposed to the above three human rights instruments, the ACHPR does not have a derogation clause. It, however, is full of limitations or 'clawback' clauses that authorize States to suspended most of the rights in the Charter.[21] These clauses give wide latitude for States, under normal circumstances (even in the absence of emergencies), to restrict the rights and freedoms enshrined under the Charter in so far as such restrictions are done in accordance with domestic laws of the States.[22] Thus, it is perfectly legal for a

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[20] European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No. 11), November 4, 1950), *available at* http://www.echr.coe.int/Convention/webConvenENG.pdf (last visited on February 28, 2004).

[21] *See for instance*, Articles 6, 8, 9(2), 10(1) and (2) and 12(4) of the Charter. The enjoyment of some of the rights in the Charter is "subject to law and order," "within the law," if one "abides by the law," or "subject to the obligation of solidarity." Other rights may be restricted in order to protect "national security," "public interest," "public order" and "public health", which according to one writer are "nebulous and open-ended phrases, not qualified as 'necessary in democratic society' [as in the case of the ECHR and IACHR]." GEORGE W. MUGWANYA, HUMAN RIGHTS IN AFRICA: ENHANCING HUMAN RIGHTS THROUGH THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM 389 (2003).

[22] Rosalyn Higgins, *Derogation under Human Rights Treaties*, 48 BYIL, 281,281(1978) [hereinafter Higgins: Derogation]. For further discussion of claw back clauses, *see generally*, Dinah Shelton, The Promise of Regional Protection of Human Rights in THE FUTURE OF INTERNATIONAL HUMAN RIGHTS 369-370 (Burns H. Weston et al. eds. & contributors, 1999); P. Takirambudde, *Six Years of the African Charter on Human and Peoples' Rights: An Assessment* 7(2) LESOTHO L. J. 35, 50-52 (1991); Oji Umozurike, *The Protection of Human Rights Under the Banjul (African) Charter on Human and Peoples' Rights* 1 AFR. J. INT'L L. 82 (1988) and R. Gittleman, The Banjul Charter on Human and Peoples' Rights: A

government to take away the rights recognized by the Charter by enacting a domestic law.

2. PROBLEM OF DEFINING STATES OF EMERGENCY

> It is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this no constitutional shackle can wisely be imposed on the power to which the care of it is committed.[23]

As the above quotation sums it up, defining state of emergency has proved to be a rather daunting task. In the words of the International Law Association, it "is neither desirable nor possible to stipulate what particular type or types of events will automatically constitute a public emergency within the meaning of the term; each case has to be judged on its own merit taking into account the overriding concern for the continuance of a democratic society."[24] The word emergency is an "elastic concept,"[25]capable of covering a very wide range of situations and occurrences including such diverse events as wars, famines, earthquakes, floods and epidemics.[26] The number, diversity and

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Legal Analysis, in HUMAN RIGHTS AND DEVELOPMENT IN AFRICA 159 (C.E. Welch et al, eds., 1984).

[23] Gross: Once More unto the Brach *supra* note 10 at 439 n.8 (1998) quoting Alexander Hamilton, THE FEDERALIST No. 23, at 153 (Clinton Rossiter, ed., 1961).

[24] International Law Association Report 59(1984) as quoted in Oraa: Human Rights, *supra* note 3, at 31. Gross doubts whether it is possible to formulate a working definition of the terms that "would stand the test of actual exigencies. In times of crisis, legal niceties may be cast aside as luxuries enjoyable only in times of peace and tranquility." Gross: Once More unto the Brach *supra* note 10, at 439.

[25] H. P. LEE, EMERGENCY POWERS 4(1984) as quoted in Gross: Once More unto the Breach, *supra* note 10, at 501 n7.; Gross et al: Revisiting State of Emergency, *supra* note 10, at 80 n5; Mohamed M. El Zeidy, *The ECHR and States of Emergency: Article 15-A Domestic Power of Derogation From Human Rights Obligation*, 4 SAN DIEGO INT'L L. J. 277, 280(2003) [hereinafter El Zeidy: The ECHR and States of Emergency].

[26] Gross et al: Revisiting State of Emergency, *supra* note 8, at 79; Macdonald argues that "[t]he types of situations that may occur in a state range from ordinary, through extraordinary, to the 'exceptional' circumstances of a public emergency, although the distinctions are unclear." Macdonald: European Convention, *supra* note 23 at 233. Likewise, Yoram Dinstein says that "the absence of a consensus as to when a public emergency occurs [means that] it is by no means plain when exactly a State is allowed by international law to derogate from its obligations to respect and ensure human rights." Yoram Dinstein, The Reform of the

complexity of emergency regimes that exist at any given point in time as well as the profusion and inexactitude of terminology employed in different legal systems make the term not amenable to a precise and a single definition that is acceptable on both sides of the Atlantic.[27]

Nonetheless, "state of emergency" has been defined in tediously many ways. First, Article 4 of the ICCPR refers to a public emergency as a calamity that "threatens the life of a nation," while the European Commission defined "public emergency" as "a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organized life of the community which composes the State in question."[28]

Similarly, the *Paris Minimum Standard of Human Rights* prepared by the International Law Association (ILA) defines states of emergency as "an exceptional situation of crisis or public danger, actual or eminent, which affects the whole population of the area to which the declaration applies and constitutes threat to the organized life of the community of which the state is composed."[29]

It is possible to make distinction between *de jure* and *de facto* states of emergency. *De jure* emergencies are emergencies put in place after all the legal and institutional requirements for their declaration and implementation under domestic law and international human rights instruments are fulfilled.[30] The second types of emergencies, *de facto*, are "undeclared, emergency regimes and ambiguous situations."[31] They are "situations of a purely political nature," (in government) which cannot be justified in terms of the constitution or

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Protection of Human Rights During Armed Conflicts and Periods of Emergency and Crisis, in THE REFORM OF INTERNATIONAL INSTITUTIONS FOR THE PROTECTION OF HUMAN RIGHTS: FIRST INTERNATIONAL COLLOQUIUM ON HUMAN RIGHTS 337, 349(1993). *See also*, El Zeidy, The ECHR and States of Emergency, *supra* note 34, at 281.

[27] Iyer: States of Emergency, *supra* note 10, at 133.

[28] *Lawless v. Ireland*, 1 Eur. Ct. H.R. (ser.B) at 56(1960-1961). *See also Lawless* (Court), 3 Eur. Ct. H.R. (ser.A) 1960-1961).

[29] Art.1(b) of the Paris Minimum Standards of Human Rights Norms in a State of Emergency. The full text of the Standard appears in Richard B. Lillich, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. INT'L L., 1072, 1072(1985) [hereinafter Lillich: The Paris Minimum Standards].

[30] States of Exception in Turkey: 1960-1980 in ICJ: States of Emergency, *supra* note 3, at, 312.

[31] Iyer: States of Emergency, *supra* note 10, at 133; States of Exception in Turkey: 1960-1980 in ICJ: States of Emergency, *supra* note 3, at 311-312.

previously established laws."[32] *De facto* emergencies usually arise when a government resorts to its emergency powers without complying with the legal or constitutional preconditions for the declaration of states of emergency, or when the measures are extended beyond the formal termination of a declared state of emergency.[33] In some instances, a state of emergency that was declared in full compliance with all the conditions for its declarations may outlive the period for which it was intended and easily becomes a perpetual state of emergency.[34]

Some writers equate emergency rule to a state of necessity "which recognizes the right of every sovereign state to take all reasonable steps needed to protect and preserve the integrity of the state...."[35] The overarching purpose of the right of States to resort to self-defense in case of exigencies is to "balance the most vital needs of the State with the strongest protection of human rights possible in the circumstances."[36] It should be noted that the adjustment "is not between the State and the individual," but rather it is "between the individual's rights and freedoms and the rights and freedoms of the community."[37]

There is a plethora of evidence that shows the direct correlation between state of emergency and gross human rights violations. In many instances, emergency powers tend to be abused by governments to dispel any political dissent and perpetuate their tyrannical rule. The world has witnessed grave violations of human rights in the last couple of decades under the guise of states of emergency, declared or otherwise.[38] According to Joan Fitzpatrick, "[g]overnments have frequently succumbed to the temptation to deflect criticism of their human rights violations by pleas of "emergency." Officials

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[32] Iyer: States of Emergency, *supra* note 10, at 171; ICJ: States of Emergency, *supra* note 3, at 413

[33] ICJ: States of Emergency, *supra* note 3, at 413; Iyer: States of Emergency, *supra* note 10, at 171.

[34] ICJ: States of Emergency, *supra* note 3, at 415. As one of the contributors said it, in Uruguay "people have become accustomed to the emergency regime to the point that it has become the normal machinery of government." *States of Exception in Uruguay*, ICJ: States of Emergency, *supra* note 3, at 358.

[35] Iyer: States of Emergency, *supra* note 10, at 128.

[36] Macdonald: European Convention, *supra* note 23 at 225.

[37] Higgins: Derogation, *supra* note 30, at 282.

[38] Oraa: Human Rights, *supra* note 3, at 1.

may even be tempted to manufacture crises in order to justify their denials of fundamental rights."[39]

3. PRINCIPLES GOVERNING STATES OF EMERGENCY

As discussed above, some of the major international human rights treaties recognize the right of States parties to derogate from some of their obligations under the treaties in exceptional situations. Such a right is meant to enable governments to save the State, not a specific government, from destruction as a result of exigencies.[40] The treaties, however, do not give a *carte blanche* to the States parties. Instead, they impose a number of conditionalities for the legitimate exercise of the right of States to restrict some of the rights contained therein. These preconditions and requirements are intended to strike a balance between the needs of the State and the rights and freedoms of individuals as most of their rights are protected even during exigencies.[41] These principles, which "form the core of the 'legal regime of the derogation clauses'... function to minimize the danger of usurpation or abuse of the derogation power by establishing a set of criteria by which any particular exercise of that power may be evaluated."[42]

The five substantive principles require that for valid states of emergency, the government which intends to resort to emergency powers must prove a) the existence of an exceptional threat to the security of the state or its people; b) the emergency measure that is going to be taken is proportional to the threat posed; c) that there will be no derogation from certain rights and freedoms, known as non-derogable rights; d) that the emergency measures are not going to be used in a discriminatory manner; and e) the compatibility of all

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[39] Joan Fitzpatrick, Protection against Abuse of Concept of "Emergency" in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 203, 203(Louis Henkin et al, eds., 1994) [hereinafter Fitzpatrick: Protection against Abuses].

[40] UN & International Law Association, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (Professional Training Series No. 9, Chapter 16, 2003) available at http://www.unhchr.ch/pdf/CHAPTER_16.pdf at 821 [hereinafter UN &ILA: Human Rights]; Margaret DeMerieux, *The Regimes for States of Emergency in Commonwealth Caribbean Constitutions*, 3 J. TRANSNAT'L L. & POL'Y, 103, 103(1994)[hereinafter DeMerieux: Emergency in Commonwealth Caribbean].

[41] UN & ILA: Human Rights, *supra* note 71, at 821.

[42] Gross: Once More Unto the Breach, *supra* note 10, at 448; Oraa: Human Rights, *supra* note 3, at 3.

emergency measures with the State's other international obligations.[43] We may sketch each of these principles as follows.

3.1. Overview of the Principles Governing Derogation

3.1.1. Strict necessity and proportionality

Despite the fact that there is a difference in phraseology, international human rights instruments require that an exceptional threat that "threatens the life of the nation" must exist before a State could be allowed to suspend rights and freedoms.[44] The exigency must "imperil some fundamental elements of statehood or survival of the populations,"[45] be provisional or temporary in nature,[46] be imminent,[47] and be of such character that it threatens the nation as a whole.[48] Some of the exigencies include, but are not limited to, public health threats, economic calamities, natural disaster,[49] war, internal or external armed conflict, acts of subversion and insurrection, and "anything that puts the security of the State in peril."[50]

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[43] *See* Article 4 of the ICCPR, Article 15 of the ECHR, and Article 27 of the American Convention of Human Rights. Incidentally, the African Charter of Human Rights has no comparable derogation clause.

[44] Articles 4(2) of the ICCPR and Article 15 of the ECHR.

[45] Fitzpatrick: Human Rights, *supra* note 1, at 56; Fionnuala Ni Aolain, *The Fortification of an Emergency Regime*, 59 ALB. L. REV. 1353, 1367(1996) [hereinafter Aolain: Emergency Regime]. For detailed discussion see section 2.5.1.

[46] Chowdhury: Rule of Law, supra note 16 at 27-29; *But see*, John Quigley, *Israel's Forty-Five Year Emergency: Are There Limits to Derogation from Human Rights Obligations?* 15 MICH. J. INT'L L. 491, 491 (1994) [hereinafter Quigley: Are There Limits].

[47] Oraa: Human Rights, *supra* note 3, at 27; Aolain: Emergency Regime, *supra* note 79, at 1386; Macdonald: European Convention, supra note 23 at 241; Chowdhury: Rule of Law, *supra* note 16, at 27-29.

[48] Oraa: Human Rights, supra note 3, at 29; Chowdhury: Rule of Law, *supra* note 16, at 27-29

[49] Higgins: Derogation, *supra* note 30, at 287.

[50] Macdonald: European Convention, supra note 23 at 233; Quigley: Are There Limits, supra note 80 at, 492-493; L.C. Green, *Derogation of Human Rights In Emergency Situations*, 16 CAN. Y.B.I.L. 92, 105-106(1978). Joan Fitzpatrick, however, maintains that the "[s]atisfaction of technical criteria for the existence of a state of war is neither necessary nor sufficient for derogation from human rights treaties, though it bears obvious importance with respect to the applicability of international humanitarian law. Derogation would not be permissible in the case of a war that did not threaten the 'life of the nation' or 'the independence or security' of the derogating State." Fitzpatrick: Human Rights, supra note 1 at 57. Haysom argues that the failure to adequately provide for right to derogate would mean that the derogations will occur outside the law, without the law, without legal limitation or formal proclamation." Haysom: States of Emergency, *supra* note 19 at 143.

The derogating state has to demonstrate that the measures it could have taken under ordinary laws would not have been sufficient to meet the danger posed by the exigencies.[51] In *Ireland v. United Kingdom*, the European Court of Human Rights held that the U.K. was "reasonably entitled to consider" that the measures that were available under ordinary laws were not suitable or adequate to meet the danger posed by the IRA terrorist activities.[52] The Court also considered the question in the *Lawless case* and ruled that "the application of ordinary law had proved unable to check the growing danger which threatened the Republic of Ireland."

The measures taken to avert the crisis should also be proportional to the threat posed by the crisis. Hence, suspension of rights and freedoms of citizens should be limited to the extent strictly required by the situation on the ground. The non-derogation clauses of the ECHR and the ICCPR state that restrictions placed on rights and freedoms in times of public emergency must be limited "to the extent strictly required by the exigencies of the situation."[53] Thus, "emergency power cannot be used to destroy the guaranteed rights altogether or to impose unwarranted limitations on their exercise."[54] In other words, the principle of proportionality proscribes "unnecessary suspension of specific rights, greater restrictions on those rights than necessary, or the unnecessary extension of the geographical area to which the state of emergency applies."[55]

Similarly, the emergency measures taken by a derogating State must be connected to the emergency, i.e., they must be *prime facie* suitable to reduce the crisis and must be commensurate with the severity of the threat posed.[56] Implicit in the element of severity is the requirement of restricting the measures to areas that are affected by the emergency and only to the extent necessary.[57]

According to the Human Rights Committee's General Comment on Article 4 of the ICCPR, the requirement of proportionality "relates to the duration, geographical coverage and material scope of the state of emergency

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[51] Macdonald: European Convention, *supra* note 23, at 243.
[52] *Ireland v. United Kingdom*, 25 Eur. Ct. H. R. (ser. A) at 84 (1987).
[53] Article 4(1) of the ICCPR and Article 15(1).
[54] Chowdhury: Rule of Law, *supra* note 16, at 102.
[55] Grossman: Examination of State of Emergency, *supra* note 45, at 35-52.
[56] Macdonald: European Convention, *supra* note 23, at 243-44.
[57] *Ibid.*, at 244.

and any measures of derogation resorted to because of the emergency."[58] The Human Rights Committee added that:

> the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviors of the State Party. When considering States Parties' reports the Committee has expressed its concern over insufficient attention being paid to the principle of proportionality.[59]

The principle of proportionality, thus, requires States to provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation.[60] If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation.[61]

In the opinion of the Committee, the possibility of restricting certain Covenant rights, for instance, freedom of movement (article 12) or freedom of assembly (article 21), is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.[62]

As the European Human Rights Court ruled in the *Lawless* case, real and effective safeguards must also be provided in order to curtail any possible abuse of emergency powers.[63] According to the Court, the inclusion of a number of safeguard measures in the Emergency legislation (Act) and its subsequent amendment, limited the acts of the government to those that are

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[58] General Comment No. 29, at 2 Para. 2; Chowdhury: Rule of Law, *supra* note 16, at 103; Macdonald: European Convention, *supra* note 23, at 243.
[59] General Comment No. 29, at 2-3 Para. 4
[60] *Ibid.*
[61] General Comment No. 29, at 2-3 Para. 4.
[62] General Comment No. 29, at 3 Para. 5.
[63] *Lawless case*, 1 Eur. Ct. H.R. (Ser. A) (1961), at Para. 42.

strictly necessary to address the situation.[64] The Court also emphasized the importance of the supervision by the Irish Parliament, which possessed the power to revoke the declaration of emergency by receiving detailed information about the enforcement of the Act.[65] The safeguards provided by the Act were deemed to be of particular importance in determining that the measures taken by the government were "strictly required by the exigencies of the situation."[66]

3.1.2. Non-discrimination

The principle of non-discrimination requires that emergency measures adopted by the derogating State should not entail discrimination solely on the basis of race, colour, sex, language, religion or social origin or any other status. Article 4 of the ICCPR stipulates that in time of public emergency which threatens the life of the nation, the State parties to the Covenant may take measures derogating form their obligation under the Covenant to the extent strictly required by the exigencies of the situation, provided that such measures do not involve discrimination solely on the ground of race, religion, sex, ethnic group, political belief or other status. Article 15 of the ECHR does not contain a specific prohibition against discrimination in the application of emergency measures. Under Article 1 of Protocol 12 to the Convention, however, it is unlawful for a High Contracting Party to discriminate on the basis of the above-mentioned grounds.

It should be stressed that the prohibition of discrimination under Article 4 of the ICCPR is in addition to the stipulations under Articles 2(1) and 26. According to Prof. Grossman, "[t]he multiple reference[s] to this prohibition, not unusual in international instruments related to the protection of human rights, serve to codify what is already a fundamental principle of *jus cogens*: the total proscription of any form of discriminatory treatment based [the above grounds.]"[67] Besides, to the extent that a High Contracting Party to ECHR is also a State Party to the ICCPR, derogatory measures that discriminate based on those grounds would be a violation of the principle of consistency incorporated under Article 15 of the ECHR.[68]

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[64] *Ibid.*
[65] *Ibid.*
[66] *Lawless* case, 1 Eur. Ct. H.R. (Ser. A) (1961), at Para. 35
[67] Grossman, Examination of State of emergency, *supra* note 37, at 35-52.
[68] UN & ILA: Human Rights, *supra* note 81, at 879.

3.1.3. Compatibility with other Obligations

According to the principle of consistency or compatibility, states may derogate from human rights norms provided that such measures are not inconsistent with their other obligation undertaken under international law. This criterion is intended to create compatibility, concordance and complemetarity among the different obligations of the derogating State under international law and maintain better protection of human rights in crisis situations. Both under Article 15(1) of the ECHR and Article 4 of the ICCPR, a State may suspend rights only if the measures it has taken are "not inconsistent with its other obligations under international law."[69] Hence, the derogating State has to make sure that the emergency measures it takes are in conformity with its obligations under the particular human rights treaty to which it is a party and other international law norms. Thus, the obligation of consistency (compatibility) may have the effect of expanding the list of non-derogable rights discussed below.[70]

In *Brannigan v. United Kingdom*, the European Human Rights Court entertained the question whether the United Kingdom's public announcement of a state of emergency in Northern Ireland was enough to meet the requirements of an official proclamation of a state of emergency under Article 4 of the ICCPR. The Court noted that the statement of the Secretary of State for the Home Department to the House of Commons "was formal in character and made public the Government's intentions as regards derogation, was well in keeping with the notion of an official proclamation."[71]

The requirement that the right of states to suspend rights should be compatible with its other international law obligations reflects the overlap and divergence between international human rights law and other systems of international law in general and international humanitarian law norms, such as

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[69] In a similar vein, Article 53 of the ECHR states that a High Contracting Party could not use the Convention to justify limitations or derogation from any of the human rights obligations that it has accepted under its own domestic law or *any other agreement* to which it is a party.

[70] Macdonald: European Convention, *supra* note 23, at 246; P. VAM DIJK et al, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 555(2d. ed., 1990); DAVID J. HARRIS, et al, THE LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 503(1995).

[71] *Brannigan v. United Kingdom*, Para 73.

the Geneva Conventions, in particular."[72] The four Geneva Conventions and their Additional Protocols are not subject to suspension even in case of emergency, "since the very purpose of their adoption was to provide rules to govern situations of armed conflict."[73] A noted scholar emphasizes the complementarity and non-exclusiveness nature of the protective norms of international law, especially international human rights law and international humanitarian law norms in states of emergency. He argues that:

> Ideally, there should be a continuum of norms that protect human rights in all situations, from international armed conflicts at one end of the spectrum to situations of non-armed internal conflicts at the other. In every situation, either there should be a convergence of humanitarian or human rights norms, or at least one of these two systems of protection of human rights should clearly apply.[74]

3.2. Non-Derogable Rights

3.2.1. Substantive Rights

Even if a State declares emergency in full compliance with the aforementioned conditions, there are certain "core" human rights norms from which no derogation is allowed. Stated in simple terms, the principle of non-derogability prohibits States from suspending the rights that are specifically mentioned as non-derogable even under the gravest states of emergency. According to this principle, even in a situation of a state of emergency, there are certain fundamental rights and freedoms which can never be suspended or derogated from.

The list of these rights differs from treaty to treaty and, as we shall see, there is a general trend of expanding this list although the proposals have not yet attained universal acceptance. The non-derogable rights that are listed

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[72] Hernan Montealegre, *The Compatibility of a State Party's Derogation Under Human Rights Conventions with Its Obligations Under Protocol II and Common Articles 3*, 33 AM. U. L. REV. 41, 44 (1983) [hereinafter Montealegre: Compatibility of a State Part's Derogation].

[73] Montealegre: Compatibility of a State Part's Derogation, *supra* note at 108, at 44.

[74] Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 Am. J. Int'l L. 589, 589(1983) (Note and Comment). *See also*, Draper, *The Relationship between the Human Rights Regime and the Law of Armed Conflicts*, 1 ISR. Y. B. HUM. RTS. 191 (1971).

under Article 4(2) of the ICCPR are: Article 6(the right to life), Article 7(freedom from torture or to cruel, inhumane or degrading treatment or punishment), Article8 (prohibition against slavery or to be held in servitude), Article 11(imprisonment for the inability to discharge contractual obligation), Article 15 (prohibition against *ex-post facto* criminal law), Article 16(the right to be recognized as a person before the law) and Article 18 (freedom of thought, conscience and religion). In contrast, under Article 15 of the ECHR, Article 2 (the right to life), Article 3 (prohibition against torture, inhumane or degrading treatment or punishment), Article 4(1) (prohibition against slavery or servitude), and Article 7 (non-retroactivity of criminal laws) are the only non-derogable rights. Article 3 of Protocol 6 and Article 2 of Protocol 13 to the ECHR also prohibit derogation under Article 15 of the Convention.

As can readily be observed, the above two human rights treaties recognize, in common, four rights as non-derogable, namely, the right to life, the right to be free from torture and other inhumane or degrading treatment or punishment, the right to be free from slavery or servitude, and the rule of no *ex post facto* criminal laws. According to Jamie Oraa these four rights have attained the status of *jus cogens* norms of international law.[75]

According to Joan Fitzpatrick, the criteria for making certain rights non-derogable in the case of the ICCPR are: first, some of those rights are absolutely fundamental and indispensable for the protection of human beings and, second, derogation from some of those rights during states of emergency would never be justified because they have no direct bearing on the emergency.[76] By the same token, the Human Rights Committee maintains that "[t]he proclamation of certain provisions of the Covenant as being a non-derogable nature ... is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7). However, it is apparent that some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency (e.g., articles 11 and 18)."[77] But these criteria seem not to have been consistently applied because there are some rights which seem to have no less fundamental importance but have nonetheless not been included in the list

[75] Oraa: Human Rights, *supra* note 3, at 96.

[76] Fitzpatrick: Protection against Abuses, *supra* note 62, at 209; Oraa: Human Rights, *supra* note 3, at 94; General Comment 29, at 4-5, Para. 11.

[77] General Comment 29, at 4, Para. 11.

of non-derogable rights. As a result, there has been, as of late, calls to broaden the list of these rights.

The Paris Minimum Standards which were adopted by the ILA in 1984 contain "a set of minimum standards governing the declaration and administration of states of emergency that threaten the life of a nation, including sixteen articles setting out the non-derogable freedoms to which individuals remain entitled even during states of emergency."[78] Likewise, the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, that came out in 1985, make a similar recommendation of making the right to fair trail non-derogable.[79] Again the *Queensland Guidelines for Bodies Monitoring Respect for Human Rights during States of Emergency*, approved by the ILA in 1990, endorse the recommendations of the above two standards and ask for making the right to fair trail non-derogable.[80]

The UN Human Rights Committee too seeks to enlarge the list of non-derogable rights by adding the rights to fair trial and personal liberty as non-derogable provisions. It strongly suggests that the writ of *habeas corpus* should be a non-derogable right.[81] In General Comment No. 29, it states that:

> It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including often judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state

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[78] Chowdhury: Rule of Law, *supra* note 16, at 1. For the list of the proposed non-derogable rights to a fair trail, *see* Lillich, The Paris Minimum Standards, *supra* note 40, at 1079.

[79] The Siracusa Principles on the Limitation and Derogations Provision in the International Covenant on Civil and Political Rights, 7 HUM. RTS. Q. 3, 12-13(1985).

[80] Richard B. Lillich, *Queensland Guidelines for Bodies Monitoring Respect for Human Rights during States of Emergency* 85 AM. J. INT'L L, 716,716 (1991) [hereinafter Lillich: *Queensland Guidelines*].

[81] Annual Report of the Human Rights Committee, UN. G.A.O.R., 49th Sess., Supp. No. 40, at 120, UN Doc. A/49/40, at 2(1994).

> of emergency must conform to the provisions of the Covenant, including all the requirements of article 14 and 15.[82]

In the same vein, the Inter-American Court of Human Rights, in its Advisory Opinion of January 30, 1987, asserts that the writ of *habeas corpus* and *amparo*, which are not specifically included in the list of non-derogable rights under Article 25, "may not be suspended because they are judicial guarantees essential for the protection of the rights and freedoms whose suspension Article 27 (2) prohibits".[83]

3.2.2. Procedural Safeguards

Article 4(1) of the ICCPR makes it a requirement that a State which wishes to suspend rights and freedoms has to first "officially proclaim" the existence of the emergency threatening the life of the nation. In other words, the principle of proclamation proscribes a States' resort to emergency measures without a prior official proclamation of a state of emergency.[84]

The official proclamation of a state of emergency serves a number of important purposes. First, it prevents an arbitrary use of emergency powers in events that do warrant suspension of rights. By compelling States to make the existence of emergency public, the principle tries "to reduce the incidence of *de facto* states of emergency by requiring states to follow formal procedures set forth in their own municipal laws."[85] "Official proclamation by the political organs of a state, its legislature and executive, has the important effect of publicizing the existence of the crisis and of possible derogations from normal standards."[86] According to the UN Human Rights Committee, the official proclamation of state of emergency:

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[82] General Comment 29, at 6 Para. 15.

[83] IACtHR, Advisory Opinion OC-8/87 of January 30, 1987, which appears in THOMAS BUERGENTHAL & DINAH SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS: CASES AND MATERIALS 492(1995).

[84] Gross: Once More unto the Brach, *supra* note 10, at 448-449.

[85] *Ibid.* at 449; N. Questiaux, Study of the Implications for Human Rights of Recent Developments Concerning situations Known as States of Emergency, UN. Doc. E/CN.4/Sub 2/1982/15, July 27, 1982, at 12; Chowdhury: Rule of Law, *supra* note 16, at 28-29; Fitzpatrick: Human Rights, *supra* note 1, at 59; Oraa: Human Rights, *supra* note 3, at 34-35. Joan Hartman argues that the principle of proclamation avoids ex post facto explanations for the violations of rights. *See* Joan F. Hartman, Working Paper for the Committee of Experts on the Article 4 Derogation Provision, 7 HUM. RTS. Q. 89, 99(1985).

[86] Macdonald: European Convention, *supra* note 23, at 250. He argues that "[i]t is perhaps unrealistic to expect states in the midst of a crisis threatening their continued existence to comply with a requirement of prior notification." *Id.* He also laments the lack of a "review

> [I]s essential for the maintenance of the principles of legality and the rule of law at time when they are most needed. When proclaiming a state of emergency with consequences that would entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor that the laws in question enable and secure compliance with article 4. [87]

Secondly, the official declaration of emergency notifies the population as to "the exact material, territorial and temporal scope of the application of emergency measures and their impact on the exercise of human rights."[88] Thirdly, it also helps for domestic supervision by the legislative and judicial organs of the government.[89]

As an extension to the requirement of public declaration of emergencies, States are required to inform, in a timely manner, the other contracting parties to the treaties that they are temporarily unable to discharge some of their treaty obligations. In order to check whether derogations from human rights are necessary and proportional to the danger posed by the exigencies, derogations are "subject to international scrutiny and review."[90] In line with this, both the ICCPR and ECHR require States Parties to notify he Secretary General the declaration and termination of states of emergency.

Article 4 of the ICCPR stipulates that any State party to the Covenant availing itself of the right of derogation should immediately inform the other States parties, through the intermediary of the Secretary General of the UN, of the provisions from which it had derogated and the reasons by which it was actuated. The ICCPR also provides for a similar notification requirement when the derogation is terminated.

Article 15(3) of the ECHR requires that a derogating State "shall keep the Secretary General of the Council of Europe fully informed of the measures

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mechanism of a state's measures before they are instituted and before likely violations of the convention and human rights occur." *Id.*

[87] General Comment 29, at 2, Para. 2.

[88] Nowak: Commentary, *supra* note 27, at 80.

[89] *Ibid.*

[90] Higgins: Derogation, *supra* note 40, at 283.

which it has taken and the reasons thereof." High Contracting parties are obliged to notify the Secretary General when derogation ceases.[91]

The purpose of notification is to inform the other Contracting States to the instruments and the organ entrusted with the supervision of the instruments. A Commentary on the ICCPR states that derogations are "a matter of gravest concern and the States parties have the right to be notified of such situations"[92]so that they will be informed of "what the situation of the derogating state is in respect of the treaty, and accordingly to be able to exercise their own rights."[93]

The ICCPR and ECHR do not set specific time limits within which the State invoking the right to derogate has to notify the other Contracting Parties. In the *Lawless case,* Ireland's notification of the Secretary General about the measures it had taken derogating from the ECHR within twelve days was considered "sufficiently prompt."[94]

In the *Greek case*, although it fulfilled the "promptness" prong, the Respondent government failed to specify the reasons that necessitated derogation from Article 15 of ECHR and provide the text of the emergency decree up until after four months of the declaration of emergency.[95] The Court ruled that the Government failed to meet the requirements of Article 15(3) of the Convention.[96]

What is more, both instruments do not provide any guidelines as to what type of information should be included in the notification to the appropriate organs. Louis Henkin argues that [a] key weakness of Article IV (3),... is that it fails to require States to Report the specific derogation measure taken."[97] The absence of specific requirements of providing details about the specific measures taken has made it difficult to determine whether actions taken in derogation were "strictly" necessary," as required by Article 4.[98] In

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[91] Art. 15(3) of the ECHR.

[92] MARE J. BOSSUYT, GUIDE TO THE TRAVAUX PREPARATOIRES" OF THE INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS 97(1987).

[93] Oraa: Human Rights, *supra* note 3, at 58. Article 41 of the ICCPR recognizes the rights of other states to lodge inter-state communication with the Human Rights Committee if the derogating state has already made a declaration accepting the jurisdiction of the latter.

[94] *Lawless case*, 1 Eur. Ct. H.R. (Ser. A) (1961) at 42.

[95] The *Greek Case,* (1969) 12 YBECHR, paras. 165 at 71, 74.

[96] *Ibid.*

[97] LOUISE HENKIN, THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 85(1981).

[98] *Ibid.*

the *Ireland v. United Kingdom* case, the European Human Rights Court stated that the United Kingdom's notices of derogation "fulfilled the requirements of article 15(3)," without specifying the necessary details that should be included in such a notice.[99]

A question that may be asked in connection with the requirements of notification is: what is the legal consequence of a state's non-compliance with it? Some argue that:

> [w]hile it might be salutary if the ... authorities regarded a deficiency in notification as rendering the declaration a nullity, the seriousness of what is at stake if the state demonstrates the existence of an emergency at the appropriate time may equally make it appear too draconian a sanction and one which is likely to be of little efficacy.[100]

Allan Rosas claims, "it would seem that a failure to notify in accordance with paragraph 3, while a breach of the relevant instruments, does not, as such, foreclose invoking the right to derogate."[101]

II. STATE OF EMERGENCY AND THE FDRE CONSTITUTION

This Part examines the Ethiopian constitutional law concerning human rights and states of emergency. It explains the procedures of declaring states of emergency, the constitutional safeguards against potential abuse of emergency powers, non-derogable rights and the role of the Ethiopian judiciary, if any, in limiting the emergency powers of the government. It also attempts to identify the shortcomings in the Ethiopian constitutional framework in light of the generally accepted international norms discussed in the earlier sections.

1. CONSTITUTIONAL BACKGROUND

In May 1991, the Ethiopian People's Revolutionary Democratic Front (EPRDF), a coalition of mainly ethnic-based rebel groups came to power by overthrowing the military junta that ruled the country for almost two decades. In the following month, EPRDF held a national conference that established a

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[99] *Ireland v. United Kingdom*, 25 Eur. Ct. H. R. (ser. A) at 84 (1987).

[100] DAVID J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 506(1995).

[101] Allan Rosas, Emergency Regimes: A comparison in BROADENING THE FRONTIERS OF HUMAN RIGHTS: ESSAY IN HONOUR OF ASBJORN EIDE 165, 177(Donna Gomien ed., 1993).

transitional government and endorsed a transitional period Charter.[102] The Charter, which had only twenty provisions, envisaged a nation of a multi-party democracy and incorporated certain basic constitutional principles including guarantee of equal rights, self-determination of all people, enduring peace and stability by bringing to an end all hostilities, redressing regional imbalances as well as establishing accountable government, rebuilding the country and restructuring of the state.[103]

In 1994, the Council of Representatives endorsed a draft constitution that the Constituent Assembly, elected by universal suffrage, adopted in December of 1994. The Constitution came into force in August 1995 and established an ethnic based state structure and dividing powers and their exercise between the Federal and state governments.[104] A document of 11 chapters and 106 articles, the 1995 FDRE Constitution is the fourth written constitution in the political history of Ethiopia.

The preamble to the Constitution lists past and existing social, economic and political ills it aspires to remedy. The first chapter deals with general provisions such as the nomenclature of the state, its territorial jurisdiction, national anthem and language policy of the country. Chapter Two sets out the fundamental principles of the Constitution, which include the supremacy of the Constitution and the inviolable and inalienable nature of human and democratic rights. Fundamental Rights and Freedoms are covered by Chapter Three of the Constitution. Chapter Four provides the structure of the government and sets out the separation of powers among the three organs of the government. Chapter Five defines the structure and division of powers at the federal level and authorizes state constitutions to define the structure and

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[102] H. S. Lewis, Ethnicity in Ethiopia: The View from Below (and from the South, East, and West) in THE RISING TIDE OF CULTURAL PLURALISM: THE NATIONS-STATE AT BAY? 158 (Crawford Young ed., 1993).

[103] The Transitional Government of Ethiopia, The Transitional Period Charter of Ethiopia No. 1 of 1991, Negarit Gazetta, Year 50, No1, Preamble.

[104] ETH. CONS. Arts. 1, 45, 46, 47, 50, 51 and 52. For some of the scholarly works on the FDRE Constitution, *see*, Fasil: Constitution for the Nation of Nations, supra note 14; Minasse Haile, *The New Ethiopian Constitution: Its Impact Upon Unity, Human Rights and Development*, 20 SUFFOLK TRANSNAT'L L. REV. 1-84 (1996) [hereinafter Minasse: The Ethiopian Constitution]; T.S. Twibell, *Ethiopian Constitutional Law: The Structure of the Ethiopian Government and the New Constitution's Ability to Overcome Ethiopia's Problems*, 21 LOY. L. A. INT'L & COMP. L. J. 399-466(1999); Charles E. Ehrlich, *Ethnicity and Constitutional Reform: The Case of Ethiopia*, 6 ILSA J. INT'L & COMP. L. 51-71 (1999); Berket Habte Selassie, *Self-Determination in Principle and Practice: The Ethiopian-Eritrean Experience*, 29 COLUM. HUM. RTS. L. REV. 91-142 (1997).

divide power at the state level. Chapter Six establishes the two houses of the federal parliament and stipulates the conditions of eligibility for membership in the houses, powers and rules of procedure as well as the procedures for the dissolution of the two houses. Chapter Seven details the nomination, appointment, powers and functions of the President of the Republic. Chapter Eight deals with the powers of the executive, the appointment and term of office of the chief executive organ and Council of Ministers. Chapter Nine establishes an independent judiciary at both federal and state levels and sets out the structure and power of courts. The national policy objectives and principles are outlined in Chapter Ten. Chapter Eleven addresses miscellaneous issues, including procedures for constitutional amendment.

The Constitution establishes a bicameral legislative organ composed of two houses, the House of Peoples' Representatives (HOPR) and the House of the Federation (HOF), at the Federal level.[105] Despite the stated bicameral structure of the parliament, it is only the HOPR that has the supreme legislative decision-making power in matters that are assigned to the Federal government.[106] The HOF has a very limited role in the law-making process.[107] The HOF is, however, entrusted with very important tasks including the interpretation of the Constitution, deciding on issues relating to the right of ethnic groups to self-determination including and up to secession, and deciding the instances in which the federal government has to intervene in the states.[108] In interpreting the Constitution, the HOF is assisted by the Council of Constitutional Inquiry (CCI), which is composed of legal experts.[109] The CCI is mandated to investigate constitutional disputes and submit its recommendations to the HOF for a final decision.[110]

The Council is composed of eleven members, six of whom should be legal experts with proven professional competence and high moral standing.[111] They are recommended by the HOPR for appointment by the President of the Republic.[112] The remaining three members are persons designated by the

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[105] ETH. CONST. art. 53.
[106] ETH. CONST. art. 55(1).
[107] The only instances in which the HOF participates in law making process are during constitutional amendment as per art. 104 of the Constitution and authorization of Federal intervention in States according to Article 62(9) of the Constitution.
[108] ETH. CONST. art. 62(9).
[109] ETH. CONST. arts. 82-84.
[110] ETH. CONST. art. 84(1).
[111] ETH. CONST. art. 82(2) (c).
[112] ETH. CONST. art. 82(2) (c).

HOF.[113] The CCI is presided over by the President of the Federal Supreme Court with the Vice President of the same court as its vice president.[114]

The Constitution embraces a rigid form of amendment so that human rights provisions will not be watered down by subsequent constitutional amendments. According to Article 105, amendment of human rights provisions requires majority vote of all state legislatures as well as two third majority vote of both the HOPR and the HOF, whereas amending other provisions requires two-third majority votes of the joint session of the HOPR and HOF along with majority votes in two-third of the state legislatures.[115]

Nearly one-third of the text of the Constitution is devoted to fundamental human rights and freedoms. These are categorized as "Human Rights" and "Democratic Rights" and, under Article 13 (2),"rights and freedoms" are to be "interpreted in conformity with the principles of the Universal Declaration of Human Rights, the International Covenants on Human Rights and other international instruments ratified by the country."[116] In addition, Article 9(4) states that "[a]ll international agreements ratified by Ethiopia are an integral part of the law of the land." Moreover, the Constitution also establishes twin human rights institutions, namely, the Human Rights Commission and the Office of the Ombudsman.[117]

There are differing opinions concerning the incorporation of such detailed provisions in the FDRE Constitution. For instance, according to Fasil Nahum, the Legal Advisor to the Ethiopian Premier, "the clear message of the Constitution is that it is serious with the respect for human rights."[118] Some others, however, very much doubt the significance of such detailed human rights provisions. Professor Minasse Haile, for instance, asserts that "the fate of human rights in Ethiopia is a dim one."[119] He adds that "government's

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[113] ETH. CONST. art. 82(2) (d).

[114] ETH. CONST. art. 82(2) (a) and (b)

[115] ETH. CONST. art. 105 (2).

[116] Some of the rights included in the Human Rights Section are the right to life, the security of person and liberty, rights of persons arrested, accused, detained or convicted; the right to equality, the right to privacy and freedom of religion, belief and opinion. Whereas rights such as right of thought, opinion and expression, freedom of assembly and demonstration, freedom of association, freedom of movement, right to nationality, rights of women, family rights, rights of children, right to vote, right to justice, rights of labour, right to development, rights to environment, right to property and right to self-determination as well as economic, social and cultural rights are included under "democratic rights".

[117] ETH. CONST. art. 55.

[118] Fasil: Constitution For A Nation of Nations, *supra* note 14, at 58

[119] Minasse: The New Ethiopian Constitution, *supra* note 153, at 66.

verbal commitment to human rights and democracy is merely designed to tranquilize donor governments into disregarding its continuing violations of human rights."[120] Another writer considers the human rights provisions of the Constitution as "... too specific on a particular right, yet too vague and general to serve as a proper measuring guide for implementation."[121]

2. Declaration of State of Emergency

There are two major models for declaring a state of emergency: the parliamentary and the presidential or executive models. As the name indicates, in the parliamentary model, the prerogative to declare a state of emergency is vested in Parliament, whereas in the executive model, the power to declare a state of emergency is vested in the chief executive, the president or the prime minister.[122]

Within the parliamentary system, there are certain variations. In some instances, parliament may be required to follow more stringent procedures than is the case with ordinary legislation, or it may have to consult the executive branch before it decides on state of emergency cases.[123] When parliament is not in session, an alternative option for tackling the problem of emergency situations is normally provided.[124] Whosoever is nominated as a temporary guardian of the emergency powers, has to refer the whole issue to the titular holder of those powers as soon as possible.[125]

Similarly, in the case of the executive model, the decree introducing a state of emergency may be required to be countersigned by another official within the executive and the president may also be required to bring the matter to the attention of parliament as soon as possible.[126] Article 93 of the FDRE Constitution lays down the circumstances for a valid declaration of states of emergency under the Ethiopian legal system. Sub-article 1 reads:

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[120] *Ibid.*

[121] Twibell: Ethiopian Constitutional Law, *supra* note 166, at 442.

[122] Venelin Ganev, *Emergency Powers and the New East European Constitutions*, 45 AM. J. COMP. L. 585, 588(1997) [hereinafter Ganev: Emergency Powers]

[123] *Ibid.*, at 588. For instance, the Constitution of Slovenia empowers the National Assembly to declare a state of emergency, but the motion for the declaration has to come from the executive branch. *Ibid.*

[124] Ganev: Emergency Powers, *supra* note 175, at 591.

[125] *Ibid.*

[126] *Ibid.*, at 590. For instance, the Romanian Constitution requires the decree of emergency to be signed by the president and the prime minister. The president is also required to convene parliament within 24 hours after the declaration of emergency. *Id.*

1. (a) The Council of Ministers of the Federal Government shall have the power to decree a state of emergency, should an external invasion, a break down of law and order which endangers the Constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel, a natural disaster, or an epidemic occur.
(b) State executives can decree a State-Wide state of emergency should a natural disaster or an epidemic occur. Particulars shall be determined in State Constitutions to be promulgated in conformity with this Constitution.

First, the situations that justify the declaration of a state of emergency are an external invasion, a break down of law and order which endangers the constitutional order and which cannot be controlled by regular law enforcement agencies and personnel, a natural disaster, or an epidemic. In these situations, the Council of Ministers can lawfully exercise its power to declare a state of emergency. To put it differently, a war of aggression, internal disturbance, such as rebellion and subversive movements or natural calamities like flood, wildfire and transmissible diseases are the only grounds on which a state of emergency could be declared under the Constitution.

The Constitution requires the actual occurrence of the circumstance for a state of emergency to be put in place. Near occurrence or quite immanency are insufficient. The requirement that the breakdown of law and order must be such that it endangers the Constitutional order and cannot be controlled by the regular law enforcement agencies and personnel indicates that a declaration of emergency should be of an exceptional nature. The crisis has to be so serious that the country's institutional framework has broken down and violence must have become widespread, wreaking havoc on citizens.

Second, the power to declare states of emergency is given to the Council of Ministers, which is the executive organ of the country.[127] During emergency, the Council is also given all the powers to protect the country's peace and sovereignty as well as maintain public security, law and order.[128] Similarly, Article 93(1) (b) authorizes state executives to declare state of

[127] ETH. CONST. art. 77(10) cum Article 93(1) (a). Article 77(10) states that [the Council] has the power to declare a state of emergency; in doing so, it shall, within the time limit prescribed by the Constitution, submit the proclamation declaring a state of emergency for approval by the House of Peoples' Representatives." Here it should be noted that Article 93(1)(b) of the Constitution authorizes state executives to declare "a state-wide state of emergency should a natural disaster or an epidemic occur."

[128] ETH. CONST. art. 93(4) (a).

emergency within their respective regions when they are confronted with natural disasters or epidemic, provided that such declaration is in conformity with the constitution of the particular state.

Where a state of emergency is declared while the HOPR is in session, the declaration should be submitted to the House within forty-eight hours for endorsement. [129] If, however, the House is in recess, the declaration should be submitted within fifteen days of its adoption by the Council of Ministers.[130] If the declaration gets the assent of the HOPR, the state of emergency will remain in effect for up to six months. Similarly, if the members of the HOPR, by a two-thirds majority vote so decide, an emergency proclamation may be renewed for a four-month period successively.[131]Third, the Council has "the power to suspend *political and democratic rights* contained in this Constitution to the extent necessary to avert the conditions that required the declaration of a state of emergency."[132] Fourth, the Constitution, under Article 25 incorporates the principle of non-discrimination and its derogation clause stipulates clearly that the principle is not subject to any type of limitation or suspension.

3. Non-Derogable Rights under the FDRE Constitution

In line with the general state practice in times of emergency discussed in earlier sections, the FDRE Constitution too allows limitations on and derogation from the fundamental rights and freedoms listed under Chapter Three while at the same time recognizing certain absolute rights. Article 93 (4) of the Constitution states:

> (b) The Council of Ministers shall have the power to suspend such political and democratic rights contained in this Constitution to the extent necessary to avert the conditions that required the declaration of a state of emergency.
> (c) In the exercise of its emergency powers the Council of Ministers can not, however, suspend or limit the rights provided for in Articles 1, 18, 25, and sub-Articles 1 and 2 of Article 39 of this Constitution.

The Constitution thus puts certain rights and freedoms beyond the reach of the emergency powers of the government even when there is an actual

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[129] ETH. CONST. art. 93(2) (a).
[130] ETH. CONST. art. 93(2) (b).
[131] ETH. CONST. art. 93(3).
[132] ETH. CONS. art. 93(4) (b) [emphasis added]. Note that the Constitution speaks about derogation of political and democratic rights, and not derogation of human rights. For more discussion on this issue see chapter 4 and accompanying footnotes.

and imminent danger against the life of the nation. The list of fundamental rights and freedoms that are non-derogable under the FDRE Constitution include: the right to protection against cruel, inhuman and degrading treatment or punishment [Art.18(1)]; the right to be protected against slavery, servitude and the trafficking of human beings [Art. 18(2)]; the right to equality (Art.25) and the right of Nations, Nationalities and Peoples of Ethiopia to self-determination up to secession [Art.39(1)] and their right to speak, to write and to develop their own language as well as to express, to develop and promote their culture and to preserve their history [Art.39(2) and (3)]. Although it is not a right, nomenclature of the State is also made non-derogable under the Constitution (Art.1).

A juxtaposed reading of Article 93(4) (c) of the Constitution and Article 4(2) of the ICCPR clearly demonstrate that the list of non-derogable rights and freedoms in the former leaves out some of the rights that are enumerated in the latter. The non-derogable rights listed under Article 4(2) are right to life;[133] freedom against torture, cruel, inhuman or degrading treatment or punishment;[134]freedom against slavery, slave trade and servitude;[135] freedom against imprisonment for contractual obligation;[136] freedom against *ex post facto* criminal laws;[137] right to recognition everywhere as a person before a law;[138] and right to freedom of thought, conscience and religion.[139] The Constitution fails to exempt the right to life,[140] freedom against imprisonment for contractual debt, right to recognition everywhere as a person before the law and the prohibition against *ex posto facto* penal law as well as right to freedom of thought, conscience and religion from suspension during emergencies.

4. Constitutional Safeguards against Abuse of Emergency Powers

The importance of precise and effective national legislation and effective domestic control mechanisms to prevent breaches of human rights during situations of public emergency cannot be overemphasized. Domestic control

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[133] ICCPR, art. 6
[134] ICCPR, art. 7.
[135] ICCPR, art. 8 (1) and (2).
[136] ICCPR, art. 11
[137] ICCPR, art. 15.
[138] ICCPR, art. 16
[139] ICCPR, art. 18
[140] As absurd as it is, the Constitution prohibits torture, inhumane or degrading treatment of persons, and not their killing. So, it is perfectly legitimate for the government to kill someone during emergency, but it cannot treat him or her inhumanly.

over emergency power takes two main forms: legislative control and judicial review.[141]

4.1. Legislative Control

In most cases, national constitutions provide in some detail the circumstances under which a state of emergency may be declared, the nature of permissible derogations, the monitoring role of the legislative and judicial organs, and the way in which the emergency regime could be extended and ultimately come to an end.[142] Specific controls may include: a requirement that any resort to emergency powers must be approved, either before introduction or soon after that, by a specified majority of the legislators; a duty on the executive to seek periodic renewals for emergency mandate; time limits on the overall duration of the emergency; and a right on the part of the legislature to terminate the emergency at its discretion.[143]

In the Ethiopian Constitution, attempt has been made to give HOPR some control over the executive act of proclaiming or declaring an emergency. The first limitation is that if the state of emergency is declared while the HOPR is in session, the emergency decree should be submitted to the House within forty-eight hours of its declaration.[144] If the emergency is decreed when the HOPR is in recess, then, it needs to be submitted to the House within 15 days of its declaration. In both cases, if the decree fails to get the approval of two-third majority vote of the members of the HOPR, it has to be repealed forthwith.[145] The second limitation relates to the scope of the emergency regulations, i.e., the executive can only derogate from what the Constitution designates as "political and democratic rights." The third safeguard is temporal, i.e., the declaration of emergency is limited to six months. Although the Constitution does not put an upper limit to the number of renewals, it requires the HOPR to reconsider the emergency publicly on a bi-annual basis.

More importantly, the Constitution entrusts the duty to administer a state of emergence to the Emergency Inquiry Board constituted by the HOPR.[146] The Board undertakes a series of tasks including inspection and follow up to ensure

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[141] Iyer: States of Emergency, *supra* note 10, at 185.
[142] ICJ: State of Emergency, *supra* note 3, at 432.
[143] Iyer: States of Emergency, *supra* note 10, at 185-186.
[144] ETH. CONST. art. 93(2)(a).
[145] ETH. CONST. art. 93(2) (a).
[146] ETH. CONST. art. 93(5).

that measures taken during the state of emergency are not inhumane.[147] When the Board finds any case of inhumane treatment, it is mandated to suggest certain corrective actions to the Council of Ministers or to the Prime Minister and to ensure that the perpetrators of those acts are prosecuted.[148] It is also empowered to publicize the names of all persons detained by reason of the declared state of emergency within one month and to convey its views to the House of Peoples Representatives on matters of extension of the duration of the state of emergency.[149]

4.2. JUDICIAL REVIEW

In a system in which the judiciary is empowered to review acts of parliament and the executive action, a declaration of emergency that fails to meet legal requirements could be declared null and void by a court of law.[150] Further, national courts normally have the power to review measures taken during the emergency situation, including the power to issue writ of habeas corpus.[151]

Of greater interest is the question whether the courts have power to question the wisdom of the executive's determination that an emergency exists. Some authors argue that "a court [should] question the correctness of the belief that an emergency situation in fact existed or even the *bona fides* of the government in making a proclamation or declaration of emergency."[152] Others, however, claims that "the executive and legislature, the political branches of government, are entitled to discretion in determining the existence and gravity of a threat to the nation, i.e., the need for a state of emergency, and the necessity for recourse to specific measures."[153]

The different principles adopted as guidelines for derogation as well as the human rights instruments and the work of human rights bodies, make it clear that ordinary courts should be empowered not only to rule on the constitutionality of the state of emergency but also the way in which the

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[147] ETH. CONST. art. 93(6).

[148] ETH. CONST. art. 93(6)(c) and (d).

[149] ETH. CONST. art. 93(6)(e).

[150] DeMerieux: Emergency in Commonwealth Caribbean, *supra* note 71, at 117.

[151] *Id.* at 186; Gross: Once More unto the Breach, *supra* note 12, 491.

[152] DeMerieux: Emergency in Commonwealth Caribbean, *supra* note 71 at 117; Iyer: States of Emergency, *supra* note 10, at 186.

[153] ICJ: States of Emergency, *supra* note 3, at 435. It is alleged that the U.S. Courts avoid this issue "by invoking the political question doctrine or declaring that the discretion of the executive, the legislature, or the military commander is absolute and not subject to judicial review." Alexander: The Illusionary Protection, *supra* note 365, at 15-16.

executive exercise it emergency powers.[154] Courts should be able to declare that emergency measures that go beyond the demands of the situation and the powers conferred on the executive as null and void. Constitutional and judicial guarantees, including due process of law and habeas corpus, should be accessible to individuals to challenge government acts.

The *Paris Minimum Standards* suggest that during emergency the judiciary should have four specific powers for the protection of the individual. First, the judiciary should have the power to decide "whether or not an emergency legislation is in conformity with the constitution of the state."[155] Second, the courts should have the jurisdiction to rule on "whether or not any particular exercise of emergency power is in conformity with the emergency legislation."[156] Third, the judiciary should be able "to ensure that there is no encroachment upon the non-derogable rights and that derogatory measures derogating from other rights are in compliance with the rule of proportionality."[157] Finally, "where existing municipal laws and orders are not specifically rescinded or suspended, the judiciary shall continue to regard them as being in effect[158] [and, if necessary, grant relief on such basis.]"[159] If derogation measures or any act of application of such measures does not satisfy the above tests, courts should have full power to declare such measures

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[154] In its General Comment 29, the Human Rights Committee notes that "a state party may not depart from the requirement of effective judicial review of detention. The *Siracusa Principles* also states that during public emergency, "where persons are detained without charge the need of their continued detention shall be considered periodically by an independent review tribunal." According to the Tenth Annual Report by Mr. Leondro Despouy, the remedy of habeas corpus should be included "among the non-derogable guarantees because it is an essential legal guarantee for the protection of certain non-derogable rights." The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency- Eighth annual report and list of States which, since January 1, 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leondro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council Resolution 1985/37. UN Doc. E/CN.4/Sub.2/1997/19, 7-32, at para. 107; ICJ: States of Emergency, *supra* note 129, at 434-6.

[155] Section (B) Art. 5 of the Paris Minimum Standards which appear in Lillich: The Paris Minimum Standards, *supra* note 40, at 1075.

[156] Lillich: The Paris Minimum Standards, *supra* note 40, at 1075; Chowdhury: Rule of Law, *supra* note 16 at 141.

[157] Lillich: The Paris Minimum Standards, *supra* note 40, at Section (B) Art. 5; Chowdhury: Rule of Law, *supra* note 21 at 141.

[158] Lillich: The Paris Minimum Standards, *supra* note 40, at Section (B) Art. 5; Chowdhury: Rule of Law, *supra* note 21 at 141.

[159] Chowdhury: Rule of Law, *supra* note 16 at 142.

as null and void.[160] Similarly, the *Siracusa Principles* and other major human rights instruments emphasize that every derogation should be subject to the possibility of a challenge to and a remedy against its abusive application or imposition. They also stress that the ordinary courts shall maintain their jurisdiction to adjudicate any complaint that a non-derogable right has been violated. [161]

The institutional process of testing the constitutionality of legislative enactments and executive action is conducted through different mechanisms in different countries.[162] Some have entrusted their ordinary courts with that, while other have opted for special constitutional courts to undertake the task of constitutional interpretation. In others, such as Switzerland, referendums whereby the entire population engages in constitutional interpretation and reviews the laws enacted by the legislature are not unusual. The overreaching purpose behind all such exercise is to void subsidiary laws and administrative decisions that run against the constitution and thereby ensure the supremacy of the latter.

The FDRE Constitution, in a rather unique way, empowers the second house of Parliament, the HOF, to interpret the Constitution.[163] The House is composed of representatives of nations, nationalities and peoples of Ethiopia, each represented by at least one member and an additional representative for each one million of its population.[164] The Council of Constitutional Inquiry (CCI) has the mandate to investigate constitutional disputes and to submit recommendations to the HOF if it finds that there is a need for constitutional interpretation. The HOF then must decide on the dispute within 30 days of receipt.[165] The CCI has a role of a "clearing house," since its mandate is

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[160] Lillich: The Paris Minimum Standards, *supra* note 40, at Section (B) Art. 5; Chowdhury: Rule of Law, *supra* note 16, at 142; Stephen Ellmann, *A Constitution for all Seasons: Providing against Emergencies in a Post-Apartheid Constitution*, 21 COLUM. HUM. RTS. L. REV., 163, 187 (1989).

[161] Haysom, States of Emergency, *supra* note 19, at 155-6.

[162] For very good discussions on the issue of constitutional interpretation, *see* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (1977); WALTER MURPHY ET AL, AMERICAN CONSTITUTIONAL INTERPRETATION (2d. ed., 1995); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW (1986); Dennis Davis et al, Democracy and Constitutionalism: The Role of Constitutional Interpretation in RIGHTS AND CONSTITUTIONALISM 1(Dawid van Wyk et al., eds., 1996); MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD (1971).

[163] ETH. CONST. art. 61(1) and 83(1).

[164] ETH. CONST. art. 61(2)

[165] ETH. CONST. art. 84(2).

limited to making recommendations to the HOF concerning the need for constitutional interpretation.[166]

A question that forces itself into the forefront is: what is the rationale behind entrusting the HOF with the power to interpret the Constitution? Commenting on this particular question, the Ex-Speaker of the HOPR, who was also the Secretary of the Constitutional Drafting Commission, Ato Dawit Yohannes is quoted as saying:

> How can a constitution that has been ratified by the People's Assembly be allowed to be changed by professionals who have not been elected by the people? To allow the courts to do the interpretation is to invite subversion of the democratization process. Since, the constitution is eventually a political contract of peoples, nations and nationalities, it would be inappropriate to subject it to the interpretation of judges. It is the direct representatives of the contracting parties that should do the work of interpreting the constitution.[167]

The above quotation makes it clear that the drafters of the Ethiopian Constitution considered the Constitution a political pact entered into by the peoples of Ethiopia and constitutional interpretation as a political function.

Be that as it may, the next questions worth considering at this juncture are: Where does this leave Ethiopian courts as far as interpretation of the constitution is concerned? On the one hand, given the fact that the power of the courts to review the constitutionality of law is not provided for *expressis verbis* in the Constitution, one may reasonably argue that ordinary courts have no jurisdiction to entertain cases involving the constitutionality of laws.

However, one may also reasonably argue that a close reading of the section of the Constitution dealing with judicial power reveals that the power to interpret the constitution is shared between ordinary courts and the House of Federation. Article 78 of the Constitution endows courts, both at the Federal and State levels, with judicial power. It goes with out saying that the exercise of judicial power naturally implies interpretation and application of the constitution as well as other laws in their day-to day activity of dispute settlement. In fact, court cases, especially criminal cases, often involve

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[166] ETH. CONST. art. 83(2).

[167] As quoted in Assefa Fiseha, Adjudication of Constitutional Issues in Ethiopia: Challenges and Prospects (unpublished, LL.M. Thesis, University of Amsterdam, June 2001), at 44.

allegations of violation of constitutionally guaranteed rights, thereby making it almost impossible for the court to rule on such cases without making some sort of reference to the Constitution.

In a similar vein, Article 13 (1) of the Constitution reads as "[a]ll Federal and State legislative, executive and judicial organs of at all levels shall have the responsibility and the duty to respect and enforce the provisions of this Chapter [Chapter 3]." It is clear from the provision that all the three branches of the government share the duty and responsibility to respect and enforce human rights provisions of the Constitution equally. Courts can neither respect nor enforce human rights norms unless they are in one way or another involved in interpreting the scope and limits of the norms.

Be that as it may, it can be maintained that judicial review of legislative and executive measures assumes even more importance in Westminster styles of government where the party in power controls both the legislative and executive branches. It provides the "check and balance" necessary for the better protection of human rights and freedoms of individual citizens.

CONCLUSION

A few things need only be said by way of conclusion as this paper is a study of principles rather than a case study of their application. All the major international instruments allow states to restrict or derogate from certain rights and freedoms when states of emergency materialize. The overarching purpose of allowing a state to derogate from human rights norms in extraordinary circumstances is to "balance the most vital needs of the state with the strongest protection of human rights possible in the circumstances [not because such norms become any less important]."[168] This balancing act "is not between the State and the individual," but rather "between the individual's rights and freedoms and the rights and freedoms of the community at large."[169] It is thus imperative for nations to strictly observe not only the norms governing the preconditions for a valid declaration of a state of emergency but also those safeguarding against abuses of emergency powers.

[168] Macdonald: European Convention, *supra* note 23 at 225.
[169] Higgins: Derogation, *supra* note 30, at 282.

Package Limitation under International Conventions and the Maritime Code of Ethiopia: An Overview

Tsehai Wada*

1. Introduction

The commercial transportation of goods from one place to another on board a ship may be effected either through charter party or bill of lading contacts. A charter party generally suits the need for shipping of a large quantity of goods or bulk cargo. On the other hand, bill of lading contracts suit the shipment of goods as general cargo.[170] A charter party regulates the relationship between a ship owner and a charterer while a bill of lading contract binds not only a shipper and ship-owner, that is, the immediate contracting parties, but also the consignee abroad and his assignee, as well as to a certain extent bankers who take up such documents as securities for loans granted to their customers.[171] Since almost all cargo owners invariably insure their cargoes with underwriters, in cases of loss or damage they collect indemnity f4rom the latter and underwriters have the right to subrogate to the rights of the insured. Thus, insurers and reinsurers also have stakes in bills of lading transactions.

The ship has served as the chief means—in prehistory and antiquity—of the carriage of goods and people over great distances and the first Maritime Code—i.e. The Rhodian Law—dates back to 900 B.C.[172] Despite this long history, in the United Kingdom, which is one of the major maritime states with a rich tradition in shipping for example, parliament's first interference with the law relating to sea carriage occurred in the eighteenth century.[173] Since then many laws have been enacted with a view to regulating this branch of business. The Merchant Shipping Act of 1894 and the Carriage of Goods by Sea Act of 1971 of the U.K. and the Harter Act of 1893 and the Act Relating to the Carriage of Goods by Sea of 1936 of the U.S.A. are notable laws enacted in this regard.

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[170] Tomas J. Schoenbaum, Admiralty and Maritime Law, 2nd ed, West Publishing Co., St.Paul, Minn,. (1994), p.,491.

[171] NJJ Gaskell, C. Debattista and R.J. Swatton, Chorley and Giles' Shipping Law, 8th ed., Pitman Publishing, London, (1995), p. 169.

[172] Grant Gilmore and Charles L. Black Jr., The Law of Admiralty. The Foundation Press, Brooklyn, (1957), pp.2 and 3.

[173] Gaskell, et. al., Supra Note 2, p.168.

Given the risky nature of running a ship, i. e. the multitude sea perils that confront a ship under voyage, it is quite common for shipping laws of many countries to accord special privileges to ship-owners. Accordingly, different shipping laws allow a ship owner to limit his liability to persons suffering loss or damage through negligent navigation or management of his ship, usually according to the size of his ship.[174] Furthermore, as a carrier of cargo, the ship and ship-owner are by statute freed from liability for damage to cargo in many situations for which other types of carriers are liable.[175] General average, which is a scheme of risk-sharing, and package limitation, a scheme that entitles a ship-owner to limit his liability to a certain sum of money calculated per package or other units of measurements of goods, are also incorporated in shipping laws of so many countries with a view to encouraging ship-owners engaged in this risky business.

The Maritime Code of Ethiopia, (hereinafter the Code), also accords aqll these benefits to ship-owners. Accordingly, per Articles 80 and the following of the Code, ship-owners are entitled to limit their liability in respect of claims arising from loss of life of, or personal injury to, any person being carrie3d in the ship, and loss of, or damage to, any property on board the ship. The Code also entitles a ship-owner to share sacrifices and expenditures made by way of general average with others, under Article 251 and the following. As far as bill of lading contracts are concerned, ship-owners are exempted from liability for loss or damage to cargo arising or resulting from a number of grounds (Art.197). The type and list of grounds that may lead to the exemption of a ship-owner from liability under the Code are more extensive than those accorded to land or air carriers under the Commercial Code of Ethiopia.[176] Even when a ship-owner cannot be exempted from liability for failure to prove the existence of the different grounds enumerated under Article197, he is entitled to limit his liability for loss of or damage to goods to five hundred Birr per package or other unit normally serving for the calculation of the freight (Article 198). This last legal entitlement is known as "Package Limitation" or according to the Code's naming, "Global Statutory Limitation of Liability."

Package limitation, though an incentive to ship-owners, has failed to serve as a mechanism of a striking a balance between the conflicting interests

[174] Ibid, p. 394.
[175] Gilmore and Black Supra Note 3, p. 663.
[176] Compare Art.197 of the Maritime Code of Ethiopia with Arts. 589-600, (On carriage by land) and Arts. 630-649 (on carriage by air) of the Commercial Code of Ethiopia.

of ship owners on the one hand and cargo-owners, on the other. The major shortcoming of package limitation is its use of a national currency or its substitute, gold, as a basis of limitation. The devaluation of national currencies due to inflation and the introduction of containers as a frequent means of packing cargoes have made the traditional formula of package limitation outdated and disadvantageous to cargo interests. This situation has, therefore, called for the adoption of a new formula with a view to bridging the gap between the two interests. Accordingly, international conventions as well as domestic shipping laws have been amended, time and again, so as to respond to current development. However, the package limitation provided under the Code has not been amended for more than forty years.

This article attempts to shed some light on current international developments in the field and the major shortcomings of the Marine Code in light of these international developments. We shall begin with a brief discussion of the history and development of the law on package limitation in international conventions. This will be followed by a discussion of Ethiopian law and practice on the subject.

2. Package Limitation Under International Conventions

2.1. The Legislative History of Package Limitation

Sea carriage is by and large international. A ship, though owned by a national of one state, may carry different goods belonging to persons of different nationalities. It may also enter and leave ports of various states for the purpose of loading and unloading cargoes. A contractual relationship based on bills of lading can, therefore, be subject to different laws and thus triggers conflict of laws. As far back as 1882, major shipping nations felt that uniformity of laws may be achieved through multilateral treaties and not through individual or separate acts of states. One of the most contentious issues that demanded uniformity was package limitation.

In addition to conflict of laws issues that may be created as a result of contractual relationships based on bills of lading, there was yet another situation that also called for uniformity of laws internationally. This situation is the imbalance between the bargaining powers of the two parties represented in a given bill of lading. In the words of one author, the situation before uniformity looks as follows:

> The basic contractual liability of the carrier for loss of, or damage to, the goods covered by a bill of lading was substantially eroded during the second half of the nineteenth century. Taking advantage of the current lasissez faire philosophy and favourable market, carriers sought to restrict their liability by the use of exceptions drafted as widely as their bargaining position would allow. So, successful were their efforts in this direction that inevitably they provoked a reaction from shippers, bankers and underwriters who were becoming increasingly dissatisfied with the lack of protection afforded to cargo interests.[177]

The struggle between the interests of the respective parties demanded a mechanism whereby the conflict can be resolved amicably in particular through international agreements. One of the earliest agreements made in this regard was the Liverpool Conference Form Bill of Lading. This form was adopted by the International Law Association at Liverpool in 1882 and promulgated by the New York Produce Exchange, with some amendments, in 1883. One of the Issues settled in the conference was package limitation. Accordingly, the instrument put the limitation of liability at £ 100 per package.[178]

Though the Liverpool Conference Form Bill of Lading was adopted in 1882, it could not bring about the desired uniformity on package limitation. Thus, the quest for uniformity continued and, as a result, the *Comite' Maritime International* (herein after C.M.I), which was originally a Committee of the International Law Association, was formed in 1896 for the purpose of promoting worldwide uniformity of maritime law. The committee's endeavour in search of uniformity as well as the struggle between ship owning and cargo interests eventually culminated in the 1924 Convention for the Unification of Certain Rules Relating to Bills of Lading, otherwise known as, The Hague Rules. This Convention was signed at Brussels on August 25, 1924.

The Convention provided, among others, for: the fixing of package limitation at 100 Pound Sterling per package or unit; non-applicability of the limitation in cases when the nature and value of goods have been declared or

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[177] John F. Wilson, World Shipping Laws, International Conventions, Preface, Carriage by Sea, Oceania Publications Inc., Dobbs Ferry, New York, (1986), P. V.

[178] John C. Moore, The Hamburg Rules, Journal of Maritime Law and commerce, Vol, 9. (1977-1978), p.1.

these have been knowingly mis-stated by the shipper; and the possibility of fixing a greater amount of limitation through the agreement of the parties.[179]

In addition to these, the Convention also provided for the different grounds that may exempt a carrier from liability. Thus, the purposes achieved through the adoption of the Hague Rules are in short, allocation of loss or damage between carriers and shippers, establishing the basic liabilities of the carrier, and prescribing the extent to which this liability could be limited or excluded by private agreement between the parties.[180]

Some writers acclaimed the Convention as successful for being based on commercial practicality. However, through time, it appeared that the convention could not address current problems that cropped up in the 1950s and onwards. The major limitations of this Convention were *inter alia*; the erosion of the value of Pound Sterling and the absence of a clear definition of the term "Package" that reflects the technological development of the time.

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[179] The relevant part of the Convention reads as follows;

Article 4 (5)

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 Pounds Sterling per package or unit or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and interested in the bill of lading.
This declaration if embodied in the bill of lading shall be prima facie evidence but shall be binding or conclusive on the carrier.
By agreement between the carrier, master, or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named. Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-sated by the shipper in the bill of lading.

Article 9
The monetary units mentioned in this convention are to be taken to be gold value.

Those contracting states in which the Pound Sterling is not a monetary unit reserve to themselves the right of translating the sums indicated in this convention in terms of Pound Sterling into terms of their own monetary system in round figures.

The national laws may reserve to the debtor the right of discharging his debt in national currency according to the rate of exchange prevailing on the day of the arrival of the ship at the port of discharge of the goods concerned.

[180] Wilson, Supra Note 8, p.V.

> Over the years, inflation had eroded the value of £ 100 gold, differential rates of inflation had created international disparities, with potential conflict of law problems, and technological developments had increased the size of packages from those, which could be man-handled by two men to the 40-foot container, weighing, with its contents, up to 35 tons. [Thus, consequently raising] the question of what was and what was not a package.[181]

For this and other few reasons, the need to amend the Hague Rules was felt by the business community. Accordingly, the C.M.I. started reviewing the Hague Rules in 1959 at Rijeka, Yugoslavia, and this process culminated in a proposal of amendment. Even though the proposal found acceptance of the plenary conference of the C.M.I. held at Stockholm in June 1963, it was completed at the XII Maritime Diplomatic Conference convened by the Belgian Government in February 1968. The proposal culminated in an act known as "Visby Amendments", after the name of place where it was made in 1963 (i.e. Visby, Gotland).

The Visby Rules, though completed in 1968, came into force in 1977. The Rules have made substantial changes on carrier/shipper relationships in general and package limitation in particular. Accordingly, the £ 100 limitation was substituted by gold that was believed at the time, to be more stable. Moreover, the Rules, among others: expanded the definition of packages so as to include containers: included weight of goods as an alternative method of calculating package limitation; and made clear that the deliberate or reckless act of a carrier that caused damage can be a ground to take away the privilege of invoking package limitation.[182] However, once again, as the dramatic fall of

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[181] Moore, Supra Note 9, p.3

[182] The relevant parts of the Rules wherein major changes were introduced read as follows;

Article 2.

Article 4, paragraph 5 shall be deleted and replaced by the following:

a. ...neither the carrier nor the ship shall in any event be liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent Frs. 10,000 per package or unit or Frs. 30 per Kilo of gross weight of the goods lost or damaged, whichever is the higher.

c. Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these package or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.

the value of Pound Sterling made The Hague Rules on package limitation inadequate, so too, the fact that gold lost its monetary functions and no longer had an official price in some countries led to the inadequacy of the Visby Rules.[183] There was thus a consensus among the business community that gold had failed to reflect the actual value of goods and that package limitation should, therefore, be fixed against a new modern unit that is accepted by all.

Apart from the Pound versus gold controversy, a new controversy also started to crop-up in the late 1970s. This controversy focused on, not only the replacement of gold by another unit, but in general on an equitable and balanced relationship between carriers and shippers. The developing countries felt that the Hague Rules unfairly protected the ship-owner, placing too heavy a burden on the shipper.[184] Moreover, the C.M.I. and International Maritime Organization (I.M.O.), which consider themselves as the guardians of the Brussels convention, were seen, in the eyes of the developing countries, sympathetic to traditional maritime states that own the great majority of world ships and therefore, did not suit the former's needs.[185] Thus, a new initiative to revise the old rules was undertaken under the auspices of the United Nations Conferences for Trade and Development (UNCTAD) and the United Nations Commission on International Trade Law (UNCITRAL), which were considered as sympathetic to the needs of developing countries. Accordingly, a new Convention known as the Hamburg Rules was promulgated in 1978, in Hamburg Germany.[186] The new Hamburg Rules have made a substantial and revolutionary, so to say, changes on carrier's liability. One of the major changes introduced by the Hamburg Rules is the replacement of the Franc or

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d. A franc means a unit consisting of 65.5 milligrames of gold of millesimal fineness 900. The date of conversion of the sum awarded into national currencies shall be governed by the law of the court seized of the case.

e. Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

Note. Except for the above, the other relevant provisions of the new legislation are substantially similar to the former.

[183][183] Schoenbaum, Supra Note 1, p. 525.

-The official price of gold was abolished by the Second amendment of the IMF's Article on April 1, 1978.

[184] Gaskell, et al., Supra Note 2, p.321

[185] Schoenbaum, Supra Note 1, p.525

[186] The convention is also known as "United Nations Convention on the Carriage of Goods by Sea, 1978".

gold by other units of account calculated against the SRD (Special Drawing Right) as defined by the IMF (International Monetary Fund).[187]

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[187] The relevant parts of Rules wherein major changes aare introduced read as follows:
Article 6-Limits of liability
1.(a) The liability of the carrier for loss resulting from loss of or damage to goods...is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods or damaged, whichever is the higher.

...

2. Unit of account means the unit of account mentioned in article 26.

... ...

Article 26. Unit of Account

1. The unit of account referred to in article 6 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amount mentioned in article 6 are to be converted into the national currency of a state according to the value of such currency at the date of judgement or the date agreed upon by the parties. The values of a national currency, in terms of Special Drawing Right of a Contracting State which is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions.

The value of a national currency in terms of the Special Drawing Right of a Contracting State, which is not a member of the International Monetary Fund, is to be calculated in a manner determined by that State.

2. Nevertheless, those states which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, or at the ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for this Convention to be applied in their territories shall be fixed as:

12,500 monetary units per package or other shipping unit or 37.5 monetary units per kilogramme of gross weight of the goods.

1. The monetary unit referred to in paragraph 2 of this article corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of the amounts referred to in paragraph 2 into the national currency is to be made according to the law of the state concerned.
2. The calculation mentioned in the last sentence of paragraph 1 and the conversion mentioned inparagraph 3 of this article is to be made in such a manner as to express in the national currency of the Contracting State as far as possible the real value for the amounts in article 6 as is expressed there in units of account.

Note. Except for these, the relevant provisions of the two Conventions i.e. the Visby amendments and the Hamburg Rules are by and large similar.

Though promulgated in 1978, the Hamburg Rules came into force on November 1, 1992. It was noted above, that the Hamburg Rules were designed to reflect the interests of developing nations. Accordingly, the Convention entered into force by the ratification of 20 states, mostly from Africa. The developed nations, though not interested in being parties to this Convention, did not disregard the need to amend the Hague Visby Rules so as to conform to new developments.[188] Thus, they signed a new treaty known as the Visby Amendments or Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 25 August 1924, as amended by the Protocol of 23 February 1968. The coming into force of the Protocol needed the deposit of five instruments of ratification or accession [Article VII (1)]. The Protocol was signed by ten states on 21 December 1979 and came into force three months after this date. The major purpose of the Protocol was to change the standard of computation of package limitation from gold to another timely and suitable standard, i. e. SRD.[189]

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[188] Note. This observation is made taking into account the respective dates of promulgation of the two conventions, but not the dates of their entry into force.

[189] The relevant provisions of the Protocol wherein major changes were introduced read as follows:

Article II

1. Article 4, paragraph 5, (a) of the Convention is replaced by the following:

a. ...neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is higher.

Note. The other relevant provisions of the two legislation are almost identical. The only major difference is the amount of units to be applied in those countries, which are not members of the IMF and whose laws do not permit the application of the relevant provisions of the Conventions. Accordingly, the counterpart of Article 26 (2) of Hamburg Rules reads in the Protocol as follows:

Nevertheless, a State which is not a member of the International Monetary Fund and whose law

Law does not permit the application of the provisions of the preceding sentences may, at the time

of ratification of the Protocol of 1979 or accession thereto or at any time thereafter, declare that the

limits of liability provided for in this Convention to be applied in its territory shall be fixed as

follows:

i. in respect of the amount of 666.67 units of account mentioned in sub-paragraph (a) of paragraph 5 of this Article, 10,000 monetary units;

ii. in respect of the amount of 2 units of account mentioned is sub-paragraph (a) of paragraph 5 of this Article, 30 monetary units.

2.2. Main Features of Package Limitation

Package limitation can be seen from two different vantage points. On the one hand, it is a legally recognized privilege of the carrier, which is designed to save the same, from crippling losses from loss of or damage to goods while in his custody. Thus, had it not been for this legal privilege, a carrier would have been liable for loss of or damage to goods to their full value. On the other hand, package limitation is a restriction on the contractual right of a carrier. Thus, unlike in the old days, a carrier cannot at present insert a clause that reduces his liability below the legal minimum but is at liberty to increase his liability and agree on another maximum liability. Furthermore, this privileges which accord carriers total exemption from liability under specific circumstances. If such specific circumstances are met, carriers need not invoke package limitation for such special privileges make the privilege of package limitation redundant.

Under the Hague Rules, for example, a carrier is exempted from any liability for loss or damage caused due to seventeen specific grounds or perils [Article 4 (2)]. This list of exempted perils is identical to that found in the provisions of Article 197 of the Maritime Code of Ethiopia and the reader is advised to refer to them for a better understanding of the nature of the grounds which entitle such exemptions. Moreover, deviation in saving or attempting to save life and property at sea can exempt a carrier from liability for loss or damage to goods resulting therefrom [Article 4 (4))]. The list of exempted perils is not affected by the amending legislation. Thus, if any one of the grounds listed is proved to be the "proximate" cause of loss or damage, a carrier is totally exempted from liability. A carrier is also not liable where the nature or value of goods has been knowingly mis-stated by the shipper in the bill of lading [Article 4 (5)]. Under these situations, it is of no importance for a carrier to invoke package limitation.

The Hamburg Rules do not contain these excepted perils. Under these Rules, "it is the common understanding that the liability of the carrier...is based on the principle of presumed fault or neglect [and]...as a rule, the burden of proof rests on the carrier..."[190] Thus, if a carrier has taken all measures that

[190] Common understanding adopted by the United Nations Conference on the Carriage of Goods by Sea. According to Article 5 of the Convention the following are the basic liabilities of a carrier:

could reasonably be required to avoid the occurrence and consequence of a loss of or damage to goods, it is totally exempted from liability[191] and it is not required to invoke the privilege of package limitation.

2.3. Exceptions to the Privilege of Package Limitation

As indicated earlier, package limitation is a statutory right and can only be exercised upon the conditions and within the limits provided by the law. A carrier may not thus limit its liability under certain circumstances. Major exceptions to the privilege are the following.

Under the Hague Rules, if the nature and value of goods are declared by the shipper before shipment and inserted in the bill of lading, a carrier cannot avail its right to limit its liability [Article 4 (5) and Article 2 (a) of the Hague Visby Rules].[192] In addition to this, a carrier is entitled to waive its right to package limitation. Accordingly, if a carrier agrees with a shipper to increase his liability and to fix another maximum, it is the agreed upon amount that controls, instead of the statutory package limitation [Hague Rules, Article 4 (5) Article 2 (g) of the Hague Visby Rules]. Lastly, a carrier may lose its right to limit its liability if the loss or damage resulting from its act or omission was done with intent to cause damage or recklessly and with knowledge that damage would probably result [Article 2 (e) of the Hague-Visby Rules and Article 8 of the Hamburg Rules].[193]

In relation to bills of lading, the laws of some jurisdictions provide that a carrier may lose his privilege to limit its liability when the shipper has no adequate notice of the limitation by a Clause Paramount in the bill of lading and is not given a fair opportunity to avoid the limitation by declaring excess value and paying extra freight.[194] This is the position in the U.S.A. However, it should be noted that the pertinent law, i. e. COGSA, does not expressly provide for this exception, but this is created by judicial decisions. Moreover,

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"The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge...unless the carrier proves that he, his servants or agents, took all measures that could reasonably be required to avoid the occurrence and its consequences."

[191] An *a contrario* reading of Article 5.

[192] Similar exceptions are not provided under the Hamburg Rules.

[193] The Hague Rules do not contain exceptions.

[194] Schoenbaum, Supra Note 1, p. 613.

there is a split of opinion on the issue as well as on the methods how a carrier can give this opportunity to a shipper.[195]

2.4. Standards of Computation of Package Limitation

2. 4. 1. Units of Account

Under those circumstances wherein a carrier can limit its liability, liability can be limited in the following manner;

a. Under the Hague Rules, the liability of the carrier is limited to 100-Pound Sterling per package or unit or the equivalent of that sum in other currency [Article 4 (5)].
b. Under the Hague-Visby Rules, a carrier's liability is limited to 10,000 Francs per package or unit or 30 Francs per kilo of gross weight of the goods lost or damaged, whichever is the higher. A Franc means a unit consisting of 65.5 milligrammes of gold [Article 2 (a) and (d)].[196]
c. Under the Hamburg Rules, liability is limited to 835 units of account per package or other shipping unit or 2.5 units of account per killogramme of gross weight of the goods lost or damaged, whichever is the higher. The unit of account is the Special Drawing Right (S.D.R.) as defined by the International Monetary Fund (IMF) [Article 6 (a) and 26].
d. Under the 1979 Protocol that amended the Hague-Visby Rules, liability is limited to 666.57 units of account per package or unit or 2 units of account per killogrammes of gross weight of the goods lost or damaged, whichever is higher. The unit of account is SDR, as defined by the IMF [Article 2(a) and (d)].

The legislative history of package limitation shows that the unit of account has passed through many phases. First it was the Pound Sterling, and then came Franc and now it is the SDR. The fact that the SDR is given legal recognition under the two important legal instruments, i. e. the Hamburg Rules and the 1979 Protocol shows that the much-desired uniformity on this

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[195] Ibid. pp. 613and 614. For more details on this particular issue, i. e. "Fair Opportunity", see Michael F. Sturley. The Fair Opportunity Requirement Under COGSA Section 4 (5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act, Journal of Maritime Law and Commerce, Vol. 19, No. 1, January 1988, pp. 1-35, and [part II], Vol. 19 No. 2, April, 1988, pp. 157-206.

[196] The Hague and Hague-Visby Rules on package limitation are no more operative, for they are amended by the 1979 Protocol. See (d), below.

particular issue is achieved at last. Thus, as can be easily understood from the reading of the pertinent provisions of the two instruments, except for the figures, i.e. 835 and 2.5 under the Hamburg Rules and 666.67 and 2 under the 1979 Protocol, one is a verbatim copy of the other. The SDR is, therefore, the single unit of account at present.

SDR is a unit of account determined by the IMF.

> ...The technique since July 1, 1974 has been to relate the value of the SDR to a "basket" of currencies according to which the SDR is equal to a total of fixed
> amount links and arrangements with members, and a computerized set of calculations, the Fund determines the exchange rates of currencies in terms of the SDR for the purpose of its own operations and transactions, and publishes these rates on a daily basis for a growing number of member currencies.[197]

For those states that are members of the IMF, the value of the SDR is equivalent to the rate published by the Fund at the date in question. A non-member state can determine the value of its national currency in terms of the SDR. In this regard "[t]he simplest method that a non-member state may choose is to select the currency of a member of the [IMF] as the reference currency and to value its own currency as published by the Fund."[198] In those non-member states whose laws do not permit the application of the preceding conditions, the unit of account is not SDR but 12,500 monetary units or 10,000 monetary units per package or 37.5 or 30 monetary units per kilogram of gross weight of the goods, whichever is higher. Monetary units mentioned here are of the Hamburg Rules and the 1979 Protocol respectively and a unit corresponds to 65.5 milligrammes of gold. Generally speaking, it can be said that the Hamburg Rules are more shipper friendly than the 1979 Protocol. It should, however, be noted that the business community is well aware of the fact that the SDR, like its predecessors, may fail to reflect the real value of goods in the future. To this effect, the Hamburg Rules provide that in case when there is a significant change in the real value of the SDR and the need to substitute it by another unit arises, a revision conference can be called upon the request of a minimum of one fourth of the contracting states and the pertinent

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[197] Stephen A. Silard, Carriage of the SDR by Sea: The Unit of Account of the Hamburg Rules, Journal of Maritime Law and Commerce, Vol. 9, (1977-1978), p. 18
[198] Ibid, p. 33

provisions can be amended by a two-thirds majority of the participating states (Article 33).

3. 4. 2. Package and Other Units of Measurement

When a carrier is liable for the loss of or damage to goods, its liability or the amount of money that it should pay is dependent on the number of packages or units or weight of the goods lost or damaged. In this regard, the Hamburg Rules provide for 835 SDR per package or other shipping unit or 2.5 SDR per kilogram of gross weight of the goods lost or damaged, whichever is higher. The 1979 Protocol, on the other hand, provides for 666.67 SDR per package or unit or 2 SDR per killogramme of gross weight of the goods lost or damaged, whichever is higher. Thus, the liability of a carrier depends on the nature in which the goods were transported, i. e. in packages or otherwise.

The definition of the term "package" is a flexible one. It may be defined as:

> Any preparation of a cargo item for transportation that facilitates handling but does not necessarily conceal or completely enclose the goods. This is broad enough to include a wide variety of methods of consolidation of goods ranging from boxed item to materials tied together or lashed to skids or pallets; it would necessarily exclude certain types of cargoes such as loose liquids, bulk cargo, and fish.[199]

Thus, only cargo that is shipped un-enclosed and fully exposed is not a "package."[200] The other multipliers of the SDR are: "units" or "shipping units" and "weight" of the goods lost or damaged.

For a long time, it has been debatable whether or not a container is a "package" However, at present, this is no more a contentious issue for the two international instruments earlier mentioned have solved it by the inclusion of clear provisions in their texts. Accordingly, where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units and, in the absence of this,

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[199] Schoenbaum, Supra Note 1 above, p. 606.
[200] Ibid, p. 605

such article of transport shall be considered the package or unit (Hague-Visby Rules, Article 2 (c) and Hamburg Rules, Article 6 (2) (a). [201] As far as containerized cargoes are concerned, therefore, what matters is the figure indicated under the column assigned for number of packages. If the figure indicates the number of packages packed in a container or the unit of items (say, for example, 10 packages of radios or two TV sets) the applicable unit of SDR shall be multiplied by the number of packages or units indicated in the bill of lading. Where such figures are not indicated and the figure mentioned is the number of containers (for example, "one or two containers" only) then the unit of SDR shall be multiplied by the number of containers. It should, however, be noted that even when goods are packed in containers or other packages, a carrier can be obliged to pay a sum of the fixed SDR multiplied by the weight of the goods lost or damaged, provided that this is advantageous to the shipper or consignee.

3. Package Limitation In Ethiopia

3.1. Sources of the Law

The Maritime Code of Ethiopia was drafted either by Professor Jean Escarra of the University of Paris or Professor Jauffret of the University of Aix-Marseilles or most probably by both. Prof. Escarra was originally commissioned to draft the Commercial Code of Ethiopia and Prof. Jauffret took over the task upon his death.

Of the source of the Code, even less is known. The *Minutes* of the Codification Commission entrusted with the task were either not recorded or, even if recorded, were either lost or their whereabouts unknown.[202] To date, the only information we have on the Code as a whole are occasional references to it made, in passing, in the course of the discussions on the draft Commercial Code, and the references as to source found in these are too sketchy to be of any help.[203] Nonetheless, the following general remarks may safely be made.

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[201] See, footnote 13, supra.

[202] In 1954, the then reigning monarch, Emperor Haile Selassie, established a Codification Commission charging it with the task of preparing five Codes, these being: the Penal Code, the Civil Code, the Commercial Code, the Maritime Code, and the Code Judiciare. The Commission comprised of both foreign and local jurists.

[203] For more information, see, Peter Winship, Background Documents of the Ethiopian Commercial Code of 1960, H.S. I.U., Faculty of Law, (Unpublished), (1972), pp. 7,8,84.

The Code deals with many aspects of the shipping business and some of these are: Maritime Liens and Mortgage of a Ship; Limitation of Liability; Maritime Employment; Charter Party Agreement; Contract of Carriage Supported by a Bill of Lading; Maritime Collisions, Assistance and Salvage; General Average and Marine Insurance. A closer look at Title VI of the Code, which deals with Participation in General average, evinces that this part of the Code is by and large taken from the York-Antwerp Rules.[204] Articles 180-209 of the Code, which deal with bill of lading contracts are most probably taken from the Hague Rules, for the provisions of the former are very similar to the latter than any other similar law. Moreover, it helps to note that some articles of the Code and the Rules are identical. A case in point is Article 197 of the Code and Article 2 of the Rules, which deal with grounds of exemption from liability. Another case in point is Article 200 of the Code and 6 of the Rules, which deal with shipment of dangerous goods. Furthermore, as shown above, The Hague Ruels, before being amended by The Hague-Visby Rules in 1968, was the prominent convention in 1960 when the Maritime Code was enacted.

3.2. The Provisions on Package Limitation

The pertinent provisions of the Code on package limitation read as follows:

Article 198, Global Statutory Limitation of Liability.

1) In respect of loss or damage to goods, the liability of the carrier shall not exceed one thousand Ethiopian dollars.

2) The statutory limitation shall be determined by package, and in respect of goods loaded in bulk, on the basis of the unit normally srving for the calculation of freight.

3) The statutory limitation may not be setup against the shipper where the nature and value of the goods have been declared by the shipper before shipment, and such declaration has been interested in the bill of lading.[205]

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[204] The first york rules were adopted in 1864. These were revised in 1877 at Antwerp. The York-Antwerp Rules were first adopted by the International Law Association in 1880, then revised in 1924, 1949 and again in 1974. The probable source of the Ethiopian laws of General Average can be the 1949 Revision.

[205] The parallel provisions of the Hamburg Rules read as follows:

It should be noted at the outset that there is a discrepancy between the two versions of the Code, i. e. the Amharic and English, and that the former, as the official language, prevails over the latter. The Amharic version puts the extent of liability at five hundred Ethiopian dollars instead of one thousand Ethiopian dollars as in the English version. Whether or not this is a deliberate act or a slip of the pen is unknown for, as mentioned earlier, background materials are not available. One may, however, add that this particular fact is not included as errata in the Corrigendum section of the English version of the Code.

The provisions of the Hague Rules and the Code, quoted above, are more or less similar except for minor differences. Accordingly, apart from the difference in the amount of package limitation mentioned earlier, the Hague Rules provide that the sum shall be calculated in terms of the number of packages or "units" while the Code provides that the sum fixed should be calculated in terms of packages or "in respect of goods loaded in bulk, on the basis of the unit normally serving for the calculation of freight." Given these differences and in particular the difference in the amount of money provided under the two laws, it appears that Article 198 of the Code is much closer to Carriage of Goods by Sea Act (COGSA) of the USA than the Hague Rules. Section 1304 (5) of COGSA reads as follows:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper and inserted in the bill of lading...(underlines added).

Hague Rules-Article 4 (5)

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 Pound Sterling per package or unit or the equivalent of that sum in other currency, unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading.

The figures mentioned under Article 198 of the Code and the COGSA are identical, i.e. 500[206]. Moreover, the expression used under the Code, i.e. "...in respect of goods loaded in bulk", is similar to "goods not shipped in packages" (COGSA's expression). It can also be maintained that the expression "on the basis of the unit normally serving for the calculation of freight" found in the Code is not different from the expression "customary freight unit" found in COGSA.

3.3. Case Reports and Practice on the Subject

The is no law reporting system in Ethiopia and it would thus be difficult to relate the prevailing practice in any one field of study with some certainty. Nonetheless, it is believed that the following three cases rendered by the higher courts of the country at different periods coupled with the practice of the only national carrier of the country, the Ethiopian Shipping Lines, will help shed on the prevailing trends and attitudes on the subject. We shall discuss these in turn.

3.3.1. Cases[207]

Case One

In a case litigated at the High Court of Addis Ababa[208], the plaintiff claimed that the contents of five "cartons" of goods that delivered to the carrier for transportation were found missing upon arrival at the port of destination, i.e. Assab (the former port of Ethiopia). Accordingly, he claimed 12,000 Birr, being the cost of items lost during voyage. The defendant argued that it is not liable for the loss as the goods were carried on deck and, alternatively, if found liable for the loss, that its liability is limited to a maximum of 200 Pound Sterling as per the provisions of the bill of lading. The court ruled that loss other than that due to common elements of the sea, such as salty water, cannot exempt a carrier from liability for the loss of goods carried on deck and that the

[206] Note. COGSA has set the limit at 500 USD for the reason that in 1925, the year the United States signed the Hague Rules Convention, 100 Pound Sterling had an average value of 482.89 USD and Art.9 of the Convention permits contracting states to translate Article 4(5)s 100-Pound Sterling into terms of their own monetary system in round figures. Michael, F. Sturley, Supra Note 29. at p. 177, Foot Notes, No. 321 and 322.

[207] The decisions are written in Amharic and only the relevant parts are translated and presented.

[208] Girma Kebede v Ethiopian Shipping Lines Corporation et. al., Civil File No. 689/78, Ginbot 11, 1981 Ethiopian calendar or May, 1989 G.C.

defendant should pay a total of 2,500 Birr being the cost of the missing goods, i.e. 500 Birr for each carton.

Case Two

In another case litigated at the Zonal Court of Region 14 (Addis Ababa) Administrative Region[209], the plaintiff claimed the payment of 40,000 Birr, being cost of a car that he delivered to the defendant for transportation and was lost after arrival at the port of destination, i. e. Assab. The defendant, Ethiopian Shipping Lines, argued that it is not liable for the loss as the car had arrived at the port of discharge safely and was handed over to the port authority and that the war situation then prevailing at the port had prevented its final delivery to the plaintiff. It, alternatively, further argued that, if at all liable, its liability is limited to 500 Birr or 100-Pound Sterling. The court ruled that the defendant has failed to discharge its contractual obligation to deliver the car to the plaintiff or, in lieu thereof, to a responsible body customarily employed for safe-keeping and delivery of goods in transit; that it cannot invoke the war situation as a defence as, by his own account, the car was safely unloaded and delivered to the port authorities; and that, accordingly, it is liable to the plaintiff for loss of goods shipped. It fixed the amount of compensation at the statutory limitation of 500 Birr since the plaintiff has not specified the nature and value of the property shipped in the bill of lading. Both parties appealed from this decision and the appellate court confirmed the lower court's ruling on the amount of compensation. It is, however, interesting to note that the appellate court reasoned in passing the Art.198(2) of the Code applies to goods shipped enclosed in "parcels" or "packages" and thus concealed but not to such goods as motor vehicles which are not so consolidated.

Case Three

Yet in another case litigated before the Central Arbitration Committee[210], the plaintiff, an insurer, claimed for refund of 3,804.61 Birr that it paid to its clients as a result of loss of goods on voyage. The plaintiff argued that the bills

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[209] Melese Asfaw v Ethiopian Shipping Lines Corporation, Civil File No. 1709/1985, Ginbot 9, 1985, Ethiopian Calendar (E.C.). Appeal-Civil File No. 1772/88, Sene 8, 1992 E.C. or May 2000 G.C.

[210] Ethiopian Insurance Corporation v Ethiopian Shipping Lines Corporation, File No.71/77. The Central Arbitration Committee was a tribunal established to resolve disputes between administrative organs of the state. It is now defunct.

of lading issued for the goods clearly provide that the Hague Rules apply and that liability is determined as follows:

> -If the Hague Rules are applicable in the country of port of shipment, the liability will be determined according to the Rules.
> -If the Hague Rules are not applicable in the country of port of shipment, liability will be determined according to the local laws of the country.
> -If there is no law that governs the situation in the country, the Hague Rules shall apply.

Accordingly, since two of the cargoes were shipped from UK and other from West Germany, and the package limitations under the laws of these countries are 471.69 Pound Sterling and 1250 Duetch mark, respectively plaintiff claimed that the defendant is liable to compensate him to the full amount paid by him to his clients. The defendant contended that both The Hague Rules and the Ethiopian law apply to cases where the amount of liability is not specified in the bill of lading and that, in the present case, the bill of lading issued limits its liability to 100 Pound Sterling per package for which sum alone he can be held liable. The Committee ruled that the provisions in the bills of lading are controlling and accordingly fixed the liability of the defendant to 100-Pound Sterling per package.

3.3.1.1 Comments on Cases

3.3.1.1.1 Units of Measurements

Of the three cases summarized above, it is only in the case number *one* where it is expressly mentioned that the lost items were consolidated in package (i.e. cartons). In case number *two*, it is nowhere mentioned that the car was enclosed in a given package. Given the practice, items such as cars are usually shipped outside of packages. In case number *three*, however, though nothing was mentioned about the nature and type of goods, it appears that the parties have agreed that the goods were in packages.

Given these facts, in case number two, the unit of measurement of liability should not have been packages but the alternative provided under Article 198 (2), i. e. "the unit normally serving for the calculation of the freight." In this regard, the alternative unit is no different from "customary freight unit", a phrase frequently found in other laws. As stated by Schoenbaum:

> "Customary freight unit applies for goods that are not shipped in packages. This limit applies to bulk cargo as well as machinery and equipment shipped uncrated or unpackaged. It is settled that the phrase "customary freight unit" means the unit by which the freight was calculated in particular case. The customary freight unit to be applicable need not have any relationship to the value of the article involved. It has been calculated by measures such as weight, cubic feet, and by the piece involved.[211]

Article 12 of the bills of lading issued by the Ethiopian Shipping Lines indicates that freight can be calculated on the basis of weight, measurement and value of goods. Thus, whether or not the alternative method of calculation is advantageous to the shipper, further inquiry should have been made into the basis on which freight was calculated and the amount of liability fixed accordingly.

3.3.1.1.2. The Amount of Liability

In case number one, the carrier argued that its liability to Pound Sterling 200. In case number two, the carrier argued that its liability is limited to 500 Birr or Pound Sterling 100 and in case number three 100-Pound Sterling only. The courts ruled that in the first two cases the carrier's liability is limited to 500 Birr per package, and in the third case Pound Sterling 100.

In case number one, it is not clear from the facts whether the carrier was contending that its aggregate liability cannot, in any case irrespective of the number of packages, exceed 200-Pound Sterling or that its liability is limited to 200-Pound Sterling for each package. First, if the carrier was arguing that its aggregate liability could not in any case exceed 200-Pound Sterling, this is not legally tenable for the Code nowhere authorizes a carrier to do so. What is actually provided under Article 198 of the Code is the minimum amount of liability per package or other units. Moreover, the carrier has cited Article 24 of its bill of lading as its authority. However, assuming that the bill of lading issued at the pertinent time contained such a provision,[212] this provision is void for it cannot contradict the minimum limit provided by law. Second, if on the other hand, the carrier was arguing that its liability is limited

[211] Schoenbaum, Supra Note 1, p. 612.

[212] Bills of Lading currently issued by the Ethiopian Shipping Lines do not contain similar provisions.

to Pound Sterling 200 per package, then the plaintiff should have been awarded this sum and not 500 Birr per package as was the case. In this regard Article 206 (1) of the Code provides the following.

> Article 206-Carrier may increase his liability
>
> (1) A carrier may surrender in whole or in part all or any of his rights and immunities, or increase any of his responsibilities and liabilities under this Section provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

Moreover, in case number one, although the carrier did not raise this matter in his defence, it is worthy of note that the plaintiff did not allege that all the items packed in the five cartons were lost upon arrival. He claimed that only some items out of the total consignment were lost. The carrier would be liable for the payment of 500 Birr per package only when the whole package is lost but not when only parts of its contents are missing. This will reduce the liability of the carrier proportionately.

In case number two, as the carrier has admitted that its liability is limited to 500 Birr or 100 Pound Sterling, it is not clear why the court opted to award the plaintiff 500 Birr only and not 100-Pound Sterling as admitted. The exchange rate of the Pound Sterling is currently around 16.05[213] Birr to the Pound (£1=16.05 Birr) and, even at the time of suit, the plaintiff would have been entitled to a much higher sum had defendant's liability been determined in Pound Sterling. Similarly, it is not clear why, in the same case, the appellate court affirmed the decision of the lower court as to the amount of liability while at the same time holding that sub-article (2) of Article 198 is not applicable to the case.

3.3.2. Shipping Practice

Bills of lading issued by the Ethiopian Shipping Lines contain a set of provisions pertaining to package limitation. These provisions are printed in fine letters and found at the back of each bill.[214] The relevant laws applicable

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[213] The Ethiopian Herald, Vol. LXII. No. 254, July 3, 2006

[214] Pertinent provisions of the Bills read in part as follows:
Article 5. Carriers Responsibility, (a) Port to Port Shipment

to package limitation under these provisions are four. These are: local laws, The Hague Rules, The Visby Amendments, and the Carriage of Goods by Sea Act 1936 of the U.S.A. Given the level of unification attained at present on the issue of package limitation, it may be asked why the bills' provisions cite four different laws. Moreover, given the fact that the Hague Rules are amended by the Visby Protocols, it may again asked why The Hague Rules are repeatedly cited as basis of liability. The only possible explanation that may be offered is that this is probably done to accommodate the interests of those countries that are parties to one or the other of these conventions as well as those which are not parties to any of the conventions. As we saw earlier in relation to case number *three*, under the bills of lading provisions of the Ethiopian Shipping Lines: (a) if the Hague Rules are applicable in the country of port of shipment, liability will be determined according to these rules; (b) if the Hague Rules are not applicable, liability will be determined according to the local laws of the country of port of shipment; (c) if there is no law governing the case in the coutry of shipment, the Hague Rules apply.

Conclusion

Package limitation is a legal mechanism that is designed to save ship-owners from crippling losses resulting from loss of or damage to goods that may arise out of the different hazards of the sea. Thus, unlike other instances wherein a

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i.[When goods are lost or damaged while in the actual custody of the carrier, i. e. from loading to discharge], the liability shall be determined in accordance with any national law making the Hague Rules or the Hague Rules as amended by the Protocol signed at Brussels on 23 February 1968 (Hague/Visby Rules) compulsorily applicable or, if there be no such national law in accordance with the Hague Rules contained in the International Convention for the Unification of Certain Rules Relating to Bills of Lading dated 25th August 1924... Where the exemption contained in the previous sentence may not be valid, the carriers liability shall be governed during the periods of the Carrier actual or constructive possession before loading on to and after discharge from the sea going vessel by the provisions of the Carriage of Goods by Sea Act 1936 of the USA which shall be deemed to be incorporated herein and to apply to such periods.

General provisions (applicable to both port to port and combined transport).

v. Ad valorem declaration of Value.

The liability of the carrier, if any shall not exceed the limits prescribed in any national law or international conventions unless the nature and value of the goods has been declared by the merchant before shipment and inserted in the Bill of Lading and extra freight paid on such declared value if required.

vi. Hague Rules Limitation

Subject to (v) above, whenever Hague Rules are applicable, otherwise than by national law, in determining the liability of a carrier, the liability shall no event exceed one hundred Pound Sterling per package or unit.

contracting party can be made liable to the full extent of the loss or damage suffered, a ship-owner is not required to compensate the owner of goods lost or damage to the full extent. A ship-owner is, therefore, entitled to limit his liability to a certain unit of exchange to be multiplied by the number of packages or other units of measurement. The legislative history of the law of package limitation clearly shows that it had been difficult to fix the amount of liability against a certain currency or other unit of exchange. Accordingly, at the international level, the liability had, at different periods, been fixed against Pound Sterling, gold and, currently, the SDR. The major reason behind the shift in the unit of exchange is the failure on the part of the Pound Sterling as well as gold to refer the actual value of goods, which change through time. For the present, at least, the SDR is found to be a convenient unit of exchange.

The package limitation provide under Article 198 of the Code is 500 Birr per package or other units of measurements. The Code as well as the pertinent article, i.e. Article 198, has not been amended for the past forty-two years. However, the Birr has been devalued in the course of the last forty-two years and the amount fixed under Article 198 of the Code is no more realistic. Thus, the devaluation of the currency has favored ship-owners and unduly disfavoured cargo owners. Currently, the exchange rates of Birr against USD, Pound Sterling and SDR are 8.86, 16.05 and 12.86, respectively.[215] Taking the present exchange rate, the amount fixed under Article 198 of the Code is roughly equivalent to, 56.43 USD, 31.15-Pound Sterling or 38.88 SDR. Given the level of uniformity achieved through relevant international conventions, the limit of liability would have been 835 SDR under the Hamburg Rules or 666.67 S DR under the 1979 Protocol.[216] However, since Ethiopia is not a party to any one of the conventions to date, an Ethiopian Shipper/consignee cannot invoke this privilege nor can a carrier be bound by these limits. A shipper would thus only be entitled to a compensation of 4.66% or 5.71% of what he would be entitled to under The Hamburg Rules and the 1979 Protocol limits liability respectively.

[215] Ibid.

[216] Had Ethiopia been a party of the Hamburg Rules or Hague Rules (as amended in 1979), a shipper/consignee would have been entitled to Birr 10,738.10 or 8753.38, respectively, for a package.

Formation of Arbitral Tribunals and Disqualification and Removal of Arbitrators under Ethiopian Law

Zekarias Kene'aa*

INTRODUCTION

Although Compromise, Conciliation and Arbitration were given recognition by the 1960 Ethiopian Civil Code as alternative mechanisms of dispute settlement in Ethiopia, the three aspects have not been put into practice excepting may be arbitration, which, it may be said, is put into operation to some extent. Because of the fact that these alternative mechanisms are not put into practice, or are, as such, not tested, disputes have been, at least in major townships in Ethiopia, been taken to public courts. Also notable is that in rural Ethiopia, and even in some Ethiopian townships, disputes have been and still are settled through traditional mechanisms practiced amongst the different ethnic groups in the country.

As stated above, arbitration as an alternative means of adjudicating disputes has, to some extent, been put into effect in Ethiopia. Although the Civil Code recognized arbitration as one mechanism of settlement of disputes, however, little has thus far been done to elucidate the provisions of the Code on arbitration.

This modest work on "Formation of Arbitral Tribunals and Disqualification and Removal of Arbitrators Under Ethiopian Law" hopefully contributes something towards shading light on the provisions of the Civil Code on arbitration. The paper is divided into two parts. The first part deals with the formation of arbitral tribunals and the second part deals with disqualification and removal of arbitrators. The essay comes to an end by some remarks in the form of conclusion.

I. *FORMATION OF ARBITRAL TRIBUNALS*

A. Appointment of Arbitrators

One of the main characteristics of arbitration is that there would be private judges or referees that would consider and resolve the dispute(s) between the parties as opposed to judges sitting in courts which are appointees of the sovereign. In other words, arbitrators are appointees of the parties or

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disputants, or as the case may be the appointees of the parties / disputants through some kind of an appointing authority designated as such by the parties themselves. As the reference is going to be considered and finally resolved by the arbitrators, their appointment becomes very important in the sphere of arbitration. It could in fact be said that without the appointment of the arbitrators in one way or another, the arbitral tribunal [1]cannot be formed and the agreement of the parties to refer their existing or future disputes to arbitration cannot be executed. It would remain an agreement without effect.

Primarily, the appointment of the arbitrators constituting the private dispute resolution tribunal is the right of the parties. However, if the parties fail to agree on the appointment of their private judges, they may seek a court's assistance. Here below we will consider situations where both parties appoint their arbitrators, courts appoint them, when they are appointed by a third party entrusted with such an appointment, and the role of arbitrators in appointing or choosing a chairman, a president, or an umpire as it may be called.

1. Appointment by the Parties

Parties may appoint their respective arbitrators [2] the moment they agree to submit their existing disputes to arbitration, or may even agree on the proposal made by one of them. The same applies when parties agree to submit their future disputes to arbitration. The parties can, right from the moment they gave their free consent to submit their future disputes "arising from" or "in relation to" their main underlying contracts to arbitration, appoint their respective arbitrators or endorse the proposal of the appointment of arbitrators submitted by one of them which would be tantamount to appointing one's arbitrator(s) respectively.

The equality of the parties as stated under the provisions of Article 3335 of the Civil Code, must, however, not be forgotten with regard to the appointment of arbitrators. The provisions of Article 3335 are so strict that the agreement to arbitrate is rendered invalid where it places one of the parties in a

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[1] The 1960 Civil Code of Ethiopia doesn't use the word "tribunal." It simply refers to Arbitrators as individuals. Under French Law, which is the main source of Ethiopian Private Law, the term "arbitral tribunal" is a recent phenomenon intended to give to arbitrators the status of a collegial jurisdictional body rather than viewing it implicitly as merely a group of private individuals. See for instance R. David Arbitration in International Trade, Kluwer, Law and Taxation Publishers, Deventher/ Netherlands, 1985 p. 225.

[2] The Civil Code of Ethiopia Articles 3331 & 3337.

privileged position as regards the appointment of the arbitrators.[3] This presupposes that there has to be an agreement between the parties as to the appointment but the agreement reached on cannot be valid if it puts one of the parties on a privileged position. Professor Rene David wrote:

> *A restriction on the freedom of the parties would seem to be imposed in all countries. It is imperative that parties should be ensured full equality in the constitution of the arbitral tribunal. A specific provision of the law in some countries, the general principles of law in other countries condemn a number of practices on the grounds that they result in a privileged position for one of the parties as regards the constitution of the arbitration tribunal.* [4]

The "equality of the parties" requirement imposed by Article 3335 of the Civil Code doesn't, however, prohibit the endorsement by one party of the list of would-be arbitrators submitted by the other, provided however, that the endorsing party's consent is freely given. What Article 3335 purports to guard against, is that it should not be acceptable where "all arbitrators are appointed by one of the parties only," [5] or in case of a sole arbitrator, where his appointment was made by one of the parties without securing the free consent of the other, or by ignoring his objection as to the appointment of the sole arbitrator. [6]

Appointment of arbitrators necessarily involves the naming of the arbitrators by the parties and hence the parties agreeing only on the procedure for appointment doesn't mean appointment in the sense it is used in the Civil Code. The naming of arbitrators in the agreement to arbitrate is left to the discretion of the parties. They may agree to appoint their arbitrators in the agreement to arbitrate or provide in their agreement for the number and procedure of appointment and leave the actual naming for a future date but before a dispute arises or until after a dispute has arisen between them. [7] The

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[3] See the discussion on "equality of the parties" infra.

[4] Rene David, Arbitration in International Trade Kluwer, Law and Taxation publishers, Deventher/Netherlands, 1985, p.23.

[5] Ibid.

[6] Incidentally, it is commendable to note that the Civil Code uses "arbitrator" throughout in its singular form although in Article 3331 it is provided that there may be one or several arbitrators. I personally, prefer the plural form because the appointment of three arbitrators has gained so much popularity and the Code also recognizes collegiality.

[7] The Civil Code, in Article 3331(1) provides that appointment of the arbitrators may be made in the arbitral submission or subsequently.

simultaneity of agreement to arbitrate and the naming of arbitrators then and there seem to be highly probable in the cases where the agreement to arbitrate is in reference to already existing disputes. It is, however, possible even in agreements to arbitrate existing disputes for the parties to postpone the appointment of arbitrators until a future date. In agreements to arbitrate future disputes, the highly probable arrangement would be that the agreement provides for the procedure and number of arbitrators, but the likelihood would be that the naming of the arbitrators is left until after the dispute has arisen between the parties. Nevertheless, the possibility that the appointment is made at the time of the agreement cannot be dismissed.

Both in "*compromis*" agreement i.e., the agreement to submit existing disputes to arbitration or in the "clause *compromissoire*" i.e., the agreement to submit future disputes to arbitration, there may be advantage in leaving the appointment of arbitrators until after a dispute has arisen between the parties. It is submitted, that awareness by the parties of the nature and extent of their disputes before they appoint their arbitrators would be advantageous to them. This is so, particularly because it enables them to select the appropriate persons with the necessary qualification and expertise to facilitate the speedy disposal of their disputes and to avoid the trouble of re-appointing in cases where the pre-dispute appointed arbitrators may have died or have become incapable.

Sub-article (3) of Article 3331 of the Civil Code provides: "where the parties have failed to specify the number of arbitrators or the manner in which they shall be appointed, each party shall appoint one arbitrator". This is intended to fill the vacuum left by the parties in the event that they weren't careful enough to fix the number of arbitrators or the procedure by which they shall be appointed, without, of course, prejudice to the provisions of Article 3335 of the Civil Code. Sub-article (3) of Article 3331 has three limbs. The first one is intended to cover the situation where the parties have agreed on the procedure of appointment of their arbitrators but failed to have provided for the number of arbitrators in which case they shall appoint one arbitrator each and if their agreement on the manner of appointment happens to be different from appointing one arbitrator each, without prejudice to Article 3335, it seems that such an agreement on the manner of appointment is overridden by the application of article 3331(3). If, for instance, the parties have agreed that the arbitrators were to be appointed by the Ethiopian Chamber of Commerce but failed to provide for the number of arbitrators, and how many arbitrators each party should appoint, then they shall appoint one arbitrator each but their agreement that the arbitrators were to be appointed by the Ethiopian Chamber

of Commerce is impliedly rendered ineffective unless one argues that the parties' agreement as to the appointing authority should remain effective and only the aspect of Article 3331(3) dealing with the number of arbitrators should be given effect.

The second limb of Article 3331(3) would be that in the agreement to arbitrate the parties would have provided for the number of arbitrators but have failed to agree on how they are to be appointed and may be on who appoints them. In such a case again, the simple way out provided by Article 3331(3) would be that the parties should themselves appoint one arbitrator each. On the other hand, if the agreement of the parties provides that there shall be appointed five arbitrators, the parties should be able to appoint two arbitrators each.

The third aspect of Article 3331(3) would be that in certain circumstances the "or" in sub-article (3) of Article 3331 might need to be taken as an "and". Parties may fail to provide for both the number of arbitrators and the manner or procedure of appointment in which case Article 3331(3) should again be of use to remedy the situation. The more likely applicability of sub-article (3) of Article 3331 is after disputes have arisen between the parties but in the circumstances where there is no recalcitrance of the parties to constitute the tribunal.

On the other hand, Article 3333 gives the procedure of appointment, which may be used by the parties to constitute the tribunal in cases that fall under Article 3331(3). As Article 3333 begins with "where necessary," one would imagine that there is an implied pre-supposition that as far as possible, the parties should try to agree both on the number and procedure of appointment of arbitrators. Failing such agreement, one would also imagine that "the party availing himself of the arbitral submission" may make use of the procedure under Article 3331(1). In such a situation, the concerned party shall have to specify the dispute he wishes to raise and appoint an arbitrator and has to give notice of his action to the other party or the person entrusted with the appointment of arbitrators in the arbitration agreement.[8]

The notice receiving party, or somebody authorized by him, is given 30 days commencing from the date of reception of the notice under Article 3333(2) within which he may appoint his arbitrators(s) failing which he loses

[8] Civil Code Article 3333(2).

his right of appointing his arbitrator and the right shifts over to the court. [9] Sub-article (3) of Article 3334 may be taken as a provision of the law empowering the parties, in their agreement to arbitrate, to modify the rules of sub-articles (1) and (2) of the same Article. The parties can, among others, agree to shorten or elongate the thirty days time limit or shift the commencement of the running of the limitation from date of reception to date of dispatch.

2. Appointment By the Court

(i) Of Arbitrators

Where the parties fail to appoint their arbitrators either in the agreement to arbitrate or subsequently, the right of appointment shifts over to the court. [10] This is so because at least one of the parties, i.e., the one seeking to "avail himself of the arbitral submission" should, to set the arbitral justice into motion, "specify the dispute he wishes to raise and appoint an arbitrator" [11] as a corollary of which the other party or the person entrusted with the appointment of arbitrator under the arbitration agreement shall be given notice of his willingness to avail himself of the agreement and his appointing an arbitrator. [12] It is not until after the party or as the case may be the appropriate person entrusted with the appointment of arbitrator is put the right to appoint arbitrators shifts over to the court. Putting the notice-receiving party in default would only materialize where thirty days have elapsed after he has received a notice specifying the dispute the other party wishes to raise and the fact of his having appointed his arbitrator. [13] In circumstances where the parties may have agreed to modify the provisions of Article 3334(1) & (2) of the Civil Code, putting in default may materialize in a shorter or longer time than thirty days after reception or dispatch of the notice.

If the notice receiving party or person wants to make use of his right of appointing his share of arbitrator after receiving the notification given by the other party, he can still proceed and appoint his arbitrator provided it is within the limitation period of 30 days or longer or shorter period of time if otherwise fixed by the parties. The court's right of appointing an arbitrator becomes

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[9] Civil Code Article 3334(1) cum 3334(2).
[10] Civil Code Article 3334(1).
[11] Civil Code Article 3333(1).
[12] Ibid, sub-article (2).
[13] Civil Code Article 3333(1) and (2).

exercisable after it is made certain that the notice receiving party or person has failed to make use of the notification of the initiation of the arbitral justice.

(ii) Of Presidents of Tribunals

The right of the court to appoint "an arbitrator who shall as of right preside over the arbitral tribunal" becomes exercisable after the appointed arbitrators have failed to agree to appoint a chairman either from among themselves or somebody outside of themselves. [14] Sub-article (1) of Article 3332 in this respect orders that in the situations where there is an even number of arbitrators, they shall, before assuming their functions, appoint another arbitrator, outside their own rank, who shall as of right preside over the tribunal. This provision presupposes agreement between the arbitrators in appointing the umpire and it is when they fail to reach an agreement as to who shall chair the tribunal in its proceedings leading to an enforceable award, that the right to appoint the chair arbitrator passes over to the court. The right of appointment of a presiding arbitrator however, doesn't automatically pass to the court merely because the arbitrators have failed to agree to appoint such a president. Although it is not explicitly provided, it seems that the arbitrators whose number is even and who have failed to reach an agreement as to who should preside over the arbitral tribunal report back to the parties of their inability to agree as a consequence of which one of the parties applies to the court for appointment of a president. Incidentally, even in the appointment of an ordinary arbitrator, by the court, it should be noted that it is the party seeking to avail himself of the agreement to arbitrate that after putting the other party in default, applies to the court that the rest of the arbitrators, presumably including the chairman,[15] be appointed by the court.

The provision of Article 3332(1) applies where the number of arbitrators appointed either by the parties or as the case may be by the person authorized to appoint on their behalf is, to take the minimum, two, i.e., where the parties or the persons entrusted with appointing appointed one each only. Starting from two, it could be any number as long as the number of appointed arbitrators is even.

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[14] Civil Code Article 3332, especially sub-article (3).

[15] Alternatively, the court may only appoint the arbitrators and leave the right of appointing a president to the court-appointed arbitrators themselves until after they fail to agree in appointing such a president in which case it can exercise its right of appointing the president.

Where the number of arbitrators chosen by the parties is odd, they have to appoint the president from among themselves. [16] This could be taken as an indication that despite the number of the parties being just two, there may be the possibility of their appointing more than one each arbitrator provided such uneven appointment doesn't violate the equality provision of Article 3335 of the Civil Code. One of the parties or one of the persons or authorities in charge of appointing the arbitrators can, therefore, agree to endorse the appointment of the arbitrators nominated by the other.

3. Appointment by the Person Entrusted With the Appointment

It may be appropriate, at this juncture, to at least briefly deal with the appointment of arbitrators by a person who may be entrusted with the power of such an appointment by the parties.[17] Ideally, it would be preferable if the parties themselves appoint their arbitrators by reaching agreement between themselves for "a major attraction of arbitration is that it allows parties to submit a dispute to judges of their own choice; and parties should exercise this choice directly rather than allowing it to be exercised by third parties on their behalf."[18] However, parties cannot, in all cases of appointing their arbitrators, among themselves reach agreement particularly in cases where they have opted for a sole arbitrator as distinguished from a collegial arbitral tribunal. It, therefore, becomes imperative that "In all types of arbitration, a method of appointing the arbitral tribunal should be available to break the deadlock which arises if the parties cannot agree on the composition of the arbitral tribunal" [19] As has already been observed above, the law provides for the courts to appoint arbitrators where the parties fail to reach agreement or where one of the parties fails to appoint his share of arbitrator whereas the other wants to avail himself of the arbitration agreement and hence applies to the court after giving notice and waiting for the legally prescribed period of limitation. But the court's involvement should be as a final resort and parties might want an intermediary third party to appoint their arbitrators before finally the court, in order to protect the interest of the party seeking to avail himself of the arbitral submission imposes some arbitrators on them.

As stated above, the right of appointment of arbitrators, however, may be entrusted to another person by the parties or may be one of them so that that

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[16] Civil Code Article 3332 (2).

[17] This is the principle enshrined in Articles 3333(2) and 3334(1) of the Civil Code.

[18] Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration, Sweet and Maxwell, London, 1986, p.160.

[19] Ibid. p. 365.

other person "may exercise the right on behalf of him/them." Such other person, who becomes a trustee of the parties, exercises his right before a final resort is made to the court. It, in fact, transpires from Article 3333(2) and 3334(1) that the trustee for the appointment of arbitrators plays the parties' role whenever there happens to be one. Nonetheless, it could be that first the parties themselves try to appoint their arbitrators and if they fail entrust another person with the appointment, but it may as well be that the parties right from the beginning entrust the appointment of arbitrators to a third person. In Ethiopia, there is no guiding rule as to who may be entrusted with the power of appointing arbitrators on behalf a party. Any capable person may be entrusted with the power to appoint an arbitrator on behalf a party. Without the possibility of other persons being entrusted, and without losing sight of the fact that an arbitration may be ad hoc, the two recently formed institutions, i.e., The Ethiopian Arbitration and Conciliation Center and The Arbitration Institute of the Addis Ababa Chamber of Commerce and Sectoral Associations may be mentioned as well-posited persons (institutions) to appoint arbitrators on behalf parties in Ethiopia. These two institutions keep their own rosters of competent arbitrators. For commercial arbitrations, the National and the Addis Ababa Chambers of Commerce may also be entrusted.

As is in use in very many countries the world over, particularly in relation to international commercial arbitrations, professional institutions may also be entrusted with the power to appoint arbitrators. Professional Institutions are, to mention just two of them, organizations like the Institute of Chartered Arbitrators and the International Bar Association.

On the other hand, on the regional or international plane, there are arbitral institutions, which may assist in appointing arbitrators. Such arbitral institutions include, the International Chamber of Commerce (ICC), the LCIA (The London Court of International Arbitration) the LMAA (The London Maritime Arbitration Association), The Kuala Lumpur Regional Center for Arbitration, The Hong Kong International arbitration Centre, The Cairo Regional Centre for International Commercial Arbitration, The Spanish Court of Arbitration, The American Arbitration Association (AAA), and The Inter-American Arbitration Commission, and the International Centre for the Settlement of Investment Disputes(ICSID).[20]

[20] See generally Redfern and Hunter, Supra, footnote #18 pp. 160 Et. Seq. See also Rene David, Supra footnote #4 p. 230.

The discussion above, might possibly lead to the view that "persons" entrusted with the appointment of arbitrators should only be a juridical one as opposed to a physical person. There is, nevertheless, no indication in the Civil Code that the "person" to be entrusted with the appointment of arbitrators need necessarily be juridical. There appears to be no reason why the parties, provided they agree, cannot entrust the appointment of their arbitrators to another third party who is a physical person.

4. Appointment by the Court in Cases of Default

It is not only in situations where the parties have failed in their submission to provide for the appointment of arbitrators or fail to agree on the appointment of arbitrators subsequently that the court's assistance in appointing is sought. Article 3336(1) of the Civil Code in a mandatory fashion[21] provides that "where an arbitrator refuses his appointment, dies, becomes incapable, or resigns, he shall be replaced by the procedure prescribed for his appointment in accordance with the provisions of the preceding Articles." According to this provision, appointment of an arbitrator in replacement of one who has already been appointed by the parties but because of the latter's refusal to accept the appointment, death, post appointment incapacity, or resignation, the tribunal couldn't have been formed though Articles 3331and 3335 come into application to fill the gap created. On the other hand, a look at those Articles reveals that appointment in accordance to them is either by the parties, arbitrators, the court or the person entrusted with the power of appointment of an arbitrator. Leaving aside appointment by the parties, by the arbitrators, and by the person entrusted with the power, it may be worthwhile, at this juncture, to look at the power of the court in appointing arbitrators in cases of refusal, incapacity, death or resignation of an already appointed arbitrator.

The parties to an agreement to arbitrate or even disputing ones may have agreed and named or appointed some persons who they believe would resolve their dispute. Unless one thinks of such naming of arbitrators after securing the consent of the would-be arbitrators, there may be the possibility that one of the named arbitrators may refuse to take the appointment. As a result, there may be created a vacancy that needs to be filled. Failing the agreement of the parties to fill such a vacancy or in case of impossibilities for

[21] However, it would be important to note that mandatory ness of Article 3336 of the Civil Code doesn't seem to be absolute. The provisions of the Article are in fact subject to the parties' modification if and when they think fit.

the parties to do so, it should be the court that should be given the power to fill the vacancy there by assisting in the constituting of the tribunal.

Where an arbitrator who presumably has been appointed by the parties dies, the incident automatically affects the constitution of the tribunal. This could happen immediately after the appointment of their respective arbitrator by the parties but before a third arbitrator, who, as of right, will preside over the tribunal is appointed. In such a situation, the single left arbitrator cannot exercise his right under Article 3332(1). Under the provisions of the latter Article, the right is given to both arbitrators to be exercised simultaneously and jointly i.e., by reaching an agreement as to who should be presiding over the arbitral proceedings. It may also be that the death of one of the arbitrators appointed by the parties or by the court whose number is odd may occur before they have appointed a chairman arbitrator from among themselves in which case their number would definitely be reduced to and becomes even and consequently either Article 3332(1) should come into application or a replacement appointment should be made in the section under consideration by the court although it could as well be made by the parties themselves.

The court's assistance in appointing an arbitrator may also be sought when an arbitrator becomes incapable [22] after he has been appointed. It should, however, be noted that there seems to be an overlapping between the application of Article 3336(1) on the one hand and that of Article 3340(1) *cum* 3336(2) on the other. According to Article 3336(1), it seems that where an already appointed arbitrator becomes incapable, his case comes under default. Hence, he could be replaced either by the parties or the arbitrators or the person entrusted with the appointing of the arbitrators. Failing agreement between the parties, the arbitrators, or persons entrusted with the power to appoint, then the power to appoint shifts over to the court at the request of one of the parties or the party wishing to avail himself of the arbitral agreement. Pursuant to Article 3340(1) *cum 3336*(2) on the other hand, the situation where an arbitrator becomes incapable constitutes a legal ground for disqualification and in such a case, the court may only make replacement appointment. Though sub-article (3) of Article 3336 states that the provisions of Article 3336 may be modified by the agreement of the parties anyway, the court's assistance could

[22] The term "becoming incapable" does not necessarily denote the technical legal meaning it usually carries in legal texts. In particular, the way the term "becoming incapable" is employed in Article 3336(1) gives it a broader meaning which embraces illness other than insanity, judicial or legal interdiction etc.

still be sought in appointing replacement arbitrators even if it is because of disqualification which is going to be considered later.

Where an arbitrator resigns after he has accepted his being appointed but before he has started discharging his duties or even after he has started discharging his duties as an arbitrator, a replacement appointment may be made by the court. Before summing up my discussion on replacement appointment of arbitrators by the court on default grounds, under Article 3336(1), it may be said that sub-article (1) of the Article deals with two voluntary and two involuntary grounds as causes for replacement of arbitrators. Accordingly, refusal to accept one's appointment and resignation could be categorised as voluntary causes for replacement of an arbitrator whereas death and incapacity may be categorised as involuntary. It must not be forgotten that the provisions of Article 3336, in general, are not mandatory in the strict sense. They may be modified by the parties' agreement as stated in sub-article (3) of the Article.

At this juncture, it may be necessary to consider the relationship between the provisions of Article 3336 and Article 3337. The latter Article in its first sub-article provides: "where the arbitrator has been named in the arbitral submission, and the parties do not agree on who is to replace him, the arbitral submission shall lapse." What does this mean vis-à-vis the provisions of Article 3336? If the provisions of article 3337 were to be given effect, when would the provisions of Article 3336 come into application? In other words, if an arbitrator has been named in the agreement to arbitrate and there arises the need to replace him because of the taking place of one of the reasons under Article 3336(1), and the parties do not agree on who is to replace him, does the arbitral submission lapse in the absence of a modifying agreement between the parties? Or can one of the parties, more likely the one wishing to avail himself of the arbitration agreement, apply to the court for a replacement appointment? In sub-article (2) of Article 3337, the law makes it clear that an agreement to arbitrate future disputes should be treated differently. In contradistinction to the situation where the parties agree to submit an existing dispute to arbitration, an agreement to submit future disputes to arbitration does not lapse in case the parties did not agree on who is to replace him if an arbitrator is unable to discharge his duties because of any of the reasons provided for in sub-article (1) of Article 3336. However, sub-article (2) of Article 3337 is qualified and the agreement to submit future disputes shall only remain valid, if at the time a dispute arises the ground that gave rise to the inability of the arbitrator to discharge his duties has ceased. According to sub-article (2) of

Article 3337, therefore, the application of the provisions of sub-article (1) of Article 3337 is limited to cases of agreements to arbitrate existing disputes.

Accordingly, if one limits himself to arbitration of existing disputes, and the disputants fail to agree on who is to replace an arbitrator who has been named in the agreement to arbitrate, and the parties did not, by agreement, set aside or modify the seemingly mandatory provision of sub-article (1) of Article 3337, it is provided that the arbitration agreement lapses and the party seeking to avail himself of the arbitral submission cannot apply to the court for a replacement appointment.

There is nothing clear as to whether Article 3337(1) is applicable only to cases where there is only one arbitrator as distinguished from a tribunal constituted of "several" arbitrators although the definite article "the" used in that sub-article seems to indicate that it is. It is highly probable, however, that sub-article (1) of Article 3337 is limited to sole-arbitrator cases because in cases where there is appointment of at least one arbitrator each by the parties, the likelihood of the application of the sub-article under consideration is remote in that each party would be replacing his arbitrator who refuses to accept his appointment, dies, becomes incapable, or resigns. If the parties fail to agree on who replaces their sole-arbitrator appointed to resolve their existing dispute, therefore, their submission shall lapse on the strength of Article 3337.

B. The Number of Arbitrators

The Civil Code in Article 3331(2) states that the parties may, in the agreement to arbitrate, provide that there shall be one or several arbitrators. This may automatically be taken as a legal provision giving the parties the freedom to submit the resolution of their dispute to one or three or more arbitrators. It, in other words, gives the discretion to the parties on whether to submit their case to one private judge (a sole arbitrator) of their choice or to a tribunal constituted of three or more odd-numbered arbitrators the chairman of which is to be chosen either from among themselves or from outside depending on the number of arbitrators appointed by the parties.

It is important to note that there is no provision of the law that limits the number of arbitrators to be chosen by the parties. It, therefore, follows that the maximum number of arbitrators to be appointed, is left to be fixed by the parties as conveniently numbered as they think fit for the quick and just disposal of their case, without ignoring the possibility that the parties may go for a sole arbitrator.

One thing to be noted is that the Civil Code implicitly reflected its preference for a panel of three arbitrators[23] in comparison to a sole arbitrator[24] or an odd number of arbitrators, which is more than three. This is indicated in Article 3331(3) of the Civil Code wherein it is provided "where the submission fails to specify the number of arbitrators or the manner in which they shall be appointed, each party shall appoint one arbitrator" This, of necessity, leads to the application of Article 3332 which is to the effect that the two arbitrators appointed by the parties will have to appoint another third arbitrator[25] who shall as of right preside over the arbitration tribunal. Together with the president, therefore, the arbitral tribunal would be constituted of three arbitrators. The procedure for appointment provided in Articles 3333 and 3334 of the Civil Code also consolidates the stand taken in Article 3331(3).

On the other hand, though the Civil Code's preferred number, at least impliedly, seems to be three arbitrators for a tribunal, in general however, it is important to note that the Code, in one way or another, tends to go for uneven number of arbitrators thereby avoiding the "possibility of a deadlock and the attendant dilatory tactics."[26] This is manifested in the Code's imposition on the appointed arbitrators either by the parties or persons in charge of their appointment or even by the courts whose number is even, unless the parties have agreed otherwise, to appoint another arbitrator (outside themselves) who shall as of right preside over the arbitral tribunal and whose addition makes the number of the arbitrators on the tribunal odd thereby facilitating decision by majority.

II. DISQUALIFICATION REMOVAL AND REPLACEMENT OF ARBITRATOR

A. Disqualification.

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[23] Professor Rene David advocates that there are advantages in having a tribunal constituted of more than one arbitrator. See David, Supra footnote # 4, pp 224-225.

[24] Professor David as well as Redfern and Hunter also share the view that having a single arbitrator may be advantageous when it comes to the payment of fees to the arbitrators and the difficulty of pooling arbitrators together for meetings or hearing and speed in giving an award etc. See p. 224 of David and p.157 of Redfern and Hunter.

[25] I am referring to him as a "third arbitrator" although it may be arguable that it would be more appropriate to call him the president, the chairman or umpire. Nevertheless, it is also important to note that there is no code-based special role he plays other than presiding over the tribunal.

[26] Jean Robert and Thomas Carbonneau, The French Law of Arbitration, New York, 1983, S.2:04 p.I: 2-16

In addition to the grounds for replacement of an arbitrator for his default, this is as used in Article 3336 of the Civil Code, which may either be voluntary or involuntary as the case may be, there are other[27] reasons for which an arbitrator may either be disqualified or removed.

As has already been discussed, by virtue of the provisions of Article 3336(1) of the Civil Code, there is a procedure for the replacement of an arbitrator who refuses to accept his appointment, who dies after having accepted his appointment, becomes incapable after his appointment or resigns after having accepted his appointment. Articles 3340-43 on the other hand, provide for the grounds that may cause the disqualification and removal of an arbitrator and the procedure to be followed in putting into effect removals and disqualifications. As has already been hinted, there is much in common between what Article 3336 provides by way of the grounds and the replacement procedure of an arbitrator in case of his default on the one hand and what Articles 3340 et seq. on the other provide on the disqualification and removal of an arbitrator. Despite the similarities between the provisions of Article 3336 and those of Articles 3340 et seq., yet there are observable differences between replacement for default and disqualification and removal, which merits to be discussed herein below.

(i) Grounds of disqualification

Article 3340(1) of the Civil Code lays down a number of reasons why an arbitrator may be disqualified some of which, to state again, did appear in the provisions of Article 3336(1). The grounds enumerated under the provisions of sub-articles (1)&(2) of Article 3340 are: minority, conviction by a court, unsound mind, illness, absence, impartiality, independence and any other reason sufficient to indicate the inability of the arbitrator to discharge his functions properly or within a reasonable time. Each ground deserves to be considered separately and below is an attempt made in that line.

a) Minority of an arbitrator

Mention has already been made that even though "any person may be appointed as an arbitrator" the effect of such a wide and unqualified provision seems to have been curbed by the provisions dealing with disqualification of an arbitrator. It therefore follows that a minor appointed as an arbitrator may later on be disqualified merely because he is not of age. What one should bear

[27] See the discussion on pp 9-10 above that indicates that the grounds for replacement may overlap with that of disqualification and removal.

in mind here is that unless one of the parties, presumably the one entitled by law to avail himself of the disqualification applies to the court to that effect, a minor arbitrator need not be disqualified merely because he is not of age. To repeat what has already been said earlier, there is no positive requirement of capacity laid down in the arbitration provisions of the Civil Code unless one argues that the requirement is there by implication. Although there is the risk of disqualification in as much as an arbitrator didn't attain the age of 18, a 15 years old boy could however be appointed an arbitrator and the award he renders could be enforceable. As distinguished from the application of Article 1808, here, it is one of the parties that should apply for disqualification and not the minor arbitrator. An arbitrator may, however, avail himself of his being incapable to initiate the replacement under Article 3336(1) of the Civil Code.

b) Where an arbitrator has been convicted by a court

An arbitrator may be disqualified if he has previously been found guilty of a crime. This is clearly a very wide ground that may be said embodies any crime for which an arbitrator whose disqualification is being sought has been convicted and the record of which has been kept. Normally, one would have thought of crimes like bribery, corruption, breach of trust and others akin to such crimes to be the most relevant types of crimes justifying the disqualification of an arbitrator. However, according to the phrase used in Article 3340(1) of the Civil Code, there seems to be no distinction between the nature and/or gravity of the offence for which an arbitrator has been charged and convicted. It seems the presentment of a record of conviction of any crime would be sufficient to warrant disqualification for the purposes of Article 3340(1) of the Civil Code.

As a ground warranting disqualification, one also would wonder if legal interdiction (this would be consistent with capacity provisions of the Civil Code) may fit into the situation envisaged under Art. 3340(1). A legal interdiction signifies the circumstances in which the law withdraws from a person the administration of his property as a consequence of a criminal sentence passed on him[28] and penal laws determine the cases in which a person is to be considered as interdicted.[29] In our case, the relevant provision of The Criminal Code of the Federal Democratic Republic of Ethiopia 2004 is Article 123 and it provides:

[28] Civil Code, Article 380(1).
[29] Civil Code, Article 380(2).

Where the nature of the crime and the circumstances under which the crime was committed justify such an order and the criminal has, by his unlawful act or omission shown himself unworthy of the exercise of any of the following rights, the court may make an order depriving the offender of:

a) his civil rights particularly the right to vote, to take part in any election, or to be elected to a public office or office of honour, to be a witness to or a surety in any deed or document, to be an expert witness or to serve as an assessor; or

b) of his family rights particularly those conferring the rights of parental authority of tutorship or of guardianship; or

c) his rights to exercise a profession, art, trade or to carry on any industry or commerce for which a licence or authority is required.

In Article 3340(1) of the Civil Code, "conviction by a court" is not qualified as to whether the conviction must be coupled with the deprivation of the rights mentioned in Article 123 of the Criminal Code in which case it may have to be taken literally. If it is to be taken literally, it doesn't matter whether the criminal court that has convicted the arbitrator whose disqualification is being sought has gone further to find the previous criminal (the present arbitrator) to be unworthy of the exercise of his civil rights or may be to put it more aptly, to be appointed as an arbitrator.[30]

According to Article 3340(1) of the Civil Code, therefore, an arbitrator may be disqualified if the penalty or the measure pronounced in the judgment by which he has been convicted has been entered in police record in cases where such an entry is required by law and in accordance with the order relating there to.[31] Of course, the party seeking to disqualify the arbitrator should have had access to police record provided he meets the requirement of a person having a justified interest in them which again is determined by the law referred to in sub-article (1) paragraph (1) of Article 156 of the Criminal Code.[32]

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[30] If analogy is permissible, or there may be forwarded an argument that the rights enumerated under Article 123(a) of the Criminal Code are not exhaustive, then the right of being appointed as an arbitrator should, I think, come under that sub-article.

[31] Criminal Code, Article 156 (1).

[32] Paragraph (2) of Article 156(1) of the Criminal Code.

An arbitrator, can validly object to his being disqualified on the ground of criminal conviction if he had been re-instated and his conviction cancelled pursuant to Articles 232-237 of the Criminal Code. In general, it doesn't seem to be an easy task for a party to prove his allegation of the past criminal conviction of an arbitrator whom he is desirous of having disqualified. In the event that the party seeking the disqualification of an arbitrator on the ground of past criminal conviction fails to prove his allegation, it may be argued that the concerned arbitrator would remain on the tribunal. On the other hand, there is also the possibility of the arbitrator being removed from the tribunal and be replaced by another arbitrator immediately after an allegation of past criminal conviction has been tabled. The latter argument may be strong especially taking into consideration the time lost in proving and/or disproving past criminal conviction of an arbitrator whose disqualification is being sought.

c) Where an Arbitrator is of Unsound Mind

The other ground for disqualification of an arbitrator is if he/she is found to be a person of unsound mind. This generally expressed ground could, however, cause debate as to whether it refers to somebody who is notoriously insane or whether it's also applicable to a person who is mentally unbalanced. The law deems a person to be notoriously insane where by reason of his mental condition he is an inmate of a hospital or of an institution for insane persons or of a nursing home for the time for which he remains an inmate.[33] In the rural areas, i.e. in communes of less than two thousands inhabitants, the insanity of a person shall be deemed to be notorious, where the family of that person, or those with whom he lives, keep over him a watch requested by his mental condition and where his liberty of moving about is, for that reason, restricted by those who are around him.[34]

Where the case of an arbitrator whose disqualification is sought on the ground of being a person of "unsound mind" happens to be notorious, then the proof of his insanity might not, as such, cause difficulty thanks to the two Civil Code provisions above-mentioned i.e. Arts 341 and 342. It would be a matter of obtaining evidence as to the mental condition of the concerned arbitrator from a hospital, or an institution for insane persons or from a nursing home. If, on the other hand, the concerned arbitrator happens to be from the rural area,

[33]Article 341 of the Civil Code.
[34]Article 342 of the Civil Code.

evidence may be obtained from his commune (may be from his local Peasant Association or a Cooperative Society?).

On the other hand, if the insanity of the arbitrator one of the parties wants to have disqualified is not notorious, the proving of the "unsound" status of the concerned arbitrator's mind might not be very easy. In urban context, the situation might be such that the concerned arbitrator may have been, once in a while visiting a mental hospital or institution as an outpatient in which case there may be the possibility of obtaining medical evidence from the hospital or institution visited by the concerned arbitrator. On the other hand, if the concerned arbitrator has never been to a mental hospital or institution, but yet people in the community he lives and/or works regard him as a person of "unsound mind," then proving his mental condition might not be easy. Even in such circumstances, however, resort may be had to the Urban Dwellers' Association or Kebele Administration of the urban centre wherein the concerned arbitrator lives, or in rural communities to the concerned Peasants' Association and/or Cooperative Society. How far such non-medical evidence may be a conclusive proof to have an arbitrator disqualified on the ground of being a person of "unsound mind," however, becomes an issue by itself. Going back to the provisions of the Civil Code that deal with capacity, one notes that where the insanity of a person is not notorious, juridical acts performed by such a person may not be impugned by himself on the grounds of his insanity[35] unless he can show that at the time he performed them, he was not in a condition to give a consent free from defects.[36]

Subject to the exception in Articles 349 and 350 of the Civil Code, therefore, if a person whose insanity is not notorious cannot invalidate his acts, can a party to an arbitration proceeding have an arbitrator disqualified on the ground of the latter being of "unsound mind" where such "unsoundness" is not notorious? Is the phrase "unsound mind" equitable with insanity? Who is to determine the truth of the allegation that an arbitrator is a person of "unsound mind" to bring about the desired disqualification? Is it the tribunal itself? Should the request to have an arbitrator disqualified on the ground of his being a person of "unsound mind" be submitted to a court? These and similar other questions remain unanswered since there is no provision in the Code that addresses them.

d) Where an Arbitrator is Ill

[35] Article 347(1) of the Civil Code.
[36] Ibid. sub-article (2).

Pursuant to Article 3340(1) of the Civil Code, illness may also constitute a ground for disqualification of an arbitrator. As no indication as to what sort of illness may be taken as a valid ground to disqualify an arbitrator is given by the Code, it may possibly be said that any illness other than mental illness which is treated separately, and which has already been discussed above, may be taken as a ground for having an arbitrator disqualified. "Illness" as a ground to justify the disqualification of an arbitrator appears to be an even more awkward ground relative to "unsound mind" as a ground. To envisage the application of illness as a ground for disqualification, the situation may be such that the concerned arbitrator might want to continue to serve on the tribunal pretending that he is healthy but in actuality he is ill. This might sound unlikely but it may sometimes happen because of the fees to be paid to an arbitrator. The more likely imaginable circumstance in relation to illness would be where an arbitrator is no longer able to regularly appear for meetings of the tribunal or generally unable to discharge his responsibilities as a member of the tribunal. There may also be the possibility that the ailing arbitrator submitted a resignation letter to the tribunal and to the party that appointed him with the view to voluntarily trigger his being disqualified and being replaced by another. Application to have an arbitrator disqualified also may possibly be submitted by the party who appointed the ailing arbitrator in the circumstance where the concerned arbitrator struggles to continue to serve on the tribunal with the hope that he will soon get well and resume rendering the services expected of him.

In general, and as stated earlier on, illness as a ground for disqualification consists in situations where an arbitrator is not healthy and as result cannot attend the meetings of the arbitrators and moreover, the proceedings of the arbitral tribunal. If the tribunal cannot effectively continue to discharge its duties because of the non-appearance of one of the arbitrators due to illness, the procedure would be to adjourn the hearings and/or meetings may be once or twice.

Nevertheless, since it would definitely be detrimental and unfair to the parties if the resolution of their dispute is to be dragged indefinitely because of the illness of one of the arbitrators, it would become appropriate for the entitled party to apply to the tribunal or "another authority", where there is one, to have the ill arbitrator disqualified.

e) Where an Arbitrator is absent

To begin with, it is not clear whether "absence" in Article 3340(1) of the Civil Code is used in reference to failure to attend the arbitral proceedings and/or meetings of the arbitrators, or the technical legal circumstance where an arbitrator has disappeared and has given no news of himself for two years and hence is declared to be absent.[37] In any event, and despite lack of clarity in its meaning, "absence" is mentioned in Article 3340(1) of the Civil Code as one of the grounds to disqualify an arbitrator.

If the word "absence" in Article 3340(1) of the Civil Code is intended to cover the situations where the arbitrator fails to attend meetings and/or proceedings; then the absence could be due to mental illness or another type of illness that may suffice to cause disqualification. "Absence" if it is in relation to failure to attend meetings and/or proceedings could also be attributable to any other reason that debars an arbitrator from discharging his functions properly or within a reasonable time. In other words, the arbitrator could still be around but is unable to attend meetings and/ or proceedings regularly. Failure to attend just one very important preliminary meeting of the arbitrators may possibly result in having the absentee disqualified for the purposes of Article 3340(1) of the Civil Code unless the parties are convinced that the absentee arbitrator is kind of a key person for the resolution of their dispute and would accordingly wait and see if he could resume his functions soon.

On the other hand, if absence in Article 3340(1) is in reference to the technical legal situation covered by Articles 154-173 of the Civil Code, starting from the very first article., i.e. Article 154, there should at least be a lapse of time of two years since the last news about the person purported to be absent has been heard from him. After an application has been submitted to a court of jurisdiction, there will also, of necessity, be lapse of time, which probably would push the time until the final declaration of absence is made. The question would, therefore, be could parties to a dispute be patient enough to wait for longer than two years and until a declaration of absence is made to have the absentee arbitrator disqualified? The answer to this query should naturally, be in the negative. This is so simply because if parties should wait for longer than two years to have an absentee arbitrator disqualified; then arbitration process cannot but be taken as a means of speedy resolution of disputes. It, therefore, follows that "absence" in Article 3340(1) cannot be in reference to the declaration of absence at least with respect to the disqualification of an arbitrator appointed to resolve an existing dispute.

[37] Article 154(1) of the Civil Code.

However, there may be the possibility of the term "absence" used in Article 3340(1) in reference to the legal circumstances covered by Article 154-177 of the Civil Code if the arbitrator to be disqualified on the ground of "absence" was appointed to resolve a future dispute.

f) Any Other Reason That Renders an Arbitrator Unable to Discharge His Functions Properly or Within a Reasonable Time

Without prejudice to the grounds considered above, Article 3340(1) in its latter limb also recognizes "any other reason rendering an arbitrator unable to discharge his functions or within a reasonable time" to be a ground for disqualification. This latter limb of Article 3340(1) is so wide and may be taken as accommodating very many reasons. The following may be considered as few of the possible grounds that may fit into this last limb of Article 3340(1).

1. Detention and/or imprisonment. Where an arbitrator is imprisoned for sometime, this fact may be taken as a factor adversely affecting his ability to attend the arbitral proceedings and/or meetings of the arbitrators. The detention and/or imprisonment may be for a brief period of time. Nevertheless, however brief the period may be, it might still render the concerned arbitrator unable to discharge his functions within a reasonable time.

2. Fulltime engagement otherwise. Where an arbitrator is fulltime engaged otherwise, and is, as a result, unable to discharge his functions of being an arbitrator, this very situation may be taken as sufficient enough to constitute a ground for disqualification.

3. Insurmountable Personal and/or Family Problems. Where an arbitrator is faced with an insurmountable personal and/or family problem and is unable because of that to discharge his functions or within a reasonable time the situation in which the concerned arbitrator finds himself may be a sufficient ground to have him disqualified. Blanket as the last limb of the provisions of Article 3340(1) is, any reason, which could not be imagined now, may be invoked to have an arbitrator disqualified as long as the concerned arbitrator is totally unable to discharge his functions as an arbitrator because of that reason or though he may be able to discharge his functions, is unable to do so within a reasonable time because of the same reason.

g) Partiality of an Arbitrator

Unfortunately, the Civil Code doesn't provide the definition of partiality or impartiality. Nor does the Code provide any clue as to what circumstance or which factors constitute cases of partiality. We may, therefore, be forced to look elsewhere in order to be able to get some ideas as to what "partiality" may mean or those factors that constitute it. To begin with, "the concept of partiality may be concerned with the bias of an arbitrator either in favour of one of the parties or in relation to the issues in dispute"[38]. Partiality would be the state of mind, which is harboured by an arbitrator and which dictates the outcome of the proceedings so much so that the arbitrator whose impartiality is challenged would decide or propose to decide the case in front of him favouring the party to whom he is predisposed and naturally against the party about whom he is biased.[39] A partial arbitrator would be dictated by his bias instead of being led by his conscience and judgment in disposing of the case.

The impartiality of an arbitrator may also be challenged where an arbitrator exhibits prejudice against one of the parties to the dispute or one or more of the issues in the dispute. At the end of the day, however, both bias and prejudice may be taken as meaning the same thing, at least for the purposes of challenging the impartiality of an arbitrator.

An arbitrator who is personally interested in the outcome of a case in front of him or whose interests would be adversely affected by the outcome of the case may also be predisposed in such a way that his conducts would be telling that he is biased against one of the parties or one or more of the issues in the dispute.

In some respects, the partiality of an arbitrator may also be inferred from the conducts he openly exhibits in the course of the arbitral process. Clear and indubitable animosity, for example, of an arbitrator, presumably against one of the parties, may be a sufficient cause to challenge that arbitrator on the ground of partiality. For that matter, any improper conduct and detected improper motives exhibited by an arbitrator may also be taken as sufficient to challenge and possibly to warrant the disqualification of an arbitrator on account of impartiality.

Although the relationship an arbitrator has had or is currently having or may be contemplating of having in the future with one of the parties, primarily affects the independence of an arbitrator, in many instances, however, the bias

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[38] Redfern and Hunter, supra footnote # 18, p.171.
39 Ibid.3rd edition, 1999, Para. 4-52.

or prejudice or the partiality because of which an arbitrator may be challenged may also arise from relationships. In other words, the bias or prejudice an arbitrator may be accused of may simply be because of no other reason but the relationship between the challenged arbitrator and the party he tended to favour. According to Redfern and Hunter: "impartiality is a much more abstract concept than independence in that it involves primarily a state of mind which presents special difficulties of measurement."[40] Incidentally, impartiality is by far the most important ground for which an arbitrator may be disqualified since "justice must be beyond all suspicion as to the independence and impartiality of the judges, and this basic principle of justice in the court is no less fundamental in the case of justice administered by an arbitral tribunal."[41] Impartiality becomes even more glaringly important because of the general tendency of party-appointed arbitrator's misconception of his role as he "will approach the examination of the dispute with some prejudice in favour of the party who has appointed him and it may even happen that in some cases, especially if he is not a lawyer, he will conceive his role as that of an advocate rather than a judge"[42]. A party-appointed arbitrator, however, "is not a partisan."[43] Arbitration being a private mechanism of dispute settlement, it is, on the other hand, submitted that parties may want that their arbitral adjudication to proceed in sort of a partisan way. This may be achieved by the parties agreeing that "one arbitrator shall be an umpire and the other arbitrators as mere advocates and representative of the parties who have appointed them" [44] It is believed that parties are at liberty to do so and consequently, it would only be possible for them to challenge the impartiality of the umpire and they cannot raise that of the other advocate arbitrators. Professor David is of the opinion that partisanship in arbitration proceedings may still be tolerable but on condition an arbitrator avoids dishonesty:

> *It is fundamental that this should be done openly. A party cannot be prevented from choosing an arbitrator a person who will consider his case in a friendly way, but in this case it cannot be possible for the other party as well to designate an arbitrator a person devoted to his interest. What is unacceptable is concealment, which would result in the inequality of the parties. Also forbidden of course is dishonesty. As*

[40] Ibid. Para. 4-51
[41] David, Supra, footnote # 4 p. 252.
[42] Ibid. p. 253.
[43] Ibid. pp. 245-255.
[44] Ibid. P.255, quoting Martin Domke.

*M. Domke has said in respect to the partisan - arbitrator" **partisan he may be but not dishonest***[45]

Article 3340(2) of the Civil Code seems to indirectly recognize that an arbitrator appointed by one of the parties may be partisan to the party who appointed him by limiting the disqualification of an arbitrator for partiality and lack of independence[46] only applicable in respect of an arbitrator appointed by agreement between the parties or by an appointing neutral third party. In other words, what Article 3340(2) provides is that an arbitrator who is common to both parties should be impartial and independent. Such an arbitrator, it seems, could either be a sole arbitrator appointed either by the agreement of both parties or failing such an agreement by a third party usually referred to as an appointing authority. Or if there may have been an agreement reached between the parties that each of them appoints one arbitrator and the president be appointed by the two party-appointed arbitrators; then the latter, who as of right presides over the tribunal, may not be partial to one of the parties. He may be disqualified if there happens to be any circumstance capable of casting doubt upon his impartiality.[47] On the other hand, if the parties have agreed to have a tribunal of five arbitrators and they have managed to agree on three of them and for the appointment of the remaining two they designated a third party; the two arbitrators appointed by the designated appointer shall have to be impartial to the parties lest they be disqualified.

That the stand adopted by the Ethiopian legislature in this respect is a widely accepted view has been confirmed by Prof. David's statement:

> *If doubts may be entertained as to the party-appointed arbitrators, the situation is different in case of arbitrators designated otherwise; by an agreement between the parties or by the other arbitrators or by some third person. The arbitrator is then bound to be independent and impartial in the same manner as a judge. This principle is unanimously recognized; how it is implemented and guaranteed differs, however, from country to country.*[48]

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[45] Ibid., emphasis supplied

[46] See the discussion on pages 21 Et. Seq. infra, on "independence" , as a ground for disqualification.

[47] Article 3340(3) of the Civil Code separately and distinctly states that the grounds for disqualification applicable to other arbitrators do, as well, apply to the president of an arbitral tribunal.

[48] David, p. 255.

Whether a court-appointed arbitrator, be he a president of the tribunal or otherwise, may be subjected to the disqualification provisions and procedures of the Civil Code may be a matter of controversy. If a court may be treated as a "third party" in discharging its law-given responsibility of appointing an arbitrator, then it may be said that the provisions of Article 3340(2) of the Civil Code cover it. If on the other hand, the court's role in appointing arbitrators cannot be assimilated to that of a third party appointing authority or person, then the question as to whether or not a court-appointed arbitrator may be disqualified for partiality may arise. It appears to be a little awkward to assimilate an arbitrator-appointing third party of necessity designated by the parties as such with a court, which is there independent of the will of the parties. It, therefore, seems that a party seeking to avail himself of the arbitration agreement may resort to the court to have an impartial arbitrator appointed by a third party removed irrespective of whether or not such a right is spelt out in the arbitration agreement.

The issue as to whether or not a court-appointed arbitrator may be removed if he happens to be partial to one of the parties remains to be addressed. Accordingly, one may pose the queries: should a court-appointed arbitrator be subjected to the same procedure as party or third-party appointed ones for the purposes of being disqualified on the ground of partiality? Who is to remove a court-appointed arbitrator? Is it the party seeking to have him disqualified? The tribunal? Or the court that appointed him? These and similar other queries are yet to be ruled upon by courts in the future.

As is provided clearly under sub-article (3) of Article 3340 of the Civil Code, the president of an arbitral tribunal may be disqualified for the same reasons and by the same procedures that are applicable to the other arbitrators. If this is so, it should be taken as a clear indication that a president appointed by the party-appointed arbitrators either from among themselves or from outside is taken as a third-party appointed arbitrator. A court-appointed president's disqualification for partiality, however, is as stated above for non-president arbitrators a matter to be ruled upon in the future.

As has already been discussed, "a party may not nominate an arbitrator who is generally predisposed towards him personally or as regards his position in the dispute provided that he is at the same time capable of applying his mind judicially and impartially to the evidence and arguments submitted by both

parties".[49] We have also considered that the predisposition of an arbitrator towards the party who appointed him, does not apply to a presiding arbitrator who "must be, and be seen to be entirely neutral as well as impartial".[50]

h) Independence of an Arbitrator

Independence of arbitrators is a topic that is very much related to impartiality of arbitrators. Sometimes, the partiality of an arbitrator may be for no other reason but merely because of lack of independence on the part of the arbitrator that acted partially. Irrespective of the overlapping between impartiality and independence, however, it may be worthwhile to treat the topic of independence distinct from impartiality for a number of reasons. First, because, treating the question of independence is as important as treating impartiality and secondly because the Ethiopian Civil Code in Article 2240(2) treats the two separately and distinctly. Independence, in other words, is written as a ground separate from impartiality for the purposes of challenging arbitrators under Ethiopian law. In this regard, Redfern and Hunter opined:

> *The terms "independent" and "impartial" are not interchangeable. It would be possible, for instance, for an arbitrator to be independent in the sense of having no relationship or financial connection with one of the parties, and yet not impartial. He might have such strong beliefs or convictions on the matter in issue as to be incapable of impartiality. The converse can also be imagined of an arbitrator who is not independent of one of the parties (because he has some financial interest) yet who is perfectly capable of giving an impartial view on the merits of the case.*[51]

The Ethiopian Civil Code doesn't give any kind of hint as to which factors affect the independence of arbitrators. The Civil Code doesn't give the meaning of the word "independence" either. In fact, the only article of the Civil Code wherein reference is made to "independence" happens to be in Article 3340(2). In the face of lack of any provision of our law that at least explains what independence means, one would be circumstantially dictated to look for what is meant by independence, elsewhere. Redfern and hunter offered the following:

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[49] Redfern and Hunter, supra footnote # 18 p.171
[50] Ibid.
[51] Ibid. P.172.

There is both an objective and a subjective aspect to the question of independence, which is a less abstract concept than that of impartiality. Objectively, it is easy to see that a person should be precluded from acting as an arbitrator if he has a direct professional relationship with one of the parties; and still more, if he has financial interest in the outcome of the arbitration (through a shareholding, perhaps in a company which is a party to the dispute). Subjectively, the position is less simple to analyze.[52]

The same learned authors in the third edition of their book on the same subject wrote that "The concept of "dependence" is concerned exclusively with questions arising out of the relationship between an arbitrator and one of the parties, whether financial or otherwise. By contrast, the concept of "partiality" may be concerned with the bias of an arbitrator either in favour of one of the parties or in relation to the issues in dispute."[53] The following may be considered as situations signifying relations between a challenged arbitrator and one of the parties.

1. **Past Business Relation(s)**

It may be that one of the arbitrators in a tribunal of three or more arbitrators has had business relation with one of the parties sometime in the past. The relationship may have taken place some ten years back or a few weeks or days before the arbitral tribunal constituted, among others, by the arbitrator who is now being challenged. So, the pertinent query would be could the other party apply for the disqualification of the arbitrator who has had prior business relations with his opponent on the allegation that the relation is sufficient to constitute a circumstance capable of casting doubts upon the concerned arbitrator's impartiality? This query may be answered in the positive and it is regarded by renowned authors as "a special case where a party may wish to challenge an arbitrator is when he discovers that business relations have been or are entertained or likely to be entertained between the other party and the arbitrator."[54]

Professor David offered the following on business relations:

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[52] Ibid.
[53] Ibid. 3rd edition, 1999, Para. 4-54
[54] David, supra note # 4 p. 257.

[A] decision of the Supreme Court of the U.S.A given in 1968 has marked a reaction. The person appointed as a third arbitrator in this case in which one of the three arbitrators had four or five years previously given some advice to one of the parties as an engineer and for which he had received twelve thousand dollars, and the fact of which was not disclosed by him at the time of accepting his appointment was held by the U.S. Supreme Court as a sufficient ground for disqualification on the strength of the mere fact that he has previously had business relations with one of the parties and has derived some profit there from [55]

The problem of challenging of an arbitrator on the ground of business relations would be frequent in cases where the arbitrators are themselves, business men or as is usually called "commercial men."[56]

2. Existing Business Relations

Where one of the parties discovers that an arbitrator is currently having a business relationship with the other party, his opponent, whilst the arbitral process is in progress; for stronger reasons the situation may be a ground to challenge the arbitrator having such a relation. The widely known approach to avoid the disqualification or challenge of an arbitrator in this respect would be disclosure on the part of the concerned arbitrator. The expectation is that the concerned arbitrator, at the time of accepting his appointment as an arbitrator, should disclose the fact of his having business relation with one of the parties to both parties involved in the dispute to be adjudicated by arbitration. If the parties agree after such a disclosure, to still have him continue as an arbitrator, then they shall be regarded as having done away with their right to challenge the impartiality of the concerned arbitrator on the ground of having business relation with one of them.

3. Future Business Relations

If one of the arbitrators or in a sole arbitrator case, if the arbitrator is likely to entertain a future business relation with one of the parties, it may be a ground for the other party to challenge the independence of such an arbitrator. This

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[55] Ibid. P.258.

[56] Parties, very often in their agreement to arbitration, designate their arbitrators to be "commercial men" probably belonging to the same trade to which they themselves belong.

would, personally, consist in the belief that the challenged arbitrator would incline to favour the party with whom he is anticipating or hoping to have business relationship. It would, however, be difficult for the party wanting to avail himself of disqualification because of lack of proof of future business relation unless he is able to produce clear and tangible evidence as to the intention or plan of the arbitrator to have business relation with his opponent party.

It is not very clear as to what standard of proof would be required to show circumstances capable of casting doubt upon the impartiality and independence of an arbitrator. On the one hand, since the matter is civil, as opposed to criminal, it may be said that ordinary civil standard of proof would do. On the other hand, there is a mild form of crimination of an arbitrator whenever the impartiality of such arbitrator is challenged and hence his disqualification is sought by one of the parties. The disqualification of an arbitrator for fear of impartiality may be damaging to his future reputation and may have bearing on his being chosen as an arbitrator in the future after his impartiality has once or twice been challenged and he was disqualified as a consequence of that. Moreover, a controversial issue may arise because of the application of the phrase used in Art. 3340(2) i.e., ".... any circumstances capable of casting doubt upon his impartiality..." It is feared that the application of the said phrase might give rise to controversy because there is no clue as to whether the "circumstances capable of casting doubt" should necessarily and tangibly be in existence at the time of invocation of the challenge or, whether fear of impartiality and lack of independence may be proved by putting bits and pieces of apparent circumstances i.e., those circumstances which may be capable of indicating that the person whose disqualification is being sought might be impartial in disposing of the case submitted to him for adjudication. In other words, the scope of application of the crucial phrase in Article 2240(2) is not clear as to whether the "circumstances capable of casting doubts on an arbitrator's impartiality and lack of independence should be only those which constituted precise, relevant and well established or establishable ones or even those ones that are remote, uncertain or conjectural to have an arbitrator disqualified on the ground of impartiality.

4. Non-Business Relations

Other relationships other than business relationship may as well be the cause for disqualification of an arbitrator on account of lack of independence. Consanguinal or affinal relations between the arbitrator whose independence is being challenged and one of the parties, may very well constitute "a circumstance which is capable of casting doubt" upon the impartiality of an arbitrator. One of the arbitrators' having love affairs with one of the parties may possibly constitute a circumstance falling under Article 2240(2) and thereby become a ground for challenging the impartiality and independence of the concerned arbitrator.

5. Employer-Employee Relations

An arbitrator who may be having an employment relationship with one of the parties may be challenged on the ground of lack of independence. Although the focus generally is on an on-going employment relationship between the challenged arbitrator and one of the parties, it may sometimes be the case that past employment relationship that may have been brought to an end before the nomination of the challenged arbitrator may as well be a ground for challenging the independence of an arbitrator. If, in particular, the reasons for termination of the relationship has been such that there was no disagreement or misunderstanding between the parties; the ex-employee of one of the disputants in an arbitral process may still be inclined to favour his ex-employer. It may, as well, be that if the previous employment relationship was brought to an end in an unpleasant way to the ex-employee, it may constitute a bias against the former employer and hence a ground for him to challenge his ex-employee's but present arbitrator.

It is said that in an on-going employer-employee relationship between a party and an arbitrator, not only does such an arbitrator "have a financial interest in keeping his job, but he is also by definition, in a subordinate relationship to his employer."[57]

6. Lawyer - Client Relationship

According to the International Chamber of Commerce, a lawyer of one of the parties who has been appointed as an arbitrator may be challenged and "it is

[57] Craig, Park and Paulson, International Chamber of Commerce Arbitration, Paris, 1984, Part III, S. 13.05, p. 44

generally recognized that the regular counsel for one of the parties may not serve as an arbitrator in the absence of agreement to the contrary.[58]

Other than bias and/or relations, an arbitrator may be disqualified whenever there happens to be "any circumstance capable of casting doubt upon his impartiality and independence". In other words, the impartiality and/or independence of an arbitrator is not only affected where an arbitrator harbours a bias against one of the parties or where he has some kind of relation with one of the parties. As mention has already been made as regards the last limb of Article 3340(1), sub-article (2) of the Article is, in the same fashion, so wide and blanket. It may accommodate, **any circumstance**, which in any way, is capable of casting, even the slightest doubt, upon the impartiality or independence of an arbitrator.

Before finalizing our discussion on grounds of disqualification, it would be worthwhile to take a brief look at the proviso stated in Article 3341 of the Civil Code under the title of ***"demurrer"***. Article 3341 provides: "Unless otherwise provided, a party may seek the disqualification of the arbitrator appointed by himself only for a reason arising subsequently to such appointment, or for one of which he can show that he had knowledge only after the appointment." It is not clear whether the phrase "unless otherwise provided" refers to the provisions of the law or the stipulation of the parties. This writer believes that the phrase should be taken as referring to the agreement of the parties, if any, and not the provisions of the law. This is, it is believed, to be so primarily because of the fact that the proviso being imposed by the law cannot be excepted by another legal provision.

ii) Procedure for disqualification

Notwithstanding the fact that arbitration is a mechanism of private adjudication, the law has prescribed a procedure for disqualification of arbitrators. As we have already noted that that there are law-prescribed grounds for disqualification, the law clearly states that the party attempting to have an arbitrator disqualified must comply with the prescribed procedure. Per the provisions of Article 3342(1) of the Civil Code, first of all, the party seeking to have an arbitrator disqualified must file an application to the arbitration tribunal. Such party must file his application before the tribunal renders an award and as soon as he knew of the grounds for disqualification.

[58] Ibid.

Sub-article (2) of Article 3342 provides: "The parties may stipulate that the application for disqualification be made to another authority." And where there is such a stipulation, there has to be filed an application for disqualification to the designated authority before the tribunal renders an award.

The arbitration tribunal, or the designated authority, must rule on the application for disqualification by either granting the application by ruling that the concerned arbitrator is disqualified or deny the application by ruling to dismiss the request to have the concerned arbitrator disqualified. In the latter case, i.e., where the tribunal, or as the case may be, the designated authority, dismisses the application for disqualification, sub-article (3) of article 3342 provides that an appeal may be lodged within ten days as of the date of the ruling to a court of law against the denial.

B. Removal

Though it doesn't address "replacement" and the procedure to be followed in replacing arbitrators whose impartiality and independence has been successfully challenged, the Civil Code, however, addresses ***removal*** of arbitrators. The Civil Code in Article 3343 prescribes ***removal*** as a remedy in the event that an arbitrator who had accepted his or her appointment unduly delays the discharge of his/her duties. An interesting point worth noting in the provisions of Article 3343 is that the power to remove an arbitrator who unduly delays the discharge of his/her duties is primarily given to the authority designated by the parties. Article 3343 of the Civil Code doesn't leave any clue as to whether the authority envisaged therein is the one entrusted by the parties to appoint arbitrators; or a separate one with a special power to remove an arbitrator who unduly delays the discharge of his/her duties.

Article 3343 of the Civil Code also addresses the question: "who may apply to have an arbitrator who unduly delays the discharge of his/her duties removed"? Article 3343 does not provide that request of removal must be submitted by the "party availing himself of the arbitral submission." Neither does the Article provide that the right to have an arbitrator who unduly delays the discharge of his/her duties must be given to the party that appointed the concerned arbitrator. Quite logically, and with the view to assist the constitution of the arbitral tribunal, the lawmaker has given the right to apply to have an arbitrator removed to either one of the parties.

C. *Replacement*

An arbitrator, whether an umpire or otherwise, whose impartiality or independence has been successfully challenged must, naturally, be replaced by another arbitrator. The Civil Code does not address whether an arbitrator whose impartiality or independence has been successfully challenged stops discharging his duty all by himself or whether the court must remove him. Moreover, it is nowhere provided as to how an arbitrator whose impartiality or independence has successfully been challenged may be replaced. Expectedly, it seems that the legislator may have thought that the challenged arbitrator would stop discharging her or his duty after the challenging party has proved that the concerned arbitrator is either partial or not independent. However, in the circumstances that the arbitrator whose partiality or lack of independence had been proved doesn't, by him/herself stop discharging her or his duty as an arbitrator, then removal by the court upon the application of the challenging party seems to be inevitable. Though nothing has been provided for in the Civil Code as to replacement procedure, it may be argued that the procedure of appointment of arbitrators with all its ramifications may be repeated again when an arbitrator shall have to be replaced.

CONCLUSION

As it is in other private mechanisms of dispute resolution, arbitrators are primarily appointed by disputing parties. Parties may also enjoy the liberty of appointing their arbitrators long before a dispute arises between them, i.e., at the time they agree to submit their disputes to judges of their own choice as opposed to those ones appointed by the Sovereign.

Parties may, however, sometimes fail to agree on who may serve them as a sole arbitrator after having agreed that their dispute is to be adjudicated just by one arbitrator as opposed to having a tribunal of plural arbitrators. In the circumstances the parties have failed to agree on a sole arbitrator and didn't designate a third party to appoint the sole arbitrator, then the right to appoint the sole arbitrator shifts over to the court. What ought to have been exercised by the parties may also shift over to the court where the parties having agreed to have a tribunal of plural arbitrators and one of them, usually the party seeking to avail himself the arbitral submission, has appointed his arbitrator and the other party refuses to appoint his.

The party-appointed arbitrators in cases of collegial arbitrations usually appoint presidents or umpires or chairpersons of arbitral tribunals. Parties may also agree that the president of their arbitration tribunal be appointed by a third party designated by them for that purpose. In cases where the party-appointed arbitrators fail to agree on the would-be president of the tribunal, the right of appointing the latter may shift over to the court. The same applies where the third party entrusted with the appointment of the chair arbitrator fails to discharge his function.

A third party may also be called upon to appoint all arbitrators including an umpire where the parties may have, from the very beginning, agreed to entrust appointment of their arbitrators to a third party of their choice. This very often happens when there are neutral institutions that are capable of discharging such functions.

Arbitrators may be disqualified for a number of reasons enumerated by the Civil Code. They may be disqualified for voluntary as well as involuntary grounds the Code lists. Although the remaining grounds of disqualification are not, as such, unimportant, the independence and impartiality of arbitrators are, exceedingly much more important compared to the remaining grounds.