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JOURNAL OF ETHIOPIAN LAW

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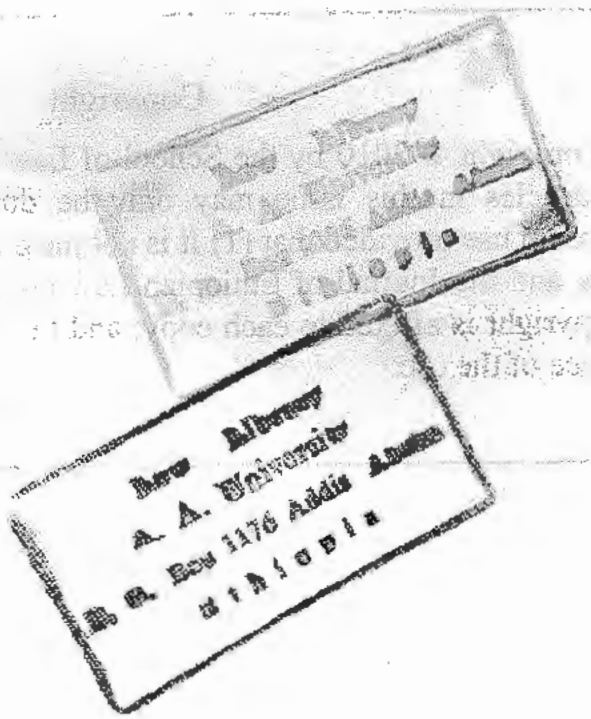

JOURNAL OF ETHIOPIAN LAW

The Journal of Ethiopian Law 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 3 pages). Selected letters will be edited with the cooperation of the author and published.

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Case Reports, Comments and Book Reviews

Book Review

David Turton (ed.), Ethnic Federalism: The Ethiopian Experience in Comparative Perspective (Eastern African Studies, James Currey, Ohio University Press and Addis Ababa University Press 2006, 246 pages)

Reviewed by Wondemagegn Tadesse

Editorial

It is trite to explain the relevance and importance of scholarly publications in expanding the frontiers of knowledge. The Journal of Ethiopian Law strives to publish writings that contribute to the dissemination of knowledge and the enrichment of the debate on the different aspects of the Ethiopian laws and legal system. All along the Journal combines theoretical and practical approaches to publish research articles that explain principles as well as commentaries on court cases that scrutinize the practice.

The research articles in this volume cover such wide-ranging subjects as insurance, speedy trial, employment of disabled persons, access to genetic resources and benefit sharing, and the criminalization and punishment of inchoate conducts and criminal participation under the anti-terrorism law of Ethiopia. This volume also contains three commentaries on court cases that focus on land use and mortgage, a note on the Ethiopian Arbitration and Conciliation Center, case reports and a book review.

I am pleased to announce that Dr. Assefa Fiseha (Associate Professor, Institute of Federalism& Legal Studies, Ethiopian Civil Service College) has joined the Editorial Board of the Journal as of July 2010. I thank Dr. Assefa and all members of the Editorial Board, the Editors and the Secretary for their efforts in the preparation and publication of the current volume. I also thank the following people who were referees for the research articles submitted for publication in the current volume: Abera Degefa, Aman Assefa, Belete Geda, Getahun Kassa, Hailu Nigatu, Kalkidan Negash, Mekete Bekele, Nuru Saaid , Mehari Redae, Samuel Asfaw, Sisay Alemahu, Dr. Solomon Ayele, Taddesse Lencho, Tewordros Mehret, Yonas Birmeta, and Wondemagegn Tadesse.

Girmachew Alemu (Ph.D.)
Editor-in-Chief

ዘካርያስ ቀነዓ*

መግቢያ

መብትና ግዴታ በስፋትና በጠባቡ ሊታዩ የሚችሉ ፅንሰ ሓሳቦች ናቸዉ። በዚህ ጽሑፍ ዉስጥ ግን መብትና ግዴታ ከሕግና ከዉል ረገድ ካላቸው ጠባብ ቴክኒካዊ ትርጉም አንፃር እንደሚታዩ ለአንባቢ ግልጽ ሊደረግ ይገባል።

መብትና ግዴታ ሁለት አብረው የሚሄዱ /ኮሪሌቲቭ/ ፅንሰ ሓሳቦች ናቸዉ። መብት ሲባል አንድ ሰው ከአንድ የተለየ ሌላ ሰው ወይም ባጠቃላይ ከአንድ ማሕበረሰብ ወይም ከአንድ ሕብረተሰብ ሊያገኝ የሚገባው ገንዘብ፣ አገልግሎት ወዘተ ሲሆን ባንፃሩ ደግሞ ለባለመብቱ እንዲደርሰው የሚፈለገውን ገንዘብ ወይም አገልግሎት ወዘተ የመስጠት የማቅረብ ግዴታ በዚያ በተለየ አንድ ሰው ላይ ወይም ባጠቃላይ በማኅበረሰቡ ወይም በሕብረተሰቡ ላይ እንደሚወድቅ እናያለን።

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መብትና ግዴታ ከሕግ ሳይሆን ከውል በሚመነጩበት ጊዜ የግድ አዛዥ የሕግ አንቀጾችን ሳይጥሱ ወይም ሳይቃረኑ መቋቋም እንዳለባቸው ግልጽ ቢሆንም ማስታወሱ ጠቃሚ ነዉ። በዚህ ረገድ የፍትሐብሔር ሕግ ቁጥር (ከዚህ በኋላ የፍ.ብ.ሕ.ቁ.) 1731/2/ ተዋዋይ ወገኖች ከውላቸው እንዲመነጩ የሚፈልጉትን መብቶችና ግዴታዎች አዛዥ የሕግ አንቀጾችን ሳይጥሱ ወይም ሳይቃረኑ እንደፈለጉ ማቋቋም ወይም መመሥረት እንደሚችሉ ይደነግጋል።

የዚህ ጽሑፍ ርዕስ የመድን ውል ተዋዋዮችን መብትና ግዴታ የሚመለከት ቢሆንም በኢትዮጵያ የንግድ ሕግ ውስጥ በዚህ ርዕስ ሥር ሊነሱ የሚችሉትን ጉዳዮች ሁሉ በእንደዚህ ዓይነቱ ውስን ጽሑፍ መዳሰስ አይቻልም። ስለሆነም ይህ ጽሑፍ የቃኛቸው በርዕሱ ውስጥ ሊጠቃለሉ ከሚችሉ ጉዳዮች ጥቂቶቹን ብቻ ያዉም በንግድ ሕጉ ዉስጥ በጠቅላላ ድንጋጌነት የሰፈሩትን መሆኑን አንባቢያን ከወዲሁ እንዲገነዘቡት ያስፈልጋል።

ተዋዋይ ወገኖች እነማን ናቸው?

ከመድን ሕግና ውል አኳያ "ተዋዋይ ወገኖች" ሲባል በአንድ በኩል የመድን ሽፋን እንዲሰጠው ለመድን ሰጪው አመልክቶ ማመልከቻው ወይም ጥያቄው ተቀባይነት

*ተባባሪ ፕሮፌሰር እና ተ/ዳን አዲስ አበባ ዩኒቨርስቲ፣ ሕግ ትምህርት ቤት

ያገኘ በሕግና በፖሊሲዎች ውስጥ መድን ተቀባይ ወይም መድን ገቢ የሚባለው ወገንና በሌላ በኩል የመድን ሽፋን ለመስጠት የተዋዋለው መድን ሰጪ ብቻ መስለው ሊታዩ የሚችሉ ቢሆንም በንግድ ሕጉ ውስጥ እንደተመለከተው "ወኪል" "ፈራሚ" "የመድን ውል የተላለፈለት ሰው" መድን የተገባለት ንብረት የተላለፈለት ሰው "ወራሽ" "ተጠቃሚ" ተብለው በተለያዩ ቁጥሮች ሥር በተለያየ አገላለጽ የተጠቀሱ ሌሎችም ምናልባት ከመብትና ግዴታ አንፃር ከመድን ገቢዎች ጋር የሚደመሩ ሰዎች መኖራቸውን እንመለከታለን። በዚሁ መሠረት በንግድ ሕጉ የመድን ድንጋጌዎች ባብዛኞቹ ላይና በፖሊሲዎች ላይ መድን ገቢ፣ ተጠቃሚ፣ የመድኑ ውል ባለቤት ወዘተ በሚል አጠራር የተመለከቱት የሚናገሩት ያው ስለመድን ገቢ መሆኑን መረዳት ጥሩ ነው።[1]

የተዋዋይ ወገኖች መብትና ግዴታ ከውሉ ምሥረታ ጋር በተያያዘ

የመድን ውልን ምሥረታ በሚመለከት ምንም እንኳን የመድን ውል ልዩ ውል ቢሆንምና የንግድ ሕግ ቁጥሮች 654-712 በልዩነታቸው በቅድሚያ ተፈፃሚ ቢሆኑም በፍ.ብ.ሕ.ቁ.1676/1/ እና /2/ መሠረት የመድን ውሎችም ጠቅላላ ውሎችን በሚመለከቱ የፍትሕብሔር ሕግ ድንጋጌዎች ይገዛሉ። በመሆኑም የውል አቀራረብና አቀባበልን የሚመለከቱ የፍትሕብሔር ሕጉ ድንጋጌዎች፣ እንዲሁም የተዋዋይ ወገኖች የችሎታ፣ በውል ለመገደድ ፈቃዳቸውን በነፃ የመስጠት፣ የውሉ ጉዳይ ማለትም የተዋዋይ ወገኖች ግዴታዎች ጥርት ባለ ሁኔታ መመልከት፣ የተዋዋይ ወገኖች ግዴታዎች የሚቻሉ፣ ሕጋዊና ከንብረተቡ የሞራል ሕግ ጋር የማይጋጩ፣ እንደዚሁም ውሉ ሕግ በሚያዘው ፎርም[2] መሠረት የተቋቋሙ መሆን እንዳለባቸዉ ስናስተውል፣ ከነኚህ በሕግ ፊት የፀና ውል እንዲቋቋም አስፈላጊ ናቸው ተብለው ከሚወሰዱት ነገሮች ያንደኛው አለመሟላት አንድን የመድን ውል በፍ.ብ.ሕ.ቁ. 1808 እና ተከታታዮቹ ቁጥሮች መሠረት ፍርስ ወይም ፈራሽ ሊያደርገው ይችላል።

በንግድ ሕግ ቁጥር (ከዚህ በኋላ ን.ሕ.ቁ.) 654/1/ እንደተመለከተው የመድን ውል ማለት፣

- ኢንሹራንስ /መድን/ ሰጪ የሚባለው /ወገን/፣

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[1] ከሕይወት መድን አኳያ "ተጠቃሚ" የሚለው ቃል "beneficiary" የሚለው የእንግሊዝኛ ቃል ትርጉም ሆኖ በጠባቡ መወሰዱን መገንዘብ ያስፈልጋል።

[2] በን.ሕ.ቁ.657/1/ መሠረት አንድ የመድን ውል የመድን ውል ፖሊሲ በሚል ጽሑፍ መደገፍ አለበት። የን.ሕ.ቁ.657/2/ እንደሚደነግገዉ አንድ የመድን ውል ፖሊሲ ሊሻሽልም እንደዚሁ "ተጨማሪ ጽሑፍ" /endorsement/ በሚባል ጽሑፍ መሆን አለበት። ተጨማሪ ጽሑፍ እስከሚፈረም ድረስ መድን ሰጪው ጊዜያዊ የመድን ሽፋን መስጠቱን የሚያረጋግጥ የጽሑፍ ውልም ሊሰጥ እንደሚችል በን.ሕ.ቁ. 657/3/ ላይ ተመልክቷል። በን.ሕ.ቁ. 657/3/ የሚሠጠው ሰርቲፊኬት በሌሎች አገሮች "Cover note" የሚባለው መሆኑ ነው።

- በአንድ ጊዜ ወይም ስለአከፋፈሉ በተስማሙት መሠረት ከአንድ ጊዜ በላይ እንዲከፈል የተመደበውን አረቦን /ፕሪሚዬም/ ተቀበሎ፣
- በውሉ የተመለከተው አደጋ ወይም ቀን፣ ወይም ኃላፊነት በደረሰ ጊዜ፣
- መድን ለገባው ሰው ወይም ለተጠቃሚው ወይም የመድን ውል መብት ለተላለፈለት ሰው በውሉ የተመለከተው የኃላፊነት ጣሪያ እንደተጠበቀ ሆኖ በደረሰው ጉዳት ልክ ካሣ ወይም በውሉ የተመለከተውን ገንዘብ ለመክፈል ግዴታ የሚገባበት ውል ሲሆን፣

የውሉን ጉዳይ (object of the contract) ለይተን ለማውጣት ብንሞክር በመድን ሰጪው በኩል ስምምነት የተደረገበትን አረቦን (premium) የማግኘት ጉዳይ ሲሆን በመድን ገቢው በኩል ደግሞ የተፈራው አደጋ ወይም ጊዜ ወይም ኃላፊነት ሲደርስ የመካስ ወይም የተመለከተውን ገንዘብ የማግኘት ፍላጐት ሆኖ እናገኘዋለን።

በዚሁ መሠረት መድን ሰጪው ዋስትና ሊሰጥበት እየተዋዋለ ያለውን የአደጋውን (risk) መጠንና ሁኔታ አመዛዝኖ በስሌት የደረሰበትን አረቦን የመቀበል መብት ሲኖረው፣ መድን ተቀባዩም ይህንኑ የመክፈል ግዴታ ይወድቅበታል።

ምንም እንኳን በን.ሕ.ቁ. 659/1/ መሠረት አንድ የመድን ውል ተቃራኒ ስምምነት ከሌለ ውጤት መስጠት የሚጀምረው ፖሊሲው ከተፈረመበት ጊዜ ጀምሮ ቢሆንም በዚሁ ቁጥር ንዑስ ቁጥር /2/ መሠረት የመድን ውል ተፈፃሚነቱ የሚጀምረው የመጀመሪያው መደብ አረቦን ሲከፈል ነው ብሎ መዋዋል እንደሚቻል ተመልክቷል። ይህ ሊሆን የሚችለው መድን ሰጪው እንዲከፈለው ያለሳው አረቦን ወይ ከአንድ ጊዜ በላይ እንዲከፈል ማለትም ተቆራርጦ እንዲከፈል ስምምነት ሲደረግ ወይም ውሉ ፀንቶ ለሚቆይበት ለመጀመሪያው የስምምነት ጊዜ /ዕድሳትን ሳይጨምር/ የሚከፈል አረቦን ሲሆን ነው።

በን.ሕ.ቁ. 659/2/ መሠረት የተፈረመው የመድን ውል ፖሊሲ የመጀመሪያው መደብ አረቦን እስኪከፈል ተፈፃሚነቱን ለማዘግየት መዋዋል አንዳንድ አስራካሪ ውጤቶችን ሊያስከትል እንደሚችል ይገመታል። ይኸውም በአንድ በኩል የመድኑ ውል ፖሊሲ ተጽፎ ከተፈረመ በኋላ መድን የተገባለት አደጋ ቢደርስ መድን ገቢው መካስ ይገባኛል ብሎ መጠየቅ ይችል ይሆን? የሚለውን ጥያቄ ሲያስነሳ በሌላ በኩል ደግሞ የመድኑ ውል ፖሊሲ ቢፈረምም ተዋዋዮቹ ተፈፃሚነቱ የሚጀመረው የመጀመሪያ መደብ አረቦን ሲከፈል ነው ብለው በመስማማት የመድን ፖሊሲውን ተፈፃሚነት አግደውታልና አረቦኑ ተከፍሎ እገዳው እስከሚነሳ ድረስ ውሉ ቢመሠረትም በተዋዋይ ወገኖች ላይ ውጤት አይኖረውም ማለት ይቻላል።

በሕግ ረገድ ይህ ዓይነት ስምምነት በሁኔታ መስማማት ነው ተብሎ ሊወሰድ የሚችል ሲሆን በፍ.ብ.ሕ.ቁ.1871 ላይ እንደተመለከተው አንድ ውል የማቆያ ሁኔታ ተጨምሮበት የተመሠረተ እንደሆነ የውሉ ተዋዋይ ወገኖች ሌላ ተቃራኒ

ሃሳብ ካልገለፀ ውሉ ውጤት ማግኘት የሚጀምረው ማቆያ ሁኔታው ከሚፈፀምበት ቀን ጀምሮ እንደሚሆን ተደንግጓል። በን.ሕ.ቁ. 659/2/ ሥር ሠፍሮ የሚገኘውም አባባል የማቆያ ሁኔታን የሚመለከት ሆኖ መድን ሰጪውና መድን ተቀባዩ የርሱን ዓይነት ሁኔታ አስገብተው ከተዋዋሉ ውላቸው ሁኔታው እስከሚፈፀም ድረስ ውጤት መስጠት እንደማይጀምር መገንዘብ ቀላል ነው።[3]

በውሉ ምሥረታ ጊዜ በፖሊሲው ላይ ወይም በን.ሕ.ቁ. 657/3/ መሠረት በተሠጠ በጊዜያዊ የመድን ሽፋን ማረጋገጫ ምስክር ወረቀት ላይ የመድን ሰጪው ግዴታ ቢጠቀስም የርሱ ግዴታ ተፈፃሚ የሚሆነው በውሰታው ላይ የተመለከተው አደጋ፣ ኃላፊነት ወይም ጊዜ ሲደርስ ብቻ ነው። የመድንን ውል ልዩ ከሚያደርጉት ጠባዮች አንዱ ውሉ በመድን ተቀባዩ ላይ ከአረቦን ክፍያ አኳያ ወዲያውኑ ተፈፃሚ የመሆኑ ጉዳይ ሲሆን ለመድን ሰጪው ግን ተፈፃሚነቱ የመድን ሰጪውን ኃላፊነት የሚያስቀሩለት ምክንያቶች እንደተጠበቁ ሆነው በውሉ ላይ የተመለከተው አደጋ ወይም ኃላፊነት ወይም ጊዜ ሲደርስ ብቻ ነው።[4]

ስለዚህ በመድን ሰጪው በኩል በውሉ ምሥረታ ጊዜ የሚፈለግበት ግዴታ ባጠቃላይ አነጋገር የተፈራው አደጋ ሲደርስ ወይም በውሉ የተነገረው ጊዜ ሲሞላ ወይም ኃላፊነት ሲመጣ እክስሃለሁ ብሎ ቃል መግባት ነው ለማለት ሲቻል[5] መድን ገቢው ግን ሌሎች በውሉ ምሥረታ ጊዜ ወይም እንደሁኔታው ከምሥረታው በፊት የሚወድቅበትን ግዴታዎች ከዚህ ቀጥለን እንመለከታለን።

የመድን ሰጪውን የአደጋ አስተያየት የሚለውጡበትን ሁኔታዎች /ፍሬ ነገሮች/ መረጃዎች ስለማስታወቅ

ከመድን ውል ልዩ ጠባዮች መካከል አንደኛውና ምናልባትም ዋነኛው ተብሎ ሊጠቀስ የሚገባው ስለፍፁም ቅን ልቡና ጉዳይ ነው። የመድን ውል በሁለቱም ተዋዋይ ወገኖች ቅን ልቦና ላይ በተለይም ደግሞ በመድን ገቢው ፍፁም ቅን ልቦና ላይ የሚመሠረት ውል ነው።

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[3] አንድን የመድን ውል በን.ሕ.ቁ. 659/1/ ሥር በተዓፈው ዓይነት የማቆያ ሁኔታ አድርጐ መዋዋሉ ግን በተግባር ላይ አንዳንድ ችግሮችን ሊያስነሣ ይችላል። ጎላ ብሎ የሚታየው የመድን ውል ፖሊሲ ዛሬ ተፈርሞ ውጤት መስጠት የሚጀምረው ግን የመጀመሪያ መደብ አረቦን ሲከፈል ከሆነ የአረቦኑ መከፈል ውሉን ከተፈረመበት ጊዜ ጀምሮ ውጤት እንዲሰጥ ያደርገዋል? ወይንስ አረቦኑ ከተከፈለበት ጀምሮ ወደፊት? የሚለውን ጥያቄ ያስከትላል።

[4] Henry vance, Handbook of the Law of Insurance, በተሰኘዉ መጽሐፉ West Publishing Co. (1951) pp. 94-95 የሚከተለዉን አስቀምጧል: "A contract of insurance is executory and conditional. It is executory on the part of insured and conditional as regards the insurer."

[5] ይህን ስንል ግን መድን ሰጪው ከሥራው ተግባር የተነሳ ስለተፈራው አደጋ የደረሰው መረጃ ካለ ለመድን ገቢው የማሳወቅ ግዴታ የለበትም ማለት አይደለም። እ.ኤ.አ. በ1987 ላይና ከዚያም ወዲህ የፍጹም ቅን ልቡና ግዴታ በሁለቱም የመድን ውል ተዋዋዮች ላይ ተፈጻሚ መሆኑ ተረጋግጧል።

የመድን ኢንዱስትሪ እጅግ በጣም በዳበረበት በእንግሊዝ አገር ከጥንት ጀምሮ ማለትም እ.ኤ.አ. ከ1766[6] ጀምሮ የመድን ውል የቅን ልቡና ውል መሆኑ የታወቀ ሲሆን በየዘመናቱ ይኸው አስተሳሰብ ሲጠናከር የቆየበት አገር ነው ። አንዱ ታዋቂ የመድን ሕግ ምሁር እንዲህ ይላሉ፦

> The Law Relating to contracts of insurance is part of the general law of contracts. Contracts of insurance are, however, a species of that speeial class of contract, contracts of utmost good faith. Special rules therefore apply in insurance law relating to non-disclosure and misrepresentation which differ from the rules applicable to contracts generally. Otherwise there is no principle in insurance law which is repugnant to the ordinary principles of the Law of contracts.[7]

/የመድንን ውል የሚመለከተው ሕግ የጠቅላላ ውል ሕግ አንዱ ክፍል ነው። ሆኖም ግን የመድን ውሎች ልዩ ከሚባሉት የውል ዝርያዎች አንዱ ሆነው "የፍፁም ቅን ልቡና ውሎች" ከሚባለው ክፍል የሚመደቡ ናቸው። በመሆኑም የመድን ውሎችን በሚመለከት ከሌሎች ውሎች በተለየ አኳኋን ተፈፃሚ የሚሆኑ መደበቅን (መሸሸግን) እና ሐሰተኛ መግለጫን የሚመለከቱ ደንቦች አሉ። በተረፈ በመድን ሕግ ውስጥ ከሌሎች ከማናቸውም ተራ የውል መርሆችና ደንቦች ጋር የማይጣጣም መርህ የለም።/

ትርጉም የፀሐፊው/ ነው።

ሌላ በመድን ሕግ ላይ የጻፉ እንግሊዛዊ ምሁር የሚከተለዉን ያስረዳሉ፦

A Contract of insurance is the primary example of the class of contracts <u>*uberrimae fidei*</u> that is of the utmost good faith. As a result, the parties to it are bound to volunteer to each other before the contract is concluded information which is material to the risk.[8]

/የመድን ውሉ የፍፁም ቅን ልቡና ተብለው ከሚመደቡት መካከል ዋነኛው ምሣሌ ነው። ከዚህም የተነሣ የውሉ ተዋዋይ ወገኖች ውሉ ከመመሥረቱ በፊት አንዱ ለሌላኛው ሰለተፈራው አደጋ መረጃ ለመሰጠት ይገደዳል

/ትርጉም የፀሐፊው/ ሲሉ ሌሎችም በርካታ ፀሐፊዎች ስለመድን ውል የፍፁም ቅን ልቡና ውልነት በሰፊው አትተዋል።[9]

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[6] Carter V Boehm (1766) 3 Burr. 1905.

[7] Raoul Collinvaux, <u>the Law of Insurance 5th</u> ed ,Sweet & Maxwell, London, 1984 p.11

[8] John Birds, <u>Modern Insurance Law</u>, Sweet & Maxwell, London, 1982,p.83

[9] ለምሣሌ፦ E.R. Hardy Ivamy, <u>Principles of Modern Insurance Law 4th</u> ed., Butterworths & Co., (Publishers) Ltd., London, 1986 p. 119 et seq., Merkin and McGee, <u>Insurance Contract Law</u>, Kluwer, London, 1988. (et.passim).

በአዲስ አበባ ዩኒቨርስቲ የሕግ ፋኩልቲ የመድን ሕግ መምህር የነበሩት ብሩን ኦቶ ብሪዴም ባጠቃላይ የንግድ ሕጉ ከፍትሕብሔር ሕጉ ጋር ተዛምዶ መታየትና መነበብ እንዳለበት ካወሱ በኋላ ለምሳሌ ያህል ስለመድን ውል ምሥረታ ብለው በመቀጠል የፍ.ብ.ሕ.ቁ. 1678 በሁሉም ውሎች ላይ ተፈፃሚ ነው። ለሁሉም ውሎች አስፈላጊ ተብለው በዚህ ቁጥር ሥር ከተጠቀሱት ሁኔታዎች ውስጥ የችሎታ ጥያቄ የሚዳኘው በፍትሐብሔር ሕግ ነው፣ የፈቃድ ጉዳይም ከሞላ ጐደል እንደዚሁ ሲሆን፣ ነገር ግን የን. ሕ. ቁ. 667 እና 668 ከፍትሐብሔር ሕግ ድንጋጌ የበለጡ ተንኮልንና ስሕተትን የሚመለከቱ ደንቦችን ያስቀምጣሉ በማለት ያስረዳሉ።[10]

የን.ሕ.ቁ. 667 በኢትዮጵያ የመድን ሕግ ውስጥ የቅን ልቡናን ግዴታ በመድን ገቢው ላይ ሲጥል ከዚህም አኳያ ውሉን በሚዋዋልበት ጊዜ ኢንሹራንስ ሰጪው ኃላፊነት የሚወስድባቸውን አደጋዎች ለመመዘን የሚያስችሉትን ማናቸውንም ሁኔታዎች በትክክል መግለጥ አለበት ሲል ይደነግጋል።

ምንም እንኳን ሙሉ በሙሉ ትክክል ነው ለማለት ባያስደፍርም[11] በመድን ሥራ ሠፊ ልምድ ባላቸው አገሮች እንደሚታመነው በን.ሕ.ቁ. 667 ሥር የተፃፈው ግዴታ መሠረቱ የሚከተለዉ አስተሳሰብ ነዉ፦

> The underwriter knows nothing and the man who comes to him to ask him to insure knows everything, it is the duty of the assured, the man who desires to have a policy, to make a full disclosure to the underwriter without being asked of all the material circumstances, because the underwriter knows nothing and the assured knows everything. That is expressed by saying that it is a contract of utmost good faith *uberrimae fides*[12]

/መድን ሰጪው የሚያውቀው ምንም ነገር የለም። መድን እንዲሰጠው ለመጠየቅ የሚመጣው ሰውዬ ግን ሁሉን ነገር ያውቃል፣ በመሆኑም ይህ መድን እንዲሰጠው የሚፈልገው መድን ገቢ አስፈላጊና ጠቃሚ የሆኑትን ሁኔታዎችና መረጃዎች ሳይጠየቅ ለመድን ሰጪው በሙሉ የመግለጽ ግዴታ አለበት። ምክንያቱም መድን ገቢው ሁሉን ነገር ያውቃል፣ መድን ሰጪው ግን የሚያውቀው ምንም ነገር የለም። ይህም የመድን ውል የፍጹም ቅን ልቡና ውል ነው። ፍጹም ቅን ልቡና በሚል አገላለጽ ይጠቃለላል። /ትርጉም የፀሐፊው/

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[10] Brun Otto Bryde. Insurance Law, unpublished, Faculty of Law, Haile Selassie I University, (1983), p.104.

[11] መድን ገቢው የሚያውቃቸውን ወይም ማወቅ ይገባዋል ሊባሉ የሚችሉትን ፍሬነገሮች /facts/ መድን ሰጪውም ሊያውቃቸው ይችላል። በተለይም ከመድን ሰጪው ሙያ አንፃር ሊያውቃቸው ይገባል የሚባሉት ፍሬነገሮች ቁጥራቸው በርካታ ሊሆን እንደሚችል ይገመታል። እንደዚሁም ማንም ሰው የሚያውቀውን ፍሬነገር መድን ገቢው አልገለፀም ተብሎ ክርክር ሊቀርብበት አይገባም።

[12] Rozan V Bowen (1982) 32 LIL Rep. 98 at 102

እንግዲህ በን.ሕ.ቁ. 667 ሥር የሠፈረው አባባልም የመጣው መድን ስለሚገባለት ንብረት፣ ሰው ወይም አደጋ የሚያውቀው መድን ጠያቂው ነው ከሚል እምነት ነው ቢባል ስሕተት አይመስለኝም።

በን.ሕ.ቁ. 667 መሠረት መድን ገቢው መግለጽ የሚገባው ሁሉንም መድን የሚጠየቅለትን ንብረት፣ ወይም ሰው፣ ወይም አደጋ የሚመለከቱትንና እርሱ የሚያውቃቸውን ፍሬነገሮች ቢመስልም ነገር ግን መወሰድ ያለበት በመድን ጠያቂው በኩል መገለጽ ያለባቸው ፍሬነገሮች መድን ሰጪው ኃላፊነት እንዲወስድባቸው የሚፈለጉትን አደጋዎች ለመመዘን የሚያስችሉትን ማናቸውንም ፍሬነገሮችን[13] ነው እንጂ ሁሉንም መድን ገቢው የሚያውቃቸውን ፍሬነገሮች አይደለም።

እንደ ኤዉሮፓ አቆጣጠር በ1906 ዓ.ም. በወጣዉ የእንግሊዝ ማሪን ኢንሹራንስ አክት በአንቀጽ 18(2) እና 20(2) መሠረት የአደጋ መመዘኛ ፍሬነገር ማለት፦ "Any fact which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk"[14] ነዉ። ይህ በግርድፉ "ያደጋ መመዘኛ ፍሬነገር ማለት ማንኛዉም አንድ አመዛዛኝ መድን ሰጪ የሚያስከፍለዉን አረቦን ወይም መድን ሽፋን በመስጠት ሓላፊነትን የሚወስድበትን አደጋ የሚመለከት ፍሬነገር ማለት ነዉ" ተብሎ ሊተረጎም ይችላል።

በኢትዮጵያ የመድን ሕግ ውስጥ የትኞቹ ፍሬ ነገሮች አስፈላጊና ዋነኛ የአደጋ መመዘኛ ፍሬነገሮች (material facts) ሊባሉ እንደሚችሉ በግልጽ የተሰጠ ትርጓሜ ወይም ማብራሪያ የለም። የንግድ ሕጉ ሲረቀቅ በነጊህ በን.ሕ. ቁ. 667 እና 668 በስተጀርባ የነበረዉን አስተሳሰብ ፒተር ዊንሺፕ ጠቅለል አድርገዉ እንደሚከተለዉ ይገልጹታል፦

> On the question of facts concealed and false statements, I have included the more nuanced sanctions found in the French law rather than the solutions set out in the Maritime Code, which are perhaps too rigorous.[15]

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[13] በመሠረቱ አንድ መድን ገቢ መግለጽ የሚጠበቅበት ፍሬነገሮችን (facts material, material facts)እንጂ የመድን ገቢዉን የግል አስተያየት(opinion)አለመሆኑን አንባቢ ልብ ሊል ይገባል። ለአንዳንድ የመድን ዉሎች ምናልባት የመድን ገቢዉ አስተያየት ሊጠየቅ ወይም ሊፈለግ ይችል ይሆናል። ይህ በሚሆንበት ጊዜ መድን ገቢዉ በሚሞላዉ ፎርም መጨረሻ ላይ የማዉቀዉንና የማምነዉን ያህል በፎርሙ ላይ የሰጠሁት መረጃ ትክክል ነዉ ከማለት በስተቀር ለሰጣቸዉ መረጃዎች ትክክለኝነት ማረጋገጫ ወይም ዋስትና ሊሰጥ አይችልም። በተጨማሪም አንባቢ ከዚህ በታች በግርጌ ማስታወሻ ቁ. 7 ላይ የተጠቀሰዉን መጽሃፍ ከገጽ 98-101 እንደዚሁም ገጽ 104 እና 140ን ይመልከት።

[14] Sections 18(2) and 20(2) of the English Marine Insurance Act of 1906

[15] Peter Winship, (editor and translator) Background Documents of the Ethiopian Commercial Code of 1960, Faculty of Law , Haile Selassie I University, Addis Ababa, 1974 p. 83

የተሸሸጉ እና በትክክል ያልተገለጹ ፍሬነገሮችን ጥያቄ በተመለከተ በባሕር ሕግ ዉስጥ የተካተቱትን ጠበቅ ያሉ መፍትሔዎችን ከመዉሰድ ይልቅ በፈረንሳይ ሕግ ዉስጥ የሚታዩትን ረቀቅ ብለዉ ላላ ያሉትን የማስገደጃ ስልቶችን አካትቻለሁ (ትርጉም የፀሓፊዉ)።

በኢትዮጵያ የባሕር ሕግ ቁጥር 300 ላይ "ስላለመግለጽና አለተኛ መግለጫ ስለመስጠት" በሚል ረዕስ የሚከተለዉ ተደንግጓል፦

(1) ኢንሹራንስ የገባዉ ሰዉ ሳይገልጽ መቅረቱ ወይም አለተኛ የሆነ መግለጫ መስጠቱ ምንም እንኳ በማታለል መንፈስ የተደረገ ባይሆን ለመድረስ በሚያስጉ አደጋዎች (ሪስክ) ላይ ኢንሹራንስ አድራጊዉ ያለዉን አስተያየት የሚቀንሱ ከሆኑ የኢንሹራንሱን ዉል የሚያፈርሱ ናቸዉ።
(2) ሳይገለጽ መቅረቱ ወይም በሃሰት የተሰጠዉ መግለጫ ኢንሹራንስ በተደረገለት ዕቃ ላይ ለደረሰዉ ጉዳት ወይም መጥፋት ምክንያት ሆኖ ባይገኝም እንኳ የኢንሹራንሱን ዉል ፈራሽ ነዉ።
(3) ኢንሹራንስ የተደረገለት ሰዉ የማታለል ሃሳብ አሳይቶ እንደ ሆነ በኢንሹራንስ የተከፈለዉ ዋጋ (ፕሪሚየም) በሞላዉ የማታለል መንፈስ የሌለ እንደሆነ በግማሽ የኢንሹራንስ አድራጊዉ ገንዘብ እንደሆነ ይቀራል።

በእርግጥም በባሕር ሕጉ ላይ የተደነገገዉ ጠበቅ ያለ መመዘኛ ነዉ። መመዘኛዉ ለመድን ሰጪዎች ጥሩ ሊሆን ሲችል ለመድን ገቢዎች ግን ከበድ ያለ ዉጤት ይኖረዋል። የባሕር ሕጉ ድንጋጌ ጠበቅ ያለ ስለመሆኑ በተለይም በእንግሊዝኛ ቅጂ ላይ በግልጽ ይታያል።[16]

ወደ ንግድ ሕጉ ስንመለስ በቁ. 667 ሥር የተመለከተውና "መድን ሰጪው ዋስትና እንዲሰጥባቸው የሚፈለጉትን አደጋዎች ለመመዘን የሚያስችሉትን ማናቸውንም ፍሬነገሮች" የተሰኘው አባባል በኢትዮጵያ ሕግ የማቴሪያሊቲ (ያደጋ መመዘኛ ፍሬነገሮች) መለኪያ ነው ተብሎ ሊወሰድ ይችላል።

በን.ሕ.ቁ. 668 /1/ ሥር "እውነተኛው ነገር ተገልጾለት ቢሆን ኖሮ ኢንሹራንስ ሰጪው ይህን ውል አይዋዋልም ወይም ተጠቃሚው ከፍ ያለ ገንዘብ እንዲከፍል የሚያደርግበት ውል ይዋዋል ነበር እስከሚያስኝ ድረስ እነኚህ የተሸሸጉ ነገሮች ወይም በሐሰት የተሰጡ መግለጫዎች የመድን ሰጪውን አስተያየት ለውጠውበት እንደሆነ ነው ..." ተበሎ የገባውም አባባል እንደ ማቴሪያሊቲ መመዘኛ ሊወሰድ ይችላል።

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[16] Sub-article (1) of Art. 300 of the 1960 Maritime Code of Ethiopia provides: "Any concealment or misrepresentation on the part of the assured, by which the risk insured has been underestimated, shall result in the cancellation of the policy, even in the absence of fraud"

ይህንንም ለማለት የሚያስችለው ተደበቀ ወይም በሐሰት ተገለፀ የሚባለው ፍሬነገር ማንኛውንም መድን ገቢው የመድን ሽፋን እየጠየቀለት ስላለው አደጋ ወይም ሰው ወይም ንብረት የሚያውቀውን ፍሬነገር ሳይሆን የመድን ሰጪውን ያደጋ አስተያየት ሊለውጥበት ይችል የነበረውና የተደበቀው ቢታወቅ ኖሮ ወይም ትክክለኛው ፍሬነገር ቢገለጽ ኖሮ ወይ ለተፈራው አደጋ ዋስትናውን ከመስጠት ይቆጠብ ነበር ወይም ዋስትናውን ለመስጠት ፈቃደኛ እንኳን ቢሆን አስከፍሎ ከተዋዋለው ወይም ሊያስከፍል ከተዋዋለው አረቦን የበለጠ ያስከፍል ወይም ሊያስከፍል ይዋዋል ነበር የሚያሰኝ ሲሆን ነው።

ሌላው መነሣት የሚያስፈልገው ነጥብ በኢትዮጵያ የመድን ሕግ አንድ ፍሬነገር የአደጋ አስተያየት ሊያስለውጥ የሚችል /ማቴሪያል ፋክት/ ነው አይደለም ብሎ ለመወሰን ሕጉ ሥልጣን /መብት/ የሰጠው የመድን ሽፋን እንዲሰጥ ጥያቄ እየቀረበለት ላለው ለዚያው መድን ሰጪ ይመስላል።[17] በሌላ አነጋገር የኢትዮጵያ የመድን ሕግ አንድን የተሸሸገን ወይም በትክክል ያልተገለፀን ፍሬነገር ያደጋ መመዘኛ አስፈላጊ ፍሬነገር ነው አይደለም ለማለት የሚችለው ያው ጥያቄ የቀረበለት መድን ሰጪ እራሱ ነው እንጂ አንድ መድን ሰጪ ተደበቀ የተባለውን ወይም በትክክል አልተገለፀም የተባለውን ፍሬነገር እንደአስፈላጊ ያደጋ መመዘኛ ፍሬነገር ይወሰደዋል ወይንስ አይወሰደውም? በሚል አብጀክቲቭ መለኪያ እንደማይሄድ ነው ይህንንም የሚያስብለዉ የን.ሕ. ቁ. 667 ድንጋጌ ራሱ ሲሆን የሚለዉም "ዉሉን በሚዋዋልበት ጊዜ ኢንሹራንስ ገቢዉ የሚያዉቃቸዉን ማናቸዉንም ሁኔታዎችና ኢንሹራንስ ሰጪዉ ኃላፊነት የሚወስድባቸዉን አደጋዎች ለማመዛዘን የሚያስችሉትን ማናቸዉንም ሁኔታዎች በትክክል መግለጥ አለበት" ነዉ። ፍ/ቤቶች አብጀክቲቭ መለኪያ እንጠቀማለን ቢሉ እንኳ ይህን ማድረጉ የማይቻልበት ወቅት ነበረ።[18]

ፕሮፌሰር አይቫሚ በእንግሊዝ አገር በሥራ ላይ ያለውን መለኪያ እንደሚከተለው ይገልፁታል።

> The test which is usually adopted is whether the non-disclosure of the facts would influence a "prudent" insurer

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[17] In a note published in Michigan Law Review, Vol.25 (1927) p. 469, it was stated: "The Insured's non-disclosure (misrepresentation) being material will be assumed to have influenced the insurer to assume the risk, to have induced him to enter into a contract which he would otherwise have declined or to take a less premium then he would otherwise have demanded."

[18] ከ 1967 እስከ 1983 ዓ.ም. በኢትዮጵያ ውስጥ አንድ መድን ሰጪ ብቻ (የኢትዮጵያ መድን ድርጅት) በነበረበት ሁናቴ ፍርድ ቤቶች አንድ reasonable insurer ተደበቀ የተባለውን ወይም በትክክል አልተገለፀም የተባለውን ፍሬነገር እንደአስፈላጊ ያደጋ መመዘኛ ፍሬነገር ያየዋል አያየውም? የሚለውን ለማጣራት /theoretically and fictitiously/ ካልሆነ በስተቀር ይችሉ እንዳልነበረ ግለጽ ነው። ከዚህም ሌላ በተቻለ መጠን ፍርድ ቤቶች አብጀክቲብ መለኪያ ወደመጠቀም ቢያዘነብሉ የተሻለ ነው የሚል ግምት አለ።

(though in some cases the term "reasonable" has been substituted for "prudent") Another test is whether a "reasonable" assured would consider them material…In no case is it relevant to consider whether the non- disclosure would influence the particular insured concerned or whether the assured himself sought that the facts were material. [19]

ምንም እንኳን አንዳንዴ "አመዛዛኝ" የሚለውን ቃል ቢጠቀሙበትም ብዙ ጊዜ የሚወሰደው መለኪያ /መመዘኛ/ መደበቁ የአንድን "ጠንቃቃ" መድን ሰጪ ያደጋ አስተያየት ይነካ ወይም ያሰቀይር እንደሆነ ነው። ሌላኛው መለኪያ ደግሞ አንድ "አመዛዛኝ" መድን ገቢ የተደበቁትን ፍሬነገሮች እንደ ማቴሪያል ይወስዳቸው እንደሆነ ሲሆን ... መቸውንም ቢሆን የተደበቀው ፍሬነገር የመድን ሽፋን እንዲሰጥ ጥያቄ የቀረበለት የተለየውን መድን ሰጪ ውሳኔ ይነካል ወይም ያስቀይረዋል ብሎ መውሰድ አግባብነት የለውም። መድን ገቢውም ራሱ በግሉ የተደበቁት ፍሬነገሮች ያደጋ መመዘኛ ፍሬነገሮች ናቸው ወይስ አይደሉም ይበል ተብሎም አይወሰድም/ ትርጉም የፀሐፊው ነው።

ሌላው በኛ ሕግ ውስጥ በግልጽ ያልተመለከተው በን.ሕ.ቁ. 667 ሥር የተጣለበትን ግዴታ መወጣት ያለበት መድን ገቢ የትኞቹ ፍሬነገሮች ያደጋ መመዘኛ ናቸው ብሎ ማለት ያለበት እርሱ ነው ወይንስ መድን ሰጪው ወይንስ ሁለቱም ናቸው የሚለው ጥያቄ ሲሆን ይህም አከራካሪ ሲሆን እንደሚችል መገንዘቡ መልካም ነው።

መድን ገቢው በን.ሕ.ቁ. 667 ላይ የተጣለበትን ግዴታ ሳይወጣ ሲቀር ምን ውጤት እንደሚከተል በን.ሕ.ቁ. 668 ላይ ተመልክቶአል። በዚሁ ቁጥር ንዑስ ቁጥር /1/ ሥር ተጽፎ እንደምናነበው መድን ገቢው "ሆነ ብሎ"[20] የመድን ሰጪውን የአደጋ አስተያየት ሊለውጥበት የሚችል ፍሬነገር /ማቴሪያል ፋክት/ ደብቆ ከተገኘና የተደበቀው ፍሬነገር ቢገለጽ ኖሮ ወይም በትክክል ተገልጾ ቢሆን ኖሮ መድን ሰጪው ወይ የመድን ዋስትናውን የመስጠት ግዴታ ውስጥ አይገባም ነበር ወይም ዋስትናውን ለመስጠት ፈቃደኛ እንኳን ቢሆን አስከፍሎ ከተዋዋለው አረቦን በላይ ያስከፍል ነበር ወይም ሊያስከፍል ከተዋዋለው በላይ ለማስከፈል ይዋዋል ነበር የሚያሰኝ ከሆነ ውሉ ፍርስ እንደሚሆንና መድን ሰጪውም የተቀበለውን አረቦን እንደሚያስቀር ተደንግጓል።

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[19] Ivamy፣ የግርጌ ማስታወሻ ቁጥር 9፣ ገጽ 126 ።

[20] ሕጉ "እያወቀ" ነው የሚለው። ይህ አባባል ግን በሕጉ ላይ ከተመለከተው ውጤት አኳያ ሲታይ ብዙም ትክክል አይመስልም። ሆነ ብሎ የሚያውቁትን ነገር መደበቅ ወይም በሐሰት መግለጽ ግን fraud /ተንኮል/ ያለበት መሆኑን ያመለክታል።

በፍ/ብ/ይ/መ/ቁ 637/81 በይግባኝ ባይ የኢትዮጵያ መድን ድርጅት እና በመልስ ሰጭ በወ/ሮ አዳነሽ አድማሱ (የእነ መሠረት ከተማ ሞግዚት) መካከል በተደረገዉ ክርክር ሟች የመልስ ሰጭ ባለቤት አቶ ከተማ ገ/መስቀል ለሞት የሕይወት መድን ዋስትና ሲገዙ በሞሉት መግለጫ ላይ የጉበት በሽታ የለብኝም ብለዉ ሞልተዉ በጉበት ሕመም ሕወታቸዉ ካለፈ በኋላ መድን ሰጪዉ ሟቹ የጉበት ሕመም እንዳለባቸዉ እያወቁና ለዚህ ህመም ህክምና እየተደረገላቸዉ መሆኑን እያወቁ በሞሉት መግለጫ ላይ የጉበት በሽታ የለብኝም ማለታቸዉ የመድን ሰጪዉን የአደጋ አስተያየት ሊያስለዉጥ የሚችል እዉነት መደበቅ ስለሆነ ከሃላፊነት ነጻ እንደሚያደርገዉ ተከራክሮ ረትቶበታል። በዚህ መዝገብ ላይ በዋናነት ክርክር የተካሄደዉ መድን ሰጪዉ ዉሉ ፍርስ ስለሆነ ሓላፊነት የለብኝም የሚለዉን ክርክር ሟች መድን ገቢ በሕይወት እያሉ ሊያነሳ ይችል እንደሆን እንጂ የመድን ገቢ ሕይወት ካለፈ በኋላ ማንሳት አይችልም የሚል ክርክር እንደነበረ አንባቢያን ማወቃቸዉ መልካም ነዉ።[21] በተመሳሳይ መልኩ በ1994 ዓ.ም. በከሳሽ በአቶ አዲሱ ተመስገን እና በተጠሪ የኢትዮጵያ መድን ድርጅት መካከል በግልግል ዳኝነት ጉባዔ ፊት ተካሂዶ በነበረዉ ክርክር ይሸዉ ሀሰተኛ መግለጫ የመስጠት ጭብጥ ተነስቶ የግልግል ዳኝነት ጉባዔዉ ጉዳዩን በአምስት ፓራግራፎች እንደሚከተለዉ ገልጾታል፦[22]

> አንድ መድን ገቢ የመድን ዉል በሚዋዋልበት ጊዜ የፍጹም ቅን ልቦናን (utmost good faith) መሠረት በማድረግ ዋስትና እንዲገባለት ለተጠየቀዉ ንብረት የሚያዉቀዉን ሁሉ ተጠይቆም አስጠይቆም መግለጽ እንደሚጠበቅበት የንግድ ሕግ ቁጥር 667 ይደነግጋል።
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> በንግድ ሕግ ቁጥር 668(1) መሠረት የመድን ዉል የገባዉ ሰዉ እያወቀ እዉነተኛውን ነገር የሸሸገ ወይም የሃሰት መግለጫ የሰጠ እንደሆነ እዉነተኛው ነገር ተገልጾለት ቢሆን ኖሮ ኢንሹራንስ ሰጪው ይህን ዉል አይዋዋልም ወይም ከፍ ያለ አረቦን አስከፍሎ ይዋዋል ነበር እስከሚያስኝ ድረስ እነዚህ የተሸሸጉ ነገሮች ወይም በሃሰት የተሰጡ መግለጫዎች የኢንሹራንስ ሰጪውን የአደጋ አሰተያየት ለዉጠዉበት እንደሆነ ዉሉ ፍርስ ነዉ። እንደ እንግሊዝኛው ቅጂ "the policy shall be of no effect" ኢንሹራንስ ሰጪውም ተከፈለዉን አረቦን ያስቀራል።
>
> ከሳሽ ዋስትና ለተገባላቸዉ ማሽኖች መግዣ የተሰጠ ብድር በሰጣቸዉ በኢትዮጵያ ልማት ባንክ አማካይነት እ.አ.አ 01/05/93 እና እ.አ.አ 13/2/96 በተጻፈ የመድን መግቢያ መጠየቂያ ቅጽ ላይ የማሽኖች ዋጋ ብር

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[21] በ1989 ዓ.ም በ ጠቅላይ ፍ/ቤት ጥናት ምርምርና ሕትመት መምሪያ ታትሞ ወጥቶ የነበረዉን የፍርዶች መጽሐፍ ቮልዩም አንድ ከገጽ 49-51 ይመልከቱ።

[22] የኢትዮጵያ አርቢትሬሽን ኤንድ ኮንሲሊዬሽን ሴንተር <u>የግልግል ዳኝነት ዉሳኔዎች</u>፤ ፭ኛ መጽሐፍ፣ገጽ 195 እና 196።ከላይ ከተመለከቱት ሁለት ዉሳኔዎች በተጨማሪ አንባቢያን የአዲስ አበባ ፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት በመ.ቁ. 84/89፤02188 የሰጣቸዉን ዉሳኔዎች እንደዚሁም ፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት ድሬደዋ ምድብ ችሎት በፍ/መ/ቁ 01798 የሰጠዉን ዉሳኔ መመልከት ይችላሉ

92,820 (ዘጠና ሁለት ሺህ ስምንት መቶ ሃያ ብር) እና ብር 282,705 (ሁለት መቶ ሰማንያ ሁለት ሺህ ሰባት መቶ አምስት ብር) መሆኑን ገልጸዋል።

ከዚህ በኋላ በአደጋ ወቅትም ቢሆን ማሽኖቹ አዲስ የተገዙ ናቸዉ በማለት ከሃግቤስና ጀኔራል መርካንታይል ከተባሉ ኩባንያዎች ደረሰኞች አቅርበዋል። ከነዚህ ሁኔታዎች የምንረዳዉ ከሳሹ ዋስትና እንዲገባላቸዉ የጠየቁላቸዉ ማሽኖች አዲስ ናቸዉ በማለት የመድን መግቢያ ጥያቄ ማቅረባቸዉን ነዉ። ለዚህ ክርክር ምክንያት የሆነዉ አደጋ ከደረሰ በኋላ ተከሳሽ ድርጅት ጉዳቱን አስመልክቶ ተገቢዉን ምርመራ (ሰርቬይ) ለማድረግ በቦታዉ የተገኘ ሲሆን በምርመራዉ ወቅት የተገኘዉ ሪፖርት እንደሚያመለክተዉ ማሽኖቹ በፍጹም አዲስ አይደሉም። ይህም ሁኔታ አጠራጥሮት ከሳሹ ድርጅት ደረሰኝ ካቀረበባቸዉ ከሃግቤስና ጀኔራል መርካንታይል ኩባንያዎች ዕቃዎቹን አስመልክቶ ለሺያጩ መረጃ ሲጠይቅ ሁለቱም ኩባንያዎች ያረጋገጡት ማሽኖቹ ለከሳሹ አለመሸጣቸዉንናቀረቡ የተባሉት ደረሰኞችም በነርሱ በኩል ያልተዘጋጁ መሆናቸዉን ነዉ። ስለሆነም ከሳሹ አሮጌዎችን አዲስ የተገዙ በማስመሰል ዋስትና ገብተዋል። በዚህ ሁኔታ መድን ሰጪዉን የአደጋዉን ግምት አሳስተዉበታል። ይህም ድርጊታቸዉ ከላይ በጠቀስነዉ የንግድ ሕግ ቁጥር 667 መሠረት የሚጠበቅባቸዉን የፍጹም ቅን ልቦና ተጻራሪ ነዉ። ይህ ከላይ የተገለጸዉ የፍጹም ቅን ልቦና መርህ በመድን ገቢዎች ተጥሶ እዉነተኛዉ ነገር የተሸሸገ ወይም ሃሰት መግለጫ የተሰጠ እንደሆነ መድን ሰጪዉም እዉነቱን ቢያዉቅ ኖሮ አይዋዋልም ወይም ከፍ ያለ አረቦን ሊያስከፍል ይችላል የሚያስብል በመሆኑና ከሳሹ የሰጡት መግለጫ የመድን ሰጪዉን የአደጋ አስተያየት የለወጠበት በመሆኑ ከሳሽ ከተከሳሽ ጋር አለኝ የሚሉት የመድን ዉል በንግድ ሕግ ቁጥር 668 ንኡስ ቁጥር 1 መሠረት ፍርስ ነዉ። በመሆኑም ተከሳሽ ለደረሰዉ አደጋ በመድን ሕግ መሠረት ኃላፊነት የለበትም።

በመሆኑም በንግድ ሕግ ቁጥር 668(1) መሠረት የመድን ዉሉ ፍርስ (of no effect) ስለሆነና እንዲህ ዓይነት ዉሎች በተለየ ሁኔታ ከመጀመሪያዉ (ከመመስረታቸዉ) ጀምሮ ዉጤት የሌላቸዉ ወይም እንዳልተቋቋሙ የሚቆተሩ ናቸዉ። ስለዚህ የመድን ዉሉ ፍርስ ስለሆነ ከሳሽ የሚጠይቁት ካሳ የለም።

የን.ሕ.ቁ. 668/1/ የእንግሊዝ ቅጂ "It shall be of no effect" ነው የሚለው ይህ አባባል ደግሞ "ፍርስ ነው" ከሚለው የበለጠ ጠበቅ ያለ ይመስላል። በእንግሊዝኛው ቅጂ ከተሄደ የተደበቀ ወይም በሐሰት የተገለጸ ፍሬነገር ኖሮ ሁኔታው በን.ሕ.ቁ. 668/1/ እንደሚሸፈን ከተረጋገጠ በመድን ገቢውና በመድን ሰጪው መካከል

የተመሠረተው ውል ምንም ውጤት እንደሌለው ነው የሚናገረው::[23] በቁጥር 668/1/ የአማርኛው ቅጂ አባባል ከተሄደ ውሉ ይፈርሳል:: /"ፍርስ ነው" የሚለው አባባል "ይፈርሳል" ከሚለው የተለየ ትርጉም ይሰጣል ካልተባለ/ ውሉ የሚፈርስ ከሆነ ደግሞ ተዋዋይ ወገኖች በተቻለ መጠን ከውሉ በፊት ወደነበሩበት ቦታ የመመለሳቸውን ውጤት ያስከትላል::[24] ምናልባት "It shall be of no effect" የሚለው አባባል "Void ab initio"ከሚለው የላቲን አባባል ጋር ይመሳሰል ይሆናል::ይህ ከሆነ ደግሞ ውሉ በሕግ ፊት ጨርሶ እንዳልኖረ፣ እንዳልተመሠረተ ይቆጠራል ያሰኛል::

በሌላ በኩል ግን "ፍርስ ነው" ቢባል ወይም "ይፈርሳል" ወይም "ፈራሽ" ነው ቢባል ምንም ልዩነት አያመጣም ሊባል ይቻል ይሆናል:: ውጤቱ ዞሮ ዞሮ በተቻለ መጠን ተዋዋይ ወገኖችን ከውሉ በፊት ወደነበሩበት ቦታ የመመለስ ሲሆን ከውሉ ሊመነጩ ይችሉ የነበሩት ግዴታና መብቶች አይመነጩም ማለት ነው ተብሎ ሊወሰድም ይቻላል::[25] ሆኖም ግን በን.ሕ.ቁ 668/1/ ሥር የተመለከተውን ልዩ የሚያደርገው ሌላው ሁኔታ መደበቁ ወይም ሐሰተኛ መግለጫ መሰጠቱ ሆን ተብሎ መደረጉ ሲረጋገጥና ከዚህም የተነሣ ውሉ ፍርስ ሲሆን ተዋዋይ ወገኖች በተቻለ መጠን ከውሉ በፊት ወደ ነበሩበት ቦታ መመለሳቸው መቅረትና መድን ሰጪውም የተቀበለውን አረቦን ማስቀረቱ ነው::[26]
የመድን ሰጪው የተቀበለውን አረቦን ማስቀረት ራሱ ተዋዋይ ወገኖች ዉሉ ፍርስ ነዉ ሲባል ከዉሉ ምስረታ በፊት ወደ ነበሩበት ያለመመለሳቸዉን ያሳያል::

ምናልባት አረቦኑ እንዳይመለስ የተከለከለው መድን ገቢው ከፈጸመው ማታለል የተነሳ በመድን ሰጪው ላይ የሚያደርሰውን ጉዳት ለማካካስ ሊሆን ይችላል:: በዚያውም አታላዩን በገንዘብ ለመቅጣትም ሳይሆን አይቀርም:: ይህ ድርጊት

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[23] በአማርኛ የፍትሐብሔር እና የንግድ ህጎቻችን ዉስጥ አገልግሎት ላይ ዉሰዉ የምናነባቸዉ አንዳንድ ቃላት በህጎቹ የእንግሊዝኛ ቅጂ ዉስጥ ከሚሰጡት መልዕክት የተለዩ መሆናቸዉን አንባቢያን ልብ ሊሉ ይገባል:: ለምሳሌ በእንግሊዝኛዉ ቅጂዎች "void" "voidable" ተብለዉ ልዩነት ባለዉ መልኩ ሲቀመጡ በአማርኛ ቅጂዎች ላይ ግን ልዩነቶቹ ብዙም ግልጽ አይደሉም:: እንደዚሁ በእንግሊዝኛዉ ቅጂዎች ዉስጥ "invalidation" እና "cancellation" ተለይተዉ ሲቀመጡ በአማርኛ ቅጂዎች ላይ ግን በሁለቱ መካከል ልዩነት እንደሌለ ተደርጎ ተጽፏል:: ሌሎች ተጨማሪ ምሳሌዎችም ሊኖሩ ይችላሉ::

[24] የፍትሐብሔር ሕግ ቁጥር 1815::

[25] በሕግ ፊት እንዳልተመሠረቱ እንዳልኖሩ የሚቆጠሩ 'Void ab initio" የተሰኙ ውሎች ምናልባት unenforceable ስለሆኑ በፍርድ ቤት እንዲፈርሱና ተዋዋይ ወገኖች በተቻለ መጠን ከውሉ በፊት ወደ ነበረበት ቦታ ይመለሱ ለማለትም አይቻልም ይሆናል::

[26] በዚህ ጹሑፍ በግርጌ ማስታወሻ ቁጥር 4 ላይ እንደተገለፀው አንድ የመድን ውል በመድን ገቢው ላይ ወዲያውኑ ተፈጻሚ ሲሆን በመድን ሰጪው ላይ ውጤት የሚኖረው ግን የተፈራው አደጋ ወይም ጊዜ ሲደርስ ወዘተ ስለሆነ በውሉ ምሥረታ ጊዜ ወይም ከዚያ ቦኋላ ለመድን ገቢው ተሰጥቶት መድን ገቢው ውሉ በመፍረሱ ምክንያት የሚመልሰው ነገር የለውም::

በወንጀልም ያስቀጣል።[27] መድን ሰጪው አረቦን ማስቀረት ብቻ ሳይሆን በን.ሕ. ቁ. 668 ሥር የሰፈረዉ ሁኔታ ሲያጋጥም በወንጀልም ሊያስቀጣ ይችላል።

የመድን ገቢው ሆን ብሎ ሐሰተኛ መግለጫ መስጠት ወይም መሸሸግ መድን የተገባለት አደጋ ከመድረሱ በፊት ወይም በኋላ ቢታወቅ የተለያየ ውጤት ስለማስከተሉ በን.ሕ.ቁ. 668/1/ ላይ የተመለከተ ነገር የለም። ሕጉ በዚህ ረገድ ፀጥ ቢልም ሆን ብሎ መሸሸጉ ወይም ሐሰተኛ መግለጫ መሰጠቱ መድን የተገባለት አደጋ ከደረሰ በኋላ ቢታወቅ በቁ. 668/1/ የተመለከተውን ውጤት አያስከትልም ብሎ መገመቱ በአንድ በኩል የዋህነት ሲሆን በሌላ በኩል ሕጉ ሊጠብቀው የፈለገውን (public policy) ዝቅ ማድረግ ነዉ። ስለሆነም ያንድ መድን ገቢ ያደጋ መመዘኛ ፍሬነገሮችን ሆን ብሎ ደብቆ መገኘት ወይም ሆን ብሎ በሐሰት መግለጽ የተደረሰበት ተፈርቶ መድን የተገባለት አደጋ ከመድረሱ በፊት ይሁን በኋላ ምንም ለውጥ አያመጣም። ውጤቱም ያው በን.ሕ.ቁ.668/1/ ሥር የተጻፈውና ከዚህ በላይ ያየነው ይሆናል።

መድን ገቢው ያደጋ መመዘኛ ሊሆኑ የሚችሉትን ፍሬነገሮች የደበቀው ወይም በሐሰት የገለጸው ሆነ ብሎ በተንኮል መድን ሰጪውን ለማሳሳት ካልሆነ ውጤቱ በን.ሕ.ቁ. 668/1/ ሥር ከተመለከተው የተለየ ነው። ውጤቶቹ በን.ሕ.ቁ. 668/2/ /ሀ/ እና /ለ/ ሥር የተጻፉት ይሆኑና በንዑስ ቁጥር /1/ ሥር ከተመለከተው ለዘብ ያሉ ሆነው እናገኛቸዋለን። የንዑስ ቁጥር /2/ አነጋገር ራሱ ቁልጭ አድርጎ እንደሚያመለክተው ተቃራኒ ስምምነት ቢኖርም እንኳን መሸሸጉ ወይም ሐሰተኛ መግለጫ መስጠቱ ሆን ተብሎ ያልተደረገ ከሆነና መድን ሰጪውም ሆን ተብሎ መደረጉን ማስረዳት ካልቻለ ውሉ አይፈርስም።

የን.ሕ.ቁ. 668/2/ አነጋገር ሁለት ዋና ዋና ነጥቦችን ይዟል። 1ኛ/ለውሉ ፍርስ መሆን ወይም አለመሆን መለኪያው መሸሸጉ ወይም ሐሰተኛ መግለጫ መሰጠቱ ሆን ተብሎ መደረጉ ወይም አለመደረጉ መሆኑን፤እና 2ኛ/መደበቁ ወይም በሐሰት መገለጹ ሆን ተብሎ የተደረገ መሆኑን ማስረዳት ያለበት መድን ሰጪው መሆኑን ነው።

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[27] ሆን ተብሎ በራስ ወይም ለሌላ ሰው ጥቅም ለማግኘት ወይም ለማስገኘት በማሰብ ከመድን ውል ነገር በተያያዘ የማጭበርበርና የተንኮል ሥራ በ1949 ዓ.ም. ሥራ ላይ በነበረዉ ወንጀለኛ መቅጫ ሕግ ቁጥር 659 መሠረት ያስቀጣ ነበር። በ19977ዓ.ም. በወጣዉ የወንጀል ሕግ በአንቀጽ 698(1) ላይ ደግሞ **እንሹራንስ በሚመለከት የሚፈፀም የአታላይነት ድርጊት** በሚል ርዕስ እንደሚከተለዉ ተደንግጓል። " ማንም ሰዉ የማይገባ ብልጽግና ለራሱ ለማግኘት ወይም ለሌላ ሰዉ ለማስገኘት በማሰብ፦

ሀ/ኢንሹራንስ የተገባበት አደጋ በመፍጠር፣ ወይም

ለ/በዉሉ ዉስጥ በተገለፀዉ ጥቅም ላይ ተጽዕኖ በሚያደርግ አኳኋን ኢንሹራንሱን ገንዘብ ልክ የዉሉን ዘመን ወይም የኢንሹራንስ ተጠቃሚዎችን በሚመለከት ፍሬነገር በመደበቅ፣ በማሳሳት፣በማረጋገጥ፣ወይም ይህንኑ በሚመለከት ሀሰተኛ መግለጫ በመስጠት አንድ የኢንሹራንስ ማሕበርን ያታለለ እንደሆነ.....በቀላል እሥራት ወይም ሁኔታዎቹ በይበልጥ ከባድ ሲሆኑ ከአምስት ዓመት በማይበልጥ ጽኑ እስራትና ከብር ሃምሳ ሺህ በማይበልጥ መቀጮ ይቀጣል....።

ለውሉ "ፍርስ" መሆን ወይም አለመሆን የተሰኘውን አባባል ትንሽ ማየት ጠቃሚ ሳይሆን አይቀርም፣ ምክንያቱም የን.ሕ.ቁ.668 ንዑስ ቁጥር/2/ "ውሉ አይፈርስም" የሚል አነጋገር ነው የተጠቀመው። በሌላ በኩል በንዑስ ቁጥር /1/ ሥር ያለው አባባል ግን "ፍርስ ነው" የሚል ነው። በቁ. 668 ንዑስ ቁጥር /2/ የተመለከተዉ በሕግ ጣልቃ ገብነት ዉሉ "ፍርስ" ወይም "of no effect" አለመሆኑን ለማመልከት ይመስላል። በመሆኑም "ውሉ አይፈርስም" ከሚለው አነጋገር የበለጠ የሕግ አውጪውን ፍላጐት ሊገልጽ ይችል የነበረው "ውሉ ፍርስ አይሆንም" የሚለውን አባባል ቢጠቀምበት ኖሮ ነበር ቢባል ስሕተት አይመስለኝም።

የን.ሕ.ቁ. 668/2/ "ውሉ አይፈርስም" ወይም በእንግሊዝኛው አነጋገር "ውሉ ፀንቶ ይቆያል" ይበል እንጂ ውሉ ሊቋረጥ እንደሚችል በዚሁ ንዑስ ቁጥር ሥር በ/ሀ/ ላይ ተመልክቶአል። ይህም የሚያሳየው በሁለቱ ተዋዋይ ወገኖች መካከል እስከሚቋረጥበት ጊዜ ድረስ በሕግ ፊት የፀና ውል እንደኖረ የሚያስረዳ ሆኖ ሐሰተኛ መግለጫ መሰጠቱ ወይም የተደበቀ የአደጋ መመዘኛ ፍሬነገር መኖሩ ተደርሶበት ውሉን መድን ሰጪው ለማቋረጥ ወስኖ የአንድ ወር ማስጠንቀቂያ ሰጥቶ እስካቋረጠበት ጊዜ ድረስ ውለታው ውጤት እንደሚኖረው ነው። ለምሳሌ ያህል አንድ ሰው ተሽከርካሪውን ለግጭት አደጋ በ 2002 ዓ.ም. መጀመሪያ በመስከረም ወር ላይ ለብር 120.000 ለአንድ ዓመት መድን ቢያስገባና በጎዳር ወር በዚያው ዓመት በተሽከርካሪው ላይ ትንሽ የግጭት ጉዳት ደርሶበት መድን ሰጪው 5000 ብር ያህል ቢከፍለውና በሚያዝያ ወር 2002 ዓ.ም. ውስጥ ሆን ተብሎ ሳይሆን በስሕተት የተሸሸገ ያደጋ መመዘኛ ፍሬነገር እንደነበር ቢደረስበትና መድን ሰጪው ከዚህ የተነሳ ውሉን ለማቋረጥ ወስኖ የአንድ ወር ማስጠንቀቂያ ሰጥቶ ቢያቋርጥ የውሉ መቋረጥ የሁለቱን የወደፊት ግንኙነት ከፍጻሜ ያደርሰዋል እንጂ ወደኋላ ተመልሶ <u>በጎዳር ወር</u> 2002 ዓ.ም. የተከፈለውን የ5000 ብር ካሣ አይነካም። በዚህ ምሣሌ ሥር የተነሳው የመሸሸግ ጉዳይ በን.ሕ.ቁ. 668/1/ ሥር የሚወድቅ ቢሆን ኖሮ ግን ውሉ ራሱ ፍርስ ስለሆነና በሕግ በፊት እንዳልተደረገ ወይም እንደውጤት አልባ ውል ስለሚቆጠር መድን ሰጪው በጎዳር ወር 2002 ውስጥ የከፈለውን ብር 5000 መልሶ መጠየቅ እንደሚችል ይገመታል።

ሌላኛው በን.ሕ.ቁ. 668/2/ /ሀ/ ሥር የተጠቀሰው ነጥብ መድን ሰጪው በውለታው መቀጠል ከፈለገ ማለትም ማቋረጡን ካልፈለገ ሆን ተብሎ ሳይሆን በስሕተት የተሸሸገውን ወይም በሐሰት የተገለጸው የአደጋ መመዘኛ ፍሬነገር ባይደበቅ ኖሮ ወይም በትክክል ቢገለጽ ኖሮ ያስከፍል ወይም ሊያስከፍል ይዋዋል የነበረውን አረቦን አስልቶ ከዚሁ ላይ መድን ገቢው የከፈለውን ወይም ሊከፍል የተዋዋለውን ቀንሶ በሁለቱ መካከል ያለውን ልዩነት አስከፍሎ ምናልባትም ኪሣራውን ጨምሮ በማስከፈል ውሉን ሊቀጥል እንደሚችል ነው።

በን.ሕ.ቁ. 668/2/ /ለ/ ሥር እንደተመለከተው ሆን ተብሎ ሳይሆን በስሕተት የተደበቀው ወይም በሐሰት የተገለፀው የአደጋ መመዘኛ ፍሬ ነገር መኖሩ የታወቀው መድን የተገባለት አደጋ ከደረሰ በኋላ የሆነ እንደሆነ ውጤቱ ለመድን

ገቢው መጥፎ አይደለም። በሌላ ሌላ ምክንያት መድን ሰጪው ከሃላፊነት ይድን እንደሆነ እንጂ በዚህ ንዑስ ቁጥር ሥር በሚወድቅ መሸሸግ ወይም ሐሰተኛ መግለጫ መሰጠት መድን ሰጪው ከመካስ ሃላፊነት ነፃ እንደማይሆን ስለተደነገገ መደረግ ያለበት የተደበቀው ቢታወቅ ኖሮ ወይም በሐሰት የተገለጸው በትክክል ቢገለጽ ኖሮ መድን ሰጪው ለአደጋው ሽፋን ያስከፍል ወይም ሊያስከፍል ይዋዋል በነበረውና ባስከፈለው ወይም ሊያስከፍል በተዋዋለው መካከል ያለውን ልዩነት መድን ሰጪው ለመድን ገቢው ከሚከፍለው ገንዘብ ላይ ይቀንሰዋል።

ከዚህ በላይ ስለመደበቅና ሐሰተኛ መግለጫ መስጠት ሕግ የሚለውን ለማየት ተሞክራል። ከዚህ ቀጥሎ ደግሞ በኢትዮጵያ አንጋፋዉ፣ ዋናዉና ትልቁ መድን ሰጪ የሆነዉ ኢትዮጵያ መድን ድርጅት ከሚጠቀምባቸው ፖሊሲዎች አንፃር መሸሸግና ሐሰተኛ መግለጫ መስጠት እንዴት ይታያል? የሚለውን ጥያቄ ባጭሩ እናያለን። የኢትዮጵያ መድን ድርጅት የሚጠቀምባቸው ፖሊሲዎች ከእንግሊዝ አገር መድን ሰጪዎች እንደተወሰዱ ሁሉ ሌሎች በኢትዮጵያ ዉስጥ ያሉት መድን ሰጪ ኩባንያዎች የሚጠቀሙባቸውን ፖሊሲዎች የወሰዱት ከኢትዮጵያ መድን ድርጅት ነዉ። በመሆኑም በዚህ ጽሁፍ ዉስጥ የተካተቱት አንጋፋዉ የኢትዮጵያ መድን ድርጅት የሚጠቀምባቸውን ፖሊሲዎች የሚመለከቱ አስተያተቶች ሌሎች መድን ኩባንያዎች ለተመሳሳይ አደጋዎች ሰሚጠቀሙባቸዉ ፖሊሲዎች ያገለግላሉ።

የኢትዮጵያ መድን ድርጅት በሚጠቀምበትና አሁን በሥራ ላይ ባለው የሠራተኞች የካሳ ፖሊሲ /workmen's compensation policy/ ላይ 'ሁኔታዎች' "conditions" በሚለው ክፍል ሥር በ10ኛው ቁጥር ላይ ማንኛውም የአደጋ መመዘኛ ፍሬነገር ቢደበቅ ወይም በሐሰት ቢገለጽ በደፈናው ፖሊሲው ውድቅ እንደሚሆን ከመጸፉ በስተቀር በን.ሕ.ቁ. 668 ላይ እንደተመለከተው ሆን ተብሎ ሲደረግና በስሕተት ወይም ባለማወቅ ሲደረግ የተለያዩ ውጤቶች እንደሚያስከትል አልተገለፀም።

በቤቶችና በሌሎች ነገሮች በኃይል ሠብሮ የመግባት ፖሊሲ (Burglary & Housebreaking policy) ላይ አሁንም ሁኔታዎች (conditions) በሚለው ክፍል ሥር በ2ኛው ቁጥር ላይ የመድን ገቢው በማመልከቻ ላይ የሞላቸው መግለጫዎች እውነት መሆን መድን ሰጪው በፖሊሲው መሠረት በኃላፊነት ለመጠየቅ እንደቅድመ ሁኔታ ተደርጎ እንደሚወሰድና መድን ገቢው በማመልከቻው ውስጥ ካሠፈራቸው መግለጫዎች ሐሰተኛ የሆነ ካለ ወይም ሳይገለጽ የቀረ ያደጋ መመዘኛ ፍሬነገር /ማቴሪያል ፋክት/ ከተገኘ ፖሊሲው ውድቅ ይሆናል ይላል። ይህም አባባል በንግድ ሕጉ በን.ሕ.ቁ. 668 ሥር ከሠፈረው የተለየ ሆኖ እናገኘዋለን። ከላይ ለመግለጽ እንደተሞከረው ምናልባት በን.ሕ.ቁ. 668/1/ ሥር ከተመለከተው ጋር ሊመሳሰል ይቃጣው ይሆናል። ነገር ግን በቁ. 668/1/ ሥር የተመለከተው ጠንከር ያለ ውጤት እንዲመጣ መድን ገቢው ያደጋ መመዘኛ ፍሬነገሮችን የደበቀው ወይም በሐሰት የገለፀው ሆን ብሎ መሆን እንዳለበት ስንመለከት በዚህ በያዝነው በቤቶችና በኃይል ሰብሮ የመግባት ፖሊሲ /Burglary and Housebreaking policy / ላይ ግን ሆን ተብሎ ይሆን በቸልተኝነት ይሁን

ወይም በስሕተት ሳይለይ በደፈናው ብቻ መድን ገቢው ያደጋ መመዘኛ ፍሬነገሮችን ሳይገልጽ መቅረቱ ወይም በሐሰት መግለጹ ፖሊሲውን ውድቅ እንደሚያደርገው መጻፉን እንረዳለን።

የኢትዮጵያ መድን ድርጅት ለእሳትና ለመብረቅ አደጋ መድን በሚጠቀምበት ፖሊሲ /Fire and Lightning policy/ ውስጥም 'ሁኔታዎች' conditions በሚለው ክፍል በአንደኛው ቁጥር ላይ ያደጋ መመዘኛ መረጃዎችን ያለመግለጽ ወይም በሐሰት መግለጽ በደፈናው የመድን ሰጪውን በፖሊሲው መሠረት ለመካስ መጠየቅን እንደሚያስቀርለት ሲያመለክት በግል ተሽከርካሪ ለ3ኛ ወገን ኃላፊነት ፖሊሲ /Private Vehicle third party policy/ ላይም አሁንም 'ሁኔታዎች' conditions በሚለው ክፍል በመጀመሪያ ቁጥር ላይ የመግለጫዎች እውነትነት ለመድን ሰጪው በፖሊሲው መጠየቅ ቅድመ ሁኔታ መሆኑ ተመልክቷል። በንግድ ተሽከርካሪዎች ፖሊሲም ላይ ይኸው ሠፍሮ ይገኛል።

በፊደሊቲ ጋራንቲ /Fidelity Guarantee/ ፖሊሲ ላይ ደግሞ በመድን ገቢው የተሰጡት መግለጫዎች ውሉ የቆመበት ዋነኛ መሠረት basis of the contract ተብለው እንደሚወሰዱ ሲነበብ በአካል ጉዳት መድን ፖሊሲ ላይም ያልተገለፀ ወይም በሐሰት የተሠጠ ያደጋ መመዘኛ ፍሬነገር ካለ በደፈናው ፖሊሲው ውድቅ እንደሚሆን ተጽፎ ይገኛል።

አሁን በሥራ ላይ ካሉት የኢትዮጵያ መድን ድርጅት ከሚጠቀምባቸው ፖሊሲዎች መካከል ወደ ን.ሕ.ቁ. 668 ቀረብ ተደርገው የተቀረጹት፡- የሕይወት መድን ፖሊሲ፣ የሁሉም ዓይነት አደጋ ፖሊሲ /all risks policy/ እና የገንዘብ ፖሊሲ /Money policy/ የሚባሉት ብቻ ናቸው ቢባል ስሕተት አይመስለኝም። ይህንንም ያልኩበት ዋናው ምክንያት በነዚህ ሶስት ፖሊሲዎች ላይ በተመለከተው መሠረት ውሉ ውድቅ የሚሆነው መድን ገቢው ያደጋ መመዘኛ ፍሬነገሮችን ሆን ብሎ ካልገለፀ ወይም ሆን ብሎ ሐሰተኛ መግለጫዎችን ከሰጠ ብቻ ነው ስለሚል ነው።

ባጠቃላይ ሕጉና አብዛኞቹ የኢትዮጵያ መድን ድርጅት የሚጠቀምባቸው ፖሊሲዎች ያደጋ መመዘኛ ፍሬነገሮች ከመደበቅና በሐሰት ከመግለጽ አኳያ ብዙም ተጣጥመው አናገኛቸውም። አብዛኛዎቹ ፖሊሲዎች የመድን ገቢውን መብት የሚያጣበቡ ሆነው እናገኛቸዋለን። ምናልባት ይህ ችግር የመጣው በኮንቲኔንታል የሕግ ሲስተም (Continental Legal System) ለተቀረፀ የመድን ሕግ የኮመንሎው (Common Law) ፖሊስዎችን ከመጠቀም ሳይሆን አይቀርም። የኢትዮጵያ መድን ድርጅት የሚጠቀምባቸው ፖሊሲዎች የእንግሊዝ መድን ሰጪዎች የሚጠቀሙባቸው ፖሊሲዎች ሳይሆኑ አልቀሩም።

በመጨረሻም በ የኮመንሎው ሲስተም (Common Law System) አገሮች ማለትም በሁለቱ የዚህ ሲስተም ተጠቃሽ አገሮች በዩናትድ ስቴትስ አፍ አሜሪካና በእንግሊዝ አገር ያደጋ መመዘኛ ፍሬነገሮች ሆን ተብሎ ቢደበቁ ወይም በሐሰት ቢገለፁ ወይም በስሕተት ቢደበቁ ውጤቱ አንድ ነው። መድን ሰጪው ፖሊሲውን

ውድቅ ነው ሊል ይችላል። በአሜሪካ አገር ባንዳንድ አካባቢዎች የሚከተለዉ አስተሳሰብ ይንፀባረቃል፦

> The material representation must be fraudulently made in order to avoid the policy. The defendant must show not only that the representation was material and false in fact, but that it was willfully and knowingly made form a fraudulent or corrupt motive or with intent to deceive.[28]

/ፖሊሲውን ውድቅ ነው ለማለኘት ያደጋ መመዘኛው ሐሰተኛ መግለጫ በተንኮል የተደረገ መሆን አለበት። ይህም በመሆኑ ተከሳሹ ማረጋገጥ ያለበት የተሰጠው ፍሬነገር ያደጋ መመዘኛ ፍሬነገር መሆኑንና ይኸውም በሐሰት የተሰጠ መሆኑን ብቻ ሳይሆን የተሰጠው ሐሰተኛ መግለጫ መሆኑ እየታወቀ ሆን ተብሎ በተንኮልና በማሳሳት ፍላጐት የተሰጠ መሆኑም ጭምር መሆን ይኖርበታል/ ትርጉም የፀሐፊው። ከላይ የተመለከተዉ አስተሳሰብ እንደተጠበቀ ሆኖ በአሜሪካ አገር በሠፊው ሥራ ላይ ያለውና ሥር የሰደደው ሕግ የሚከተለዉ ነዉ፦

> ... That a false representation if it be a fact material to the risk avoids the policy irrespective of the good faith of the one who makes it. A false statement or declaration of fact material to the risk and upon which the policy is based, will avoid the policy, whether that misrepresentation be the result of intention or mistake not so made.[29]

/ያደጋ መመዘኛ የሆነ ሐሰተኛ መግለጫ፣ መግለጫ ሰጪው በቅን ልቡና ይሰጥ አይሰጥ ፖሊሲውን ውድቅ ያደርገዋል። እንደፖሊሲው መሠረት ተደርጐ በሚወሰድ ያደጋ መመዘኛ ፍሬነገር ላይ የተደረገ ሐሰተኛ መግለጫ ለመሰጠቱ መንስኤው ስሕተት ይሁን ወይም በቅን ልቡና የተደረገ ይሁን ወይም ሆነ ተብሎ መደረጉ እግምት ውስጥ ሳይገባ ፖሊሲውን ውድቅ ያደርገዋል/። /ትርጉም የፀሐፊው ነው/ የተሰኘው ነው።

በእንግሊዝ አገር እንኳንስ ሆን ተብሎ ታስቦ መድን ሰጪውን ለማሳሳት የተደረገ መሸሸግ ወይም ሐሰተኛ መግለጫ ቀርቶ An innocent misrepresentation affords the party misled a ground for avoiding the policy, a rule which also applies in the case of non-disclosure.[30] *በቅን ልቡና የተሰጠ ሐሰተኛ መግለጫ በመግለጫው ምክንያት ለተሳሳተው ወገን ፖሊሲውን ውድቅ ማድረጊያ ምክንያት ይሰጠዋል። ይህ ደንብ በመሸሸግም ላይ ተፈጻሚ ነው።* ተብሎ ተወስዷል።

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[28] Michigan Law Review , supra note 17, p.468

[29] ከላይ በግርጌ ማስታወሻ ቁ.28 የተመለከተዉ።

[30] Raoul Collinvaux, ግርጌ ማስታወሻ ቁ.7 ገጽ 99

አደጋ እየከበደ መሄዱን ስለመግለጽ

ይህ ንዑስ ርዕስ ከዚህ በታች ባለዉ ክፍል ዉስጥ ሊታይ የሚችል ሲሆን እዚህ እንዲመጣ የተደረገዉ ከመሸሸግ እና ሃሰተኛ መግለጫ ከመስጠት ጋር ስለሚያያዝ መሆኑን ለአንባቢያን መግለጽ እወዳለሁ።

አደጋ እየከበደ መሄዱን ወደማስታወቅ ግዴታ ስንመለስ በን.ሕ.ቁ.667 ላይ ውሉ ሲመሠረት ወይም ከውሉ ምሥረታ በፊት መድን ገቢው ያደጋ መመዘኛ ፍሬነገሮችን መግለጽ እንዳለበት ግዴታ ሲጥል ውል ከተመሠረተ በኋላ ደግሞ አደጋው እየከበደ ስለመሄዱ የመግለጽ ግዴታን በን.ሕ.ቁ. 669 ሥር ተመልክቶ እናገኛለን።

የን.ሕ.ቁ. 669 ከርሱ በፊት ከተጻፉት ከቁጥር 667 እና 668 ተከታይ ሆኖ ከውለታው ምሥረታ በኋላም ቢሆን የፍጹም ቅን ልቡና አስፈላጊነት የጎላ መሆኑን የሚያሳውቅ ቁጥር ሆኖ እናገኘዋለን።

ያደጋ መመዘኛ ፍሬነገሮች በትክክልና ሳይደበቁ ተገልጸው መድን ሰጪው ኃላፊነት ስለሚወስድበት አደጋ በትክክልና በሚገባ ተረድቶ ተገቢውን አረቦን በማስከፈል ወይም ለማስከፈል በመዋዋል አንድ የካሳ መድን ፖሊሲ ተፈጻሚ መሆን ከጀመረ በኋላ መድን የተገባለት ንብረት ውሉ ሲመሠረት ለተፈራው አደጋ ተጋልጦ ከነበረው የበለጠ ቢጋለጥ የተፈራውና መድን የተገባለት አደጋ እየከበደ መሄዱን እንገነዘባለን። ይህም ተፈርቶ መድን የተገባለት አደጋ የመድረሱን ዕድል probability እየጨመረው መሄዱን ይጠቁምና ውሉ ሲመሠረት ወይም ከመመሥረቱ ቀደም ብሎ መድን ሰጭው እግምት ውስጥ ያላስገባቸው አዳዲስ ክስተቶች መኖራቸውን ያሳያል። ሕጉም በዚህ ረገድ መድን ገቢው አዳዲስ የተከሠቱትን የመድን ሰጪውን የአደጋ አሰተያየት ሊለውጡበት የሚችሉትን ፍሬነገሮች ለመድን ሰጪው ማስታወቅ እንዳለበት ይደነግጋል።

በን.ሕ.ቁ.669 ሥር ሕጉ ማንኛውም ዓይነት መድን የተገባለት አደጋ እየከበደ መሄዱን የሚያሳዩ ሁኔታዎች እንዲገለጹ ግዴታ አልጣለም። ይልቁንም ሕጉ መድን ገቢው እንዲገልፀው የፈለገው ያደጋው እየከበደ መሄድ ደረጃውና መጠኑ መድን ሰጪው ላደጋው ሽፋን ለመስጠት ውል ሲያደርግ እንዲህ እየከበደ መሄዱን ቢያውቅ ኖሮ ያደጋውን ኃላፊነት ለመቀበል አይዋዋልም ነበር ወይም ቢዋዋልም እንኳን ካስከፈለው ወይም ሊያስከፍል ከተዋዋለው አረቦን የበለጠ አስከፍሎ ይዋዋል ነበር ሊያሰኝ ነው።

በሌላ አነጋገር ከውሉ ምሥረታ በኋላ የተከሠተውን የአደጋ ክብደት ወደኋላ መልሶ ይህ በኋላ የተፈጠረውና የታወቀው ማክበጃ ሁኔታ ውሉ ሲመሠረት ቢታወቅ ኖሮ መድን ሰጪው ወይ ጨርሶ አልዋዋልም ይል ነበር ወይም ለመዋዋል ፈቃደኛ እንኳን ቢሆን በምንም ዓይነት አስከፍሎ የተዋዋለውን ወይም

ሊያስከፍል ለተዋዋለው አነስተኛ አረቦን አይዋዋልም ነበር ሊያስኝ ነው ማለት ነው።

በን.ሕ.ቁ. 669 ሥር እንደተደነገገዉ በተመሳሳይ መልኩ በኢትዮጵያ የባህር ሕግ ቁ. 301 "ይደርሳል ተብሎ የሚያሰጋዉ አደጋ ስለ መክበዱ" በሚል ርዕስ የሚከተለዉ ተደንግጓል፦

(1) የኢንሹራንስ ዉል በሚፀናበት ጊዜ ይደርሳል ተብሎ የሚያሰጋዉ አደጋ የከበደ እንደሆነ ይህንኑ ሁኔታ እንዳወቀ ለኢንሹራንስ አድራጊዉ ካላስታወቀ የኢንሹራንስ ዉሉ ፈራሽ ይሆናል።

(2) ይህ የአደጋዉ መክበድ ለኢንሹራንስ አድራጊ የተነገረዉ እንደሆነና ይህም የአደጋ መክበድ የደረሰዉ ኢንሹራንስ በገባዉ ሰዉ ምክንያት የሆነ እንደሆነ የኢንሹራንሱ ገንዘብ ለርሱ ቀሪ ሆኖ ወዲያዉኑ ዉሉን መሻር ወይም የኢንሹራንሱ ገንዘብ እንዲጨመር ለማስገደድ ይችላል። አደጋዉ የከበደዉ በሌላ ምክንያት የሆነ እንደሆነ ግን ገንዘቡን በመጨመር ኢንሹራንሱ ይቀጥላል።[31]

ባንዳሩ በእንግሊዝ አገር ያደጋ እየከበደ መሄድ ለተዋዋይ ወገኖች ስምምነት የተተወ ጉዳይ ነዉ። ተዋዋይ ወገኖች በዉለታቸዉ ዉስጥ መድን ገቢዉ ያደጋዉን እየከበደ መሄድ ለመድን ሰጪዉ የማሳወቅ ግዴታ እንዳለበት ካላስገቡ በስተቀር መድን ሰጪዉ ኃላፊነት የወሰደበት አደጋ እየከበደም እንኳ ቢሄድ መድን ገቢዉ ሁኔታዉን ማሳወቅ አይጠበቅበትም።

በእንግሊዝ አገር ባጠቃላይ አነጋገር ያደጋ መመዘኛ ፍሬ ነገሮችን የማሳወቅ ግዴታ ከቅድመ ዉል ምስረታ ጋር እና ከዉል እድሳት ጋር የተያያዘ ነዉ። ይህንንም ጆን በርድስ እና ኖርማ ሄርድ እንደሚከተለዉ ያስቀምጡታል፦

> The duty to disclose material facts is cast upon the proposer or insured before the contract or a renewal is concluded. At common law, there is no general duty to disclose material facts that occur when they occur during the period of insurance.[32]

ሆኖም በእንግሊዝ አገር ግዴታዉ በህግ በመድን ገቢዎች ላይ የተጣለ አይሁን እንጂ በዉሎች ዉስጥ ግዴታዉን አስገብቶ መዋዋል ግን አልተከለከለም። በአንዳንድ የመድን ዉሎች በተለይም ለእሳት አደጋ ለሚገቡ የመድኖች ዉሎች የተፈቀደ ነዉ። ጆን በርድስ እና ኖርማ ሄርድ እንደሚከተለዉ ያብራራሉ፦

> Certain contracts of insurance, though most notably those of fire insurance do, in practice, impose a duty on the insured to disclose facts occurring during the insurance which materially increase the risk. The term that

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[31] የኢትዮጵያ ንጉሠ ነገሥት መንግሥት የባሕር ሕግ ፣ነጋሪት ጋዜጣ ቁ. ፩፣ በ1952 ዓ.ም. በተለይ የወጣ፣ አዲስ አበባ

[32] John Birds and Norma Hird, Modern Insurance Law , (5th ed.), Sweet & Maxwell, London, 2001, p.122.

imposes such a duty is usually, though not necessarily, a promissory warranty, since it provides that upon a failure to disclose, the insurer can avoid the policy.[33]

ጆን በርድስ እና ኖርማ ሄርድ እንደጻፉት በዉል የሚጣለዉ ያደጋን አየከበደ መሄድ የማሳወቅ ግዴታ መድን ገቢዉን የሚያስገድደዉ በቋሚነት ወይም በዘላቂነት የመድን ሰጪዉን ያደጋ ሃላፊነት የሚያከብዱ ፍሬ ነገሮችን በሚመለከት እንጂ ለጊዜዉ ብቻ ወይም አንዳንዴ የሚያከብዱትን አይደለም። መድን ገቢዉ ለጊዜዉ ብቻ ወይም አንዳንዴ የሚያከብዱትን እንዲገልጽ አይገደድም።[34]

ከመድን ውል ምሥረታ በኋላ አደጋው እየከበደ መሄዱን የማስታወቅ ግዴታ ብቻ ሳይሆን በን.ሕ.ቁ. 669/1/ ላይ የተጣለው የመክበዱ መንስዔ ዓይነትና መድን ገቢው በምን ያህል ጊዜ ውስጥ ማሳወቅ እንዳለበትም ተመልክቷል። በዚሁ መሠረት ለአደጋው እየከበ መሄድ ምክንያቱ ወይም መንስኤው የመድን ገቢው የራሱ ድርጊት ከሆነ ይህ አደጋ አክባጅ ድርጊት ወይም ሁኔታ ከተፈጸመበት ቀን ጀምሮ በአሥራ አምስት ቀናት ውስጥ መረጃው ለመድን ሰጪው መነገር አለበት። ለአደጋው እየከበደ መሄድ ምክንያቱ ወይም መንስኤው የመድን ገቢው ድርጊት ሳይሆን ሌላ ከሆነ መድን ገቢው የአደጋ አክባጅ ሁኔታ መከሰቱን ካወቀበት ቀን ጀምሮ አሥራ አምስት ቀናት በማይበልጥ ጊዜ ውስጥ ለመድን ሰጪው ማስታወቅ እንዳለበት ሕጉ ግዴታ ሲጥል ይህንን የ15 ቀናት የጊዜ ገደብ በውሉ ላይ አርዝሞ መዋዋል በግልጽ ባይከለክልም ቀንሶ መዋዋልን ግን የን.ሕ.ቁ.669/1/ ይከለክላል።

በን.ሕ.ቁ. 669/1/ የተመለከተዉን የማስታወቅ ግዴታና የጊዜ ገደብ ሁኔታን በምሣሌ ለማየት ብንሞክር፣ ለምሣሌ አንድ ሰው ለውሃ ማመላለሻ የሚጠቀምበት ቡቴ መኪና ኖሮት መኪናውን ለእሳት አደጋ መድን አስገብቶ ሳለ የመኪናውን አገልግሎት ከውሃ ማመላለሻነት ወደ ነዳጅ ማመላለሻነት ቢቀይረው ጥሩ የአደጋ መክበድ ሁኔታ ስለሚሆንና መድን ሰጪው ውሉ ሲመሠረት ይህን ቢያውቅ ኖሮ አልዋዋልም እንኳን ባይል አስከፍሎ ከተዋዋለው ወይም ሊያስከፍል ከተዋዋለው አረቦን የበለጠ ያስከፍል ነበር ወይም ሊያስከፍል ይዋዋል ነበር ስለሚያሰኝ መድን ገቢው የውሀ ማመላለሻ ቡቴ መኪናውን ወደ ነዳጅ ማመላለሻነት ከቀየረበት ቀን አንስቶ በ15 ቀን ውስጥ ሁኔታውን ለመድን ሰጪው መግለጽ እንዳለበት እንረዳለን። በሌላ በኩል ግን ይኸው መድን የተገባለት መኪና በውሃ አመላላሽነት ወደ ጦር ግምባር ተልኮ ለተወሰነ ጊዜ አገልግሎት ሲሰጥ ከቆየ በኋላ መድን ገቢው ለአደጋው እየከበደ መሄድ መንስዔ ወይም ምክንያት ባለመሆኑ /ፊትኑ የመኪናው ወደ ጦር ግምባር መላክ የአደጋ መክበድ ሆኖ የሚቆጠር ከሆነና ይህንኑ አስታውቆ ከሆነ/ መድን ገቢው ስለአደጋው መክበድ ማስታወቅ

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[33] ከላይ በግርጌ ማስታወሻ ቁ.32 የተመለከተዉ ከገጽ 122-123።

[34] ከላይ በግርጌ ማስታወሻ ቁ.32 የተመለከተዉ ገጽ 123።

የሚፈለግበት በውሃ አመላላሽነት ወደ ጦር ግምባር የተላከው ቦቴ መኪናው ወደ ነደጅ ማመላለሻነት መቀየሩን ካወቀበት ቀን ጀምሮ አሥራ አምስት ቀናት ባልበለጠ ጊዜ ውስጥ ይሆናል።

መድን የተገባለት አደጋ እየከበደ መሄዱን ማስታወቅና አለማስታወቅ ምን ምን ውጤት እንደሚያስከትል በን.ሕ.ቁ. 669/2/ እና /3/ ሥር ተጽፎአል። ሰለሆነም ውጤቶቹ ሶስት ናቸው እነርሱም 1ኛ/ በን.ሕ.ቁ. 668/1/ ሥር በተባፊው ሁኔታ ውሉ ፍርስ ሊሆን እንደሚችል፣ 2ኛ/ በመድን ሰጪው ፍላጐትና ምርጫ ውሉ ሊፈርስ እንደሚችል፣እና 3ኛ/ እየቀጠለ የሄደውን አደጋ ገምግሞ መድን ሰጪው ተገቢውን ተጨማሪ አረቦን በማስከፈል ውሉን እንዲቀጥል ማድረግ እንደሚችል ነው።[35]

የአደጋን እየከበደ መሄድ መግለጽ የን.ሕ.ቁ 669/1/ የመድን ገቢው ግዴታ አድርጐ ያስቀምጠው እንጂ በፖሊሲዎች ላይ አልተመለከተም። ቀደም ሲል በጨረፍታ እንደጠቀስኩት ይህ ሊሆን የቻለበት ምክንያት የኢትዮጵያ መድን ድርጅት የሚጠቀምባቸው ፖሊሲዎች በቀጥታ የተወሰዱት ከእንግሊዝ አገር መድን ሰጪዎች ስለሆነ ሳይሆን እንደማይቀር ሲገመት በእንግሊዝ አገር እስከቅርብ ጊዜ ድረስ ማለትም እ.ኤ.አ. እስከ 1985[36] ዓ.ም. ድረስ የፍጹም ቅን ልቡናን ግዴታ በውሉ ምሥረታ ጊዜ ብቻ መወጣት እንደሚያስፈልግና ከውሉ ምሥረታ በኋላ ስለአደጋው እየከበደ መሄድ መግለጽ አስፈላጊ እንዳልነበረ መገንዘቡ መልካም ነው።

በን.ሕ.ቁ. 669/4/ ሥር እንደተመለከተው የአደጋን እየከበደ መሄድ የማስታወቅ ግዴታና ውጤቶች በሕይወት መድን ላይ ተፈጻሚ እንደማይሆን ተደንግጐአል። የሕይወት መድንን በሚመለከቱ የንግድ ሕጉ ቁጥሮች አካባቢም የተባለ ነገር የለም። በሌላ በኩል በሕይወት መድን ፖሊሲ ላይ ጠቅላላ ግዴታዎች በሚለው ክፍል ሥር መድን የገባው ድርጅቱ በጽሑፍ ሳይፈቅድለት በወታደራዊ፣ በባሕር ኃይል ... ወይም ማናቸውንም ይበልጥ አደጋ የሚያስከትል ሥራ ቢይዝ ወይም ... ሥራ ላይ ቢሠማራና ከላይ በተጠቀሱት በማናቸውም ምክንያቶች ቢሞት በዚህ ውል መሠረት የድርጅቱ ግዴታ ይኸው ይበልጥ አደገኛ የሆነው ሥራ ታውቆ ቢሆን ኖሮ የተከፈለው አረቦን ሊገዛ የሚችለውን የዋስትና ገንዘብ መክፈል ይሆናል። ይኸውም ይበልጥ አደገኛ የሆነው ሥራ ዋስትና ሊሰጠው የማይችል ከሆነ የድርጅቱ ግዴታ ለውሉ የተከፈውን ጠቅላላ አረቦን /ተጨማሪ አረቦን ሳይጨምር/ መመለስ ይሆናል ይላል።

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[35] በን.ሕ.ቁ. 669/1/ሥር የተጣለው ግዴታ የሚያስከትለውን ዝርዝር ውጤት አንባቢው ከዚህ በላይ ከገጽ 7 እስከ 26 ያደጋ መመዘኛ ፍሬነገሮችን ስላለመግለጽ ወይም በሐሰት ስለመግለጽና የሚያስከትለውን ውጤት በሚመለከት የተፃፈውን እንዲመለከቱ ፀሐፊው ይጠቁማል።

[36] The Litsion Pride (1985) 1 LLoyd's Rep. 437

ውሉ ፀንቶ በሚቆይበት ጊዜ /መድን የተገባለት አደጋ ከመድረሱ በፊት ወይም በውሉ የተመለከተው ጊዜ ከመሙላት በፊት/ የተዋዋይ ወገኖች መብትና ግዴታ

የአረቦን አከፋፈል[37]

በዚሁ ጽሁፍ ዉስጥ ቀደም ሲል ለማመልከት እንደተሞከረው ምንም እንኳን የኢንሹራንስ /የመድን/ መግቢያ ገንዘብ /አረቦን/ አከፋፈል በተዋዋይ ወገኖች ውል የሚወሰን ቢሆንም አንድ የመድን ውል ፖሊሲ ተፈርሞም ፖሊሲው ዉጤት መስጠት የሚጀምረው ግን የመጀመሪያው መደብ ኘሪሚዬም ሲከፈል ነው ብሎ መዋዋል እንደሚቻል በን.ሕ.ቁ. 659/2/ ተደንግጓል። ይህ የን.ሕ.ቁ. 659/2/ ድንጋጌ ለተወሰነ ጊዜ ፖሊሲውን የሚያስኬደው አረቦን ተከፍሎ ከዚያ ያ የተወሰነው ጊዜ ካለቀ በኋላ ማደሻ ኘሪሚዬም ስለማስከፈል ይሁን ወይም ለተወሰነ ጊዜ የተገባ ፖሊሲ ኖሮ ለዚያ ለተወሰነ ጊዜ ከሚከፈለው ኘሪሚዬም ላይ የሆነ ያህል እንደ መጀመሪያው መደብ የሚቆጠር ካልከፈሉ ፖሊሲው ውጤት መስጠት እንደማይጀምር ይናገር ተለይቶ አልታወቀም።

ስለ አረቦን አከፋፈል መድን ድርጅት በሚጠቀምባቸው ፖሊሲዎች ላይ ምን እንደተባለ ከዚህ በታች ባጭሩ ለማየት እንሞክራለን።

በሠራተኞች የካሣ መድን ፖሊሲ /workmen's compensation policy/ ላይ 'ሁኔታዎች' conditions በሚለው ክፍል በ6ኛው ቁጥር ላይ "የመጀመሪያው መደብ" አረቦንና "ማሳደሻ አረቦን" የሚሉ ሐረጎች እናገኛለን። "የመጀመሪያው መደብ" ማለት ውሉ ለአንድ ዓመት ተገብቶ ከሆነ ለዚያ ለአንድ ዓመት የሚውል ሙሉ አረቦን የሚል ስሜት ያለው ሲመስል አንድ ዓመት ሲያልቅ የሚከፈለው አረቦን ደግሞ "ማሳደሻ" አረቦን ይሆናል።

በሁሉም አደጋ መድን ፖሊሲ /All risks Policy/ ላይም እንደተመለከተው "የመጀመሪያ መደብ" አረቦን "first premium" የተሰኘው አባባል ውሉ ፀንቶ ለሚቆይበት ጊዜ የሚከፈለውን አረቦን እንደሚመለከት ስንረዳ ከሕይወት መድን አኳያ ስንመለከት ግን ለአንድ ዓመት የሚከፈለው አረቦን ተከፋፍሎ በ Installment ሊከፈል ስለሚችል "first premium" የመጀመሪያው መደብ አረቦን ማለትም ፖሊሲው ለአንድ ዓመት ተገብቶ ከሆነ ለዚያ ዓመት የሚከፈለው ሙሉ አረቦን ላይሆን ይችላል። "የመጀመሪያው አረቦን" በዚህ ረገድ የመጀመሪያው Installment ተደርጐ ሊወሰድ እንደሚችልና በን.ሕ.ቁ. 659/2/ መሠረትም ምንም እንኳን ፖሊሲው ቢፈረምም ይኸው የመጀመሪያው Installment ኘሪሚየም ካልተከፈለ

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[37] ይህ ፀሃፊ በኢትዮጵያ ጠበቆች የሕግ መጽሔት በመጋቢ 1ቁ.1 ላይ ያሳተመዉን ይመልከቱ፣ እንደዚሁም በጥጋቡ አንበርበር እና በኢትዮጵያ መድን ድርጅት መካከል ስለ አረቦን መክፈልና ስለመድን ዉል መታደስ በነበረዉ ክርክር ጠቅላይ ፍ/ቤት የሰጠዉን ዉሳኔ በፍ/ቤቱ የፍርዶች መጽሃፍ ቅጽ ፩ ከገጽ 121-126 ይመልከቱ

ፖሊሲው ዉጤት መስጠት አይጀምርም የሚል ስምምነት ማድረግ እንደሚቻል እንገነዘባለን።

መድን ድርጅት በሚጠቀምባቸው ሌሎች ፖሊሲዎች ላይ ሠፍሮ የሚገኘው መድን ሰጪው ለመስጠት እየተዋዋለ ስላለው የመድን ሽፋን መድን ገቢው አረቦን ለመክፈል መስማማቱን የሚገልጽ ሲሆን ውሉ ሲመሠረት መድን ገቢው አረቦኑን ውሉ ፀንቶ ለሚቆየበት ጊዜ ባንዴ ይክፈል ወይም ከፋፍሎ ይክፈል ባያመለክትም ባንዴ ከፍሎ እንደሚዋዋል ይገመታል። ቢሆንም ግን ተዋዋይ ወገኖች የአረቦኑን አከፋፈል በሚመለከት እንደፈለጉ ሊዋዋሉ እንደሚችሉ መገመት አያዳግትም።

ዋነኛው በዚህ በያዝነው "የአረቦን አከፋፈል" በተሰኘው ንዑስ ርዕስ ሥር ለማንሳት የፈለግሁት በን.ሕ.ቁ.666 እና 709 ላይ የተመለከተዉ አረቦን በጊዜ ካልተከፈለ ምን ውጤት እንደሚያስከትል የተደነገጉትንና በፖሊሲዎች ላይ ስለአረቦን ክፍያ የሠፈሩትን በሚመለከት አንዳንድ ሐሳቦችን ነው።

ምንም አንኳን በን.ሕ.ቁ.666/1/ መሠረት መድን ገቢው ለኢንሹራንስ መግቢያ የሚከፈለውን ገንዘብ በውሉ ላይ በተወሰነው ቀን መክፈል ግዴታው መሆኑ ቢደነገግም መድን ገቢው አረቦኑን በውሉ በተወሰነው ጊዜ ባለመክፈሉ ብቻ ውሉን ማፍረስ እንደማይቻል በን.ሕ.ቁ. 666/2/ ላይ ተመልክቷል። የንዑስ ቁጥር /2/ ክልከላ ተፈጻሚነቱ ተቃራኒ ስምምነት ቢኖርም ባይኖርም ሲሆን የዚህን ንዑስ ቁጥር ድንጋጌ ዋና መልዕክት አረቦን በውሉ ላይ በተመለከተው ጊዜ ካልተከፈለ ውሉ ፈራሽ ነው በሚል ሰበብ ስምምነቱን ወደጉን ማድረግ እንደማይቻል ነው። የንግድ ሕጉ ሲረቀቅ በዚህ በንግድ በን.ሕ.ቁ. 666 በስተጀርባ የነበረዉን አስተሳሰብ ፒተር ዊንሺፕ እንደሚከተለዉ ይገልጹታል፦

> As for the payment of the premium, in order to spare the insured from the sudden unforeseen rupture of the contract, I have included a provision, as has been done in the French law, requiring a mandatory waiting period of one month during which the insurance is only suspended. The provision is a matter of public policy and cannot be varied by the parties.[38]

የአረቦን አከፋፈልን በተመለከተ መድን ገቢዉ ለድንገተኛ የዉል መቋረጥ እንዳይጋለጥ ለመከላከል በፈረንሳይ ሕግ ዉስጥ እንዳለዉ ዓይነት ለአንድ ወር ጊዜ ዉሉ ታግዶ የሚቆይበትን በግዴታ የመጠበቂያ ጊዜን የሚመለከት ድንጋጌ አስገብቻለሁ(ትርጉሙ የፀሃፊዉ)

አረቦኑ በፖሊሲው ላይ በተመለከተው ጊዜ ካልተከፈለ ውሉ ለተገባበት ጊዜ ሙሉውን ፀንቶ ይቆያል ማለት አይደለም። የን.ሕ.ቁ.666/2/ አባባል ግልጽ እንደሚያደርገው መድን ሰጪው አረቦኑ በፖሊሲው ላይ በተመለከተው የመክፈያ

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[38] Peter Winship, (editor and translator) Background Documents of the Ethiopian Commercial Code of 1960, Faculty of Law , Haile Selassie I University, Addis Ababa, 1974 p. 82

ጊዜ ባለመከፈሉ ውሉ በዚሁ ምክንያት ብቻ ወዲያውኑ /automatically/ ፈራሽ ነው ሊል አይችልም። በን.ሕ.ቁ. 666/3/ እና /4/ እንደዚሁ በራሱ በንዑስ ቁጥር /2/ መሠረት መድን ሰጪው ያልተከፈለው አረቦን እንዲከፈለው ጥያቄ ማቅረብ እንዳለበትና እንዲከፈለው በጠየቀ በአንድ ወር ጊዜ ውስጥ ከተከፈለው ውለታው ይቀጥላል ካልተከፈለው ግን በን.ሕ.ቁ. 666/2/ ሥር የተጻፈው"... ባለመከፈሉ ብቻ ውሉን ለማፍረስ አይቻልም" የሚለው አባባል የተወዘፈው አረቦን ባይከፈልም ውሉ ተዋዋይ ወገኖች ፀንቶ እንዲቆይ ለተዋዋሉት ጊዜ ይፀናል ማለት አለመሆኑን ማጤን ያስፈልጋል።

በን.ሕ.ቁ.666/3/ ላይ በቁጥር የአንድ ወር ጊዜ ተለጠ እንጂ ሃሳቡ በፍትሐብሔሩ ሕግ የጠቅላላ ውል ሕግ ክፍል ውስጥ በቁጥር 1772 ላይ የተመለከተውን ማስጠንቀቅን ወይም ደግሞ በቁጥር 1770 ሥር የተጻፈውን የችሮታ ጊዜን[39] የሚመለከት ነው ለማለት ይቻላል። ልዩነቱ ማስጠንቀቂያ ተባለ የችሮታ ጊዜ በን.ሕ.ቁ. 666/3/ ሥር የመለከተውን የሰጠው ሕግ ነው እንጂ ተዋዋዩ መድን ሰጪ አለመሆኑ ነው።

ወደ ን.ሕ.ቁ. 666/3/ አባባል ስንመለስ መድን ሰጪው አረቦን እንዲከፈለው ከጠየቀበት ቀን አንሥቶ በአንድ ወር ጊዜ ዉስጥ ካልተከፈለው ውሉ አንደሚታገድ እናነባለን። የውሉ መታገድ ምን እንደሆነ፣ ምን ውጤት እንደሚያስከትል በሕጉ ላይ የተሰጠ ምንም ዐይነት ማብራሪያ ባይኖርም በዚህ ንዑስ ቁጥር ሥር "ውሉ ይታገዳል" የሚለው አባባል ምን እንደሆነና ምንስ ውጤት እንደሚያስከትል ባጭሩም ቢሆን ማየቱ ጠቃሚ ይሆናል።

ስለውሉ መታገድና ስለውጤቱ ከማውሳታችን በፊት መድን ሰጪው የተወዘፈው አረቦን እንዲከፈለው ጥያቄ ካደረገበት[40] ቀን ጀምሮ እስከ አንድ ወር ጊዜ ድረስ ውሉ እንደፀና እንደሚቆይ መገንዘቡ መልካም ነዉ። የአረቦን ክፍያ ጥያቄ በመድን ሰጪው ከተደረገበት ቀን አንስቶ በአንድ ወር ጊዜ ውስጥ መድን የተገባለት አደጋ ቢደርስ መድን ሰጪው የመካስ ግዴታ እንደሚወድቅበትም መረዳቱ አስፈላጊ ነው። የተወዘፈው አረቦን እንዲከፈለው ጥያቄ ካቀረበበት ቀን ጀምሮ በአንድ ወር ጊዜ ውስጥ መድን የተገባለት አደጋ ቢደርስ መድን ሰጪው መክፈል ይገባ የነበረውን አረቦን ከካሣው ላይ ቀንሶ ለመድን ገቢው መስጠት እንደሚችል ይገመታል። ምናልባትም ኪሣራም ሊጠይቅ ይችል ይሆናል።

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[39] የኢትዬጵያ መድን ድርጅት "የፋታ ጊዜ" ይለዋል።

[40] በን.ሕ.ቁ. 666/3/ ላይ ያለው የአንድ ወር ጊዜ መቆጠር የሚጀምረው የመድን ሰጪው የውዝፍ አረቦን ክፍያ ጥያቄ ከተላከበት ቀን /ጊዜ/ ጀምሮ ነው? ወይንስ ጥያቄው ለመድን ገቢው ከደረሰበት ጊዜ /ቀን/ ጀምሮ ነው? የሚለው ጥያቄ አከራካሪ ሊሆን ይችላል። ከውል ድርድር ማለትም hoffer እና acceptance አንፃር እንደሚታወቀው Dispatch theory እና Reception theory የሚባሉ ነድፈ ሐሳቦች አሉ። የን.ሕ.ቁ. 666/3/ አባባልም ከነኚህ ባንዱ ሥር መሸፈን አለበት ሊባል ይቻላል።

በግርጌ ማስታወሻ ቁጥር አርባ ላይ እንደተመለከተው ያንድ ወር ጊዜ መቆጠር የሚጀምረው የመድን ሰጪው የዉዝፍ አረቦን ጥያቄ ከተላከበት ቀን አንስቶ ይሁን ወይም ጥያቄው ለመድን ገቢው ከደረሰበት ቀን አንስቶ የሚለው አከራካሪ ጥያቄ እንደተጠበቀ ሆኖ መድን ሰጪው ጥያቄ ካቀረበ ከአንድ ወር በኋላ ውሉ እንደሚታገድ በን.ሕ.ቁ. 666(3) ተደንግጉአል። "ይታገዳል" የሚለው ቃል ውሉ "ይፈርሳል" እንዳልሆነ በን.ሕ.ቁ. 666 ንዑስ ቁጥር (4) ሥር ከተጻፈው መረዳት ይቻላል። "ይታገዳል" ማለት "ይፈርሳል" ካልሆነ ሊኖረው የሚችለው ትርጉም ለጊዜው ተፈጻሚነቱ ይቆማል ማለት ነው። በተለይም የእንግሊዝኛውን ቅጂ ስናይ "suspended" ስለሚልና ይህ ማለት ደግሞ "ለጊዜው የመቆም"፣ "ለጊዜው የመታገድን" "ለጊዜው የመወገድን" ሰሜት ስለሚሰጥ የን.ሕ.ቁ. 666/3/ ትርጉም በመድን ሰጪውና በመድን ገቢው መካከል የተደረገው ውለታ ሳይፈርስ ወይም ሳይቋረጥ ለጊዜው ውሉ በተዋዋይ ወገኖች ላይ ተፈጻሚነቱ ወይም ውጤታማነቱ ይቆማል ወይም ይቆያል ማለት ነው። ባጭሩ በን.ሕ.ቁ. 666/3/ ሥር ሕግ አውጪው ለማስተላለፍ የፈለገው መልእክት መድን ሰጪው አረቦኑ እንዲከፈለው ከጠየቀበት ቀን አንስቶ ሳይከፈለው አንድ ወር ካለፈ ከዚያ በኋላ መድን የተገባለት አደጋ ቢደርስ ማለትም የእገዳው ጊዜ ከተጀመረ በኋላ ለሚደርሰው አደጋ መድን ሰጪው ሊክስ እንደማይገደድ ነው።

ከላይ እንደተመለከተው በን.ሕ.ቁ. 666/3/ ሥር የተጻፈው የእገዳ ጊዜ ውሉን ለጊዜው ተፈጻሚነቱን ያቆመዋል እንጂ አያቋርጠውም ወይም አያፈርሰውም። በመሆኑም ከእገዳው በኋላም ቢሆን መድን ገቢው በመድን ሰጪው ጥያቄ ይሁን በራሱ አነሣሽነት አረቦኑን ቢከፍል ከከፈለበት ቀን አንስቶ ውሉ ተፈጻሚነቱን ሊቀጥል እንደሚችል በዚሁ የን.ሕ.ቁ. 666 ንዑስ ቁጥር /5/ ሥር ተጽፎ እናነባለን።

መድን ሰጪው የተወዘፈው አረቦን እንዲከፈለው ከጠየቀበት ቀን አንስቶ የአንድ ወር ጊዜ ሲያልፍ ማለትም የእገዳው ተፈጻሚነት ከጀመረ በኋላ በን.ሕ.ቁ. 666 /4/ ሥር ሁለት አማራጮች ተሰጥተውታል። 1ኛ/ከላይ እንደተባለው በድጋሚ የተወዘፈው አረቦን እንዲከፈለው ጥያቄ ማቅረብ ይችላል።[41] 2ኛ/ አንደኛውን አማራጭ ካልፈለገ ደግሞ ውሉ እንዲፈርስ መጠየቅ ይችላል።[42]

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[41] ይህ መቼም ተግባራዊ መሆኑ አጠራጣሪ ይመስላል፣ ነገር ግን መድን ሰጪው የረዥም ጊዜ ደምበኝነትንና ሌሎች ሁኔታዎችን ከግምት ውስጥ በማስገባት በድጋሚ ጥያቄ ለማቅረብ ይፈልግ ይሆናል። በሌላ በኩል ደግሞ የን.ሕ.ቁ.. 666/4/ የእንግሊዝኛ ቅጂ "claim" ስለሚል በፍርድ ቤት ወይም በግልግል ዳኝነት መድረክ ላይ እንዲከፈለው ክስ ያቀርባል ማለት ነው ሊባል ይችላል። በዚህ አጋጣሚ ከሕይወት መድን አንፃር መድን ሰጪው አረቦን ስላልተከፈለው ክስ ማቅረብ እንደማይችል ተጽፎ ስለምናይ የን.ሕ.ቁ.. 666/4/ ን ክስ ወደማቅረብ ልናጠቃልለው የምንችል ይመስላል።

[42] ይህ ሁሉ ሆኖ ሕጉ መድን ሰጪው ውሉን እራሱ እንዲያፈርስ ወይም ፈርሷል ብሎ እንዲል መብት የከለከለው ይመስላል። ተዋዋዮች በልዩነት ካልተስማሙ ወይም ሕግ ካልፈቀደ ውል እንዲፈርስ መጠየቅ በፍርድ ቤት በኩል እንደሚሆን በፍ.ብ.ሕ.ቁ. 1784 ተመልክቷል።

መድን ሰጪው በመጀመሪያው አማራጭ በመጠቀም የተወዘፈው አረቦን እንዲከፈለው ጠይቆ ከተከፈለው ውሉ እገዳው ተነስቶለት ውጤት መስጠት እንደሚጀምር ከን.ሕ.ቁ. 666 /5/ አባባል ስንገነዘብ፣ በሁለተኛው አማራጭ ሊጠቀም የፈለገ መድን ሰጪ ግን ሥልጣን ባለው ፍርድ ቤት[43] አማካኝነት ውሉን ሲያስፈርስ የውሉ መፍረስ የሚያስከትለውን ውጤት የንግድ ሕጉ አይናገርም። ምናልባት ያው በፍ.ብ.ሕ.ቁ 1815 መሠረት በተቻለ መጠን ተዋዋይ ወገኖች ከውሉ በፊት ወደነበሩበት ቦታ ይመለሳሉ ለማለት ይቻል ይሆናል፣ ሆኖም በን.ሕ.ቁ. 666/4/ መሠረት አንድ የመድን ውል ሲፈርስ ሁለቱንም ተዋዋይ ወገኖች በፍ.ብ.ሕ.ቁ. 1815 መሠረት ከውሉ በፊት ወደ ነበሩበት መመለስ አይቻልም። ቀደም ሲል እንደተገለፀው መድን ሰጪው ለውሉ ግዴታ ተጠያቂ የሚሆነው የተፈራው አደጋ ሲደርስ ወይም ጊዜ ሲሚላ ወዘተ ስለሚሆን ከርሱ ወደ መድን ገቢው የሚሄድ ነገር የለም። የን.ሕ.ቁ. 666 ተፈጻሚነት ራሱ የሚነሣው መድን ገቢው በገባበት ግዴታ መሠረት አረቦን ለመክፈል ሲዘገይ ስለሆነ መድን ገቢው ከሰጪው በተመሳሳኝነት የሚጠይቀው ነገር አይኖርም።

ይልቅ አክራካሪ ሊሆን የሚችለው አረቦኑ መከፈል ይገባው ከነበረበት ጊዜ አንስቶ ውሉታው በሕግ ማለትም በን.ሕ.ቁ. 666/3/ መሠረት እስከታገደበት ጊዜ ድረስ መድን ሰጪው ላደጋው ኃላፊነት ሰለነበረበትና He was on risk ለዚያ ጊዜ ደግሞ ሽፋን እንደሰጠ ስለሚቆጠር ለዚያ ጊዜ አረቦኑ ተሠልቶ መድን ገቢው እንዲከፍል ሊገደድ የሚችል ይመስላል። ይህን ገንዘብ መድን ሰጪው ባልተከፈለ አረቦንነቱ እንኳን ባያገኘው በኪሣራ መልክ ሊሰጠው የሚገባ ይመስላል። በነገራችን ላይ በን.ሕ.ቁ. 666 ሥር በአማርኛ እና በእንግሊዝኛ ቅጂዎች በተጻፉት ድንጋጌዎች መካከል ልዩነት አለ። በተለይም በእንግሊዝኛዉ ቅጂ በን.ቁ. (2) እና (4) ላይ "terminate" እና "termination" በአማርኛዉ ቅጂ ደግሞ "ለማፍረስ" እና "እንዲፈርስ" በተሰኙት ቃላት መካከል ሰፊ ልዩነት አለ። በእንግሊዝኛዉ ቅጂ ላይ የተጻፉቱ ቃላት በአማርኛ በትክክል ቢተረጎሙ ኖሮ "ማቋረጥ" "መቋረጥ" የሚል ትርጉም ሲኖራቸዉ በአማርኛዉ ቅጂ ላይ የተጻፉቱ ግን "ማፍረስ" "መፍረስ" የሚሉ ናቸዉ። በሌላ በኩል በ "መፍረስ" እና በ "መቋረጥ" መካከል ትልቅ የዉጤት ልዩነት አለ። በዉል ህግ ቋንቋ "መቋረጥ" ወይም "ማቋረጥ" የወደፊት ዉጤት ብቻ ሲኖረዉ ማለትም ዉሉ እስከተቋረጠበት ጊዜ ድረስ የተፈፀሙትን ግዴታዎች የማይነካ የተዋዋዮቹን የወደፊት ግዴታዎችን ብቻ የሚመለከት ሲሆን የዉል "መፍረስ" ግን ወደ ኋላ ሄዶ ዉሉን ከምስረታዉ ጀምሮ የሚነካዉ፣ በዉሉ መሠረት የተፈፀሙትን ግዴታዎች እንዳልተፈፀሙ በማስቆጠር ወደ ኋላ የሚመልሳቸዉ እንደዚሁም ደግሞ ከዉሉ መፍረስ የተነሳ ወደፊት ሊፈፀሙ ይችሉ የነበሩትን ግዴታዎችንም ጭምር የሚመለከት ነዉ። በ "መቋረጥ" እና በ "መፍረስ" መካከል ባሉት እነዚህ ልዩነቶች መነጽር በን.ሕ.ቁ. 666 የተቀመጠዉን

[43] የን.ሕ.ቁ. 666/4/ "ውሉ እንዲፈርስ ለመጠየቅ ይችላል" ስለሚል መድን ሰጪው የግድ በፍ/ቤት በኩል መሄድ ይኖርበታል ማለት ሲቻል በሌላ በኩል ግን ውሉን ከተዋዋይ ወገኖች አንዱ ሲያፈርስ /ፍርድ ቤት ሳይሄድ/ እንደሚቻል በፍ.ብ.ሕ.ቁ.1774 1786 እና 1787 ተመልክቶአልና ከነኝህ ቁጥሮች ባንደኛው መጠቀም ከቻለ መድን ሰጪው በገዛ ራሱ ውሉ ፈርሷል ሊል እንደሚችል ይገመታል።

ስንመለከት መድን ሰጪው አረቦን እንዲከፈለው ጠይቆ በአንድ ወር ጊዜ ዉስጥ ካልተከፈለዉ ዉሉን የማቋረጥ መብት ነዉ ያለዉ ወይንስ የማፍረስ? የሚል ጥያቄ ማስነሳቱ የማይቀር ነዉ። አስገዳጅ በሆነዉ የአማርኛዉ ቅጂ መሠረት ከተሄደ መድን ሰጪው ዉሉን ከነዉጤቱ ማስፈረስ ሲችል በእንግሊዝኛዉ ቅጂ መሠረት ከተሄደ ደግሞ መድን ሰጪው ዉሉን በራሱ ሥልጣን በማቋረጥ በወደፊት ግዴታዎች ላይ ብቻ ዉጤት እንዲኖረዉ ማድረግ ይችላል።

ስለአረቦን ክፍያ የተጻፈው የን.ሕ.ቁ. 666 በሕይወት መድን ላይ ተፈጻሚ ያለመሆኑ በዚሁ ቁጥር በንዑስ ቁጥር /6/ ሥር ተደንግጓል። ስለሕይወት መድን የተደነገጉትን የንግድ ሕግ ቁጥሮች ስንቃኝ ስላልተከፈለ የኢንሹራንስ መግቢያ ገንዘብ በሚል ርዕስ ቁጥር 709 ስለዚሁ ጉዳይ የሚደነግግ መሆኑን እንረዳለን።

በን.ሕ.ቁ. 666 እና 709 መካከል ጉልቶ የሚታየው ልዩነት በቁጥር 666 ላይ የተጻፈው እንደተጠበቀ ሆኖ ውል የማፍረስና የተወዘፈው አረቦን እንዲከፈል ጥያቄ ወይም ክስ የማቅረቡ መብት ሰፋ ተደርጐ ሰመድን ሰጪው ሲሰጥ በቁጥር 709 ላይ ግን 1ኛ/ ውዝፍ አረቦን እንዲከፈል ክስ ማቅረብ የተከለከለ መሆኑን፣ እና 2ኛ/ የአረቦኑ መወዘፍ በቁጥር 709/2/ ሥር በተመለከተው ሁኔታ ካልተሸፈነ ውሉን ማፍረስ እንደማይቻል እንገነዘባለን።

በን.ሕ.ቁ. 709/2/ ሥር እንደተመለከተው አንድ መጽናት ከጀመረ ገና ሶስት ዓመት ያልሞላው የሕይወት መድን ውል ተገብቶ በውሉ መሠረት በየዓመቱ መጀመሪያ ላይ መከፈል የሚገባው አረቦን ኖሮ ለምሳሌ በ3ኛው ዓመት መግቢያ ላይ መከፈል የነበረበት ሳይከፈል ቢቀር መድን ሰጪው እንዲከፈል ጥያቄ ያቀርብና ጥያቄ ካቀረበበት ቀን ጀምሮ በአንድ ወር ጊዜ ውስጥ ካልተከፈለው ውሉን ሊያፈርስ እንደሚችል እናያለን።[44]

ይሁን እንጂ ፖሊሲው ውሉ መጽናት ከጀመረ አንስቶ እጅግ በጣም ሶስት ዓመታዊ የአረቦን ክፍያዎች የተከፈሉበት ከሆነና ለምሣሌ የአራተኛው ዓመት አረቦን በወቅቱ ካልተከፈለው መድን ሰጪው አንዲከፈለው ጥያቄ ማቅረብ እንደሚችልና ጥያቄ ባቀረበ በ1ወር ጊዜ ውስጥ ካልተከፈለው ውሉ ውድቅ መሆኑ ወይም መፍረሱ ቀርቶ መድን ሰጪው ከዚህ በታች ከተመለከቱት ሁለት አማራጮች አንዱን መፈጸም እንዳለበት በን.ሕ.ቁ. 709/3/ ሥር ተደንግጐአል።

አማራጮቹም፡-

1/ ለተከፈለው ገንዘብ ተመጣጣኝ ፖሊሲ መስጠት ወይም

2/ የተስማሙበትን ዋና ገንዘብ ወይም በሕይወት እስካለ ድረስ የሚከፈለውን ገንዘብ በን.ሕ.ቁ. 656 መሠረት በሚወጣው ደንብ መሠረት መቀነስ ናቸዉ።

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[44] በን.ሕ.ቁ. 666/3/ ሥር የተመለከተው የእገዳ ጊዜ በቁጥር 709 ላይ አይታይም።

የመጀመሪያውን አማራጭ ለመከተል የፈለገ መድን ሰጪ አሁን ሥራ ላይ ባለውና የኢትዮጵያ መድን ድርጅት ከሚጠቀምበት የሕይወት መድን ፖሊሲ ላይ "የአረቦን ክፍያ ሲቋረጥ" በሚለው ክፍል ሥር እንደተመለከተው የሚያደርገው "የአረቦን ክፍያው በተቋረጠበት ጊዜ ውሉ ባፈራው የጥሬ ገንዘብ ዋጋና መድን በገባው ሰው ዕድሜ ላይ የተመሠረተ የተቀነሰና በሙሉ የተከፈለበት የመድን ፖሊሲ መስጠት" ሲሆን ሁለተኛውን አማራጭ ለመከተል ከፈለገ ግን አሁንም በዚሁ በሕይወት መድን ፖሊሲ ላይ እንደተመለከተው ማናቸውንም በመድን ገቢው ላይ የሚፈለገውን ዕዳ ቀንሶ ውሉ ያፈራውን የጥሬ ገንዘብ ዋጋ በጥሬ ገንዘብ ባንዱ ይከፍላል ወይም ደግሞ በተደረገው ቅናሽ መሠረት መድን ገቢው በሕይወት እስካለ ድረስ በየጊዜው የሚከፈለውን ገንዘብ ይሰጠዋል።

ከዚህ በላይ በን.ሕ.ቁ. 709/3/ ከተጠቀሱት ሁለት አማራጮች በተጨማሪ የኢትዮጵያ መድን ድርጅት የሚጠቀምበት 3ኛ አማራጭ በሕይወት መድን ፖሊሲ ላይ ይታያል። ይኸውም "የተራዘመ ተርም መድን" /ኤክሰተንድድ ተርም ኢንሹራንስ/ በሚል መጠሪያ የሚታወቅ ሲሆን ተግባራዊነቱም "ውሉ የሚኖረውን የተጣራ የጥሬ ገንዘብ ዋጋንና የመድን ገቢውን ዕድሜ እግምት ውስጥ በማስገባት ከመድን ገቢው ላይ የሚፈለገውን ማንኛውንም ዕዳ ቀንሶ መድን ገቢው በደረሰበት ዕድሜ የፖሊሲው የጥሬ ገንዘብ ዋጋ የሚገዛውን በማስላት ውሉ ለዚያን ያህል እንዲቀጥል ማድረግ ሲሆን" በእንግሊዝኛው የሕይወት መድን ፖሊሲ ቅጂ ላይ እንደተመለከተው የፖሊሲው የጥሬ ገንዘብ ዋጋ የመድን ገቢውን ዕድሜ ተንተርሶ የተራዘመ ተርም መድን ገዝቶ የሚተርፍ ከሆነ መድን ገቢው የተራዘመው ጊዜ ሲያልቅ በሕይወት ኖሮ ከተገኘ ተራፊው ገንዘብ እንደ አንድ ጊዜ አረቦን ተቆጥሮ ተጨማሪ ገንዘብ እንደሚያስገኝለት ተመልክቷል።

ከተዋዋይ ወገኖች ያንደኛው መክሠር

የን.ሕ.ቁ 671-673 ድንጋጌዎች በተመለከተ ድንጋጌዎች ሲረቀቁ ምን ታሳቢ እንደተደረገ ፒተር ዊንሺፕ እንደሚከተለዉ ይገልጹታል፦

> The effects of bankruptcy, of death and of the assignment of the object insured are regulated so as to maintain the effects of the insurance as far as possible, while at the same time safeguarding the parties' freedom to terminate the contract.[45]

የተዋዋይ ወገኖችን ዉሉን የማቋረጥ ነፃነት ሳይነካ ከሥረት፣ሞትና መድን የተገባለት ንብረት መተላለፍ የሚያስከትሏቸዉን ዉጤቶች ለመቆጣጠር እንዲቻል በተቻለ መጠን ዉሎቹ ዉጤታማ ሆነዉ እንዲቀጥሉ ተደርጓል። (ትርጉም የፀሃፊዉ)

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[45] Peter Winship, ቀደም ሲል በግርጌ ማስታወሻ ቁጥር 15 የተመለከተዉ ገጽ 83

ይህንኑ መሠረት አድርገን ድንጋጌዎቹን ከዚህ በታች እንመለከታቸዋለን።

በን.ሕ.ቁ. 671/1 ሥር ሠፍሮ እንደምናገኘው አንድ መድን ገቢ ከከሠረ የመድን ውሉ በዚሁ ምክንያት ብቻ አይፈርስም። የከሣሪው መድን ገቢ ንብረት ጠባቂ ባለአደራዎች በውሉ ተጠቃሚና ለመድን ሰጭው ለሚከፈለው አረቦን ተጠያቂ ባለዕዳ ሆነው የመድን ውሉ ፀንቶ ይቆያል።

በን.ሕ.ቁ. 671/1/ ሥር የሚታየው ድንጋጌ ሁሉንም መድን ገቢ የሚመለከት ጉዳይ አይደለም። የሚመለከተው የከሠረን መድን ገቢ ሲሆን ማንኛውም መድን ገቢ ደግሞ ከሠረ ሊባል እንደማይቻል መገንዘብ ያስፈልጋል። በዚህ በያገኘው ንዑስ ርዕስ ምን ዓይነት መድን ገቢ "ከሠረ" ሊባል እንደሚቻልና "ክሥረት" ራሱ ምን እንደሆነ "ንብረት ጠባቂ ባለአደራዎች" ማለት እነማን እንደሆኑ በመጠኑም ቢሆን ለአንባብያን ማስተዋወቁ አስፈላጊ ይሆናል።

በመጀመሪያ "ከሠረ" የሚለው አባባል ተፈጻሚነቱ የሙያ ሥራው አድርጐ ጥቅም ለማግኘት ሲል በን.ሕ.ቁ. 5 ከተዘረዘሩት ሥራዎች መካከል አንዱን በሚሠራ በማንኛውም የተፈጥሮ ሰው ላይና ከእሽሙር ማሕበር በስተቀር በመመሥረቻ ጹሑፍ መሠረት ወይም በተግባር በን.ሕ.ቁ. 5 ከተዘረዘሩት ሥራዎች አንዱን በሚሠራ የንግድ ማሕበር ላይ ብቻ መሆኑን መረዳቱ ጠቃሚ ነው።[32] በሌላም በኩል የንግድ ማሕበራትን በተመለከተ በን.ሕ.ቁ.10(2) መሠረት በኢትዮጵያ ዉስጥ ዕዉቅና የተሰጣቸዉ ሁለት ኩባንያዎች ማለትም የአክሲዮን ማህበራትና ሓላፊነቱ የተወሰነ የግል ማህበራት የተቋቋሙት በን.ሕ.ቁ. 5 ከተዘረዘሩት ሥራዎች አንዱን ለመሥራት ይሁን አይሁን ዓይነተኛ የንግድ ጠባይ ያላቸዉ ማህበራት መሆናቸዉ መዘንጋት የለበትም።[46] "ከሠሩ" ልንላቸው የምንችለው እነማንን መሆኑን ካወቅን "ክሥረት" ራሱ ምንድነው? ለሚለው ጥያቄ ባጭሩ መልስ ለመስጠት ይሞከራል። አንድ ግለሰብ ነጋዴ ወይም የንግድ ማሕበር እንደከሠረ የሚቆጠረው ይኸው ግለሰብ ነጋዴ ወይም ዓይነተኛ የንግድ ጠባይ ያለው የንግድ ማሕበር ማንኛውንም ከንግዱ ሥራ ጋራ የተያያዘውን ዕዳውን መክፈል ያቋረጠና መክሠሩ በፍርድ የተወሰነ ሲሆን መሆኑን የንግድ ሕጉ ይገልጻል።[47]

ያንድ ግለሰብ ነጋዴ ወይም የንግድ ማሕበር መክሰር የሚታወቀው ነጋዴው ወይም የንግድ ማሕበሩ ከንግድ ሥራው ጋር የተያያዙትን ዕዳዎች ለመክፈል

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[46] የንግድ ህጉ በአንድ በኩል የንግድ ማህበራትን ባብዛኛዉ በመመሥረቻ ጽሁፍ እንሠራለን ብለዉ በሚሉት ወይም በተግባር በሚሠሩት ላይ ተመሥርቶ ዓይነተኛ ንግድ ጠባይ ያላቸዉ እና የሌላቸዉ በማለት በዓላማቸዉ ላይ ተመሥርቶ በሁለት ጎራ ሊከፍላቸዉ፣ በሌላ በኩል ግን የንግድ ማህበራቱ የሚቋቋሙበት ፎርም ብቻዉን ከሁለቱ ባንደኛዉ ጎራ ዉስጥ እንዲደመሩ ያደርጋቸዋል፣ ከዚህ የተነሳ በህጉ ዕዉቅና የተሰጣቸዉ ሁለቱ ኩባንያዎች ዓላማቸዉ ምንም ይሁን ዓይነተኛ ንግድ ጠባይ ያላቸዉ ማህበራት ተብለዉ ተወስደዋል።

[47] የን.ሕ.ቁ. 5፣ ከቁጥር 10 እና ከቁጥር 968 ጋር ተዳምሮ ሲታይ

ያለመቻሉን ከሚገልጹ ከማንኛውም ድርጊቶች፣ፍሮነገሮች (facts) ወይም ሠነዶች[48] ቢሆንም ቅሉ ነጋዴው ወይም ማሕበሩ ማንኛውንም ዕዳ መክፈል በማቋረጡ ብቻ ከሠረ ሊያሰኘው እንደማይችልና አንድ ሰው ወይም ማሕበር ከሠረ ለማለት የግድ ከንግድ ሥራው ጋር የተያያዘውን ዕዳ መክፈል ማቋረጥና የፍርድ ቤት የክሥረት ውሣኔ መሠጠት እንዳለበት እንረዳለን::[49] ሆኖም የአንድ ግለሰብ ነጋዴ ወይም የንግድ ማሕበር ዕዳውን መክፈል ማቋረጥ ለፍ/ቤት ቀርቦ የክሥረት ውሳኔ ባይሰጥም በመክሠር ላይ በሚደረግ የማጭበርበር ወይም ሌሎች የወንጀል ሥራዎች የወንጀል ፍ/ቤት የቅጣት ፍርድ ሊፈረድ ይችላል::[50]

የክሥረትን ሁኔታ ለማስታወቅ የሚሰጠው ፍርድ የኪሣራውን ሥራ የሚመረምር አንድ ዳኛና አንድ ወይም ቁጥራቸው ቢበዛ ከሶስት የማይበልጥ የከሠረው ሰው ወይም የንግድ ማሕበር ንብረት የሚያስተዳድሩ ንብረት ጠባቂዎች መምረጥ /መሾም/ እንዳለበት የንግድ ሕጉ ሲደነግግ[51] ዋናው የንብረት ጠባቂዎች ሥራ የከሠረው ሰው ወይም ንግድ ማሕበርን ማስተዳደርና የአስተዳደር ሥራንም ሲያከናውኑ ግለሰቡ ወይም ማሕበሩ ከንግድ መዝገብ እስከሚፋቅ የገንዘብ ጠያቂዎችን መብት ለመጠበቅ የሚጥሩ ባለአደራዎች ናቸው::

ወደ ን.ሕ.ቁ. 671 መለስ ስንል የመድን ገቢው መክሠር ፖሊሲውን ወዲያውኑ (automatically) እንደማያቋርጠውና ምንም አንኳን መድን ገቢው ቢከሠርም በፍርድ ቤት የተሾሙት ንብረት ጠባቂ ባለአደራዎች በዚሁ የንግድ ሕግ ቁጥር መሠረት ማለትም በሕግ የመድን ውሉ ተጠቃሚ ሆነው ውሉ እንደሚቀጥል እንገነዘባለን:: የን.ሕ.ቁ 671/2/ ድንጋጌ እንደተጠበቀ ሆኖ ቁጥር 671/1/ መድን ገቢው በመክሠሩ ምክንያት ብቻ ውሉ አይፈርስም ብሎ ሲያስቀምጥ በፍርድ ቤት የተሾሙት የከሣሪውን መድን ገቢ ንብረት ጠባቂ ባለአደራዎችን የመድን ውሉ ፀንቶ እስከቆየ ድረስ ለአረቦን ተጠያቂ ባለዕዳዎች አድርጓቸዋል:: እዚህ ላይ ግልጽ መደረግ ያለበት ነገር ንብረት ጠባቂ ባለአደራዎች በውሉ ተጠቃሚነታቸው ሆነ ለአረቦን ተጠያቂነታቸው በግላቸው እንዳልሆነ ነው:: ተጠቃሚነታቸው ዞሮ ዞሮ ለዚያው ለከሠረው ግለሰብ ወይም የንግድ ማሕበር ንብረት ጠባቂ ባለአደራዎች ከመሆናቸው አንፃር እንጂ በግላቸው የመድኑ ውል ፖሊሲ የሚያስገኘውን ገንዘብ እንዲያገኙ አለመሆኑን ነው:: ይህንን ስንል ምናልባት ከክሥረት ውሣኔ በኋላ የመድን ውሉ ፀንቶ እያለ መድን የተገባለት አደጋ ቢደርስና መድን ሰጪው ካሣ ቢከፍል ካሣውን ተቀብለው ከከሣሪው ግለሰብ ወይም የንግድ ማሕበር ንብረት ይደምሩለታል ማለት ሲሆን ለአረቦኑ ተጠያቂነታቸው ከዚያው ከከሠረው ሰው ወይም የንግድ ማሕበር ሀብት ነው እንጂ በግል ከኪሣቸው አይደለም:: ንብረት ጠባቂ በለአደራዎች በህግ የተሰጣቸዉ ስልጣን የከሠረዉን ሰዉ ንብረት

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[48] የን.ሕ.ቁ. 971

[49] የን.ሕ.ቁ. 970

[50] የን.ሕ.ቁ. 970/2/ እና በ1997 ዓ.ም የወጣዉን <u>የወንጀል ህግ</u> ከአንቀጽ 725 እስከ 733 ያሉትን ይመልከቱ::

[51] የን.ሕ.ቁ. 981

በመርማሪዉ ዳኛ ጥበቃ ሥር ሆኖ ማስተዳደር እና ተራ ገንዘብ ጠያቂዎችን በሙሉ በሰስተኛ ወገኖች ፊት የመወከል ነዉ::[52]

በን.ሕ.ቁ. 671 ላይ መድን ገቢው በመክሠሩ ምክንያት ብቻ ውሉ አይፈርስም ቢልም የመድን ገቢው ክሥረት በፍ/ቤት ከተወሰነ ጀምሮ በ3 ወር ጊዜ ውስጥ ውሉን ወይ መድን ሰጪው ወይም ንብረት ጠባቂዎቹ ሊያፈርሱት እንደሚችሉ በን.ሕ.ቁ. 671/2/ ሥር ተደንግጐአል::

በአንድ በኩል በን.ሕ.ቁ. 671 "ተቃራኒ ውል ቢኖርም" የሚል አባባል ስለሌለ መድን ሰጪው በፖሊሲዎች ላይ "የመድን ገቢው ክስረት ውሉን ወዲያውኑ ከፍጻሜ ያደርስዋል" ብሎ ማስገባት የሚችል ቢመስልም በሌላ በኩል ግን ይህ ዓይነቱ ስምምነት ካጠቃላይ የን.ሕ.ቁ. 671/1/ ድንጋጌ መንፈስ ጋር ተጣጥሞ የሚሄድ አይመስልም::[53]

ለማነፃፀር ያህል በባህር ሕግ በቁጥር 299 ሥር የተደነገገዉን መመልከቱ መልካም ነዉ:: በእንግሊዝኛ የህጉ ቅጂ በንኡስ ቁጥር (1) "the underwriter may terminate policies in force in the event of the bankruptcy of the assured" ተብሎ ተደንግጐአል:: ይህ ድንጋጌ መድን ገቢዉ የከሠረ እንደሆነ ዉሉን የማቋረጥ መብትን ለመድን ሰጪዉ ሰጥቶ የንዑስ ቁጥሩ የአማርኛ ቅጂ ግን ዉሉን የማፍረስ መብት ነዉ የሚሰጠዉ::[54] ሎቹን የባህር ሕጉን የቁጥር 299 ድንጋጌዎች አንባቢዉ እንዲያዉቃቸዉ በግርጌ ማስታወሻነት ተዘርዝረዋል::[55]

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[52] የን.ሕ.ቁ. 985(1)

[53] ሕጉ በተለያዩ ሁናቴዎች የመድን ውል ፖሊሲ ወደ ሌላ ተላልፎ እንዲቀጥል የሚያዝበት ዋነኛው ምክንያት የ"risk" ጥያቄ በውስጡ ስላለ ሰዎችን ድንገት ለአደጋ እንዳይጋለጡ መሸጋገሪያ ጊዜ ለመስጠት ሳይሆን አይቀርም::

[54] የባህር ሕግ ቁጥር 299(1) የአማርኛዉ ቅጂ የሚለዉ" ኢንሹራንስ የገባዉ ሰዉ የከሠረ እንደሆነ ኢንሹራንስ አድራጊዉ የተጀመረዉን ኢንሹራንስ ሁሉ ማፍረስ ይችላል" ነዉ::

[55] ቁጥር 299(2) ለኢንሹራንሱ የሚከፈለዉ ገንዘብ በጊዜዉ ያልተከፈለና ኢንሹራንስ የተደረገለት ሰዉ በሃያ አራት ሰዓት ዉስጥ እንዲከፍለዉ ማስጠንቀቂያ ከላከለት በኋላ ይህ የማፍረስ ችሎታ ይኖረዋል::

(3) የዉሉ መፍረስና ግዴታዎች እንዲፈፀሙ የሚደረገዉ ማስጠንቀቂያ በሬኮማንዴ ደብዳቤ ወይም በቴሌግራም ሊደረጉ ይችላሉ::

(4) የሚከፈሉት የጉዳት ኪሳራዎች ሳይነኩ የዉሉ መፍረስ ይደርሳሉ ተብለዉ ለሚያሰጉት አደጋዎች (ሪስክ) ከተወሰኑት ጊዜዎች ባልደረሱት ጊዜዎች መጠን ለኢንሹራንስ ከተሰፈሰዉ ገንዘብ ላይ ተመላሽ ይደረጋል::

(5) ኢንሹራንስ የገባዉ ሰዉ ያልከፈለዉን የኢንሹራንስ ዋጋ ሦስተኛ ወገን ከከፈለ ማንኛዉም አደጋ ከመድረሱና የዉሉ መፍረስ ማስታወቂያ ከመላኩ በፊት ኢንሹራንስ በተላለፈለት በቅን ልቡና ተጠቃሚ በሆነ ሦስተኛ ወገን ላይ የዉሉ መፍረስ ዉጤት አይኖረዉም::

(6) ኢንሹራንስ አድራጊዉ በከሠረ ጊዜ ኢንሹራንስ የገባዉ ሰዉ እንደዚሁ ያሉ መብቶች ይኖሩታል::

የመድን ሰጪው መክሰር የግድ ውሉን ወደ ፍጻሜ እንደሚያመጣው በን.ሕ.ቁ. 671/3/ ላይ ተመልክቷል። የመድን ገቢው ክሥረት የግድ የውሉን መቀጠል ባያቆመውም የሰጪው ክስረት ግን የክስረቱ ውሣኔ በተሰጠ በአንድ ወር ጊዜ ውስጥ ውሉን እንዲያቋርጠው ሕግ ደንግጐአል። የመድን ሰጪው ክስረትና በዚህም ምክንያት የውሉ /ማለቅ/ ማቋረጥ ምን ውጤት እንደሚያስከትል ሕጉ ያለዉ ነገር ባይኖርም እስከ ክሥረቱ ውሣኔ ድረስ የመድን ፖሊሲዎቻቸው የበሰሉ መድን ገቢዎች የከሣሪው መድን ሰጪ ገንዘብ ጠያቂ /ክሬዲተርስ/ ሊሆኑ እንደሚችሉ ሲገመት ፖሊሲዎቻቸው ያልበሰሉ መድን ገቢዎች ከውሉ መቋረጥ ባሻገር ላለው ጊዜ የከፈሉትን አረቦን ከከሣሪው መድን ሰጪ መጠየቅ መገመት ይቻላል።

የን.ሕ.ቁ. 671 ድንጋጌ በካሣ መድኖች ላይ ብቻ ተፈጻሚ ስለመሆኑ ለመረዳት በንግድ ሕጉ ውስጥ የሠፈሩትን የካሳ ያልሆኑ መድኖችን የሚመለከቱትን ድንጋጌዎች ማየቱ በቂ ነው ። ይህ ንዑስ ርዕስ ከማጠቃለሉ በፊት ሌላው መነሣት ያለበት ነጥብ የን.ሕ.ቁ. 671 እና ምናልባትም ተከታዮቹ የመድን ውል አስተላላፊ ድንጋጌዎች ናቸው ወይንስ የመድን ጥቅም? የሚለውን ጥያቄ የን.ሕ.ቁ. 673 ን ስንመለከት የምንመለስበት መሆኑን ነዉ።

የመድን ውል ተጠቃሚ መሞት

ስለመድን ፖሊሲ በሕግ መተላለፍ የሚያወሳው ሌላው ቁጥር የን.ሕ.ቁ. 672 ሲሆን በዚህ ቁጥር ንዑስ ቁጥር /1/ ላይ እንደተመለከተው አንድ የንብረት መድን ወይም የሃላፊነት መድን ሽፋን[56] የገዛ ሰው ቢሞት የመድኑ ውል መብት ወደ ወራሾቹ ተላልፎ እንደሚቀጥል እናነባለን። ይህ የቁጥር 672/1/ ድንጋጌ ተፈጻሚነቱ ተዋዋይ ወገኖች በሚያደርጉት ተቃራኒ ስምምነት እንደማይገታ ተቃራኒ የውል ቃል ቢኖርም እንኳ በሚለው የራሱ የሕጉ ሐረግ ስለተነገረ ማንኛውም በፖሊሲው ውስጥ ይህን የ 672/1/ን አባባል የሚቃረን ስምምነት ካለ ውድቅ ይሆናል። የመድን ገቢው መሞት ውሉን ወዲያውኑ (forthwith) አያቋርጠው እንጂ መድን ገቢው በሞተ በሶስት ወር ጊዜ ውስጥ ወራሾቹ ወይም መድን ሰጪው ውሉን ማቋረጥ እንደሚችሉ በንዑስ ቁጥር /2/ ሥር ተጽፎአል። ከፈለጉም ውሉን ከመቀጠል የሚያግዳቸው ምንም ነገር የለም።

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[56] ለሞት ከተደረገ የሕይወት መድን አንፃር አንድ መድን ገቢ ቢሞት ፖሊሲው ገንዘብ ሊጠየቅበት የሚችል የበሰለ ፖሊሲ ይሆናል። ተጠቃሚውም ፖሊሲው የሚያስገኘው ገንዘብ እንዲከፈለው ጥያቄ ማቅረብ ይችላል። ከውሉ ምሥረታ ቀን ጀምሮ ወደፊት ለዚህን ያህል ዓመት ወይም እስከ ተወሰነ ቀን /ዓመተ ምሕረት/ ወዘተ በሕይወት ኖሬ ከተገኘሁ የተወሰነ ገንዘብ ትከፍለኛለህ በሚል የተገዛ ፖሊሲ ከሆነ በውሉ መሠረት ገንዘብ ሊገኝ የሚችለው መድን ገቢው በውሉ ውስጥ በተመለከተው ቀን በሕይወት ኖሮ ሲገኝ ብቻ ነው። /የን.ሕ.ቁ. 702/

መድን የተገባለትን ንብረት ስለማስተላለፍ

ከመድን ሰጪው ፈቃድ ውጪ በሆነ ሁኔታ ተቃራኒ ስምምነት ቢኖርም ባይኖርም በን.ሕ.ቁ. 673 /1/ ላይ በግለጽ ተጽፎ እንደሚገኘው መድን የተገባለት ንብረት ለሌላ በሽያጭ ወይም በስጦታ[57] ሲተላለፍ የመድኑ ውልና መብት በሙሉ ንብረቱ ወደ ተላለፈለት ሰው ይተላለፋል። ሕጉ እንደዚህ ቁልጭ ባለ ሁኔታ ቢቀመጥም የኢትዮጵያ መድን ድርጅት ከሚጠቀምባቸው ፖሊሲዎች አንዳንዶቹን[58] ስናይ መድን የተገባለት ንብረት በሽያጭ ወደ ሌላ ሲተላለፍ የመድን ውሉ ወዲያውኑ እንደሚቋረጥ ተመልክቷል።

ምናልባት በግርጌ ማስታወሻ ቁጥር 58 ላይ ለምሣሌነት በተጠቀሱት ሁለት ፖሊሲዎች ውስጥ መድን ሰጪው ንብረቱ በሽያጭ ሲተላለፍ ከተሸጠበት ጊዜ ጀምሮ ፖሊሲው ይቋረጣል ብሎ ያሠፈረው በን.ሕ.ቁ. 673/2/ ሥር ሕግ ውሉን በሶስት ወር ጊዜ ውስጥ ለማቋረጥ ለርሱም ሆነ ንብረቱ ለተላላፈለት ሰው መብት ስለሚሰጥ ይሆናል ብሎ መጠራጠር ይቻል ይሆናል፣ ነገር ግን ይህ በንዑስ ቁጥር /2/ ለመድን ሰጪውና ንብረቱ ለተላለፈለት ሰው የተሰጠው መብት በንዑስ ቁጥር /1/ ሥር የተደነገገዉን በሚቃረን ሁኔታ ተዋዋዮቹን ማገልገል የለበትም።

የን.ሕ.ቁ 673/1/ ተፈጻሚነት መድን ሰጪው በሚጠቀምባቸው እንደ የግል ተሽከርካሪ የ3ኛ ወገን ፖሊሲና የንግድ ተሽከርካሪ ፖሊሲዎች ላይ ተጽፎ የሚታየውን ዓይነት የውል ቃል ከግምት ውስጥ ሳያስገባ መሆኑ "ተቃራኒ የውል ቃል ቢኖርም" በሚል ሐረግ ተመልክቷል። ከዚህ በላይ በን.ሐ.ቁ. 671 እና 672 ላይ የሠፈሩትን በተመለከተ በተብራራዉ መሠረት የቁጥር 673/1/ እና /2/ ጥምር መልዕክትም መድን የተገባለት ንብረት ከተላለፈ በኋላ ውሉ የግድ ንብረት በተላለፈለት ሰውና በመድን ሰጪው መካከል መቀጠል አለበት ሳይሆን ሕግ ሊከላከል የፈለገው መድን የተገባለት ንብረት ለሌላ በመተላለፉ የውሉን በዚሁ ምክንያት ብቻ ወዲያውኑ መቋረጥ ነው። ለምሳሌነት በተጠቀሱት ሁለት ፖሊሲዎች ላይ የሠፈረው ግን በቀጥታ በን.ሕ.ቁ. 673/1/ ሥር የተጻፈውን የሚቃረን ይመስላል። ሲሆን ንብረት ካስተላለፈው መድን ገቢና በመድን ሰጪው መካከል በተደረገው ስምምነት መሠረት ፖሊሰው ለሶስት ወርና ከዚያ በላይ የሚቆይ ከሆነ ውለታው በአዲሱ ንብረት በተላለፈለት ሰውና በመድን ሰጪው መካከል እስከ ሶስት ወር ፀንቶ መቆየት እንዳለበት ሲገመትና ንብረት የተላለፈለትም ሰው ይህንን መከራከሪያ ሊያደርግ እንደሚችል ቢታይም መድን የተገባለት ንብረት ለሌላ ከተላለፈ ጊዜ ጀምሮ 3 ወር ሳይሞላ ውሉን ከሁለት አንዳቸው ማቋረጥ እንደሚችሉ ግን አያከራክርም።

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[57] በመያዣነት ወይም በአላባ ስምምነት ይዞታ ሲተላለፍ ጉዳዩ በን.ሕ.ቁ.673 ሥር ይሸፈን አይሸፈን ሊያከራክር ቢችልም ለጊዜው በግር ወይም በስጦታ ብቻ ስለሚተላለፍ ንብረት ማውሳቱ ብቻ በቂ ይሆናል።

[58] ለምሳሌ የግል ተሽከርካሪ የ3ኛ ወገን ፖሊሲና የንግድ ተሽከርካሪ ፖሊሲን ይመልከቱ።

ምናልባት በን.ሕ.ቁ. 666፣ 668፣ 669፣ እና 671፣ ላይ የተመለከተው የአንድ ወር ጊዜ በተለይም ደግሞ በን.ሕ.ቁ. 666/3/ እና በቁ. 668/2/ /ሀ/ ሥር ሠፍሮ የሚገኘው መድን ሰጪው ውሉን ለማፍረስ አጅግ ቢያንስ የአንድ ወር ማስጠንቀቂያ መስጠት እንደሚያስፈልገው የሚናገሩት ድንጋጌዎች መድን ሰጪው መድን የተገባለት ንብረት ለሌላ መተላለፉን ካወቀ ጊዜ ጀምሮ ውሉን ለማፍረስ ከፈለገ ቢያንስ የአንድ ወር ማስጠንቀቂያ ንብረት ለተላለፈለት ሰው መስጠት እንዳለበት ይጠቁማሉ ለማለት ይቻላል። መድን ሰጪው ውሉን በሶስት ወር ጊዜ የማፍረስ መብቱን ባግባቡ ሊጠቀምበት ከፈለገ ማድረግ የሚችለው ወይም የሚገባው መድን የተገባለት ንብረት ለሌላ መተላለፉን እንዲያስታውቅ ወይም በንብረት አስተላላፊው ላይ ወይም ሕግ የውሉ መብት ተጠቃሚ ባደረገው ንብረት በተላለፈለት ሰው ላይ የማስታወቅ ግዴታን መጣል እንጂ የሕጉን መንፈስ በሚቃረን ከዚህ በላይ በግርጌ ማስታወሻ ቁጥር 58 ላይ በተጠቀሱት ሁለት ፖሊሲዎች ላይ ተጽፎ እንደምናነበው ማድረግ የለበትም።

በርግጥ የመድን ሽፋን ያለው ንብረት ለሌላ ሲተላለፍ መድን ሰጪው ውሉ ወዲያውኑ እንዲቋረጥ አድርጐ እንዲያዘጋጅ የሚገፋፉት በርካታ አሳማኝ ምክንያቶች ሊኖሩ ቢችሉምና ከነዚህ ውስጥ ዋነኛው የንብረት መተላለፍ መድን የተገባለትን አደጋ ሊያከብድ የመቻሉ ጉዳይ ቢሆንም መድን ሰጪው ሕግ ንብረቱ ለተላለፈለት ሰው የሚሰጠውን መብት ከሕጉ መንፈስ ውጪ ሊያጠበበት አይገባም፣ አይችልምም።

በጀርመን ፌደራል ሪፑብሊክ እ.ኤ.አቆጣጠር ከ1910 ጀምሮ[59] መድን የተገባለት ንብረት ለሌላ ሲተላለፍ የመድኑ ውል መብትና ግዴታ በሙሉ ከአስተላላፊው መድን ገቢ ንብረቱ ወደ ተላለፈለት ሰው እንደሚሸጋገር ተደንግጐ ይገኛል።[60] ይህም ስለውሉ መተላለፍ ምንም ዓይነት ውለታ ማድረግ ሳያስፈልግ እንደሆነና የግድ መደረግ ያለበት ነገር ቢኖር መድን የተገባለት ንብረት ለሌላ መተላለፉን ለመድን ሰጪው ማስታወቅ መሆኑን ስንረዳ[61] አለማስታወቅም መድን ሰጪውን ከኃላፊነት ነፃ የሚያደርገው ማስታወቅ ከሚገባበት ቀን ጀምሮ መድን የተገባለት አደጋ የደሰው የአንድ ወር ጊዜ ካለፈ በኋላ ከሆነ ነው ተብሎ በዚሁ እ.ኤ.አ. ከ1910 ጀምሮ ሥራ ላይ በዋለው በጀርመን የግል መድን ሕግ በ71ኛው ሴክሽን ላይ ተጽፎ እናነባለን።[62] ከዚሁ በመነሳት ሚስተር ፖተርሰን በጀርመን የግል መድን ሕግ መድን የተገባለት ንብረት ሲተላለፍ የመድኑ ውሉ መብት ንብረቱ ለተላለፈለት ሰው መሸጋገር ምንም እንደሚያከራክርና ይኸውም መብት ወዲያውኑ

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[59] Edwin W. Patterson "The Transfer of Insured Property in German and American Law," Columbia Law Review, Vol. 29 (1929) pp.691 ff.

[60] በግርጌ ማስታወሻ ቁ.59 የተመለከተዉ ገጽ 693።

[61] በግርጌ ማስታወሻ ቁ.59 የተመለከተዉ።.

[62] በግርጌ ማስታወሻ ቁ.59 የተመለከተዉ።.

ንብረቱ ከተላለፈበት ቀን ጀምሮ ቢያንስ ለአንድ ወር መድን ሰጪውን ለመድኑ ዋስትና ንብረቱ ለተላለፈለት ሰው ተገዳጅ እንደሚያደርገው ይናገራሉ።[63]

በአሜሪካና በእንግሊዝ አገር ባጠቃላይ አነጋገር ምናልባት በንብረቱ ማስተላለፊያ ውል ላይ ወይም በሌላ ተጨማሪ ውል የመድን ውልም ከንብረቱ ጋር አብሮ ተላልፎአል ካልተባለ በስተቀር የንብረቱ መተላለፍ ብቻውን የፖሊሲውን መተላለፍ እንደማያስከትል ይነገራል።[64]

በእንግሊዝ አገር መድንና ተያይዘው ያሉትን ጥቅማጥቅሞችን የማስተላለፉ ጉዳይ ከሶስት አቅጣጫ ነው የሚታየው። እነኚህም 1ኛ/ የተገባለትን ንበረት ከማስተላለፍ አኳያ 2ኛ/ አንድ የመድን ውል የሚያስገኘውን ጥቅም ከማስተላለፉ አኳያ እና 3ኛ/ የመድን ውል ከማስተላለፍ አኳያ ሲሆን በኢትዮጵያ ሕግ ግን የሕይወት መድን ልዩ ድንጋጌዎች እንደተጠበቁ ሆነው የንብረት መድንን በሚመለከት እነኚህ የተጠቀሱት ሶስት ሁኔታዎች ተለይተው የሚታዩ አይመስሉም። በን.ሕ.ቁ. 671፣ 672 እና 673 ላይ እንደተመለከተው ሁሉም የውሉን መተላለፍ የሚያስከትሉ ይመስላል።

በውሉ የተመለከተው አደጋ በደረሰ ጊዜ

ሀ. የመድን ገቢው ኃላፊነት

በን.ሕ.ቁ. 670/1/ ላይ እንደተደነገገው አንድ መድን ገቢ ከአቅሙ በላይ በሆነ ኃይል ምክንያት ማሳወቅ ያልቻለ መሆኑን ካላስረዳ በስተቀር መድን ሰጪው ሽፋን የሰጠበት አደጋ መድረሱን እንዳወቀ ወዲያውኑ ወይም እጅግ ቢዘገይ በአምስት ቀናት ውስጥ ለመድን ሰጪው ማስታወቅ አለበት።

ከዚህ በላይ በውሉ ምሥረታ ጊዜ እንደዚሁም ደግሞ ውሉ ከተመሠረተበት ጊዜ ጀምሮ እስከ ተፈራው አደጋ መድረስ ባለው ጊዜ የተዋዋይ ወገኖችን መብትና ግዴታ ለመመልከት ተሞክሮአል። በዚህ ንዑስ ርዕስ ሥር የምናየው ተፈርቶ መድን የተገባለት አደጋ ሲደርስ መድን ገቢው ምን ማድረግ እንዳለበት ሲሆን ቀጥሎ በመግቢያው ላይ እንደተመለከተው በን.ሕ.ቁ. 670/1/ ሥር የተጣለበትን ግዴታ እንመረምራለን።

በን.ሕ.ቁ 670/1/ የአማርኛው ቅጂ መሠረት መድን ገቢው ማስታወቅ የሚገደደው መድን ሰጪው ኃላፊነት የወሰደበትን አደጋ መድረስ እንጂ ሌላ አደጋ መድረሱን አይደለም። ለምሣሌ በን.ሕ.ቁ. 677 ሥር ተጽፎ እነደምናነበው መድን የተገባለት ንብረት ወይም ዕቃ በመድኑ ውል ውስጥ ባልተመለከተ አደጋ ቢወድም በዚሁ

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[63] በግርጌ ማስታወሻ ቁ.59 የተመለከተዉ።.

[64] ከላይ በግርጌ ማስታወሻ ቁጥር 8 የተመለከተው ገጽ 138-142፤ እንዲሁም በግርጌ ማስታወሻ ቁ 56 ላይ የተመለከተው ገጽ 697 እና ተከታዮቹን ገጾች ይመልከቱ።

ቁጥር ሥር በተጻፈው መሠረት ውሉን ለማስፈረስ ስለአደጋው ያስታውቅ እንደሆነ ነው እንጂ በን.ሕ.ቁ. 670/1/ ሥር የተጻፈው ግዴታ ተፈጻሚ ሆኖበት አይደለም።

በን.ሕ.ቁ. 670/1/ የእንግሊዝኛው ቅጂ ከተሄደ "... the beneficiary shall inform the insurer of any occurrence likely to render the insuerr liable..." ሰለሚልና ከአማርኛው ቅጂ አነጋገር የሰፋ ስለሚሆን ማንኛውንም መድን ሰጪውን በውሉ የገባበትን ግዴታ ለመፈጸም ሃላፊ የሚያደርገው ሁኔታ መድረሱን ማስታወቅ እንደሚሆን እንረዳለን። በእንግሊዝኛው ቅጂ ከተሄደ በን.ሕ.ቁ 670/1/ እስከተወሰነ ጊዜ ድረስ በሕይወት ኖሬ ከተገኘሁ ይህን ያህል ብር ትከፍለኛለህ በሚል የሕይወት መድን ውል ላይና በኃላፊነት መድንም ላይ ተፈጻሚ እንደሚሆን ሲገመት በአማርኛ ቅጂ ከተሄደ ግን የቁ. 670/1/ ተፈጻሚነት በንብረት መድንና ለሞት በሚገባ መድን ላይ ብቻ የተገደበ ይመስላል። የኢትዮጵያ መድን ድርጅት የሚጠቀምባቸው ፖሊሲዎች የእንግሊዝኛውን ቅጂ ይከተላሉ። በአማርኛውና እንግሊዝኛው የን.ሕ.ቁ 670/1/ አባባል መካከል ስላለው ልዩነት ይህን ያህል ካልን ወደዋናው በዚሁ በቁጥር 670 ሥር ስለተጻፈው ግዴታ እንመለሳለን።

የደረሰው አደጋ መድን ገቢው ራሱ የተሳተፈበት ለምሳሌ መድን የተገባለት ተሽከርካሪ ሾፌር ሆኖ እየነዳ እያለ አደጋ ቢደርስ ወይም መኖሪያ ቤቱን ለእሳት ቃጠሎ መድን አስገብቶ የቃጠሎ አደጋ ሲደርስ ቤቱ ውስጥ ከነበረና ራሱ ግን ከመቃጠል ያመለጠ ከሆነ ወዘተ የአደጋውን መድረስ ማወቁ ምንም አጠራጣሪ ስላልሆነ ከአቅም በላይ በሆነ ኃይል ምክንያት ካልሆነ በስተቀር ወይም አደጋው የደረሰው ከሥራ ሰዓት ውጭ ወይም በበአል ቀን[65] ካልሆነ የአደጋውን መድረስ ማስታወቅ ያለበት ወዲያውኑ[66] ነው። ምናልባት "ወይም እጅግ ቢዘገይ በአምስት ቀናት ውስጥ" የሚለው የን.ሕ.ቁ 670/1/ አባባል ከላይ ለማመልከት በተሞከረውና መድን ገቢው ራሱ በነበረበት የአደጋ ሁኔታ አሳሳች ሳይሆን አይቀርም ተብሎ ይገመታል። ሆኖም ግን አንድ መድን ገቢ አደጋው ሲከሰት ቢኖርም አደጋው በደረሰ እስከ አምስት ቀናት ውስጥ ቢያስታውቅ /ከዐቅም በላይ የሆነ ሁኔታ ማጋጠም እንደተጠበቀ ሆኖ/ ከሕጉ ውጪ ስላልሆነ ሊከራከርበት ይችላል።

ሌላኛው በዚህ ርዕስ ሥር መነሳት ያለበት ነጥብ ለመድን ሰጪው አደጋ መድረሱን የማሳወቅ ሁኔታ መነሻው የመድን ገቢው የራሱ ያደጋውን መድረስ ማወቅ መሆኑን ነው። መድን ገቢው በቦታው ላይ በክስተቱ ጊዜ ኖሮ ያደጋውን መድረስ ካላወቀ ምናልባት አደጋ ደርሶ ለመድን ሰጪው ሳይነገረው ወራት ሊያልፉ የሚችሉበት ሁኔታ ሊኖር ይችላል። መድን ገቢው ያደጋውን መድረስ

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[65] መድን ሰጪው ከሥራ ሰዓት ውጪና በበዓላት ቀናት የአደጋ ማስታወቂያን የሚቀበልበትን ሁኔታ አመቻችቶ ይህንኑ ለደምበኞቹ ካላሳወቀ በቀር

[66] "ወዲያውኑ" የሚለው አባባል ራሱ አከራካሪ ሊሆን ይችላል። ምናልባት "ሊገኝ በሚችል ፈተሻለ ፈጣን መንገድ" ማለት ነው ተብሎ ሊወሰድ ይችል ይሆናል።

መረጃ እንደገኘ ወዲውኑ ወይም እጅግ ቢዘገይ በአምስት ቀናት ውስጥ /ከዐቅም በላይ የሆነ ሁኔታ እንደተጠበቀ ሆኖ/ ለመድን ሰጪው ማስታወቅ እንዳለበት ነው የምንረዳው። ይህንን የምንልበት ምክንያት በን.ሕ.ቁ 670/1/ አነጋገር አደጋው እንደደረሰ ወዲያውኑ ወይም አጅግ ቢዘገይ በአምስት ቀናት ውስጥ ማስታወቅ አለበት የማይል መሆኑን ለማስገንዘብ ያህል ነው። በን.ሕ.ቁ. 670/2/ ሥር እንደተጻፈው በንዑስ ቁጥር /1/ ሥር የተጻፈውንና ጊዜን የሚመለከተውን አነጋገር ማስረዘም ይቻል እንደሆነ እንጂ ማሳጠር እንደማይቻል መረዳቱ ቀላል ነው።

የአደጋን መድረስ የማስታወቅን ግዴታ ከአንዳንድ የኢትዮጵያ መድን ድርጅት ከሚጠቀምባቸው ፖሊሲዎች አንፅር ለማየት መሞከሩ በሕጉና በተግባር በሚሠራው መካከል ስምምነትም ይሁን ልዩነት መኖሩን ስለሚጠቁም ይህንኑ ከዚህ በታች ባጭሩ እንመለከታለን። በሠራተኞች የካሳ መድን /workmen's compensation policy/ ላይ እንደ 4ኛው ሁኔታ (condition) የሠፈረዉ በፖሊስው መሠረት ካሣ የሚያስጠይቅ ሁኔታ መድረሱን መድን ገቢው "በተቻለ ፍጥነት" ለመድን ሰጪው ማስታወቅ አለበት የሚል ሲሆን በኃይል ሠብሮ በመግባት ፖሊሲ፣ በእሳትና መብረቅ ፖሊሲ፣ እና በግልና ንግድ ተሸከርካሪዎች ፖሊሲዎች ላይ ደግሞ ካሣ የሚያስጠይቅ ሁኔታ እንደደረሰ "ወዲያውኑ" ማስታወቅ አለበት ተብሏል። የሁሉም ዓይነት አደጋ መድን ፖሊሲ /all risks policy/ በሚባለው ላይ ደግሞ መድን በተገባለት ንብረት ላይ አደጋ መድረሱን መድን ገቢው ከደረሰበት በኋላ "ተግባራዊ ሊሆን በሚችል በተቻለ ፍጥነት" /As soon as practicable/ ማስታወቅ እንዳለበት ተጽፎ እናነባለን።

በአካል ጉዳት መድን ፖሊሲ ላይ (As soon as possible after its occurrence) "አደጋው ከደረሰ በኋላ በተቻለ ፍጥነት" ተብሎ ሲጻፍ ለሞት በተደረገ የሕይወት መድን ግን ለሞቱ መንስዔ የሆነው አደጋ ከሆነ ወዲያውኑ ማስታወቅ እንደሚያስፈልግ ሲያመለክት መንስኤው አደጋ ላልሆነ ሞት ግን በሰላሣ ቀናት ውስጥ ማስታወቅ እንደሚቻል ተጽፎአል። ይሽኛው የኋለኛው ፖሊሲ ከዐቅም በላይ የሆነውን ሁኔታም ከግምት ውስጥ ሲያስገባ ሌሎቹ ፖሊሲዎች ግን በዝምታ አልፈውታል።

ከፖሊሲዎች አኳያ ዋናው መነሳት ያለበት ነጥብ በን.ሕ.ቁ. 670/1/ ሥር "እጅግ ቢዘገይ በአምስት ቀናት ውስጥ" ተብሎ የተጻፈው አባባል በማንኛውም ፖሊሲ ውስጥ ተጽፎ አለመገኘቱንና ይህ አለመጻፉ ደግሞ የመድን ገቢውን መብት በሕግ ከተሰጠው ማጥበብ መሆኑን ነው። አደጋን በስምምነቱ መሠረት ማስታወቅ ለመድን ሰጪው በኃላፊነት መጠየቅ እንደ ቅድመ ሁኔታ /Condition precedent/ የሚቆጠር መሆኑ ባብዛኞቹ ፖሊሲዎች ላይ ሲጠቀስ በአንዳንዶቹ ግን ቅድመ ሁኔታ መሆኑ አልተጠቀሰም።[67]

[67] ለምሣሌ Commercial Motor Policy (third party) እና Workmen's Compensation Policy.

የመድን አገልግሎት ኢንዱስትሪ በጣም ተስፋፍቶ ባለበት በእንግሊዝ አገር ሁኔታ (Condition) ወይ "ተራ" ወይም ደግሞ ቅድመ ሁኔታ /Condition precedent/ ተብሎ የሚከፈል ነዉ። በፖሊሲዎች ላይ እንደ ቅድመ ሁኔታ ያልተመለከቱት ነገሮች የመድን ሰጪውን ኃላፊነት ላያስቀሩ እንደሚችሉ ስንገነዘብ[68] በቅድመ ሁኔታነት የተጠቀሱት ጉዳዮች ያለመሟላት ግን መድን ሰጪው የካሣ ጥያቄ ከቀረበበት አደጋ አኳያ ብቻ ከኃላፊነት ነፃ የሚያደርጉት ናቸው። [69]

ለ. የመድን ገቢው መብት

መድን ገቢው በውሉ የተመለከተው አደጋ መድረሱን ወይም ሌላ ማንኛውንም መድን ሰጪውን በኃላፊነት የሚያስጠይቀው ነገር መፈጸሙን የማስታወቅ ግዴታ እንዳለበት ሁሉ በውሉ መሠረት እንዲካስ ወይም ስምምነት የተደረገበት ገንዘብ እንዲከፈለው የመጠየቅ መብትም አለው። መድን ገቢው የካሣ ጥያቄውን በምን ያህል ጊዜ ለመድን ሰጪው ማቅረብ እንዳለበት በሕጉ ላይ የተመለከተ ነገር ባይኖርም በን.ሕ.ቁ. 670/1/ ሥር አደጋ መድረሱን ሲያስታውቅ በዚያው የካሣ ጥያቄውንም ያቀርባል ተብሎ በውስጠ ታዋቂነት ተካትቷል ወይም የካሣ ጥያቄን ማቅረብ ለሁለቱ ወገኖች ስምምነት የተተወ ጉዳይ ነው ማለት ይቻል ይሆናል።

በሕጉ ላይ የተባለ ነገር ባይኖርም በመድን ውሉ መሠረት ገንዘብ እንዲከፈለው ወይም እንዲካስ ጥያቄ የማቅረብ ሁኔታ ግን በሁሉም ፖሊሲዎች ላይ ተመልክቷል። በዚሁ መሠረት በአንዳንዶቹ ላይ የተጻፈውን ብንቃኝ በሠራተኞች የካሣ መድን ፖሊሲ ላይ መድን ገቢው እንዲክስ ጥያቄ እንደቀረበለት ወዲያውኑ ለመድን ሰጪው ጥያቄውን መላክ እንደለበት ሲጻፍ በኃይል ሠብሮ በመግባት ፖሊሲ ደግሞ በ5ኛው /መ/ ሁኔታ ሥር የመድን ሰጪውን ኃላፊነት የሚያስከትለው ማንኛውም ሁኔታ እንደተፈጸመ በተቻለ ፍጥነት ወይም ለማንኛውም ኃላፊነትን የሚያስከትለው ሁኔታ በደረሰ በ14 ቀናት ውስጥ የካሣውን ጥያቄ ከዝርዝር ሁኔታዎች ጋር ማቅረብ አለበት ሲል ጥያቄው በጽሑፍ ሰለመቅረቡ ግን አይናገርም። የእሳትና የመብረቅ መድን ፖሊሲ አደጋው ከደረሰ በኋላ በ15 ቀናት ውስጥ ወይም እንደሁኔታው መድን ሰጪው በጽሑፍ በሚሰጠው ተጨማሪ ጊዜ ውስጥ የካሳ ጥያቄውን ማቅረብ አለበት ይልና ጥያቄውም በጽሑፍ መቅረብ እንዳለበት ያመለክታል።

የመድን ሰጪው ግዴታ

ከዚህ በፊት ለማመልከት እንደተሞከረው የመድን ውል በመድን ገቢ ላይ ከምሥረታው ጀምሮ ተፈጻሚ ሲሆን በመድን ሰጪው ላይ ተፈጻሚ የመሆኑ ጉዳይ ግን በሁኔታ ላይ የተመሠረተ ነው። ይህም ማለት መድን ሰጪው የውሉን

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[68] በግርጌ ማስታወሻ ቁጥር 8 ላይ የተመለከተው ገጽ 126።

[69] በግርጌ ማስታወሻ ቁጥር 8 ላይ የተመለከተው ከገጽ 211-212።

ግዴታ እንዲወጣ የሚጠየቀው በውሉ የተመለከተው አደጋ ወይም ኃላፊነት ውሉ ፀንቶ በሚቆይበት ጊዜ ውስጥ የደረሰ ከሆነ ብቻ ወይም ደግሞ ፖሊሲው መድን ገቢው እስከተወሰነ ቀን ድረስ በሕይወት ከኖረ የተወሰነ ገንዘብ ለመክፈል ከሆነ በዚያ በተባለው ቀን መድን ገቢው በሕይወት ኖሮ ከተገኘ ብቻ ነው።

በዚህ ረገድ በን.ሕ.ቁ. 663/1/ ሥር በግልጽ እንደሠፈረው ሕጉም መድን ሰጪው በውሉ ለተመለከተው አደጋ መድን ለገባው ሰው መድን እንደሚሆን ሲደነግግ በዚሁ ሕግ በቁጥር 665/1/ ላይ ደግሞ በቁጥር 663/1/ ሥር ከተጠቀመበት ቋንቋ ሻል ባለ ሁኔታ "መድን ሰጪው በውሉ ውስጥ የተመለከተው አደጋ በደረሰ ጊዜ ወይም በውሉ ውስጥ የተስማሙበት ቀን በደረሰ ጊዜ የተሰማውበትን ገንዘብ በውሉ በተወሰነ ቀን መክፈል ይገባዋል" ይላል።

ሕጉ መድን ሰጪው በፖሊሲው ላይ የተመለከተው አደጋ ሲደርስ ወይም ጊዜ ሲሞላ በውሉ ላይ የተመለከተውን ገንዘብ መክፈል አለበት ይበል እንጂ ሁል ጊዜም በውሉ የተመለከተው አደጋ በደረሰ ጊዜ ወይም ጊዜ ከሞላ መካስ ወይም የተስማሙበትን ገንዘብ ለመድን ገቢው መክፈል አለበት ማለቱ ግን አይደለም። በን.ሕ.ቁ. 663/1/ እና 665/1/ ላይ የተቀመጡት ግዴታዎች የሚታዩት ከሌሎች የንግድ ሕግ ቁጥሮች ጋርና አዛኝ የሕግ አንቀጾችን ባልተቃረነ አኳኋን ተዋዋይ ወገኖች በተሰማሙበት መሠረት ሰለሆነ የን.ሕ.ቁ. 663/1/ እና 665/1/ በመድን ሰጪው ላይ የመጠየቅ ግዴታን ስለጣሉ ብቻ ይክሳል ማለት አይደለም።

ይህን በምሳሌ ለማስረዳት ብንሞክር ለአንድ መኖሪያ ቤት ለእሳት አደጋ መድን ተገብቶለት ኖሮ የመኖሪያ ቤቱ ከመድን ውሉ ምሥረታ በኋላ በእሳት አደጋ መውደሙ በማያከራክር ሁኔታ ቢረጋገጥ በአንድ በኩል የን.ሕ.ቁ. 663/1/ እና 665/1/ ሰብቻ ሲታዩ መድን ሰጪው ካሣ ለመክፈል መገደዱ ምንም የማያጠራጥር ሲሆን በሌላ በኩል ግን የደረሰው የቃጠሎ አደጋ መንስዔ በመድን ገቢው ሆን ተብሎ የተደረገ ጥፋት ምክንያት የመጣ ከሆነ ተቃራኒ ስምምነት እንኳን ቢኖር መድን ሰጪው በሃላፊነት እንደማይጠየቅ በን.ሕ.ቁ. 663/3/ ሥር ተመልክቶአል። በሌላ አነጋገር ምንም እንኳን በመድን ገቢው ላይ የደረሰው ጉዳት ተፈርቶ መድን በተገባለት አደጋ ቢሆንም መድን ገቢው የመድኑን ፖሊሲ ገንዘብ አገኛለሁ በሚል ቀቢፀ ተስፋ ተነሳስቶ ሆን ብሎና አስቦ መድን የተገባለት ጉዳት እንዲደርስ ቢያደርግ መድን ሰጪው የመካስ ግዴታው ይነሳለታል ማለት ሲሆን፣ ከሕይወት መድን አካያም ሲታይ መድን ገቢው ሆነ ብሎ ራሱን ቢገድል[70] ወይም ደግሞ አንድ የሕይወት መድን ተጠቃሚ መድን ገቢውን ሆን ብሎ ገድሎ ለዚህም በወንጀል ፍርድ ቤት ጥፋተኛነቱ ቢረጋገጥበት ውሉ ዋጋ እንደሌለው ሕጉ በግልጽ አስቀምጧል።[71]

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[70] የን.ሕ.ቁ. 699

[71] የን.ሕ.ቁ. 700

የን.ሕ.ቁ. 663/3/ 699 እና 700 የሚያንፀባርቁት ሐሳብ "ex turpi causa non oritur actio" ከሚባል የላቲን አባባል የመጣ ሲሆን ትርጉሙም "no action can arise from a wrongful cause" ሆኖ በአማርኛ "ክስ የማቅረብ መብት ከወንጀል ድርጊት አይመነጭም" ተብሎ ሊተረጐም ይችላል። ይህ ከዚህ በላይ የተነገረው የላቲን አባባል በተግባር ተፈጻሚ ሲሆን "ማንኛውም ሰው ከወንጀል ድርጊት ተጠቃሚ መሆን የለበትም" በሚል የተወሰደ ሲሆን በእንግሊዝኛው "A man may not profit from his own wrong or crime" የሚል መርህ ሆኖ ይሠራበታል።[72] በሌላ አነጋገር የን.ሕ.ቁ. 663/3/፣ 699 እና 700 የፐብሊክ ፖሊስ ድንጋጌዎች ናቸው ለማለት ይቻላል።በዚህ ረገድ ጆን በርድስ እንዲህ ይላሉ። "... (He) (The insured) cannot recover if the loss was caused by his deliberate act. This may be simply the true construction of an insurance contract or it may alternatively be regarded as the application of public policy".[73]

ይሁን እንጂ በመድኑ ውል ፖሊሲ ውስጥ ተቃራኒ ስምምነት ካልኖረ በስተቀር በን.ሕ.ቁ. 663/2/ መሠረት መድን የተገባለት አደጋ የደረሰው መድን በገባው ሰው ቸልተኝነት[74] ወይም ባልታሰበ አደጋ ከሆነ መድን ሰጪው በውሉ መሠረት የመካስ ግዴታ ይወድቅበታል። ከዚህ በላይ ለማመልከት እንደተሞከረው መድን ገቢው በገዛ ራሱ መሠሪ ድርጊት መድን የተገባለት አደጋ እንዲደርስ ቢያደርግ አይካስም ብሎ ሲል ሆን ብሎ ሳይሆን በመድን ገቢው ስሕተት ወይም ቸልተኝነት ለሚደርሰው አደጋ ግን መድን ሰጪው የመካስ ግዴታ እንደሚወድቅበት ሕጉ ደንግጐአል።[75] "ተቃራኒ ስምምነት ካልኖረ" የሚለው በን.ሕ.ቁ. 663/2/ ሥር ሠፍሮ ያለው ሐረግ መድን ሰጪው በመድን ገቢው ቸልተኝነት ምክንያት የደረሰውን ጉዳት አልክሰም ብሎ በፖሊስዎች ውስጥ እንዲያስገባ ሰፊ ዕድል ሲሰጠው በመድን ገቢው ቸልተኝነት ለደረው ጉዳት አልጠየቅም የሚል የውል ቃል በፖሊሲዎች ላይ ከገባ ለመድን ሰጪው በኃላፊነት መጠየቅ የሚቀረው ጉዳት የደረሰው ባልታሰበ አደጋ "accident" ከሆነ ብቻ ነው። ይህ ማለትም የጉዳት ባልታሰበ አደጋ መድረስ ከቸልተኝነትም ሆን ተብለው ከሚደረጉትም ሁኔታዎች ውጪ መሆኑን ሲጠቁም "ባልታሰበ አደጋ" የሚለው ጉዳቱ የደረሰው ባልተጠበቀ

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[72] የግርጌ ማስታወሻ ቁጥር 8፣ ገጽ 203።

[73] የግርጌ ማስታወሻ ቁጥር 8፣ ገጽ 203።

[74] አንድ መድን ገቢ ከአእምሮ ሕመም የተነሳ ወይም በቸልተኝነት ራሱን ቢገድል የመድን ውሉ ተጠቃሚ የፖሊሲውን ገንዘብ አያገኝም ለማለት አይቻልም። /የን.ሕ.ቁ.669/ ያንድ የሕይወት መድን ተጠቃሚም መድን ገቢውን ሆን ብሎ ሳይሆን በስሕተት ቢገድል የን.ሕ.ቁ. 700 ተፈጻሚ ሰለማይሆን የፖሊሲውን ገንዘብ ያገኛል።

[75] ምንም እንኳን በፍ.ብ.ሕ.ቁ. 1795 እና 1796 መሠረት ከውል ግንኙነት አኳያ የ "ጥፋት" ፅንሰ ሐሳብ ቢኖርም በዚሁ ሕግ ከውል ዉጪ ኃላፊነትን አስመልክቶ በቁጥር 2029 ላይ ጥፋት ሲባል ታስቦ በሚሠራ ወይም በቸልተኝነት በሚፈጸም ተግባር ሊደረግ እንደሚችል ተጽፎአል። ከወንጀል አኳያም በወንጀለኛ መቅጫ ሕግ ቁጥር 57 ላይ እንደተመለከተው አንድ ሰው በወንጀል የሚጠየቀው ሆን ብሎ አስቦ ሲያጠፋ ወይም በቸልተኝነት ሲያጠፋ ብቻ ሲሆን ባልታሰበ ደጋ የሚፈፀም ሊያስቀጣ የሚችል ድርጊት በወንጀል እንደሚያስጠይቅም ተደንግጐአል።

ፍጹም ዳብዕዳ በሆነ ሁኔታ መሆኑን የሚያሳይ ነው። በን.ሕ.ቁ. 663/2/ መሠረት "ባልታሰበ አደጋ" ለሚደርሱ ጉዳቶች መድን ሰጪው እንዳይጠየቅ በውል ግዴታውን ሊያስቀር እንደሚችል ተመልክቷል።

በን.ሕ.ቁ. 663/2/ ሥር "ተቃራኒ ስምምነት ካልኖረ" የሚለው ሐረግ በቸልተኝነት ሽፋን ሰዎች ግዴለሽ ሆነው ለጉዳት መድረስ መንስዔ እንዳይሆኑ በውል ስምምነት ለመከላከል ካልሆነ በስተቀር ሚናው ባጠቃላይ በመድን ገቢው ቸልተኝነት የሚደርሱትን ጉዳቶች ከመድን ሰጪው ኃላፊነት ውጭ ለማድረግ ነው ተብሎ አይገመትም። ባልታሰበ አደጋ የሚደርሱትን ጉዳቶች በውል ከመድን ሰጪው ኃላፊነት ውጪ ማድረግም ጨርሶ መድንን ትርጉም የለሽ ወደ ማድረጉ ሰለሚያቀርበው መድን ሰጪው ይጠቀምበታል ብሎ መገመት አዳጋች ይሆናል።

መድን የተገባለት አደጋ የደረሰውና በዚሁ ምክንያት በመድን ገቢው ላይ ጉዳት ያስከተለው በራሱ መሠሪ ድርጊት ወይም በርሱ ቸልተኝነት ሲሆን ምን ውጤት ሊያስከትል እንደሚችል በን.ሕ.ቁ. 663/2/ እና /3/ ላይ ሲደነገግ ራሱ መድን ገቢው ሳይሆን እርሱ ኃላፊ የሚሆንላቸው ሰዎች ባደረጉት ጥፋት ለሚደርስ ጉዳትም መድን ሰጪው በን.ሕ.ቁ. 664/1/ ሥር በተጻፈው መሠረት ኃላፊ ተደርጉአል።

እነኚህ መድን ገቢው ኃላፊ የሚሆንላቸው ሰዎች እነማን ሊሆኑ እንደሚችሉ በሕጉ ላይ በግልጽ የተመለከተ ነገር ባይኖርም ምናልባት በን.ሕ.ቁ. 683/3/ ሥር የተዘረዘሩት ሰዎች ሊሆኑ ይችላሉ የሚል ግምት አለ። የመድን ገቢዋ ባል ወይም የመድን ገቢው ሚስት በ.ን.ሕ.ቁ. 683/3/ ሥር ከተዘረዘሩት ሰዎች ውስጥ ሊደመር ወይም ልትደመር ስትችል በሌላ በኩል ግን ሚስትን ከመድን ገቢ ባል ወይም ባልን ከመድን ገቢዋ ሚስት ምን ለያት ወይም ለየው? በሚል ስሜት ተትቷል ወይም ተትታለች ብሎ ለማለት ይቻል ይሆናል።

- በን.ሕ.ቁ. 664/1/ ሥር መድን ገቢው ኃላፊ የሚሆንላቸው የተባሉት ሰዎች በፍ.ብ.ሕ.ቁ 2124 እና ተከታታዮቹ ሥር የተመለከቱት ሊሆኑ እንደሚችሉም ይገመታል። የመድን ሰጪው በን.ሕ.ቁ. 664 ተጠያቂ መሆን በዚሁ ቁጥር በንዑስ ቁጥር /1/ ሥር የተመለከቱት ሰዎች ያደረጉት ጥፋት ዓይነትና ክብደት ሳይታይ ማለትም ጉዳት ያስከተለውን ጥፋት ያደረሱት ሆን ብለው ይሁን በቸልተኝነት እግምት ውስጥ ሳይገባ መድን ሰጪው ተጠያቂ ይሆናል። ሆኖም መድን ሰጪውን የመዳረግ መብት በተመለከተ የንግድ ሕጉ የሚለዉን ማጤኑ ጠቃሚ ይሆናል።[76]

[76] የን.ሕ.ቁ. 683/3/ን ይመልከቱ።

ሌላው ሁለቱን ተዋዋይ ወገኖች የሚመለከት ፀቢይ ጉዳይ የይርጋ ጉዳይ ነው። የይርጋን ጉዳይ ከመድን ሕግና ውል አኳያ ማየት ከመጀመራችን በፊት በፍትሕ ብሔር ሕግ የውል ጠቅላላ ሕጦች ክፍል ውስጥ ስለጉዳዩ በተጻፈው በቁጥር 1845 ብንጀምር "ሕግ በሌላ አኳኋን ካልወሰነ በቀር ውል እንዲፈጸም ወይም ካለመፈጸሙ የተነሣ ለሚደርስ ጉዳት ወይም ውሉ እንዲፈርስ የመጠየቅ መብት በአሥር ዓመት ይርጋ" ይቀራል" ይላል። ምንም እንኳን ማንኛውንም ውል በተመለከተ የፍ.ብ.ሕ.ቁ. 1845 ተፈጻሚ ሊሆን ቢችልም በዚሁ ቁጥር "ሕግ በሌላ አኳኋን ካልወሰነ" የሚለው ሐረግ አልፎ አልፎ ሕግ የሚያስቀምጠው አጠር ያለ ወይም ረዘም ያለ የይርጋ ዘመን ካለ ይኸው የተጠበቀ መሆኑን ለማመልከት ነው። በሌላ አነጋገር ልዩ ልዩ ሕጦች በተለይም ደግሞ በፍትሐ ብሔር ሕግ አምስተኛ መጽሐፍ፣ በንግድ ሕግና በባሕር ሕግ ውስጥ ባሉት ልዩ ውሎች ውስጥ ሕግ ስለይርጋ በሌላ አኳኋን ወስኖ ቢገኝ በፍ.ብ.ሕ.ቁ. 1845 እና 1676/2/ መሠረት በልዩነታቸው ተፈጻሚነት ይኖራቸዋል ማለት ነው።

በፍ.ብ.ሕ.ቁ. 1845 ሥር ከተደነገገው የይርጋ ዘመን ለየት ያለ ውሣኔ ከተሰጠባቸው ግንኙነቶች መካከል አንዱ ከመድን ውል[77] በሚመነጩ መብቶችና ግዴታዎች ላይ ሲሆን ሌሎችም በፍ.ብ.ሕ.ቁ. 2143 ሥር ከውል ውጪ ኃላፊነትን በሚመለከት እንዲሁም ከቼክ ጋር በተያያዘ ያለውን የይርጋ ዘመን በን.ሕ.ቁ.881 እና 882 ሥር የመለከቱት እንደምሣሌ ሊጠቀሱ ይችላሉ።

ከዚህ ጹሑፍ አኳያ ለማየት የሚፈለገው የመድን ውል ግንኙነት የሚፈጥራቸው መብትና ግዴታዎች በይርጋ የሚታገዱት እንዴት ነው የሚለውን ጥያቄ ስለሆነ ይህንኑ ከዚህ በታች ባጭሩ እንመለከታለን።

የመድንን ውል የሚመለከተው የይርጋ ሕግ የን.ሕ.ቁ. 674 የሚከተለዉን ይደነግጋል፦

> "በኢንሹራንስ ውል ምክንያት የሚቀርብ ማንኛውም ክስ የሚታገደው ለክሱ ምክንያት የሆነው ጉዳት ከተደረገበት ወይም በጉዳዩ ቅጥም ያላቸው ወገኖች ጉዳቱን ካወቁበት ቀን ጀምሮ ከሁለት ዓመት በኋላ ነው"

የኢትዮጵያ የባሕር ሕግ ከንግድ ሕጉ ጋር ሲነጻፀር ስለ ይርጋ ዘርዘር ያሉ ድንጋጌዎችን አካቶ ይዟል። የባሕር ሕጉ የይርጋ ድንጋጌዎች ይርጋ የሚቋረጥባቸዉን ሁናቴዎች ጨምረዉ መያዛቸዉ አጽንኦት ሊሰጠዉ ይገባል። ከንግድ ህጉ በተለየና ግልጽ በሆነ ቋንቋ የኢትዮጵያ የባሕር ሕግ በቁ. 348 ላይ

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[77] የን.ሕ.ቁ. 674

"ከኢንሹራንስ ዉል የሚመነጩ ክስ የማቅረብ መብቶች ሁሉ በሁለት ዓመት ይርጋ ይታገዳሉ" በማለት ይደነግጋል::[78]

የን.ሕ.ቁ. 674 ሌሎቹ ንዑስ ቁጥሮች የሚሉትን ወደጎላ ላይ ለማየት ትተናቸው በንዑስ ቁጥር /1/ ላይ ብናተኩር ሁለት ነጥቦችን እናያለን:: እነኚህም

1) ከመድን ውል በተነሣ የሚቀርብ ማንኛውም ክስ የይርጋው ዘመን ሁለት ዓመት መሆኑ፣
2) ይርጋው መቆጠር የሚጀምረው:-
   ሀ/ ለክሱ ምክንያት የሆነው ጉዳት ከደረሰበት ቀን ጀምሮ ወይም
   ለ/ በጉዳዩ ጥቅም ያላቸው ወገኖች ጉዳቱን ካወቁበት ቀን ጀምሮ

መሆኑን ነው::

ከነኚህ ከዚህ በላይ ከተመለከቱት ሁለት ነጥቦች የሚያከራክር ሁኔታን የሚያስነሱት በሁለተኛው ነጥብ /ሀ/ እና /ለ/ ሥር የተነገሩትና የይርጋው ዘመን መቆጠር የሚጀምርባቸው ሁኔቴዎች ናቸው:: የአንድ መድን ገቢ ክስ በሁለት ዓመት ይርጋ ይታገዳል ለማለት ምን ሲሆን ነዉ ቆጠራው የሚጀምረው "ለክሱ ምክንያት የሆነው ጉዳት ከደረሰበት" ነው የምንለዉ? ምን ሲሆን ቆጠራው የሚጀምረው በጉዳዩ ጥቅም ያላቸው ወገኖች ሰለአደጋው ካወቁበት ቀን ጀምሮ ነው የምንለዉ? ከዚህ በላይ በቁጥር 2 (ሀ) ላይ የተመለከተውን የይርጋው ዘመን መቆጠር የሚጀምርበትን ጊዜ ሕግ አውጪው ከራሱ ከመድን ገቢው አኳያ እንዲታይ ፈልጐ በ 2 (ለ) ላይ የተመለከተውን ደግሞ ከሌሎች በጉዳዩ ጥቅም ካላቸው ሰዎች ስለጉዳቱ ማወቅ አንፃር ብቻ እንዲታይ ፈልጐ ነው ለማለት ይቻል ይሆን?

የደረሰውን አደጋ /ጉዳት/ የማወቅ ጉዳይ ከሆነ መድን ገቢውም ቢሆን መድን የተገባለት አደጋ መድረሱን ካላወቀ በን.ሕ.ቁ. 670 ላይ ያለውን ግዴታውን እንኳን ሊወጣ አይችልም፣ የካሣ ጥያቄም ማቅረብ አይችልም:: ምናልባት ሕግ አውጪው ከዚህ በላይ በቁጥር 2 (ሀ) እና (ለ) ላይ ያስቀመጣቸው ሁለት የተለያዩ የሁለት ዓመት ይርጋ መቆጠር የሚጀምርባቸው ሁኔታዎችን ያሠፈረው ከ "ሀ" አንፃር የመድን ገቢው የአደጋን መድረስ ማወቅ ምንም መጠራጠር አያሰፈልግም /it should be taken for granted/ ከሚል የተነሳ ነው ሊባል ይችል ይሆናል:: ነገር ግን ይህ አስተሳሰብ መቶ በመቶ ትክክል ነው ለማለት አያሰደፍርም:: ከዚህ በላይ በተመለከተው ሁለተኛው ነጥብ "ለ" ላይ "በጉዳዩ ጥቅም ያላቸው ወገኖች ጉዳቱን ካወቁበት ጀምሮ" የተሰኘው ምናልባት እነኚህ በጉዳዩ ጥቅም ያላቸው ሰዎች ሰለአደጋው ቆይተው ሊያውቁ ስለሚችሉ[79] መብታቸዉን ላለማጥበበ ይርጋው

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[78] የኢትዮጵያ ንጉሠ ነገሥት መንግሥት <u>የባሕር ሕግ</u> ፣ነጋሪት ጋዜጣ ቁ. ፩፣በ1952 ዓ.ም. በተሰይ የወጣ፣ አዲስ አበባ::

[79]ከመድን ውሉ ጋር በተያያዘ ጥቅም ያላቸው 3ኛ ወገኖች ያደጋውን መድረስ ሳያውቁ ሊቆዩ ይችላሉ:: በመሆኑም የነርሱን ጥቅም ለማስጠበቅ ሲል ሕግ አውጪው እነኚህን በተመለከተ የሁለቱ ዓመት ይርጋ መቆጠር የሚጀምረው እነርሱ ያደጋውን መድረስ ካወቁበት እንጂ አደጋው ከደረሰበት ቀን አለመሆኑን ደንግጓል::

መቆጠር የሚጀምረው አደጋው ከደረሰበት ቀን ጀምሮ ሳይሆን እነርሱ ካወቁበት ቀን ጀምሮ ነው ብሎ ለማለት ፈልጎ ይሆናል ሕግ አውጪው መቼም በ "ለ" ላይ ያለውን ሁኔታ አስረድቶ በይርጋ ምክንያት ክሱ ይታገዳል ለማለኘት መድን ሰጪው ያለበትን ፍዳ መገመቱ ክባድ አይደለም፣ በተቃራኒዉ አደጋ የደረሰበትን ቀን ማስረዳቱ ቀላል ነው።

ሌላው በን.ሕ.ቁ. 674/1/ሥር አከራካሪ ሊሆን የሚችለው ነጥብ "ጉዳት" ለሚለው ቴክኒካዊ ቃል የሚሰጠው ትርጉም ነው። ከዚህም አኳያ ለመሆኑ "ጉዳት" የተባለው ቃል መድን ሰጪው በመድን ገቢው ላይ ለአረቦን ክፍያ የሚያቀርበውን ክስ በን.ሕ.ቁ. 674/1/ ሥር ከተመለከተው የይርጋ ዘመን ውጪ ያደርገው ይሆን? ሌሎችስ "ጉዳትን" የማይመለከቱትን መድኖች ይጠቀልል ይሆን? የሚሉትን ጥያቄዎች ሊያስከትል ይችላል። በአንድ በኩል የን.ሕ.ቁ. 674/1/ የእንግሊዝኛ ቅጂ "From the occurrence giving rise to the claim" ሲል አባባሉ ምናልባት ሰፋ ያለና ማንኛውም ከመድን ውል የሚነሣ ክስ ወደማለት ይወስዳል ሊባል ሲችል በሌላ በኩል "occurrence" የሚለው ቃል ዞሮ ዞሮ የአደጋን መድረስ /materialization of the risk insured/ የሚያመለክት በመሆኑ የእንግሊዝኛውም ቅጂ "ጉዳት" የሚለውን ቃል ከተጠቀመው ከአማርኛው ቅጂ አልራቀም ለማለት ይቻላል። የሆነ ሆኖ "occurrence" "ጉዳት" ከሚለው ቃል ሰፋ ማለቱ ብዙም አያከራክርም።

በን.ሕ.ቁ. 674/1/ "ጉዳት" የሚለው ቃል ከተወሰደ ለተወሰነ ጊዜ በሕይወት ኖሬ ከተገኘሁ ይህን ያህል ትከፍለኛለህ የሚል ስምምነት የሚደረግበትን የሕይወት መድን ዘርፍ እንደማይጨምር መከራከር ይቻላል። ከሁሉም ይበልጥ ግን መድን ሰጪው የተወዘፈ አረቦን እንዲከፈለው ጠይቆ በአንድ ወሩ የፋታ ጊዜ ውስጥ ካልተከፈለው የሚያቀርበው ክስ በን.ሕ.ቁ. 674/1/ ይርጋ ይታገዳል? አይታገድም? የሚለው ጥያቄ ጉዳት ከሚለው ቃል አኳያ እንዴት ይታያል የሚል አከራካሪ ጥያቄ ያስነሳል።

የመድን ሰጪው ውዝፍ አረቦን እንዲከፈለው ጠይቆ ያለማግኘት እንደ "ጉዳት" ሊታይ ይችል ይሆን? በእንግሊዝኛው ቅጂ መሠረት (is it an occurrence?) ተብሎ ሲጠየቅ "ጉዳት" የሚለው ያማርኛ ቃልና "Occurrence" የሚለው የእንግሊዝኛ ቃል በጠባቡ ከተወሰዱ መልሱ አሉታዊ ሲሆን በሰፊው ከተወሰዱ ግን መልሱ አዎንታዊ ሊሆን ይችላል።

በፍ.ብ.ሕ.ቁ. 1845 አባባል ከተሄደ የመድን ሰጪው ውዝፍ አረቦን እንዲከፈለው ጠይቆ በአንድ ወር ጊዜ ውስጥ ያለማግኘት እንደ "ጉዳት" የማይታይበት ምንም ምክንያት የለም። በዚህ ረገድ "ጉዳት" የሚለው ቃል "occurrence" ወይም risk materialization ን የሚመለከት ሳይሆን "damage" የሚለውን የእንግሊዝኛ ቃል

ስሜት ይዞ ነው።[80] በመሆኑም ወይ አረቦኑ መክፈል ከነበረበት ጊዜ ጀምሮ [81] በሁለት ዓመት ጊዜ ውስጥ መድን ሰጪው ክስ ካላቀረበ ይርጋ ያግድበታል ወይም ደግሞ በን.ሕ.ቁ. 663/3/ የተጻፈውን ከግምት ውስጥ በማስገባት አረቦን ከማስከፈል አንፃር ይርጋ መቆጠር መጀመር ያለበት የአንድ ወሩ የፋታ ጊዜ ካለቀ ጀምሮ መሆን አለበት ብሎ መከራከር የሚቻል ይመስላል።

በንግድ ህጉ ሊያከራክር እንደሚችል የተጠቆመዉ አረቦንን ስለሚመለከተዉ ይርጋ በባሕር ሕጉ በግልጽ ተቀምጧል። ቢያንስ ቢያንስ የባሕር ሕጉ የይርጋ ዘመኑ ከመቼ ጀምሮ መቆጠር እንዳለበት በመደንገግ ከንግድ ሕጉ ተሸሏል። በባሕር ሕጉ በቁ. 349 ላይ አረቦን ለማስከፈል የይርጋ ዘመን በዚሁ ህግ በቁ. 348 ሥር በተደነገገዉ እንደሚመራ ታሳቢ በማድረግ ይልቁንም አከራካሪ ሊሆን የሚችለዉንና አረቦንን ከማስከፈል አኳያ የይርጋ ዘመን መቆጠር የሚጀምረዉ ከመቼ ጀምሮ ነዉ? የሚለዉን ጥያቄ ይመልሳል።
የባሕር ሕጉ ይህን አከራካሪ ነጥብ በሚመለከት እንደሚከተለዉ ደንግጓል፦

> የኢንሹራንስ ገንዘብ (ፕሪሚየም) አከፋፈልን የሚመለከተዉ የክስ ማቅረብ መብት ይርጋ ዘመን መቆጠር የሚጀምረዉ የዉሉ ስምምነት ተቀባይነት ካገኘበት ቀን አንስቶ ነዉ።[82]

የማንኛውም ከመድን ውል በተነሣ ለፍርድ ቤትም ሆነ ለግልግል ዳኝነት መድረክ የሚቀርብ ክስ ከይርጋ አንፃር በ.ን.ሕ.ቁ. 674 መገዛት አለበት የሚለው ጠንካራ ክርክር መሆኑን መገንዘብ አስፈላጊ ይሆናል።

በን.ሕ.ቁ. 674/2/ ሥር ወደተጻፈው ስንመለስ የተሸሸገ ወይም በሐሰት የተሰጠ መግለጫ ካጋጠመ የሁለት ዓመቱ የይርጋ ዘመን መቆጠር የሚጀምረው መድን ሰጪው ይህን ካወቀበት ጊዜ ጀምሮ ነው ይላል። በዚህ ንዑስ ቁጥር ሥር ያለው የይርጋ ዘመን መቆጠር የሚጀምርበት ሁኔታ ቀደም ብለን ባየነው የን.ሕ.ቁ. 668/2/ /ሀ/ ሥር ከተጻፈው ጋር አብሮ መታየት ያለበት ይመስላል። በነገራችን ላይ የን.ሕ.ቁ. 674/2/ ተፈጻሚነቱ በመድን ሰጪው ላይ ብቻ እንደሆነ አድርጎ ነው ሕጉ ያስቀመጠው። ነገር ግን ከመድን ውል ረገድ ተፈጻሚነቱ በሁለቱም

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[80] ጉዳት ወይም በእንግሊዝኛው "damage" የሚለው ቃል በሰው ወይም በንብረት ላይ የደረሰውን ጉዳት የሚያመለክት ሲሆን ከሕግ አኳያ ትርጉሙ ግን ሰፋ ብሎ የገንዘብ ኪሣራንም የሚጨምር ስለሆነ ሊከፈለው ይገባ የነበረው አረቦን ሳይከፈለው ያደጋውን ሃላፊነት ላጭር ጊዜም ቢሆን የተሸከመው መድን ሰጪ አረቦኑን ባለማግኘቱ ኪሣራ (damage) ደርሶብኛል በማለት ሊጠይቅ ይችላል።

[81] አረቦን ሲል እዚህ ጋር የማሳደሻ ወይም የማስቀጠያ አረቦንን የሚመለከት ይመስላል። ስለሆነም ይርጋው መቆጠር የሚጀመረው ማሳደሻው ወይም ማስቀጠያው አረቦን ሊከፈል ይገባ ከነበረበት ጊዜ ጀምሮ ነው ብሎ ማሰብ ይቻል ይሆናል። ነገር ግን ይህ ከን.ሕ.ቁ. 666/3/ አኳያ ሲታይ ብዙም ጠንካራ ክርክር አይመስልም።

[82] የኢትዮጵያ ንጉሠ ነገሥት መንግሥት <u>የባሕር ሕግ</u> ፣ነጋሪት ጋዜጣ ቁ. ፩፣በ1952 ዓ.ም. በተለይ የወጣ፣ አዲስ አበባ ቁ 349።

ተዋዋይ ወገኖች ላይ ነው::[83] በኢትዮጵያ የመድን ሕግ ውስጥ በግልጽ ባይቀመጥም የፍጹም ቅን ልቡና ጉዳይ በሁለቱም ተዋዋይ ወገኖች ላይ ተፈጻሚ መሆኑን የሚጠቁሙ የንግድ ሕጉ ድንጋጌዎች አሉ::[84]

ከመድን ውል አንፃር የይርጋን ጉዳይ ከማጠቃለላችን በፊት በን.ሕ.ቁ. 674 የተመለከተው የይርጋ ዘመን በምን በምን ምክንያቶች እንደሚቋረጥ በንግድ ሕጉ ላይ የተባለ ነገር እንደሌለ መገንዘብ ያሻል:: የንግድ ሕጉ ከዚህ አኳያ ዝም ከማለቱ የተነሳ የካሣ ጥያቄውን ለመድን ሰጪው ያቀረበ አንድ መድን ገቢ መድን ሰጪው የካሣ ጥያቄውን ተቀብዬለሁ አልተቀበልኩም ብሎ ለማስታወቅ ቢዘገይም ይህ መዘግየት የይርጋ መቆጠሩን ያቋርጣል ካልተባለ በስተቀር የግድ በ.ን.ሕ.ቁ. 674/1/ መሠረት የሁለት ዓመቱ ጊዜ ከማለፉ በፊት መክሰስ እንደሚኖርበት እንረዳለን:: ይሁን እንጂ ደግሞ ሳቀረበው የካሣ ጥያቄ ከመድን ሰጪው የእምቢታም ይሆን የእሺታ መልስ ሳይገኝ ክስ ለማቅረብ መድን ገቢው በጣም እንደሚቸገር መገመቱ ቀላል ነው::

ማጠቃለያ

በዚህ ጽሑፍ በንግድ ሕጋችን ውስጥ የሚታዩትን መድንን የሚመለከቱአንዳንድ አከራካሪ ነጥቦችን ለመጠቆም ሙከራ ተደርጓል:: ከመድን ግንኙነት የተነሣ የሚከሰቱ ችግሮች ግን ሙሉ በሙሉ የተከሰቱት ወይም የሚከሰቱት ከሕጉ ድክመት የተነሣ ብቻ ባለመሆኑ ሌሎች ከግምት ውስጥ መግባት ስላለባቸው ችግሮች መጠቆሙ ወደፊት መፍትሔ ከመሻቱ ረገድ ጠቃሚና አስፈላጊ ይሆናል:: በዚሁ ስሜት አንዳንዶቹን ከዚህ በታች ተዘርዝረዋል::

- በመሠረቱ የመድን ውል እኩል ባልሆኑና እኩል ናቸው ተብለው በማይገመቱ ወገኖች መካከል የሚደረግ ውል ነዉ፣
- ከተዋዋይ ወገኖች እኩል ያለመሆን በተጨማሪ ደግሞ የመድን ውል በአንድ ወገን ማለትም በመድን ሰጪው የሚዘጋጅ በመሆኑና adhesive contracts ከሚባሉት ውሎች እንደ አንዱና ዋነኛው የሚቆጠር ነዉ፣
- ባንድ ወገን የሚዘጋጅን ውል አዘጋጁ ወገን ለራሱ በሚያመች ሁኔታ የሚያዘጋጀው ነዉ፣
- ቀደም ሲል በዚሁ ጽሑፍ ውስጥ እንደተገለጸዉ በሀገራችን ውስጥ ያሉ መድን ሰጪዎች የሚጠቀሙባቸው የመድን ውሎች የተወሰዱት የኮመን ሎው የሕግ ሲስተም ከሚከተሉት አገሮች በተለይ ደግሞ ከእንግሊዝ አገር

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[83] የመድን ውል የፍጹም ቅን ልቡና ውልነት ቀደም ሲል እንደተገለጸው ተፈፃሚነቱ በሁለቱም ተዋዋይ ወገኖች ማለት በመድን ሰጪውና በመድን ገቢው ላይ ነው:: ምናልባት የ.ን.ሕ. ቁ. 674/2/ ከመድን ሰጪው አንፃር ብቻ እንደሚያገለግል ተደርጉ የተፃፈው ብዙም መድን ገቢው የሚጠቀምበት ስላልሆነና ባብዛኛው አታሎኛል ውሉ ፍርስ ነው ይባልልኝ ወይም ጨርሶ ያልተገለፀ ወይም በትክክል ያልተገለፀ ማቴሪያል ፋክት አሰና ውሉ ይፍረስልኝ ብሎ ጥያቄ የሚያቀርበው መድን ሰጪው ስለሆነ ይሆናል::

[84] ለምሣሌ የን.ሕ.ቁ. 680 በተለይም ንዑስ ቁጥር /1/ን ይመልከቱ::

መሆኑንና በአንዳንዱ የመድን ሕጋችን የተወሰደው ባብዛኛው የሲቪል ሎው ሲስተም ከሚከተሉት አገሮች በመሆኑ በሕጉና መድን ሰጪዎቹ በሚጠቀምባቸው ፖሊስዎች መካከል ያለመጣጣም አለ፣

- ስጊዜው ወደ አማርኛ ተተርጉሞ በሥራ ላይ ካለው የሕይወት መድን ፖሊሲ በስተቀር ሌሎች ፖሊሲዎች የተዘጋጁት በእንግሊዝኛ ቋንቋ በመሆኑና በፖሊሲዎች ውስጥ ሰፍረው የምናገኛቸው ቴክኒካዊ ቃላትና ፅንሰ ሐሳቦች እንኳንስ ላልተማረ ለተማረ መድን ተቀባይ እንኳን በቀላሉ የማይገቡ ናቸው።

ከላይ የተዘረዘሩትንና ሌሎች ችግሮችን ለመቅረፍ የመድን ሰጪዎቹ የራሳቸዉ ሚና ቀላል እንደማይሆን ቢገመትም የመድንን ሥራ የሚቆጣጠረው መንግስታዊ አካልም ብዙ ይጠበቅበታል። ከዚህ በላይ ከተጠቀሙት ችግሮች አኳያ ከሁሉም በላይ ከፍተኛ ሚና ሊጫወቱ የሚችሉት ፍርድ ቤቶች መሆናቸዉን በተለይም ገዢ ሊሆኑ የሚችሉትን ዉሳኔዎች የሚሰጠዉ የፌደራል ጠቅላይ ፍ/ቤት ሰበር ችሎት ነዉ። ጉልቶ የሚታየውም ከመድን ውሎች አተረጓጎም አንፃር ሆኖ ከተቆጣጣሪው ባለስልጣን አስተዳደራዊ ቁጥጥር በተጨማሪ በመድን ሥራ ዘርፍ ከፍተኛ የዳኝነት ቁጥጥር አስፈላጊ መሆኑ አከራካሪ አይደለም።

Timely Disposition of Criminal Cases in Ethiopia

Tsehai Wada*

Introduction

Timely disposition [85] of criminal cases is a concept close to the hearts of those who have come into conflict with the law[86]. As the old adage goes, justice delayed is justice denied. Timely disposition of cases, alias, the right to a speedy trial, though mainly discussed in light of a person who is accused of committing a crime, equally applies to litigants in civil cases. The main concern behind is litigating stale cases which may adversely affect the rights of parties in a dispute. If a legal case takes too much time to be disposed, one of the parties will be disadvantaged, for witnesses may die or disappear, physical evidences may deteriorate or get damaged partially or totally -and memory may fade. In criminal cases in particular, primarily, it is the accused that is denied the right, for unlike the prosecutor he does not have the freedom as well as the resource to collect evidences that may be submitted to court. The denial of the right to a speedy trial leaves the door open for the prosecution to dictate the length of a trial and will ultimately lead to unwarranted pretrial detention and abuse of prosecutorial power. Moreover it was explained that: [87]

> excessive delays in the administration of justice constitute an important danger, in particular for the respect of the rule of law...Celerity of proceedings responds to the need for legal

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[85] The term "Timely disposition" is no different from the well known term "speedy trial". This writer has, however, opted to use the former term, just for the sake of obviating the usual controversy that the latter refers to a person's right at trial only and does not cover any pretrial processes. It will be made clear hereunder that the right attaches to every process of the criminal justice system, starting from arrest or charging and ends at the end of trial.

[86] American Bar Association, Criminal Justice Standards on Speedy Trial, Sec. 12-1.1 a (2). Available at www.abanet.org. Moreover, the stakeholders of speedy trial or timely resolution of criminal cases are: an accused as well as the public, victims and witnesses. This is not to suggest that civil cases do not need celerity too. The European Convention for Human Rights for one, provides that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" – Art.6 Sec.1. The scope of this article is, however, limited to the criminal aspect only.

[87] Venice Commission, Can Excessive Length of Proceedings be Remedied? Science and Technique of Democracy No.44, Council of Europe Publishing, (2007), pp. 15, 16.

> certainty, for both citizens and the state, and to the need to further, and restore as soon as possible, the peaceful coexistence of individuals...Indeed the economic life too suffers from contested situations which remain unsettled for too long. Long lasting disputes disturb such peaceful coexistence; judicial proceedings may not be pursued ad infinitum, not even when this prolongation may eventually lead to substantive justice. Decisions must at some foreseeable point become final.
>
> [Delayed justice] risks to affect the confidence which the general public places in the capacity of the State to dispense justice, to decide disputes, and very importantly, to punish crimes as well as to prevent and deter future crimes. This may cause or even incite the recourse by individuals to alternative means of dispute settlement or dispensation of punishment...

Since criminal cases are processed at public expense, any mechanism that can shorten the time required to process a criminal case also saves public spending. It should be noted that both a defendant and the society have interest in the implementation of the right to a speedy trial and that their interests are not conflicting. The defendant's interests are *inter alia*: reduction of anxiety and concern accompanying public accusation; interference with the right to liberty; disruption of employment; subjection to public obloquy; and avoiding undue and oppressive pretrial incarceration. The societal interests include effective prosecution of criminal cases without advantaging the prosecutor; penalizing official abuse of the criminal process and discouraging official lawlessness; preventing an accused who is not incarcerated from committing additional criminal acts while awaiting trial;[88] and reducing cost of pretrial incarceration for defendants who may ultimately be acquitted.[89]

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[88] In the US, approximately three quarters of all defendants are released pending trial and a substantial percentage of crimes are committed by prior offenders. See, Mark L. Steinberg, Dismissal with or without Prejudice under the Speedy Trial Act: A Proposed Interpretation, The Journal of Criminal Law and Criminology, Vol.68, No.1, (1977).pp.10-12.

[89] Brian P. Brooks, A New Speedy Trial Standard for Barker v Wingo: Reviving a Constitutional Remedy in an Age of Statute, The University of Chicago Law Review, Vol. 61, No.2, (Spring 1994), p.587.

Despite this stark truth, the judicial process in many countries is slow, so much so that cases take years to be disposed to the disadvantage of everyone. One may mention so many reasons for such a slow process, but it suffices to mention just a few of them for the purpose of this article. The major causes of delay are, among others, caseloads at the different agencies of the criminal justice system, i.e. police, prosecution offices, and courts; unavailability of witnesses for whatever reason, flight of suspects with the intention to avoid arrest, pretrial motions and absence of a specific legal requirement that a case should be disposed within a given time as well as remedies when the legally fixed date expires.

The topic under discussion is an issue of universal concern, and a cursory look at the literatures that emanate from different jurisdictions[90] show that many countries have adopted different measures to lessen the effects of delayed justice, if not to do away with it *in toto*. Accordingly, some jurisdictions mandatorily require that there should be specific time limits to process a case at the different agencies and the sanction for failure to observe these limits may be, to dismiss the case with or without prejudice. A closely related solution to delayed justice is statute of limitation which will bring a definite end to such stale cases.

The right to a speedy trial is a constitutional right in Ethiopia. Moreover, subsidiary laws provide for some mechanisms to implement this right, though not to the expected level. Despite this, the right to a speedy trial is honored - in practice - more in the breach than in the observance. This article attempts to examine the state of the right in Ethiopia, compare and contrast the law with the practice and suggest some recommendations that may help ease the problem. With this in mind, the article is divided into three parts. The first part discusses the genesis and historical development of the right in the common law jurisdictions. The second section discusses the measures adopted by different countries with a view to lessen the effects of delayed justice. The third part deals with the position of Ethiopian laws on the right to a speedy trial to be followed by an overview of the practice. The article will end with conclusion and a few recommendations.

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[90] Most of the materials accessible to this writer deal with the laws and practices of the US. Thus, the term 'jurisdictions' refers to, mainly this country. It should, however, be mentioned here, that the Venice Commission's report on the subject, Supra, Note 3, has canvassed all EU members and one can easily glean from the report that European nations have developed mechanisms which are similar to the US laws. www.legislationonine.org, which is a website with rich data on European laws, also evinces the same fact.

1. Origin and development of the right to a speedy trial

In the common law jurisdictions, writers trace the origin of the right to a speedy trial back to the 12th Century: [91]

> The right to a speedy trial is an ancient liberty. During the reign of Henry II (1154-1189), the English Crown promulgated the Assize of Clarendon, a legal code comprised of twenty-two articles, one of which promised speedy justice to all litigants[92]. In 1215 the Magna Charta prohibited the king from delaying justice to any person in the realm.

The pertinent part of the latter reads, *"To no one will we sell, to no one deny or delay the right of justice"*. As a follow up to this development, the English Parliament passed the Habeas Corpus Act in 1679. The Act required that persons accused of treason or a felony be released on bail if not indicted at the next term, unless the King's witness could not be produced, and further provided for complete discharge for those not indicted and tried by the next term.[93] In the US, the first colonial right was set forth in the Virginia Declaration of Rights of 1776, which was also the first colonial bill of rights.[94] The founding fathers intended the Speedy Trial Clause to serve two purposes: first, to prevent defendants from languishing in jail for an indefinite period before trial and ...second, to ensure a defendant's right to a fair trial. This is because the longer the commencement of trial is postponed, it is more likely that witnesses will disappear, memories will fade, and evidence will be lost or destroyed.[95] Thus, the right to a speedy

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[91] Speedy Trial Encyclopedia, at www/lawencyclopedia.com. Accessed on July1, 2009

[92] The English Assize of Clarendon was enacted in 1166. See, Ostfeld, Greg, Speedy Justice and Timeless Delays: The Validity of Open ended "ends of justice" Continuance under the Speedy Trial Act, University_of Chicago Law Review, Vol.64, No.4 (summer, 1977), p.1057

[93] F.D.L. Jr., The Lagging Right to a Speedy Trial, Virginia Law Review, Vol.51, No.8, (Dec.1965), p.1595. It should also be noted that a number of American states, responding to the unfortunate effects of pretrial imprisonment, have patterned their statutes after parts of the English Habeas Corpus Act, .Ibid. at 1594 and 1595.

[94] Ostfeld, Supra, Note 7, at 1057.

[95] Speedy Trial Encyclopedia, Supra, Note 8 at 1594 and 1595.

trial is made a constitutional right under the Sixth Amendment, which states that, "in all criminal cases the accused shall enjoy the right to ...a speedy trial". Although this right is derived from the federal constitution, it has been made applicable to state criminal proceedings through the US Supreme Court's interpretation of the Due Process and Equal Protection of the Fourteenth Amendment [clauses].[96] Despite this clear constitutional guarantee, the US Supreme Court could not come up with a definite time limit within which a delay can be considered permissible or impermissible. What could be determined before 1974 was to make use of the "balancing test" in which the length of the delay is just one factor to be considered when evaluating the merits of a speedy trial claim.

Since the different mechanisms designed by the US Supreme Court's interpretation of the standards could not bring about the desired effects of reducing the backlogs of court cases, and lengthy pretrial delays, Congress enacted the Speedy Trial Act (18 U.S.C.A. Sec.3161 et. seq.) in 1974. This Act requires *inter alia*: that an information or indictment shall be filed within thirty days of a defendant's arrest; a prosecutor who knows an accused is incarcerated at the time of the indictment must take immediate steps to initiate prosecution; if a defendant enters a plea of not guilty, trial must commence within seventy days from the filing of the information or indictment, or seventy days from the accused's first appearance in court, whichever is later[97]. The Act thus, introduced definite time limits within which a criminal case may be dismissed with or without prejudice. Moreover, it provided nine specific exclusions to the time limits. Eight of the exclusions are specifically targeted at common sources of delay such as pretrial motions and joining of new codefendants...while the ninth confers discretion upon judges to grant a continuance when necessary to serve the "ends of justice".[98]

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[96] Id.

[97] See generally, Speedy Trial Encyclopedia, and Ostfed, Supra, Notes 8 and 7 respectively.

[98] Osterfed, Supra, Note 7, at P.1037, 1039. The list of exclusions that exempt specific types of delay from the statute's time limit computations [are]: delay resulting from proceedings or examinations to determine the mental competency or physical capacity of the defendant; trial on other charges; interlocutory appeal; pretrial motions; transport of defendant from another district or to and from places of examination or hospitalization; consideration of proposed plea agreement; and unavailability of an essential witness.

The time limits as well as the sanctions have generated a number of issues with which the US courts are still grappling with and there appears to be a wide divergence in interpretation. This is so because in the words of one writer, 'the right is so amorphous, slippery and generally difficult to vindicate, [as a result of which] courts have not applied consistent legal standards in [such] cases'.[99] Notwithstanding the absence of a consensus, the practice evinces that some standards have developed to tackle the issue. The major ones are discussed below, *albeit* very briefly.

2. Major standards against which the right to a speedy trial should be measured and sanctions when legally set time limits are not observed.

2.1. The Barker test[100] – This test requires that courts should balance four factors, namely, the length of the delay, the reason for the delay, [the time] when the defendant asserted his right to speedy trial, and the prejudice suffered by the defendant as a result of the delay. A very brief explanation of each follows.

Length of delay – This issue is solved under the Speedy Trial Act discussed above. The Act has introduced definite time limits. However, it is worth noting that trial cannot be too speedy, for this might violate due process. Both sides must have time to prepare their cases and witnesses must be given time to appear. As one court aptly observed, "surely we are not to go back to the system wherein an offender on Tuesday was tried on Wednesday and hanged on Thursday".[101]

Prejudice – The following are the three schools of thought on the question of who should have the burden of proving the existence of prejudice: 1. it is incumbent upon the accused to make a showing of prejudice; 2. prejudice is presumed and necessarily follows from long delay; and 3. when the delay

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[99] Brooks, Supra Note 5, p.587.

[100] Barker v. Wingo 407 U.S. 514.92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Note – These standards are developed in order to measure whether the right of an accused to speedy trial is violated or not.

[101] The ABA standard, Supra Note 2, further provides that "the standards are not intended to emphasize speedy disposition of cases to the detriment of the interests of the parties and the public, including the victim and witnesses, in the fair accurate and timely resolution of cases. In implementing [the] standards ...jurisdictions should seek to insure both prosecutors and defense counsel have adequate opportunity to investigate their cases, consult with witnesses , review documents, make appropriate motions , and conduct other essential aspects of case preparation. - Sec. 12-1.1 (b).

is substantial, the prosecution must prove that the accused suffered no serious prejudice beyond that resulting from ordinary and inevitable delay. The difficulty with presuming prejudice from long delay is in determining the point in time at which the presumption attaches.

Reason for delay – The main issue here is who the cause of the delay is. The delay may be caused by the accused, the government or courts. If the accused is the cause for the delay as in the case of flight from justice, or when he makes dilatory pleadings and motions, etc., there is no reason why he should benefit from the system. On the other hand, if delay is attributable to the government or courts, such as in cases of deliberate delays seeking tactical advantage or failure to arrange the trial calendar to accommodate an earlier trial and the granting of unreasonably long continuance, then the accused should benefit from the system. These solutions are also discussed in light of a 'motive test' which suggests that, 'relief will be granted first, when the reason for delay factor is found to weigh heavily against the government or second, when the defendant's assertion of the right and actual prejudice both weigh heavily against the government'.[102]

Waiver – is based on the demand doctrine which states that an accused must demand a speedy trial or he impliedly waives the right. But, it is objectionable because it places the burden of procuring a speedy trial upon an accused rather than on the government and it is pointed out that it is unconstitutional.[103]

2.2. Ends of justice continuance – The Act has conspicuously failed to specify whether there is a time limit requirement for ends of justice continuance. This has in turn created confusion among federal courts of appeals, as a result of which, they have interpreted the situation in at least three different ways. These are: the definite duration, the reasonable duration and reasonable relation approaches. The definite duration approach prohibits open ended ends of justice continuance, because every continuance must be specifically limited in duration and justified on the

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[102] See generally, Brooks, Supra Note 5.

[103] See generally, F. D. L. Jr., Supra Note 9, at pp.1587 -1620. This author also argues that "though the right to a speedy trial is commonly granted to a person who has been formally accused, a person who has been released due to delay without prejudice and a person who is about to be accused for the first time, alias a potential defendant, may be prejudiced because of the passage of time and they deserve some protection".

record. The reasonable duration approach permits open ended goals of justice continuance so long as they are reasonable in length and the reasonable relation approach permits open ended ends of justice continuance only so long as they can continue to be justified by reference to rationales. Under the third approach, a court should tie the duration of the continuance only when it is impossible to determine an end date and the rationale for the continuance supports the open ended duration.[104]

2.3. Remedies

It is shown above that specific time limits within which criminal cases should be processed at the different agencies are set under the law. The sanction of failure to observe the legally set time limits is either dismissal with or without prejudice, i. e., a case will be closed or be suspended till a solution can be found to the hindrance or closed forever without any opportunity of reopening. In order to determine whether a case should be closed with or without prejudice, courts are required to take into account the following three factors: the seriousness of the offense, the facts and circumstances of the case which led to the dismissal, and the impact of re-prosecution on the administration of justice.

Seriousness of the offense has to be measured in light of the involvement of threat or use of violence such as in cases of armed robbery or crimes which have massive social implications, such as environmental disasters, though not violent. The rationale behind this position is that the more serious the offense with which the accused is charged, the greater interest society has in permitting government to re-prosecute.

With regard to facts and circumstances which led to the dismissal, the focus should be on the incentive that the dismissal barring re-prosecution would provide for the courts and prosecutors to adhere to time limits in the future. Accordingly, when the reason for delay is by circumstances beyond the control of either the court or prosecutor, cases should not be dismissed with prejudice, for there exists no incentive. On the other hand, when cases are delayed because of the court's or prosecutor's deliberate or negligent misconduct, cases should be dismissed with prejudice, for the sanction can serve as an incentive.[105]

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[104] See, Ostfeld, Supra, Note 7, pp.1037 -1038.

[105] On the issues discussed under the section, see, generally Mark L. Steinberg, Supra Note 4.

As regards the impact of re-prosecution on the administration of justice, courts should use a balancing test that should take into account the degree of prejudice which re-prosecution would impose upon the accused and the facts and circumstances that led to the dismissal of the case. Courts should also examine the seriousness of the offense pending and the severity of the defendant's past criminal record.[106] In sum, courts can dismiss a case with prejudice if the case does not involve threat of force; or violence or if it does not involve massive social implications; or when dismissal serves as a lesson to avoid delays in the future prompted by negligence and the negative impact of re-prosecution on the accused is greater that the benefit to be obtained. In all other cases, the possible sanction can be dismissal without prejudice.

3. The right to a speedy trial in Ethiopia: Law and Practice

3.1. The law

The right to a speedy trial is provided for under different laws. The right is recognized under the Constitution of the Federal Democratic Republic of Ethiopia (hereinafter FDRE Constitution). This right is also embodied in subsidiary laws such as the Criminal Procedure Code. The following sections will deal with the relevant provisions of these laws.

3.1.1. The FDRE Constitution[107]

The FDRE Constitution provides for a long list of rights of persons arrested or accused of crimes. The provisions of the FDRE Constitution and their elements that have relevance to the subject at hand include Article 17 (the right to liberty which provides that no person may be detained without a charge or conviction); Article 19 (which enumerates the rights of persons arrested, namely, the right to be informed promptly of the reasons for their arrest and any charge against them; *be brought before court within 48 hours of their arrest* [108] [emphasis added]; petition the court to order their physical release where the arresting police officer or the law enforcer fails to bring them before a court within the prescribed time and to provide reasons for

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[106] See, Ostfeld, Supra, Note 7, pp.1037 -1038

[107] Proclamation No.1/1995.

[108] Because of its importance to the subject at hand, the Sub Article is excerpted here: 'Persons arrested have the right to be brought before court within 48 hours of their arrest. Such time shall not include the time reasonably required for the journey from the place of arrest to the court. On appearing before the court, they have the right to be given prompt and specific explanation of the reason for their arrest due to the alleged crime committed.'

the arrest;[109] and be released on bail [110]) and; Article 20 (the rights of persons accused to a public trial by an ordinary court of law *within a reasonable time*, [emphasis added]).[111]

Though the FDRE Constitution recognizes the rights of a person who has come into conflict with the law, i.e. a suspect or an accused, some of its provisions are vague and general, and hence leave room for interpretation. The right to a speedy trial, for instance, is mentioned in passing under Article 19 (4) and the duration is provided in a vague term - i.e., "reasonable time" under Article 20(1). Moreover, the only definite time provided under the FDRE Constitution is the time to be brought to court, which is 48 hours under Article 19 (3). It should also be noted that the right to be released on bond or surety during pretrial detention is a qualified right that can be taken away when the "interest of justice" so requires.

3.1.2. The Criminal Procedure Code

Given the fact that the FDRE Constitution is a general framework, subsidiary laws are expected to give full effect to constitutionally guaranteed rights. The Criminal Procedure Code (hereinafter CPC) is one of the important laws in this aspect. Thus, its relevant provisions will be discussed hereunder.

The right to a speedy trial can be affected by many factors that may be imputed to the police, the prosecution, the court or even the victim.[112] The

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[109] This right is subject to the following limitations: where the interest of justice requires, the court may order an arrested person to remain in custody or, when requested, remand him for a time strictly required to carry out the necessary investigation. In determining the additional time necessary for investigation, the court shall ensure that responsible law enforcement authorities carry out the investigation respecting the arrested person's ***right to a speedy trial*** [emphasis added].

[110] This is a qualified right, for the provision provides that, in exceptional circumstances provided by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person.

[111] It may be argued that it is in the nature of constitutions to grant rights in such nature and it is up to the subsidiary laws to put flesh on such general guarantees with all the necessary precision. Nonetheless, whether this is so under Ethiopian laws is discussed in the following sections.

[112] According to the ABA standards, Supra Note 2, Sec.12-2.2, the speedy trial time limit should commence, without demand by the defendant, from the date of the defendant's first appearance in court after either a charge is filed or citation or summons is issued. It also goes without saying that it ends with final judgment. See, also Venice Commission, Supra Note 3. The moral of this section is to show that an accused's right

premise of this article is that the right to a speedy trial can be affected, negatively as well as positively, depending on the speed with which duty bearers discharge their respective duties. At this junction, it is important to pinpoint the crucial moments when the right under discussion can be affected. For the purpose of this article, it appears proper to investigate the following: time within which a crime has to be reported to the police or the prosecutor; time within which a suspect should be arrested for investigation;[113] time within which investigation should be concluded; time within which a charge should be framed and the time within which a trial should commence and end. Appeal may also be taken as a factor that may influence the implementation of the right under discussion. The following sub-sections explain the above issues in light of the CPC provisions.

A. Time for investigation

Investigation is conducted by the police, either after summoning the suspect or his arrest. Regarding the issue at hand, in the strict sense, there is no legal limit within which an investigation should be finalized. What is actually provided is that "every police investigation ...shall be completed *without unnecessary delay*".[114][Emphasis added]. Though the term "unnecessary delay" is general and amenable to abuse, the law provides for the following reliefs.[115] A suspect who is arrested at a police station has the right to be released on executing a bond, with or without, sureties that he will appear at such place, on such day, at such time as may be fixed by the police, provided that the offence under investigation is not punishable with rigorous imprisonment as a sole or alternative punishment, or where it is doubtful that an offence has been committed or that the summoned or arrested person has committed the offence complained of.[116] If an accused is

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can be affected negatively not necessarily when a trial is delayed but also pretrial processes are delayed.

[113] The right to a speedy trial normally begins when a suspect is arrested. Writers such as F. D.L. Jr., Supra, Note 9, however, argues that the right extends to a potential defendant, i.e., a person who is not arrested or released on bail- See Foot Note 19, above. Though the argument is original, it appears that there is a consensus that the right starts to operate right after arrest but not before that. Thus, discussions pertaining to time to report crimes and time required to arrest a suspect are deliberately left out of this article.

[114] Art.37 (1) of the Criminal Procedure Code.

[115] Note – the following part focuses on the different reliefs that an accused or a suspect has while awaiting the final disposition of a case brought against him. Though the reliefs have nothing to do with the disposal of a case within a given time, the discussion is intended to show the predicament of such persons if not released on bail.

[116] Art.28(1).

not released despite fulfilling these conditions, he can appeal from this decision to any court of law so that he be released on bail.[117]

Even if an accused cannot be released on anyone of the above grounds, an investigation cannot run for an indefinite period. Where for where the police investigation is not completed, the investigating police officer may[118] apply for a remand for a sufficient time to enable the investigation to be completed but no remand shall be granted for more than fourteen days on each occasion.[119] An accused also has the right to be released on bail where the offence with which the accused is charged does not carry the death penalty or rigorous imprisonment for fifteen years or more and where there is no possibility of the person in respect of whom the offence was committed dying.[120] Bail is not, however allowed where the applicant is of such a nature that it is unlikely that he will comply with the conditions laid down in the bail bond or if set at liberty, he is likely to commit other offences or he is likely to interfere with witnesses or tamper with evidence.[121]

Despite these guarantees, the power given for an investigating police officer to request remand for an unspecified number of times, is a cause for concern. This in theory can lead to an indefinite pretrial detention. As å consequence, if a detention is endorsed by a court order, the arrestee has no remedy except to languish in police prison. Whether an arrestee can appeal from the decision of the court that has authorized the remand is not clear. In the absence of a specific provision to this effect, it may be assumed that this right is not vested in the arrestee.

The law has also failed to provide for a specific time limit to complete an investigation. What is provided is simply that an investigation has to be completed without unnecessary delay. Accordingly, whether the court that has endorsed the remand has also the power to release the arrestee with or without bail - when investigation cannot be completed without

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[117] Arts28/2 and 64.

[118] The term "may" indicates that this is a discretionary duty. Does it mean that an investigating officer can detain a suspect for more than fourteen days without court authorization? Note - Both versions of the code make use of the term "may" than "shall" which is an indicator of a mandatory duty.

[119] Art.59.

[120] Art.63/1.

[121] Art.67.

unnecessary delay – or close the file with or without prejudice[122], is not clear again, for there is no provision that allows or disallows this authority. What is a necessary or unnecessary delay is too subjective to determine with any degree of certainty.

B. Preliminary Inquiry[123]

One of the potential causes for delay is preliminary inquiry or pretrial motion. Under the Code, preliminary inquiry is required only in cases where an accused is to be charged for homicide in the first degree and aggravated robbery. According Art.80, such an inquiry will be allowed only when formal trial cannot be held immediately. It may be said that such an inquiry should not in principle be adjourned, except under specific conditions provided by law and the grounds for adjournment are the same as those provided for formal trials – discussed below. The major purpose of holding inquiry is to record prosecution witnesses' testimonies. It should be noted that the accused is not given the right to call his own witnesses, nor to cross examine prosecution witnesses. As regards the accused's rights, what is provided is that he can make a statement - if he wishes so - in which case his statements will be reduced to writing and kept in file. If he opts to make no statement, however, he shall be committed *"forthwith"* for trial. An accused has also a right to give a list of witnesses he wishes to call at his

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[122] The current Criminal Procedure Code is a result of many drafts some of which were dumped or discarded for one reason or another. One of the drafts had provided that "where no proceedings are instituted after a reasonable time has been given the police to complete the investigation, the detention shall be deemed to be unlawful and the arrested person shall be released". – Art.48 of the Intermediate Draft. See, Fisher, Z. Stanley, Ethiopian Criminal Procedure, A Source Book, The Faculty of Law of Haile Selassie I University, pp. ix-xii and 148.

[123] According to anonymous knowledgeable individuals with many years of experience either as judges or practicing lawyers, preliminary inquiry is largely thrown into disuse though there is a very recent practice to make use of it. Whatever the case, pretrial inquiry is a legal condition that can be availed when a trial cannot be held immediately and it is not a must that every case should pass through this process. Thus, its disuse is engendered because trials can be held without any help from it. This writer believes that despite this fact, which is not unique to this process alone, it should be given a prominent place in this article, for it is a legal process acknowledged by the relevant law. It also helps to note that according to the latest Draft Craft Criminal Procedure Code, courts that have the authority to hold such a process are given more powers than what are provided under the current law. Accordingly, there is a possibility that all cases involving non - bailable offences will pass through this process and the court can have the authority to release a suspect when no case is made against him and convict him if he admits the charge brought against him. See. Arts.162 -173 of the draft. Thus, though its applicability may be minimal at present, this may not be so in the future.

trial.[124] One may surmise here that the purpose of preliminary inquiry is to facilitate the formal trial but not to replace it. One other important purpose of preliminary inquiry is that, depositions of a witness taken at a preliminary inquiry may be read and put in evidence before the [trial] court where the witness is dead or insane or cannot be found; is so ill as not to be able to attend the trial or is outside the [country]. The deposition of an expert is likewise put in evidence[125]. Given this, and the fact that the procedure does not apply to every accused, its effect on delay may be minimal. Moreover, it appears that an accused cannot raise any pretrial motions, for the scope of preliminary inquiry is so narrow, so much so that such issues fall outside of the court's jurisdiction.

In addition to preliminary inquiry, the Code also provides that any court may record any statement or confession made to it at any time before the opening of a preliminary inquiry or trial. The purpose behind is to send such statements to the court which will conduct the preliminary inquiry or the trail and nothing else.[126] This procedure does not have any effect on delay than the one mentioned above i.e., preliminary inquiry.

C. Time to frame charges

The only article of the CPC that talks about the time required to complete charging is Art.109/1, which provides that "the public prosecutor shall within fifteen days of receipt of the police report or the record of a preliminary inquiry, frame such charge ....".This is one of the important areas where the law has prescribed a specific time limit to expedite the process or put differently, to implement the right to a speedy trial.

Despite this, the law has failed to provide for a sanction when the time limit is not honored. Whether or not a suspect has the right to demand the framing of a charge within the set time limit is also left unanswered. Moreover, as shown above, the victim of a crime is also a stakeholder in the timely disposition of cases. In this regard, one may be tempted to ask whether a victim has the right to demand the framing of charges within the legally set time limit. In relation with this, the law provides that if a case has to be prosecuted by a public prosecutor, as opposed to cases that can be prosecuted privately, the interested person - the injured or his representative, etc. - may petition the Superior Attorney who is given the

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124. See Arts.80 ff
125. Art.144.
126 Art.35.

power to: confirm or reverse, amend, suspend, alter, revoke, or confirm decisions made or measures taken by an attorney subordinate to him and it appears that this is a final decision[127].

The law's failure to provide for sanctions in effect amounts to allowing a prosecutor to sleep over this duty with impunity till a case is barred by limitation. The fact that an interested person cannot appeal to a court of law on such issues, also exacerbates the situation. One may, however, be tempted to raise the issue of judicial review in such instances. Judicial review is a constitutional right, for it is provided under Article 37(1) of the FDRE Constitution, that "everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with a judicial power". It thus remains to be seen whether the right to appeal from the decision of the Superior Attorney can be considered as justiciable or not if this figures as a constitutional issue in the future.

D. Lengths of trial and adjournment

Trial in general is dealt with under Book IV Arts.94 and the following of the Code. This part provides, *inter alia* that: when the charge has been filed...the court shall forthwith fix the date of the trial.[128] Though the term "forthwith" appears to be unambiguous, it is dependent on court calendars as a result of which and in the absence of a given time limit, it may mean a week or weeks or even months. Thus, it may be taken as a cause for concern.

As far as adjournment of trials is concerned, the relevant part of the CPC evinces that trial can be adjourned either for a definite period or indefinitely.[129] To begin with, it appears that the code envisages that trials

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[127] Office of the General Attorney General of the Transitional Government of Ethiopia Establishment Proclamation No.39/1993, Arts.19 and 20. This proclamation has repealed Arts. 42(1) (d) and (3), 44(2) and 45 of the Criminal Procedure Code among others, which had given these powers to the court. Though this proclamation is repealed by Attorneys Proclamation No.74/1993, the same powers are given to the Superior Attorney under Arts.9 and 10. Thus, courts are deprived of the power to entertain such cases and it is unlikely that an interested person can appeal from the final decision of the Superior Attorney for, no such right is provided in the proclamations citied above. Moreover, these articles talk about the right of an interested person to petition from the decision - not to prosecute - of a subordinate attorney, meaning such a right cannot be availed when an attorney sleeps over his duty to charge within the set time limit, for he has not made any decision yet.

[128] Art. 123.

[129] For the sake of convenience, Art.94 of the code is excerpted below:

should not be discontinued once started. This is so, because, as per Art.94 (l), adjournment is granted "[when a] trial cannot be completed in one day, [and that it should be] adjourned for the following day". The Code further provides that trials can be adjourned under fourteen conditions – including adjournment for the next day mentioned earlier. These conditions are further divided into two, i.e. those that call for adjournment for a week and those that call for an indefinite adjournment. Accordingly, when a trial is adjourned for anyone of the four reasons – listed under Art. 94(2) (a) and (f) – (h) – a trial can be adjourned for a week[130]. In all other cases, a trial can be adjourned for an indefinite period. Moreover, per Art.94 (1), a court may of its own motion or on the application of the prosecution or the defence adjourn any hearing at any stage thereof where the interests of justice so

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-Adjournment. - Conditions

(1) The court of its own motion or on the application of the prosecution or the defence adjourn any hearing at any stage thereof where the interests of justice so require.

(2) An adjournment may not be granted unless:

a. the prosecutor , public or private, or the accused fails for good cause to appear;
b. witnesses for the prosecution or the defence are not present;
c. In a trial other than that of a case committed on preliminary inquiry to the High Court, the prosecution requires time for investigation;
d. further evidence requires to be produced;
e. evidence is produced either by the prosecution or the defence which takes the other side by surprise and the production of which could not have been foreseen;
f. the charge has been altered or added and the prosecution or the accused requires time to reconsider the prosecution or defence;
g. the accused has not been served with a copy of the charge or of the preliminary inquiry or has been served too short a time before the trial to enable him properly to prepare his defence;
h. prior sanction for a prosecution is required before the trial may start;
i. a decision in the trial cannot be given unless other proceedings be first completed;
j. the mental stability of an accused requires to be established by an expert;
k. the court considers that the accused, if a young person, should be placed under observation;
l. the trial cannot be completed in one day and is adjourned to the following day.

[130] Art.94 (3) No adjournment under paragraphs (a) and (f) – (h) inclusive shall be granted for more than one week.

require".[131] This latter condition is similar to what is known as open ended discontinuance. It should be noted here, that in those instances where a trial can be adjourned for a week, the Code fails to provide whether such an adjournment can be allowed for one instance only or that it can be repeated when the need arises. In the absence of a clear guidance, one wonders whether the one week period is in any way different from the other grounds of adjournment whose length is not determined. Put differently, if a trial can be adjourned for a number of times – measured in weeks – it is nothing, but an adjournment for an indefinite period.

It appears that the Code has provided some guidance that can allay the fear that trials can be adjourned indefinitely. It is provided under Art.95 that:

(1) subject to the provisions of Sub-art.(3) of Art.94, the court shall adjourn the hearing for such time only as is sufficient to enable the purpose for which the adjournment is granted to be carried out.

(2) where the purpose for which the adjournment was granted has not been carried out for a reason not attributable to the fault of the prosecution or the defence, a further adjournment of the same or less duration shall be granted.

It helps to note here that the Code has failed in providing a clear solution to delayed justice due to adjournment. This is so, because, the terms employed, such as "such time as is sufficient to enable the purpose" are too vague to be of any use in mitigating the problem of delayed justice. Moreover, though it may be argued that the court has the authority not to grant further adjournment when failure to carry out the purpose for adjournment is attributable to one of the parties, it is not expressly stated in a mandatory manner and one can reach at this conclusion through interpretation only.

By way of conclusion, though it may be said that the Code has attempted to regulate length of trials - albeit indirectly - the solutions provided leave much to be desired. Accordingly, as far as the right to a speedy trial is concerned, the following can be taken as causes for concern:

- Regarding indefinite discontinuance when the interest of justice requires it, the term "interest of justice" is very vague and amenable to different interpretations. Thus, in the absence of a sort of guidance

[131] It may be presumed that such instances are different from those listed under sub.Art.2.

to this effect, this situation can be abused and be a source of unnecessary litigation.

- Those instances provided under Art.94 (2) that call for indefinite adjournment are many and the mechanisms provided to check repeated adjournment under Art.95 are not satisfactory either.
- Even under situations that call for an adjournment for a week, the law has failed to provide whether these can be repeated or not.
- A relevant impediment is, the denial of the right to appeal form lengthy or repeated adjournments.[132]

E. Other factors that may influence the length of trials

Apart from the above grounds that may call for adjournment, the admission or denial of guilt by an accused, no case motion when the prosecution fails to prove the charge up to the standard and the number of objections that may be put at trial may also influence the length of trial. In this regard, the Code provides that, where the accused admits without reservation every ingredient in the offence charged, the court shall enter a plea of guilty and may *forthwith* convict the accused. It should be noted here that in such a case, the court has the discretion to require the prosecution to call such evidence for the prosecution as it considers necessary and permit the accused to call evidences.[133] Depending on circumstances, if an accused admits guilt and the court does not see the need to call for evidences, it can convict the accused there and then and this can shorten the length of trial. Furthermore, when the case for the prosecution is concluded, the court, if it finds that no case against the accused has been made out shall record an order of acquittal.[134] Such a lucky accused can therefore escape the burden of a lengthy trial. With regard to objections, the code provides that the court shall decide forthwith on the objection where the objection can be disposed of by reference to the law or facts on which the objection is based are not disputed by the prosecutor. Where decision cannot be made forthwith owing to lack of evidence, the court shall order that the necessary evidence

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[132] Art.184 (a) provides that no interlocutory appeal shall lie from a decision of the court granting or refusing an adjournment under Art.94. This in effect means that an interested party has to wait till the end of the trial, to appeal on this issue. Accordingly, the right to a speedy trial can be affected by the denial of the right to appeal on issues pertaining to unjustifiable adjournments.

[133] Art.134.

[134] Art.141.

be submitted *without delay* and the court shall make its decision forthwith upon the necessary evidence having been produced.[135]

F. Judgment and sentencing

There is no specific time limit provided in the Code as to when the court shall give judgment. What is provided in this regard is that after the final address, the court shall give judgment.[136] If the accused is found not guilty he can be acquitted there and then. But if he is found guilty, both the prosecution as well as the accused can call their own witnesses as to character and the court shall pass sentence thereafter. It should be noted here, though depending on circumstances, the court needs time to consider the different claims submitted by the parties in dispute regarding aggravation and mitigation, before fixing the appropriate sentence/s[137], there is no legally fixed time limit for this process. Thus, this is another cause for concern.

G. Appeal

According to Art.187, an appellant is required to give notice of appeal against a judgment within fifteen days of the delivery of the judgment and the memorandum of appeal shall be filed within thirty days of the receipt of the copy of the decision appealed against.[138] The discretion to fix the date of hearing is given to the president of the appellate court and there is no fixed time in such a case. Unlike in the case of first instance courts, the law does not provide for the manner of adjournment. It should be noted that where the court of appeal confirms the conviction but alters the sentence or vice versa, a second appeal shall lie only in respect of the conviction or sentence which has been altered.[139]

By way of conclusion, it may be said that the law cannot provide for any other mechanism regarding admission or denial of guilt, raising defenses, time required to pass a judgment and sentence as well as appeal than what are provided, for such processes are also dependent on the choices to be made by an accused. Thus, as far as dilatory motions can be controlled both

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[135] Art.131.

[136] Art.149(1).

[137] The time required to fix appropriate sentences can be longer when the convicts are many.

[138] As per Art.22 (4) of Federal Courts Proclamation No.25/1996, however, an application for a hearing in cassation shall be made to the Federal Supreme Court within 90 days from the date on which the final decision is rendered.

[139] Art.195(3)

by the court as well as the parties in dispute, these processes cannot be taken as causes for concern.

Notwithstanding the strengths and shortcomings of the operational laws mentioned above, it helps to note that a recently enacted vagrancy law[140] has set ground breaking standards to implement the right to a speedy trial. The law provides *inter alia*, that a vagrant: can be arrested without warrant; should be brought before a court within 48 hours; shall not be released on bail; his investigation - at the police station - should be completed within twenty eight days and reinvestigation should be completed within five days; his charges should be filed within ten days in the absence of which he should be released and the court shall pass judgment within four months – but no remedy is given when these deadlines are not met.[141] This legislation deserves appreciation in its fixed time limits than its contents which are vague and general. It may be hoped that its principles that set out specific time limits and remedies will be emulated in drafting the future criminal procedure code.

It needs to be highlighted, here, that the CPC, though it has provided for specific time limits as a matter of exception than rule, has failed to provide for remedies when these are not observed. This therefore, calls for a serious reconsideration with a view to provide for specific time limits for all acts of the agencies of the criminal justice system as well as remedies when these are not observed. It will thus, be hoped that the future criminal procedure code will emulate the Vagrancy Act and come up with acceptable solutions to the many problems raised in this article.

3.1.3. The Criminal Code[142]

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[140] Vagrancy Control Proclamation No.384/2004. Note – A recently enacted Anti Terrorism law also provides *inter alia*: that if the investigation is not completed, the investigating police officer may request the court for sufficient period to complete the investigation and that each period given to remand the suspect for investigation shall be a minimum of 28 days; provided, however, that the total time shall not exceed a period of four months – Art.20 (2&3) of The Anti Terrorism Proclamation No.652/2009.

[141] Ibid, Arts.6 – 9

[142] This writer believes that statute of limitation has a strong relevance with the subject at hand, i.e., timely disposition of criminal cases.Though periods of statutory limitation are by any standard long, they provide for a definite end to litigating stale cases as a result of which both prosecutors and judges are required by law to observe that the cases that they handle are not barred by limitation. It should also be noted that the rationale behind period of limitation is the same as speedy trial, for in both cases the focus is on bringing an end the litigation of stale cases.

Criminal period of limitation is provided under Art.216 and the following of the Criminal Code. Art.216 (1) states that, "unless and otherwise provided by law, in all criminal cases the prosecution and the criminal action shall be barred and may no longer be instituted or brought upon the expiration of the legal period of time. The sub article also states that...as soon as the limitation period has elapsed, neither a conviction nor penalties or measures may be pronounced. Sub 2 also states that "even where, the defendant fails to raise the barring of the charge by a period of limitation the Court or the Prosecutor shall, at any time, consider the barring of the charge by limitation.

According to Art. 217,[143] the maximum period of limitation is twenty five years for crimes punishable with death or rigorous imprisonment for life; while the minimum is three years for crimes punishable with simple imprisonment not exceeding one year. Arts.220 &221, these limitation periods can be suspended or interrupted for different reasons. The Code also provides that "whatever the circumstances may be the prosecution and the criminal action shall be barred in all cases where the period equal to double the ordinary period of limitation provided by law has elapsed.[144] This is absolute period of limitation.[145]

As far as timely disposition of criminal cases is concerned, the relevant provisions of the Criminal Code that deal with statute of limitation are apparently causes for concern. Periods of limitation are relatively long and those interested in initiating a criminal process do have sufficient time to put them in motion. Despite this, the law provides that this period can be suspended or interrupted. Per Art.220 of the Criminal Code, a criminal case can be suspended "where a charge has been instituted and the case is undergoing a judicial proceeding or where the decision in the criminal case cannot be given until other proceedings have been completed". The same article further provides that "...upon the removal of the bar, the period of limitation shall revive and continue its course".

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[143] As per Art.28 of the Constitution, however, crimes against humanity cannot be barred by limitation. Moreover, per Art.24 of the Anti-Terrorism Proclamation, "criminal liability of persons who commit terrorism crimes as stipulated in [the] Proclamation shall not be barred by limitations".

[144] Art.222.

[145] Just like actions, penalties and measures can be barred by limitation, suspended or interrupted - See Arts. 223ff. These articles are left out deliberately for they apply on a criminal who has been sentenced but could not undergo through punishment for one reason or another and it is assumed that its relevance to the subject at hand is minimal.

In practice, the instances that call for the cessation of suspension and revival of the limitation period may not be many. Accordingly, a period of limitation that has began to run can be suspended when an instance that calls for retrial eventuates, and these may be flight of the defendant, absence of witnesses and the like. In all other cases a defendant is either convicted or acquitted and the revival of the limitation period cannot arise as an issue. These causes can be divided into two. These are causes attributable to the defendant and the agencies of the criminal justice system. In light of this division, it may be appropriate to suspend the limitation from running if the cause is attributable to the defendant. On the other hand, if the cause is attributable to the agencies, one wonders whether it will be wise to suspend the limitation. It is shown above that the different tasks required to process a criminal case are not given specific time limits and even those tasks that are required to be done within specific time limits lack sanctions. In light of this, an accused can be harassed by the discontinuance of the limitation that has run in his favor. If the agencies create situations that call for retrial and this can be done repeatedly, for the law has set no limit for this, a period of limitation can in theory be suspended a number of times to the disadvantage of an accused unless the court dismisses the case with prejudice. This can, therefore, be a cause for concern.

Nevertheless, it helps to note that the current Criminal Code has amended the former equivalent of Art.220, i.e., Art.229. The latter reads in part as follows: 'Limitation shall be temporarily suspended as long as there subsists, in law or fact, a bar other than one due to the volition of the offender to the institution or continuation of the prosecution.' The current Code has, however provided for the effects of causes attributable to the suspect as follows: 'Similarly, any act of the criminal voluntarily done to hinder the institution or continuation of the prosecution shall not prevent the limitation period from running – 220 /2...par.2'

According to the above quoted provision an act done by the suspect to hinder the criminal process cannot prevent the limitation period from running, i.e., it continues to run – in his favor. Is this really the intention behind? It will be interesting to note here that the explanation given in this regard, by the drafters of the current Code is that "[the phrases quoted above] have made the provision confusing [and it is decided] to put them

under sub article (2)"[146]. Can't it be argued that the current position is more confusing than the former? It is quite apparent that this provision needs amendment before it starts to cause legal problems.

The provisions that deal with interruption are less complicated than the above. The relevant article, i.e., Art 221, provides that:

> The limitation period shall be interrupted by any order, act or decision for purposes of search, summons, prosecution or investigation in relation to the crime or criminals and that upon each interruption the whole period of limitation shall begin to run afresh.

The major difference between suspension and interruption of period of limitation is temporal. A period of limitation is suspended if a case is pending at trial, while interruption starts to have effect even before a charge is pressed. In the latter case, any order, act – physical act according to the Amharic version – such as search or decision can interrupt a period of limitation. Whether this difference should give rise to different treatments, such as the revival of the limitation period in favor or against a suspect and an accused is a matter of opinion. Be this as it may, one may wonder why a cause attributable to the suspect or the agencies is not taken as a factor in this situation. As the law stands at present, it does not matter whether the cause for interruption emanates from the act of a suspect or one of the agencies. In theory, if an investigating officer takes out a warrant of arrest and could not arrest the suspect, for whatever reason, even one attributable to his own negligence, the period of limitation shall be interrupted. Moreover, there is no reason why the same investigator cannot acquire another warrant of arrest if the need arises. Is this a wise solution? Wouldn't it be preferable to allow interruption due to reasons attributable to the suspect and disallow it if the cause is attributable to the agencies?[147] Without such a separate treatment this provision is again susceptible to abuse and needs reconsideration.

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[146] The Drafting Committee of the Criminal Code, Expose des motifs, of the Criminal Code (unpublished – 2004) – explanation for the amendment of Art.229 – No page number. The document is written in Amharic, and contents are translated by this writer.

[147] Note – In other jurisdictions, reasons attributable to the agencies are causes that allow a defendant to benefit from Speedy Trial provisions while those attributable to himself are prejudicial to him - See Sec. 2.1 under reason for delay, above.

The fact that periods of limitation can be repeatedly suspended or interrupted is not lost on the part of the law maker, for the Code provides under Art.222 that:

> Whatever the circumstances may be, the prosecution and the criminal action shall be barred in all cases when a period equal to double of the period of limitation provided by law [for offences prosecutable without complaint] has elapsed, or in cases where a special period applies [upon complaint offences] when such a period has been exceeded by half.

This provision is self explanatory and bars cases that are too old. Accordingly, whether a case is suspended or interrupted for whatsoever reason, it cannot be treated beyond the time provided above. This is known as 'absolute limitation'. Given the above problematic situations, the extension of the period of limitation for so long a time may be unjustified. However, the fact that a criminal case can be stopped within a given time clearly set by law, is a relief to those who can be affected by it. With this in mind, a criminal case whose absolute period of limitation has expired, should be stopped at whatever stage it may be, i.e., under investigation, prosecution or while on trial[148].

3.2. The Practice

The different shortcomings of the Ethiopian criminal justice system are captured well in at least three authoritative publications. One of these publications covers the entire agencies of the criminal justice system of the country and the other two cover federal matters. The most pertinent parts of the publications are discussed hereunder.

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[148] Those provisions of the criminal code that deal with period of limitation are more extensive than their counterparts in the Civil Code. A cursory look at the two parts evinces that the latter has quite a few provisions that deal with the point and these are devoid of any confusing statements. Moreover, it can be seen that 'suspension' is unknown to the Civil Code. Interruption is allowed for reasons attributable to the defendant or when a case is lodged at court – See Art.1851. Should the criminal code emulate this and limit its scope to interruption only? Given the fact that causes for suspension and interruption are not that much important to make a distinction between the two – see the discussion above in this section – it is submitted that suspension should be deleted from the code for tit serves no important purpose.

3.2.1. The study conducted by the Ministry of Capacity Building

In a publication entitled "Comprehensive Justice System Reform Program, Baseline Study Report"[149], the team of experts that did the research managed to show the different shortcomings that have afflicted the system. Some of the glaring findings are discussed below.

A. On pretrial detention

The CPC is silent about the place where the pre trial custody should take place i.e., in police stations or in remand prisons. In the daily practice, however, a suspect remains in police custody as long as the police investigation is not completed. This can take months[150].

B. On length of time required to frame charges

The fifteen days legal requirement is not observed in reality and there is no sanction for failure to comply. Hence, the prosecutors take too much time to discharge this obligation. The picture painted in this study regarding the issue under discussion is shocking, to say the least. One of the reasons for delay identified in the study is "delayed summons" and the data show the following:

A striking example of the backlogs caused by delayed summons is the situation in the Addis Ababa Administration[151]. The number of pending cases that have *never been looked* [emphasis added] at by a prosecutor in the High Court Prosecution Office or at one of the 8 branches during the last five years - most probably from the date of publication, i.e. 2005 -was recently estimated at 140,000. The details of this backlog are as follows:

1991 EC – 1998 [1999 GC] – 27,790 cases,
1992 EC [1999-2000 GC] – 28,629 cases,
1993 EC [2000 – 2001GC] – 27,649 cases,
1994 EC [2001 -2002 GC] – 27,177 cases, and
1995 EC [2002 – 2003GC] – 29,442 cases.[152]

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[149] Ministry of Capacity Building, Justice Reform Program Office, Comprehensive Justice System Reform Program, Baseline Study Report, (March, 2005).

[150] Ibid, p.194.

[151] Note – Here, it appears that the figures represent the number of cases at the Addis Ababa High Court in its first instance capacity, for it deals with charging. Thus, cases processed in their appellate capacity are not included.

[152] Ibid, PP. 185-187.

The study further mentions that in the last few months - most probably from the date of publication - about 70,000 cases of the backlogged 140,000 cases have been discontinued because of expired limitation periods. The backlog appears to subsist and grow than show any sign of decrease. According to their survey, in the Paulos Branch, the PPS is able to handle about 3,500 files a year while it receives 6,000 to 10,000 from the police leading to at least a backlog of 2,500 cases every year.

C. On files that are sent back by the prosecutors to the police for further investigation

According to information obtained from Addis Ababa Office regarding Addis Ababa and the eight branches, 63,424 investigation files were received from the police in 2002. A total of 5,219 files were sent back to the police for re-investigation in that same year. The daily practice regarding prosecutors' requests for police re-investigation differ from one PPS office to another. There is a lack of appropriate guidelines that are understandable for and used by all prosecutors.

In the Addis Ababa branch office[153] 1,223 files were sent back to the police while 4509 were received (app.30%).

- In the Yeka branch office 1,500 files were sent back to the police while 4,991 were received (app.30%).
- In the Akaki branch office 386 files were sent back to the police while 3,213 were received (app.12%).
- In the Paulos branch office 58 files were sent back to the police while 6,004 were received (only 1%).[154]

Though the police are not immune from this problem of backlogged cases, one can imagine the extra burden thrown on them because of the return of such a number of files for reinvestigation. The situation is described as follows: 'The response of the police currently occurs only after a delay. We heard that on occasion it takes more than 5 years before the police complete the re-investigation and send the case back to the prosecutor. The prosecutor will then send the file to the court'.[155]

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[153] No date or year is given though it may be presumed that it is close to the publication of the research.

[154] Ibid, P.184.

[155] Ibid, P.100.

D. On the number of remand prisoners

When the study was conducted, there were 4,400 prisoners in the prison of Addis Ababa of which 2,800 were remand prisoners. The researchers opine that the cases of such prisoners are given priority over others, but despite this, many are in prison not because the crimes that they are alleged to have committed are not bailable, but because they are poor and cannot afford to set bail[156].

E. On the power of a prosecutor to refuse to institute proceedings[157]

The following observation explains the issue mandate of prosecutors to refuse to institute proceedings and its effect on backlog of cases: [158]

> When a case is discontinued, the public prosecutor must report on the decision and seek confirmation not only with superior but also with the Minister of Justice or the Head of Justice Bureau. As so much effort and so many layers are involved in dismissing a case, prosecutors often find it easier and more efficient to wait until the case reaches limitation rather than reporting to their superiors on their decision. This is a "smart trick" that a prosecutor uses to solve his or her problem dealing with an individual case s/he wants to discontinue. But seen from the system, this habit has aggravated the

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[156] Ibid, P.187.

[157] The relevant provisions of the CPC read as follows:

41. Doubtful cases.

Where it is not clear whether proceedings should be instituted, the public prosecutor shall refer the matter for instructions to the Advocate General.

42. Cases where proceedings shall not be instituted

1. No proceedings shall be instituted where:
   a. the public prosecutor is of opinion that there is not sufficient evidence to justify a conviction; or
   b. there is no possibility of finding the accused and the case is one which may not be tried in his absence; or
   c. the prosecution is barred by limitation or the offence is made the subject of pardon or amnesty; or
   d. the public prosecutor is instructed not to institute proceedings in the public interest by the Minister by order under his hand.
2. On no other grounds may the public prosecutor refuse to institute proceedings.
3. The public prosecutor shall institute proceedings in cases affecting the Government when so instructed by the Minister.

[158] Ministry of Capacity Building, Supra Note 65, p.185. This sarcastic expression, i.e., "smart trick" is further buttressed by the title of the section which reads as "better limitation than discontinuance of a case".

backlog problem that weighs heavily on the administration of the PPS.

F. Major reasons for such shortcomings

According to the study, the major causes for such shortcomings are *inter alia*: shortage of manpower, lack of interest among professionals to join the institutions and lack of clear guidelines that govern the relationship between the police and the office of the prosecution[159].

3.2.2. A study conducted by the former vice-president of the Federal Supreme Court

In November 2006, the former vice-president of the Federal Supreme Court, Ato Menbere Tsehai Tadesse, published a book entitled 'Features of Ethiopian Law and Justice'. [160] The book deals with so many issues that pertain to the legal system of the country. The author has identified critical gaps between the law and the practice and suggested his views. One of the issues raised and discussed in the book is the right to a speedy trial. Figures collected by the author show that criminal cases take more time to be disposed, than civil and labor cases. In the author's view, this mainly stems from the contradiction between the legally provided procedure of entertaining cases and the age old customary practice. The book also reveals that the backlog of court cases –in particular criminal cases - is one of the major factors that have impeded the exercise of the right to a speedy trial. Since the data speak volumes, this writer has opted to present the most pertinent parts as they are found in the book. Here follows the data:

A. On the age of files at trial

File	1 month	1-2 months	2-6 months	6 months-1year	1-3 years	3-6 years	Over 6 years	Total
Civil	308 (6.9%)	250 (5.6%)	1123 (25.2%)	801 (18%)	1370 (30%)	512 (11.5%)	94 (2.1%)	4459 (28%)
Criminal	164 (1.5%)	125 (1.14%)	1344 (12.4%)	2159 (19.9%)	4227 (38.9%)	2051 (18.9%)	801 (7.4%)	10872 (68%)
Labour	78 (13.7%)	93 (16.3%)	185 (32.5%)	123 (21.6%)	88 (15.5%)	1 (0.2%)	1 (0.2%)	569 (4%)
Total	550 (3.5%)	468 (2.9%)	2625 (16.7%)	3083 (19.4%)	5683 (35.8%)	2546 (16.1%)	896 (5.6%)	15900 (100%)

[159] Ibid, pp. 179-199.

[160] Menbere Tsehai Tadesse, Features of Ethiopian Law and Justice, November, 2006. This is a book written in Amharic and contents are translated by this writer. The author of the book was until quite recently, the Vice President of the Federal Supreme Court.

No date is given, though it may be assumed that it is close to the date of publication of the book, i.e., 2006.[161]

B. On court congestion

Flies	Brought forward	New	Total	Comp - leted	Transfe- rred	Screen- ing	Cong- estion
Civil	4600	3644	8244	3625	4665	99.5	2.27
Criminal	6633	4575	11238	2091	9114	45.7	5.36
Labor	891	1417	2308	1289	1018	90.97	1.79
Total	12124	9636	21790	7005	14797	72.7	3.11

Activity report of the High Court in the year 1995(EC) 2002-2003 GC[162]

C. On conviction rate

The book provides the following on conviction rate: [163]

> [according to a study conducted in courts] out of the cases that were submitted to courts, and disposed by them, it is on 33.1% of the files that accused were found guilty [conviction rate].....Of total cases processed by CJS agencies [reported to authorities]. It was only 47.6% that reached to the level of judgment and this includes those acquitted by courts. 52.4% of these files were dropped at different stages of the process.

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[161] Ibid, p.90.

For the sake of comparison, the length of criminal trials in some European countries are presented below:

-Estonia – First Instance Courts – 100 days and Second Instance Courts – 41 days.

-Finland – District Courts – 2 months and 27 days and Supreme Court – 5 to 9 months.

-Hungary – number of files processed - Local Courts – 0-3 months – 12974; 3-6 months -8782; 6-12 months -10692; 1-2 years -10093; 2-3 years -3180 and over 3 years -1936. County Courts as appeal courts – 0-3 months -3168; 3-6 months -1345; 6-12 months - 463;1-2 years -90 – 2-3 years -2 and over 3 years -0. County Courts as first instance – 0-3 months -292; 3-6 months – 244; 6-12 months – 316; 1-2 years -256; 2-3 years – 80 and over 3 years -38. Appellate Courts – 0-3 months -155; 3-6 months -89; 6-12 months – 36; 1-2 years -8.

-Ireland – Court of Criminal Appeal – Sentence appeals – 6-8 months; Conviction cases- 7-9 months; High Court – Bail applications – date immediately available; Central Criminal Court -6 months; Special Criminal Court – 4 months; Circuit court -7 months and District Court – 11/2 months.

Most other countries report that criminal trials usually take months. See, Venice Commission, Supra Note 3, at pp.147, 150, 171-172, 190-191, respectively.

[162] Ibid. P.91. The data appear to refer to the High Court of Addis Ababa. It should be noted here, that criminal cases represent the majority of cases handled by courts and they are the major source of delays compared to the other cases.

[163] Ibid, pp.87 & 88.

34.9% of these files were closed either due to the death or disappearance of suspects or unavailability of witnesses.

3.2.3. Statistics compiled by the Ministry of Justice

The Federal Ministry of Justice publishes criminal statistics on annual basis.[164] The data compiled show that so many files are closed during investigation and so many others are transferred to the next year due to court congestion. The rate of conviction, is not that much attractive either. Between 1994 and 2003 the conviction rate was: 15.4, 11.19, 12.1, 11, 9.3, 10.12, 9.19 and 4.60 percent respectively. The data for the following three years do not evince a better rate of conviction.

The overall data are indicative of wasted time and resource in all agencies. One may surmise here that the major culprit in all these situations is workload, for the greater the workload the less efficient the outcome. It will not be that much difficult to conclude that suspects will suffer as a result of such an inefficient system and potential defendants will escape justice, unless the system is overhauled and improved.

3.3. An overview of the practice

Almost all the data presented above show that the right to a speedy trial is neglected. The authors tell us that the major culprits are congestion and backlogs[165]. Apart from the legal *lacunae*, the capacity of the different agencies to handle the cases has apparently influenced the implementation of the right to a speedy trial. This calls for a radical overhaul of the system.

Apart from what are presented in figures above, there appears to be a practice that needs mentioning here. This is the case of prolonged adjournments. With regard to adjournment of trials, it is quite a recent memory in this country that cases use to be adjourned for a year. Thus, this

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[164] The Federal Ministry of Justice, Criminal Statistics Reports, for the years 1994 – 2006, in file with the writer. It may be argued that rate of conviction may not necessarily have any relationship with the right to a speedy trial. This writer, however, argues that any impediment in the timely resolution of cases will have a domino effect as a result of which the agencies will be occupied in entertaining cases that will ultimately be dismissed by courts. The growing number of such cases in turn creates unnecessary burden on the agencies as a result of which cases will not be processed with celerity. Thus, postponement of cases will become the order of the day and justice will naturally be delayed.

[165] The other causes are inter alia: the gap between the law and the practice, mentality of cooperation vs. isolation, and lack of accountability and resources. See, Ministry of Capacity Building, Supra, Note 65, pp.61-64.

lacuna of a fixed period to commence trial as well as repeated adjournments has undoubtedly contributed to the violation of the constitutionally guaranteed right to a speedy trial[166]. It will be interesting to note here that, the Addis Ababa Office of the Ministry of Justice requested the withdrawal of 1281 criminal cases due to mainly: failure on the part of the prosecution to submit evidences, flight of the accused, and absence of witnesses.[167] This incident is symptomatic of the courts' inability to close files with or without prejudice unless such demands are made by the prosecution. Trials have definitely been adjourned for a number of times in these cases but the incident required the intervention of the prosecution to demand dismissal without prejudice, but not a court ruling to the same effect.

3.4. Recent developments

The Ethiopian government has recently launched a serious campaign to reform the administration of the criminal justice system of the country. This is evidenced by the issuance of different documents / instruments to the same effect, such as, a draft Criminal Law Policy, a draft Criminal Procedure Law, a final Business Process Reengineering document and a Sentencing Guideline document.[168] All the documents except for the BPR document apply nationally, i.e., on federal as well as regional matters. Given this reality, it will be proper to give the highlights of the documents though in a very brief manner. Accordingly, relevant parts of the documents, except for the Sentencing Guideline, - which has no relevance to the subject at hand.

It should be noted at the outset that all the three documents envisage the incorporation of plea bargain, alternative dispute resolution mechanisms in criminal matters and diversion of some cases from the formal mainstream criminal process. These are given recognition in order to reduce the workload of the different agencies and this is a commendable trend. Despite this, it remains to be seen whether these mechanisms will really

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[166] Though the cases of the thousands of defendants accused of genocide perpetrated a decade and a half ago is a unique case, because of the complexity of the case and the number of defendants, the case took close to seventeen years to be disposed. The delay has caused public uproar so much so that public authorities were forced to say in public that "enough is enough" and the trial should come to an end as soon as possible.

[167] Letter written to The Federal High Court on Ginbot 9, 1996, Ref. No. 7-1412/2-38/96. Copy, in file with the writer.

[168] All the documents are written in Amharic as a result of which contents are translated by the writer.

achieve their intended purpose without prejudicing the rights of an accused.

3.4.1. The Criminal Law Policy of the Federal Republic of Ethiopia[169]

The Criminal Law Policy provides *inter alia*, that:

- Investigation shall be carried upon the direction or supervision of the Prosecution Office, and it should be completed within a time set in the directives to be issued according to the law and that the investigation of cases that involve suspects that are under pretrial detention shall be given priority. It also authorizes the investigating body to release a suspect on bail if it is of the of the opinion that he will appear at court whenever required to do so and the crime for which he is accused is punishable by simple imprisonment;
- Charges should be framed within the time set and failure to do so shall result in the release of the suspect on bail;
- The law will expressly provide for the time required to investigate, charge and entertain cases at courts – trials –, depending on the seriousness of the offence, the sophistication of investigation or amount of evidence required to be gathered;
- The prosecution, while deciding on a case, should take note of the fact that the case involves a public interest and that priority should be given to such cases;
- The prosecution shall have the authority to set free, or reduce the liability of those suspects who submit evidence against others with whom they were involved in the commission of a crime – criminal participants – and that this applies to crimes such as those committed by organized, armed criminals, or crimes committed by several persons and sophisticated crimes;
- The relevant authorities should hasten the investigation of those suspects who are under pretrial detention for they are denied bail and there should be a system of diversion of cases from the formal system;

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[169] Prepared by the Federal Ministry of Justice on April 21, 2009. To the best knowledge of this writer, the draft policy is still pending at the Council of Ministers awaiting final approval.

- The law will give recognition to alternative dispute resolution mechanisms more particularly in those cases that involve young offenders, first time offenders and those who have committed crimes that are punishable with simple imprisonment.[170]

The document also states that the Ethiopian criminal justice system is burdened with an increasing number of cases and that justice is delayed due to this, as a result of which, suspects are languishing in pretrial detention centers. It, thus, aims at doing away with these shortcomings and establishing a system that truly makes the exercise of the right to speedy trail a reality than a hollow right.[171] It also apparently aims at ameliorating the situation of those who may suffer as a result of delayed justice. The time limit provided for the completion of investigation, powers given to the prosecutor to release suspects on bail, framing of charges within a set time limit are important cases in point. These changes naturally call for the amendment of the relevant laws and it is hoped that this will be done after the endorsement of the document by the pertinent bodies. By way of conclusion, it may be said that though the document envisages a highly promising system, it, however, remains to be seen whether these promises will be translated into concrete legal rights.

3.4.2. The Draft Criminal Procedure Code

The draft states that one of its objectives is preventing long term incarceration of suspects.[172] In the same vein, it provides that, criminal cases should be heard within a reasonably short period of time, and an accused shall have the right to appeal from the decision or rulings of courts in the course of litigation.[173] This appears to be a new trend, for it allows interlocutory appeal which is denied under the current law.

Though it is not that much novel, the draft requires that suspects should be brought to court within 48 hours after arrest, and that remand shall be given for 29 days in cases involving terrorism and from one day up to 14 days in other cases.[174] The draft appears to give a solution to unnecessarily

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[170] See sections 3.4 and 3.6, 3.17.2.1, 3.7, 3.17.3, 3.8-3.13, 3.15, 3.17.1and 4.6, respectively for each paragraph.

[171] Sec.4.2.

[172] Art.3(1).

[173] Arts.8, 31(1) and (16).

[174] Arts.139 -141.

extended remands by providing that the court can release a suspect on bail or order his committal to a temporary place of arrest if it is of the opinion that the investigation is completed and remand is unnecessary.[175]

Furthermore, it provides for some time limits. These are:[176]

- Decisions on petitions for bail should be given within 48 hours and decisions on appeals from such decisions should be given within 8 days;
- After the completion of investigation, charges should be framed within 30 days in cases of serious crimes, 15 days in cases of medium crimes and lesser crime.

As regards sanctions for failure to observe these time limits, the draft code has allocated a provision but the draft article contains no elements. This shows that there is no consensus among the drafters on this particular point. If this is to be left out from the final enactment, the time limits will remain to be valueless. It will be interesting to note in this regard that the draft provides for the dismissal of a case / closure of the file or release of an accused if the prosecution fails to submit a charge in case when this is required in cases of addition or alteration of charges.[177] One may, therefore, be forced to question why the same solution should not apply to new charges.

The draft has also attempted to regulate adjournment of trials. It provides that, the court may adjourn the trial if it feels that this should be so and that an adjournment shall not be for more than five days.[178] The draft code has not introduced any new relief to the problems that may arise due to long and repeated trial adjournments, for it does not provide for sanctions for failure to meet the requirement.

Probably one of the innovations introduced by the draft code is the recognition given to the so called "real time dispatch" procedure wherein cases are heard soon after a suspect is brought to trial. This procedure is practiced in some courts established after the implementation of the BPR – discussed below. The draft provides that cases that involve flagrant offense but do not involve intricate evidences and those that may involve

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[175] Art.141(2).
[176] 180(2), 194 and 248.
[177] Art.253(4).
[178] Art.456.

complicated evidences but, are admitted by the suspect, can be processed through this procedure.[179]

The Criminal Procedure Code has been under revision for more than ten years and it will be difficult to say with any degree of certainty that the final draft will be enacted as a law any time soon in the future. Though the draft has introduced new trends, such as plea bargain, alternative dispute resolution mechanisms and the like, it should again go beyond these and give solutions to the problems that may arise in relation with the exercise of the right to speedy trial. The absence of sanctions to meet the time limits set by the draft is a case in point and it is submitted that this should be considered by the law maker when the draft is submitted for final enactment.

3.4.3. The Federal Business Process Reengineering Document

Business Process Reengineering, (hereinafter BPR), is in vogue at present. Almost every civil service institution is implementing this program. The BPR document contains over 150 pages and touches on different aspects of the federal criminal justice system. This writer will focus on the most relevant parts to the issue at hand.

The document begins by showing the current state of the performance of the agencies of the criminal justice system in general. It shows that the quality of service is too bureaucratic, costly, and sub standard in general. It promises to change this feature and deliver a fast justice that meets the expectations of all stakeholders.[180]

The document states that, in a study conducted on cases that were entertained in 1999 and 2000 EC, or 2007 and 2008 GC, the conviction rate was found to be, 33% and the quality of service of all processes starting from investigation up to decision was found to be 44.59%. It envisages to raise this percentage to 90%.[181]

As regards time required to process a case starting from investigation up to final decision, the average time was find by the study to be four years and one month. The document envisages to radically reducing this time. It proposes to complete the investigation and litigation of:

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[179] Art.466.

[180] Sec.1 , Introduction.

[181] Sec.10(a).

-serious and complicated cases that used to take 180 days - within 45 days;
- medium cases that used to take 180 days - within 30 days; and
- less serious cases that used to take 30 days - within 3 days.

It aims at improving conviction rate and quality of investigation and litigation to reach up to 95 %.[182]

One of the major innovations of the document is to establish a team of investigators and prosecutors so that all members will work together throughout the process and decide on issues that arise therein. It is expected that this new process will do away with the shuffling of files between prosecutors and investigators for reinvestigation. The document also aims at limiting the time required for remand as follows: [183]

- Simple cases - no need for remand;
- Serious cases - up to 45 days; and
- Complicated cases - up to 90 days.

Regarding the repeated adjournment of cases, the document states that there should be a manual that sets the limit within which a file should be completed and the number of acceptable adjournments.[184] As regards period of limitation, the document proposes that the time should run in favor of an accused even if a case is pending at trial.[185] This is a really groundbreaking position, for none of the other documents has attempted to deal with the issue. This also proves that the position of the criminal code on the issue has created this problem and the dismissal of a case even before the maturity of the absolute period of limitation is a panacea to this ever nagging issue. This position, is, therefore, very commendable.

The document further provides that the prosecutor should be authorized to pass a final decision on cases that he handles - probably to do away with the requirements that need approval from a superior; number of remands and adjournments should be limited by the law and that an investigating officer should be given the authority to release a suspect on bail provided that the offence of which one is accused is bailable.[186]

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[182] Sec.11.
[183] Sec.12(2) and (6).
[184] Sec.12(17).
[185] Secs.13 and 14.
[186] Secs.13 (47), 52, 54 and 134.

One may rightly be puzzled as to whether or not the reforms proposed in the document are compatible with the laws currently in force. The facts that investigation should be completed within a limited time; remand is to be limited to specific periods only; adjournments should be limited in time; statute of limitation should run in favor an accused if he is standing trial and that a prosecutor is to be given the power to pass a final decision without consultation with a superior and that he can release a suspect on bail, are all new situations that cannot be performed under the current operational laws. These, situations naturally call for the amendment of the relevant provisions of the laws. If the relevant laws and their provisions can be amended so as to adjust to the newly proposed reform, it will be hoped that they will advance the exercise of the right to a speedy trial.

It is worth mentioning here that, under the FDRE Constitution,[187] it is the federal government alone that is given the power to enact criminal laws. Thus, the implementation of the newly introduced changes demands the amendment of the Federal Criminal Code. As far as the practice is concerned, media reports abound that after the implementation of the highly touted BPR program, legal cases are disposed within minutes or hours - mostly in cases of flagrant offences - or much shorter periods than the previous practice. According to the Federal BPR document, in Tigray Region, the time required to process simple criminal cases was 719 days and is now reduced to 5 days. Similarly, medium cases are processed within 17 days and cases that demand technical evidences are processed within 32 days. Moreover, 360 upon complaint offences were disposed within a day. Furthermore the conviction rate in the Southern Nations, Nationalities and Peoples Region has gone up to 98% and in Oromia Region, simple and serious criminal cases are disposed within 5 hours up to 6 days. The conviction rate in the same region has risen to 96%.[188]

The achievements of the BPR process are just too good to be true. Though the effort to shorten the time to process criminal cases is by any standard commendable, it needs further studies to gauge whether the process has actually benefited suspects and accused individuals. We are in a country wherein the right to defense counsel is almost non-existent in practice.

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[187] Art.55(5) of the Constitution provides that "[the House of Peoples' Representatives - the federal legislature] shall enact a penal code . The States may, however, enact penal laws on matters that are not specifically covered by Federal legislation."

[188] The Federal BPR document - Secs.8.2 (a, b, and c).

Thus, one may be tempted to raise the issue of a rushed justice. As the saying goes, justice rushed is justice ruined. So, has the system managed to reduce time required to process criminal cases at the cost of this right? We expect the government to come up with another extensive research outcome similar to the Base Line Study discussed above and evaluate the effectiveness of the process in light of all the legal rights enshrined in the relevant laws including the Constitution[189]. Till then, given the fact that the process is new and needs time to take root and bring about a really profound change in the system, it will be very premature to say anything about it at this stage.

Conclusion

According to one report, the prison population in July 2003 was about 65,000 which was well below the prison population of many African countries.[190] The prison population in 2003/4 and 2004/5 was close to 80,000.[191] The data for the subsequent years up to 2009 do not show a significant change either. Given the increase in population, the above ratio still stands good. Despite such a low level of criminal activities the different agencies of the criminal justice system could not handle criminal cases with the necessary speed that is required of them.

The purpose of this article is not to name and shame any of the agencies, for their predicament is understandable to all. If we put aside deliberate abuses, which are the exception than the rule m of the shortcomings are

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[189] The only available source in this regard, i.e., the Federal Supreme Court's Report, published in Chilot News Bulletin, shows that most of the criminal cases are disposed within a short period of time. This source cannot be taken as an indicator of the speed within which such cases are disposed at other courts, for the Supreme Court by and large entertains cases on appeal, put differently, it does not serve as a first instance court, except for exceptional crimes. Thus, given the fact that the appellate court is not necessarily required to repeat the whole process and can dismiss a case without any need to call the parties and the Court of Cassation entertains cases that involve questions of law only, it may be presumed that such cases do not take that much time to be disposed compared to first instance courts. Thus, a research with a similar scope and themes as that of the Base Line Study discussed above is required to show that the intended resulted have been indeed achieved.

[190] Ministry of Capacity Building, Supra, Note 65, p.197

[191] See Central Statistics Agency, Law and Order data base, number of prisoners found in regional and central prisons, at www.csa.gov.et. This data do not include those that are on remand. Note also that the data on other subsequent years till 2009 do not evince a radical change. The data shows that the figures registered for the years 2005/6, 2006/7, 2007/8 and 2008/9 were, 72,211, 80,246, 85,664 and 86,366 respectively.

systemic. They can be rectified through proper legislation and infusion of resources. Thus, listing all the shortcomings of the system (diagnosis) and suggesting all possible remedies (prescription) is outside of the scope of this paper. This is so, because a detailed work has been done by other bodies – more particularly, the baseline study done by the Ministry of Capacity Building - and this writer cannot forward any different silver bullet solution. It also appears that the BPR Program under implementation is a response to the findings of these researches. It is, therefore hoped that both the program and the laws to be enacted in the future will be informed by the different solutions forwarded by the authors of the researches.

Notwithstanding the above remarks, this writer makes the following suggestions:

- The country should adopt a pragmatic criminal law policy that should seriously take into account the implementation of the constitutionally guaranteed right to a speedy trial.[192]
- The different laws that contain provisions pertaining to the right to a speedy trial should be amended in such a way that each transaction in the different agencies should be performed within definite time limits.
- The laws should also provide sanctions for failure to observe time limits.
- The case of those arrested and accused but not bailed out for one reason or another, should be given priority over those who are released on bail.[193]
- In deciding adjournments, more particularly in the case of open ended / ends of justice continuance, the law should take into account the standards adopted in other jurisdictions to decide on adjournment or continuance – discussed under Section Two.[194]

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[192] The current criminal law policy is a draft but not a final document. Thus, it will be helpful to adopt it with all the necessary changes required to implement the right to speedy trial.

[193] It is here suggested that the Speedy Trial Standards of the American Bar Association, Supra Note 2, can be availed to adopt the future Ethiopian legislation on the subject.

[194] The ends of justice continuance under Arts.19/4 of the Constitution and 94 and 95/2 of the CPC discussed above in particular, can benefit from the American experience. These articles as discussed in the pertinent section, allow for indefinite adjournments – directly or indirectly. The American experience, however, tells that such problems can be mitigated if reasonable standards are adopted.

- The contents of the Criminal Code of Ethiopia on period of limitation should be reconsidered and amended so as to remove ambiguities and further the exercise of the right to speedy trial.
- The European experience shows that preventive remedies such as interlocutory appeal, entrusting investigation to a court or another body in cases of delayed investigation, and compensatory remedies such as pecuniary and non pecuniary reparation, reduction or mitigation of sentence, a mere declaration of guilt [on the part of the agency responsible for the delay] and a disciplinary action against a dilatory judge, are put in place to deal with the issue of delayed justice. It is submitted that the experience of European countries should serve as a source of inspiration in adopting a future policy.[195]

If there is good will and a real determination to mold the face of the Ethiopian criminal justice system in a good shape, the way out of the predicaments is simple though it may take time. It is hoped that the concerned authorities will heed the different recommendations mentioned here as well as other sources and make good the deficit suffered so far. Moreover, the future Criminal Procedure Code should address the different issues contained herein and come up with practical solutions that can do away with the legal and practical deficiencies of the Ethiopian Criminal Justice System. This law is expected to shape the legal landscape for a long time to come. Accordingly, it is hoped that it will not end up repeating the same shortcomings of the existing laws.

[195] Venice Commission, Supra Note 3, pp.32, 33; 44 – 46 and 59 -62.

Towards Inclusive Employment: The Conceptual Basis and Features of Proclamation 568/2008 on the Employment of Persons with Disabilities

Seyoum Yohannes Tesfay*

Introduction

According to the UN, about 10 *per cent* of the world's population is disabled at anyone time.[196] Reported unemployment rates among the world's 386 million disabled people of working age is far higher than for other working age individuals. The unemployment rate varies from country to country. In many developing countries, it is estimated at a staggering 80 *per cent* or more.[197] Ethiopia has a very large disabled population. Though data pertaining to the prevalence and situation of persons with disability is incomplete, fragmented and sometimes misleading there is no gainsaying that the number of persons affected by disability is very high. According to UNCEF Ethiopia some five to eight million men and women constituting 7 to 10 *per cent* of the entire population have a disability of some sort.[198] What is worse, a baseline survey conducted by the Institute of Educational Research, Addis Ababa University, showed 60 *per cent* of persons with disabilities in Ethiopia were unemployed in 1995.[199] This number would be higher if those who are underemployed were to be included.

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[196] Daniel Mont, Disability Employment Policy, Social Protection Discussion Paper Series, (The World Bank, July 2004) P.4.

[197] International Labour Office, Managing Disability in the Workplace (Geneva 2002) p.v.

[198] UNICEF Ethiopia Disability Programme, Fact Sheet, http://www.unicef.org/ethiopia/Et Disability fact sheet Nov 06.pdf. (accessed on Oct 2009. As regards the precise causes of disability some studies show that 41.2% of persons with disability are affected by motor disorders, i.e., inability to walk, to sit, to eat and drink; 30.4% by visual impairment, i.e., weak sighted and blind, 2.4% persons with speech and language impairment, 2.4 % persons with behavioral problems and 2% with multiple disabilities. Tirusew Teferra, Disability in Ethiopia: Issues, Insights and Implications, (Addis Ababa University Printing Press 2005) p. 5.

[199] International Labour Organization, Ethiopia Country Profile, (Geneva 2004) p. 3.

That such a sizable number of people are unemployed cannot be explained by an actual inability to work. In fact, most are qualified and suited for particular types of jobs. It is, thus, apparent that disabled people not only have a valuable contribution to make to the national economy but that their employment also reduces disability benefits that the state has to allocate.[200] The logical conclusion is that disability does not arise simply from medical conditions but rather from the interaction between impairments and the physical, social, and policy environments. In other words, in an environment and culture that accommodates the special needs of people with various impairments; the impact of disability would be greatly limited.[201] Laws, regulations and policies issued by states play significant role in the creation of such a conducive environment.

The Proclamation to Provide for the Right to Employment of Persons with Disability (hereinafter Proclamation No. 568/2008) aims at creating an environment that recognizes the potential of persons with disability to work and exploit same. More particularly, according to its preamble, it aims at realizing equal employment opportunity for people with disabilities by providing for reasonable accommodation and procedural rules that enable them to prove before judicial organs discrimination encountered in relation to employment.[202]

In this piece, we shall attempt to dwell on the conceptual basis to disability that informs the Proclamation, the specific policy approaches underpinning the legal solutions adopted, and how the specific rules of the Proclamation mesh in with the constitutional order of the country. We shall also try to shed some light on how the rules embodied in the Proclamation should be interpreted so that the objectives set for the same are achieved without contravening the rights of all those involved.

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[200] International Labour Office, note 2 above, p.vi.

[201] Daniel Mont, note 1 above, p 4.

[202] The law replaced by this proclamation put in place a system whereby certain jobs were to be reserved for persons with disability to enable 'disabled people' get employment. It required employers to identify posts suitable for disabled persons so only persons with disabilities would compete for these positions. Proclamation Concerning Rights of Disabled Persons to Employment 101/1994 Art 4. The new law, rejects this approach to addressing employment problems of persons with disability. In its preamble Proclamation 568/2008 states that reserving vacancies for persons with disability creates the image that persons with disabilities are incapable of performing jobs based on merit and failed to provide the necessary protection of their rights.

1. Theoretical approaches to disability

The theoretical approaches that underpin a program, an organization, law or policy influence the type of interventions and solutions chosen and implemented[203]. A basic understanding of the main theories of disability, therefore, can help shed light on the different legal interventions such as the course taken by Ethiopian law.

Disability has been understood in different ways at different times (ages), places, cultures and contexts. But two opposing view points stand out. These are the individual model and the social model of disability.[204]

1.1. The Individual Model

This model situates the problems of disability in the person concerned while paying little or no attention to the physical and social environment of the person.[205] So according to this model, a person with hearing impairment is disabled as a result of individual impairment. S/he can try to overcome the functional limitations which result from this by undergoing medical treatment or using some medical and paramedical aids. Alternatively, persons with disability have to accept their limitations and learn to adapt their aspirations and what they do to the world around them as the source of these people's problem is their own body.[206] Within this overriding paradigm two major identifiable formulations of appropriate interventions exist.

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[203] http://assets.sportaddvert.org/downloads/theoretical_approaches_to_disability.pdf, accessed on October 12, 2009.

[204] Katharina C. Heyer, 'The ADA on the Road: Disability Rights in Germany', Law and Social Inquiry, Vol. 27, No. 4 (2002) p.726.

[205] Mike Oliver, The Individual and Social Model of Disability, Available at http://www.leeds.ac.uk/disability-studies/archiveuk/oliver/in%20soc%dis.pdf accessed on September 20, 2010.According to Oliver, there are two fundamental points that need to be made about this model. The first is that it locates the 'problem' of disability within the individual and second that it sees the problem as stemming from functional limitations or psychological losses. In sum, one may characterize this model as 'personal tragedy theory of disability'.

[206] http://www.gateshead.gov.uk/People%20and%20Living/equality/eddp/guidance/approac, accessed on October 3, 2009.

a. The Bio-Centric Approach of Intervention: This approach emphasizes disease, disorder, physical or mental characteristics that are regarded as abnormal,[207] but which may be prevented or ameliorated through medical intervention. So, the focus here is to bring the individual's embodied experience in line with the conventional standards. In other words, the focus is on restoring normalcy.[208]

In its extreme form, this approach may treat persons with disability even as undeserving or dangerous. This association of disability with danger underpins the custodial form of care.[209]

b. The Charity Approach of Intervention: This approach treats persons with disability as helpless victims needing 'care' and 'protection'. To address the needs of these people it relies largely on the goodwill of benevolent humanitarians. This model further assumes the existence of social responsibility on the part of members of the society. The responsibility, however, derives from charity and benevolence, and not justice or equality[210]. Disability laws that are nothing more than a subcategory of social welfare law may be regarded as falling under this model. Such laws focus on cash benefits for persons with disabilities.[211]

As regards intervention by the state, the individual model of disability translates into the policy of social welfare prominent in most civil law countries and originating in Western Europe. The welfare approach of intervention by the state follows a separate-treatment doctrine, providing for the different needs of people with disabilities in segregated settings.

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[207] A typical definition based on this restricted perception is historically found even in some UN documents. A manual relating to the consequences of disease issued by WHO in 1980 is a good example. It defines 'impairment' as 'any loss or abnormality of psychological, physiological or anatomical structure or function' while it defines disability as 'any restriction or lack, resulting from an impairment of ability to perform any activity in the manner or within the range considered normal for a human being'. See Grant Carson, "The Social Model of Disability", available at: http://www.hief.org.uk/sitebuildercontent/sitebuilderfiles/hieftoolkit24.pdf accessed on Septemeber 10, 2010.

[208] Indian National Human Rights Commission, Disability Manual (2005) available at http://nhrc.nic.in/Publication/Disability/chapter02.html, accessed on August 10, 2009.

[209] Ibid.

[210] Ibid

[211] Samuel Bagenstos, 'The Future of Disability Law', The Yale Law Journal_Vol. 114, No. 1(2004), p. 10

These include special schools, sheltered workshops, nursing home etc...to cater to the special needs of persons with disability.[212]

Interventions derived from this approach can, despite the good intentions, compromise the rights of the 'beneficiaries'. This is so because entitlement to rights is often substituted by relief measures over which the person declared invalid has little or no power to bargain. The contention is that when persons can not make their own way, even for fully understandable reasons, then a society that undertakes to care for them will necessarily also undertake to make their decisions.[213] In other words, it is maintained that, interventions under this approach are essentially paternalistic, arbitrary and oppressive as the person with disability has no role in decisions shaping his life.[214] Hence, this approach of intervention creates legions of powerless individuals.

1.2 . The Social Model

In contrast to the individual model, the underlying thinking of the social model is that there are varied types of people in the world. Some are blessed with 'extra something' that provides them an opportunity to take on the world. Still, there are some who possess the talent, but fail to give a proper shape due to lack of means and bad fate. People with disability fall under this latter group in that they possess the talent but they become so engrossed in dealing with tough challenges that the social and physical environment etc... pose that they do not get an opportunity to stand on their feet.[215]

This model that has its academic roots in UK and first politically backed in the USA is based on the idea that it is the society that disables physically impaired people.[216] It draws distinction between physical impairment and the social situation called 'disability'. It views, for instance, lacking all or part of a limb or having a defective limb as impairment. Then it holds

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[212] Katharina C. Heyer, 'The ADA on the Road: Disability Rights in Germany', Law and Social Inquiry,) Vol. 27, No. 4 (2002) p. 726.

[213] Indian National Human Rights Commission, cited at no 13 above, p.13.

[214] Ibid.

[215] http://jobfunctions.bnet.com/abstract.aspx?docid=99525&promo=100511&tag=content;col1) accessed on February 4, 2010.

[216] Shakespeare and Watson, 'The Social Model of Disability: an outdated ideology?', Research in Social Science and Disability, Vol. 2 (2002), p.3.

disability is the disadvantage or restriction of activity caused by contemporary social organization that does not take into account people who have physical impairment. Disability is, therefore, something imposed on those who have impairments. Hence, proponents of this view hold that disabled people are oppressed segment of a society.[217]

This social model has two fold impacts on the issue of disability. First, it enables the identification of political strategy, namely, removal of barrier. That is, if people with impairments are disabled by the society, the remedy is political action to dismantle these barriers and achieve inclusion.[218] The second impact of the social model is on the disabled people themselves. Once this model and thinking arrived, the disabled people began to think of themselves in totally new ways. Eventually, 'they were able to understand that they weren't at fault: society was. They didn't need to change: society needed to change. They didn't have to be sorry for themselves: they could be angry'. [219]

The logical conclusion from the social model is that disability does not arise simply from medical conditions but rather from the interaction between impairments and the physical, social, and policy environments. In other words, in an environment and culture that accommodates the special needs of people with various impairments, the impact of disability would be greatly limited.[220] In the realm of employment specifically, it is contended that most people with disabilities are willing and able to work, and it is hostile attitudes and contingent environmental barriers that are causes for their exclusion from the workforce. Therefore, the remedy is to adopt civil rights laws that prohibit discrimination and require provision of accommodations to individuals with disabilities in the workplace.[221] Under the social model that views disability as a social pathology[222] we have two formulations of intervention.

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[217] Ibid.

[218] Id., p. 5.

[219] Ibid. Shakespear and Watson hold that this is sometimes carried to the extreme. They conclude that the social model was an excellent basis for political movement but is now an inadequate grounding for social theory. See p. 29.

[220] Daniel Mont, Note 1 above, p 4.

[221] Samuel Bagenstos, 'The Future of Disability Law', The Yale Law Journal, Vol. 114, No. 1(2004), p.18.

[222]Indian National Human Rights Commission, cited at note 13 above.

a) The Functional Approach to Intervention: In this model, the difficulties experienced by a person with disability are regarded as arising from a 'mismatch between the individual's biological condition and functional capacities on the one hand, and environmental, situational factors on the other'.[223] This model tends to emphasize the role of providing trainings, support services etc...with a view to making the individual as functional as possible. It has also been instrumental in establishing rehabilitation services throughout the world and development of assistive technologies.[224]

In spite of its remarkable progress compared to the charity and bio-centric approaches to intervention, this model expects a person with disability to fit into the environment through the use of compensatory skills and assistive technologies. In other words, it tends to still expect the individual to fit within the system, not the system to include the individual, hence can be arguably regarded as having the vestiges of the individual model.

b) The Human Rights Approach to Intervention: Over the past several decades, theoretical perspectives on disability have gone through major paradigm shift. The adoption of the ILO Resolution Concerning Vocational Rehabilitation and Social Reintegration of Disabled or Handicapped Persons and the designation of the UN International Year for Disabled Persons in the 1970s marked a conceptual shift in the way disability is understood. These were the watershed periods in that both instruments constituted the first acknowledgment that the exclusion and discrimination that disabled people faced were human rights issues.[225]

In part as a consequence of the above, disability is understood as an element of human diversity. As a result, a major shift has taken in addressing issues of disability. For instance, definitions of disability have been revised to locate disability within the discourse of multiculturalism and diversity.[226] In consequence of these developments we have the human rights model. This model considers disability as an important dimension of human culture and underscores that all human beings irrespective of their disabilities have certain rights which are inalienable. It builds on the spirit

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[223] Ibid.

[224] Ibid.

[225] International Labor Organization, Employment of People with Disabilities: a Human Rights Approach, A Report of the Tripartite Technical Consultation for East and Southern Africa, September 2005 p.13.

[226] Stephen Gilson and Elizabeth DePoy, 'Theoretical Approaches to Disability Content in Social Work Education', Journal of Social Work Education, (2002) p.241.

of the Universal Declaration of Human Rights which affirms that 'all human beings are born free and equal in rights and dignity'.[227]

Respect for human diversity is based on two crucial ideas. The first is that despite their apparent differences all persons are the same as regards rights and dignity. The second is that the equality of rights and dignity does not imply all people should be treated in the same way. This means, treating two differently situated persons in identical ways could in reality be discriminatory. So, apparently neutral criteria, practices, treatments, regulations etc...which in fact result in disproportionately harsh impact on persons with certain characteristics result in what is known as 'indirect discrimination'.[228] So, equality is gauged by the results, not similarity of treatment. Therefore, equality implies not only preventing discrimination but also going beyond that and remedying discrimination. In other words, it embraces the notion of positive rights, affirmative action and reasonable accommodation.[229]

When translated into policy terms, the rights approach replaces segregation by integration and mandates antidiscrimination. Consequently, it opposes employment quota as yet another stigmatized form of special treatment. It rather opts for equal opportunity law as a primary tool. In other words, people with disability are transformed from 'passive patients or welfare recipients to people with civil rights that are enforceable by law'.[230]

With the foregoing conceptual background to disability we will now look at how disability is understood by the Ethiopian Government Institutions as can be gathered from various legislations and policy documents. The aim here is limited to putting in context the Proclamation which is the subject matter of this piece.

2. The definition of disability under Ethiopian Laws

Taking stock of all legislations in Ethiopia that directly or indirectly deal with disability is beyond the objective of this article. Hence, only a glance at the major ones is attempted. To begin with the 1955 Revised Constitution, it did not have provisions dealing with disability other than the equality

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[227] Mont cited at note 1 above.

[228] International Labor Office, Equality in Employment and Occupation (1996) p.13.

[229] Mont cited at note 1 above.

[230] Heyer cited at note 9 above p. 727.

clause, which may be construed to cover that.[231] A statute issued over a decade after the 1955 Revised Constitution, however, seemed to endorse the charity model to disability.[232] This statute established what was then called the Rehabilitation Agency for the Disabled with the aim of fostering and facilitating through direct assistance and extension services, and through increasingly effective participation of private charitable organizations, the rehabilitation of the(physically and mentally) disabled who were assimilated to infants and senile persons.[233]

Another landmark law in Ethiopian legal history, the Constitution of the People's Democratic Republic of Ethiopia, under Article 22 used words intimating its subscription to the charity approach to disability *albeit* in dealing with a particular group of persons with disability.[234] The Charter of the Transitional Government of Ethiopia, another law of constitutional significance, committed itself to the principle of equal treatment of human beings by embracing the Universal Declaration Human Rights.[235] One may infer from this the human rights approach should inform all laws to be issued regarding disability issues in the period when the Charter was the highest law of the land. The Constitution of the Federal Democratic Republic of Ethiopia Constitution (hereinafter FDRE Constitution) clearly

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[231]See Article 37 which provides that: no one shall be denied the equal protection of the laws. Article 38 says there shall be no discrimination amongst Ethiopian subjects with respect to the enjoyment of civil rights. See The Revised Constitution of Ethiopia, Proc. 149, 1955, *Nega. Gaz.* 15th Year No. 2.

[232]See Article of Order of Establishment of the Rehabilitation Agency for Disabled, No. 70, 1971, Neg. Gaz. Year 30th No. 16, which: ...any person who, because of limitations of normal physical or mental health, is unable to earn his livelihood and does not have anyone to support him; and shall include any person who is unable to earn his livelihood because of young or old age; this order had in mind in defining the term for the specific purpose of rendering assistance to a person who falls within the purview of such class. The Amharic rendition of this definition evokes the image of total incapacitation of persons with disabilities: it in part runs: "ድኩም" ማለት ሠርቶ ለመኖር የማያስችል የአካል ወይም የአእምሮ ጉድለት የደረሰበትና...

[233] Muradu Abdo, Disability and the Right to Access to Justice in Criminal Proceedings in Addis Ababa, (Unpublished May 2010) Id., Article 2 cum Article 5 cum the preamble. This document provides an excellent track of how disability was understood in different legislations in Ethiopia.

[234]This Article states: The state and society shall provide special care for those disabled in the course of defending the sovereignty and territorial integrity of Ethiopia and safeguarding the revolution as well as the families of the martyrs. The Constitution of Peoples` Democratic Republic of Ethiopia, Proc. 1, 1987, Neg. Gaz. Year 47th No. 1.

[235] See Article 1 of the Charter, 1991.

stipulates that the fundamental rights and freedoms it embodies should be interpreted in conformity with the Universal Declaration of Human Rights and International Covenants ratified by Ethiopia.[236] From this one would assume that the FDRE Constitution would adhere to the human rights approach to the extent it deals with disability. When it does specifically deal with disability under Article 41(5),[237] the FDRE Constitution, however, provides that 'the state shall...allocate resources to provide rehabilitation and assistance to the physically and mentally disabled....'. Hence, one notes that in the only explicit and directly relevant provision the FDRE Constitution uses language suggestive of the charity model. This, however, is not to suggest that the FDRE Constitution prescribes that the charity approach be followed by all laws to be issued. That the FDRE Constitution does prescribe that its interpretation be in conformity with human rights instruments is one indication of the fact that the human rights approach is not ruled out. What is more, the FDRE Constitution can not be expected to embody all the principles that should inform every law. That is simply impossible in a document of a constitution's generality. Policies and laws issued in the wake of the adoption of the FDRE Constitution buttress this view point.

In the year following the adoption of the FDRE Constitution, the Ethiopian Developmental and Social Welfare Policy was issued. The policy lays down guidelines to be followed in order to enable persons with disabilities not only to be self-supporting but also to contribute to the economic, political and social life of the country. The relevant part of the policy provides that:[238]

> Conditions that will enable persons with disability to use their abilities as individuals or in association with others to contribute to the development of society as well as to be self-supporting by participating in the political, economic and social activities shall be facilitated.

Other policy documents impacting on the employment and employability of persons with disabilities include: Special Needs Education Program Strategy[239] and Special Needs Education in TVET- Framework.[240] There are

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[236] Proclamation No. 1, 1995. Fed. Neg. Gaz Year 1 No 1, Art 13(2).

[237] See Proc. No. 1, 1995, Fed. Neg. Gaz. Year 1 No. 1

[238] Ministry of Labour and Social Affairs, Developmental Social Welfare Policy, 1996, Art 5.6.1

[239] Ministry of Education, Special Needs Education Program Strategy 2006,

also laws that impact on employability of persons with disabilities. The Ethiopian Building Proclamation is worth mentioning in this regard. This Proclamation requires that 'any public building shall have a means of access suitable for use by physically impaired persons including those who are obliged to use wheelchairs and those who are able to walk but unable to negotiate steps'.[241] The significance of this law can hardly be overemphasized as issues of mobility and access for persons with disabilities had almost totally been overlooked by urban planners and architects[242] till the issuance of this law, and barriers to access and mobility are the major impediments to the employability of persons with disabilities.

A more recent effort in addressing the employment problems of persons with disabilities is represented by the Draft National Plan of Action for Equality of Opportunity being developed by the Ministry of Labour and Social Affairs. This document seems to best summarize the views of the current Government regarding disability. After raising the various models regarding disability it concludes that:[243]

> Disability is not something that individuals have. What individuals have are impairments. They may be physical, sensory, intellectual, psychiatric or other impairments. Disability is what happens with (when) people with impairments encounter a society created by and for people without impairments.

According to this document, the Ministry of Labour and Social Affairs takes the view that the Human Rights Model of disability complements the 'social' cause understanding of disability. It further underscores that society and especially governments have the responsibility to promote and protect the rights of persons with disabilities through legislations and enforcement

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[240] Ministry of Education Special Needs Education in TVET-Framework Document 2009.

[241] Building Proclamation No. 624/2009, Art 36(1).

[242] Misrak Tarekegn, Challenges and Opportunities of Access and Mobility in Addis Ababa: The Case of People with Motor and Visual Impairments, 2006 (Unpublished, Thesis Submitted to Addis Ababa University Graduate School for MA in Regional and Local Development Studies) P. 66. Some of major problems identified by Misrak include inaccessibility of buildings and street environment that exposes persons with disability to grave dangers.

[243] The Ministry of Labour and Social Affairs of Ethiopia, Draft National Plan of Action for Equality of Opportunity and Full Participation of Persons with Disabilities 2010-2015. First Draft Updated on March 3, 2010, p. 8.

of anti-discrimination laws.[244] The foregoing policy statement sums up the understanding prevailing in the Government of Ethiopia and hence informs the policy considerations that inspired Proclamation No. 568/2008. The solutions adopted by Proclamation No.568/2008, which will be discussed in the fullness of time, make this conclusion plausible.

3. Who is a person of disability under Proclamation No.568/2008?

Whenever laws are drafted with a view to safeguarding the interests and rights of certain groups of people one of the questions that raise their heads at the outset is how to define the beneficiaries of the legislation.[245] Perhaps owing to this, that is precisely what Proclamation No.568/2008 does. Thus, we will start by throwing some light on persons with disability, the theme of Proclamation No.568/2008.

According to Proclamation No.568/2008 a " 'Person with disability' means an individual whose equal employment opportunity is reduced as a result of his physical, mental, or sensory impairments in relation with social, economic and cultural discrimination".[246] How disability is defined in a legislation depends on the objective of the particular legislation. Hence, there is no single definition of disability which can be used in all legislations. Generally, there are two different approaches to defining persons with disability. The first approach aims at singling out a narrow, identifiable beneficiary group. In this approach, the goal is to craft laws to provide financial or material support to disabled individuals or employers of disabled people. So, in this approach the definition tends to follow the individual or medical model of disability. Therefore, the definition is impairment-related to ensure that support is targeted at those who need that most[247]. The second approach aims at providing protection from discrimination on the grounds of disability. Therefore, it emphasizes the

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[244] Id., p.12.

[245] International Labour Office, Achieving Equal Employment Opportunities for People with Disabilities through Legislation Guidelines (2007) p.14.

[246] Proclamation 568/2008, Art 2(1). In contrast to this definition the law that preceded it, Proclamation 101/1994, under Art 2(1) 'A disabled person' is defined as 'a person who is unable to see, hear or suffering from injuries to his limbs or from mental retardation due to natural or man-made causes; provided however, that the term does not include persons who are alcoholics, drug addicts and those with psychological problems due to socially deviant behavior.

[247] International Labour Office, Equal Employment Opportunities for People with Disabilities Cited at note 50 above p 16.

social model of disability. Hence, it uses broad, inclusive wording to encompass those with minor disabilities, those who are wrongly assumed to have disability and even those others who are associated with people with disability[248].

The purpose of Proclamation No. 568/2008 is to combat discrimination, and not to give a targeted support.[249] It is against this latter approach that the definition provided under the Proclamation should be gauged. The definition provided by Proclamation No.568/2008 does follow the social model in that it underscores the need to determine persons with disability having regard to 'social, economic and cultural discrimination'.

In a bid to be inclusive of those with minor disabilities perhaps, Proclamation No.568/2008 refrains from prescribing a threshold on impairment. A comparison with equivalent legislations in other jurisdictions makes this point clear. If one looks at the Americans with Disabilities Act, ADA, for example, for a person to be regarded as disabled, 'physical or mental impairment must *substantially limit* one or more of the *major life activities* of such person'.[250] It is held that this definition of disability has resulted in many counterintuitive results in employment related suits by excluding many plaintiffs who seem to be covered by the law given the objectives of the Act.[251]

In a similar vein, the Indian Equal Opportunities, Protection of Rights and Full Participation Act, defines, a person with disability as 'a person suffering from impairment of not less than forty *per cent* ... as certified by a medical authority'.[252] So, according to this law there is a threshold requirement of 40 *per cent* impairment which needs to be attested to by medical authorities in order for a person to get the protection of the law under this Act. This could make protection under the Act unavailable to a significant number of persons as compliance with these two requirements could be difficult for many victims of discrimination. In fact, this Indian law

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[248] Ibid.

[249] Proclamation 568/2008, the preamble, paragraph 2 states that, 'the existing legislation' on the rights of the disabled persons to employment created, by providing for reservation of vacancies for the disable persons, an image whereby people with disabilities are considered incapable of performing jobs on the basis of merit....

[250] Americans with Disabilities Act, 42 U.S.C. Sect. 12102(2)

[251] Michelle T. Friedland, "Not Disabled Enough: The ADA's 'Major Life Activity' Definition of Disability", Stanford Law Review, (1999) Vol. 52, No 1, p. 172.

[252] International Labour Office, Cited at note 50 above p17.

almost seems to follow the medical model contrary to its name hence excluding from its scope of application a sizeable number of persons with disability. Similarly, the Social Code in Germany provides that a disabled person is 'a person whose physical functions, mental capacities or physiological health are highly likely to deviate *for more than six months* from the condition which is typical for the respective age and whose participation in the life of society is therefore restricted'.[253] So, here too, we have a threshold *albeit* only a period of that six months, unlike under Proclamation No. 568/2008.

Proclamation No.568/2008 adopts more inclusive and broader definition than some international instruments such as the ILO Convention No. 159. The ILO Convention No.159, which has the set purpose of facilitating the employment of 'disabled persons', defines a disabled person as 'an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical or mental impairment.'[254]

As can be easily gathered from the above definition a person's employment opportunity must be *substantially* reduced owing to a *recognized* physical or mental impairment to be covered by the ILO Convention No.159. These two requirements are reminiscent of disability laws directed at giving specific benefits to a narrowly targeted group rather than combating discrimination in relation to employment[255]. Proclamation No.568/2008 does not use such words which could exclude a significant number of persons from the scope of its application.

The foregoing does not, however, mean that the definition supplied by Proclamation No.568/2008 is the clearest and most inclusive ever. That the

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[253] Ibid. The Disability Discrimination Act of UK 1995 and 2005 also require long term impairment. According to it the impairment must have lasted for 12 months or is likely to last for 12 months.
http://www.nao.org.uk/careers_and_jobs/diversity/nao_disability_equality_scheme/definition_of_disability_-_the.aspx, accessed on March 12, 2010.

[254] ILO, Vocational Rehabilitation and Employment (Disabled persons) Convention (No. 159), 1983 Art 1(1).

[255] Note in this relation that the UN Convention on the Rights of Persons with Disabilities does not provide a definition for disability it only says under Art 1 paragraph 2 'persons with disabilities include those whose long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Proclamation defines a person with disability as an individual whose equal employment opportunity is reduced *as a result of* his physical, mental...impairments could be interpreted to exclude persons who are suffering discrimination as a result of past and/or imputed disability. Some laws clearly include these people in the definition. Cases in point are Australian, UK and US legislations. The Australian Disability Discrimination Act of 1992 covers disability that previously existed but no longer exists; or may exist in the future; or is imputed to a person. In a similar vein, the UK Disability Discrimination Act of 1995 includes 'persons with past disability'[256]. The Americans with Disability Act seems to cover past and imputed disability when it provides in the definition of disability '...B) a *record*[257] of such an impairment or C) being *regarded* as having such an impairment'. [258]

One may, however, cogently contend that any reasonable interpretation of the definition of persons with disability provided by Proclamation No.568/2008 covers past disability and imputed disability, as do the above foreign laws. This is particularly so in view of the objective of the Proclamation. As already stated above, Proclamation No.568/2008 is not defining persons with disability to confer particular benefits or give scarce aid to a narrowly defined group of people. This is essentially a non-discrimination act trying to create equal employment opportunity as clearly indicated in the preamble. This being the purpose, if it prohibits discrimination on the basis of present disability, for a stronger reason, it must prohibit discrimination on the basis of past disability or imputed disability. To interpret the Proclamation's definition of disability as covering only present disability would be absurd given its purpose.

Though as seen above, the definition is not particularly problematic compared to analogous legislations in other countries, employers and even courts may still face difficulties in understanding what 'physical, mental, or sensory' impairments exactly constitute disability within the purview of Proclamation No.568/2008. Do, for example, impairments resulting from old age, severe disfigurement, chronic illness such as diabetes, cancer, HIV infection etc... constitute disability for purposes of Proclamation

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[256] International Labour Office note 50 above p. 17.

[257] Samuel Bagenstos, 'Subordination, Stigma and Disability', Virginia Law Review,(2000) Vol. 86 No. 3 p. 503. If courts begin to understand the importance of the 'record prong' says Bagenstos ,the Statute can provide protection to people who face prejudice and stereotypes based on the lingering stigma of a once-active condition.

[258] Americans with Disability Act, 42 U.S.C., Sec. 12102(2).

No.568/2008? Developing implementation guidelines would help a lot in obviating doubts as regards these and similar other issues.

4. Scope of application of Proclamation No.568/2008?

Proclamation No.568/2008 applies to employment relationships that exist between any person with disability and an employer.[259] So, to understand the exact extent of the scope of application of this Proclamation one has to understand two things. These are what employment relationship means and who an employer is as envisaged by the Proclamation.

Regarding the meaning of employment relationship Proclamation No.568/2008 itself gives a list of situations deemed to fall within that. It provides that employment relationship 'includes recruitment, promotion, training, transfer and other conditions of work'. [260] One can easily infer from the word 'includes' that this is just an illustrative list. Hence, relationships that have not been listed but are deemed to follow from an employment relationship are covered by Proclamation No.568/2008.

As regards scope in terms of the types of employers that are bound to apply its provisions, Proclamation No.568/2008 provides that 'employer means any federal or regional government office or an undertaking governed by labor law[261]'. From these we can gather that the Proclamation is meant to apply to three broad categories of employers. These are:

a) Federal government 'offices'; b) Regional government offices and; c) Undertakings governed by the Labor Proclamation.

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[259] Proclamation to Provide for the Rights to Employment of Persons with Disability Proc 568/2008 Art 2(2).

[260] Ibid. Even prior to the issuance of this Proclamation, one may contend that persons with disabilities were protected against discrimination once employed. This is so because the Labor Law outlaws discrimination between 'workers' on the basis of religion, nationality, sex...or 'any other condition'. Labor Proclamation No. 377/2003, Art 14(1)(f). One may further contend that, given the objective of the Proclamation, employment relationship also covers even non-permanent type of employment but the case for that is less persuasive as remedies embodied in the Proclamation such as 'reasonable accommodation' are very likely to pose undue hardship if required to be made in respect of temporary workers or daily laborers.

[261] Proclamation to Provide for the Rights To Employment of Persons with Disability Proc 568/2008 Art 2(3).

The application of Proclamation No.568/2008 with respect to each of the above three categories gives rise to peculiar issues and concerns. Following, we will briefly look at each one at a time.

a) Federal Government Offices: This is a relatively less problematic category of employers. Issues could, however, arise as to what exactly 'Federal Government office' means. Is it limited to civil servants employed by the Federal Government? If so, there could be a significant number of people outside the scope of application of the Proclamation. This is so because the Civil Servants Proclamation excludes clearly: government officials with certain rank such as directors, deputy directors. It further excludes certain categories of employees governed by special laws such as federal judges, prosecutors, members of the armed forces and the federal police and 'other employees governed by the regulations of the Armed Forces and the Federal Police'.[262]

If a restrictive interpretation of the term 'federal government office' is adopted, people with disability will not be getting the protection that Proclamation No.568/2008 accords them with respect to employment relations they might have or are seeking let's say as support staff with the armed forces and the police etc.... But such a restrictive interpretation does not seem to be in line with the spirit of the Proclamation. The Proclamation is, as we will see when discussing its pillars below, an essentially non-discrimination law. It prohibits discrimination on the basis of disability against a person who can carry out the essential functions of the position. This being just an equal opportunity law, the term government office should be interpreted broadly so as to include every federal government institution even those outside the scope of the federal civil service law such as the above.

This broad and inclusive interpretation of the 'federal government office' is consistent with the equal protection of the law guaranteed by the FDRE Constitution. In this regard, Article 25 of the FDRE Constitution provides that:[263]

> All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect the law shall guarantee to all persons equal and effective protection without

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[262] The Federal Civil Servants Proclamation No. 515/2007, Art 2(1).

[263] The Constitution of the Federal Democratic Republic of Ethiopia of 1995, Art 25.

discrimination on the grounds of race, nationality, or other social origin, color, sex, language, religion, political or other opinion, property, birth or *other status*. (Emphasis added).

Though disability is not named as a prohibited ground of discrimination, the fact that we have 'or other status' implies that persons with disability should be given protection of the law against discrimination in matters of employment. Only an inclusive and broad interpretation of the term 'government office' will accord the persons with disability the constitutionally guaranteed right to the protection of the law.

b) Regional Government Offices: as indicated already, Proclamation No.568/2008 specifically states that the protection to persons with disability guaranteed in it is to be accorded in employment relations with 'regional government offices'. Though the protection accorded is desirable, whether the Federal Parliament can enact a law with regard to employment issues in state government offices is questionable. Article 51 of the FDRE Constitution which lists down the powers and functions of the Federal Government does not indicate enactment of laws for the administration of the regional states' employees as a matter falling within the powers of the federal government. Nor does Article 55 of the FDRE Constitution specifically indicate this power in the list of the legislative powers of the House of People's Representatives.

So, any attempt to establish the legislative competence of the House of People's Representatives on this issue should perhaps rely on the power of the House to issue 'a labor code[264]' or enacting laws aimed at establishing one economic community[265]. In fact, the Parliament in issuing the Proclamation has expressly stated in the preamble that its competence emanates from its constitutionally vested power to issue 'labour code'.

It does however seem the argument based on the power to issue 'labor code' does not hold water. A cogent argument against the legislator's understanding of its competence in this regard is found under Art 52(2) f of the FDRE Constitution. This provision provides that states have the 'power to enact and enforce laws on state civil service and their conditions of work....' Besides, one should note that in Ethiopia the federal government has powers that are only specifically given to it while every other power

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[264] FDRE Constitution (1995) Art 55 (3).

[265] Ibd Art 55(6).

remains with the regional states.[266] That means in cases of doubt an interpretation that favors the competence of the regional states, and not the federal government should be followed.

Besides, interpreting the power to issue 'labour code' as being indicative of power to issue any employment law, inclusive of employment in regional state government offices, would be incompatible with the long established understanding of labor law in Ethiopia, and the FDRE Constitution itself more importantly. Labor law has been understood as the law that regulates the employment relationship between a worker and an 'undertaking'. By undertaking is meant 'an entity established under united management for the purpose of carrying on any commercial, industrial, agricultural, construction or any other lawful activity'.[267] Though the list is illustrative, the *ejusdem generis*[268] rule of statutory interpretation requires the phrase 'any other lawful activity' be interpreted to accommodate only things of the type listed. Those in the list seem to have business activity as a common trait. Regional government offices are not business entities and hence different from undertakings within the meaning of the current labour law, at least.

As regards the second possible ground, namely, a law needed to establish 'one economic community', there has to be a prior determination to that effect by the House of Federation.[269] Any ways, the House of People's Representatives does not claim the existence of such a determination in the preamble of the Proclamation as the basis of its competence.

The foregoing should not, however, be understood as entitlement by State Government offices to disregard the right of persons with disability to equality of opportunity in employment. All the foregoing means is that under the current constitutional arrangement the Federal legislator has no competence to enact laws that govern employment relationship in State Government offices. So, any claim by persons with disability should be on the basis of the equal protection clause of the FDRE Constitution found under Article 25 already discussed under section 3(a) *supra*.

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[266] FDRE Constitution of 1995 Art 52(1).

[267] Labour Proclamation 377/2003, Art. 2(2).

[268] Duhaim's Legal Dictionary, available at http://duhaime.org/LegalDictionary/E/EjusdemorEiusdemGeneris.aspx

[269] The 1995 FDRE Constitution under Art 55(6) stipulates that the House of Peoples' Representatives 'shall enact civil laws which the House of Federation deems necessary to establish and sustain one economic community.'

This debate regarding the constitutional validity of Proclamation No.568/2008 as regards its applicability to regional state government offices has now been effectively reduced into an academic debate as Ethiopia recently ratified[270] the UN Convention on the Rights of Persons with Disabilities. Ratification of an international convention in Ethiopia makes the convention part of the law of the land that is binding on both federal government and regional states[271]. This Convention prohibits discrimination on the basis of disability with regard to '*all matters* concerning *all forms of employment*, including conditions of recruitment, hiring, and employment, continuance of employment, career advancement and safe and healthy working conditions.' [272]

The UN Convention on the Rights of Persons with Disabilities also embodies other related core principles of the Proclamation like reasonable accommodation, and protection from harassment. It further requires parties to take appropriate measures to promote employment of persons with disability in the private and public sectors such as by setting in place affirmative action programs, incentives, provision of training etc...[273]

c) Undertakings Governed by Labour Proclamation: The third category of employers on which Proclamation No.568/2008 exerts itself is 'undertakings governed by labour law'.[274] The Labour Proclamation applies to employment relationship existing between a worker and an employer.[275] The term employer is defined as an undertaking which is understood as a business firm as discussed above under b. On top of this, unless the Council of Ministers issues a regulation to the contrary, the Labor Proclamation also applies to employment relationship between Ethiopian citizen and foreign diplomatic missions or international organization operating within the

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[270] Ethiopia signed this Convention on November 20, 2009. It ratified the Convention on 7/7/2010. Information regarding the ratification status of this convention is available at a UN site called enable at:
http://www.un.org/disabilities/countries.asp?navid=12&pid=166 accessed on August 12, 2010.

[271] FDRE Constitution Art 9(4) and Art 13(2). For more on this matter read: Takele Soboka Bulto, 'The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia', in the Journal of Ethiopian Law, Vol,XXXIII No. 1, pp.132ff.

[272] Convention on the Rights of Persons with Disability Art 27(1)a.

[273] Ibid.

[274] Proclamtion 568/2008, Art 2(3).

[275] Labour Proclamation 377/2003, Art 3(1)

territory of Ethiopia in the absence of a treaty providing otherwise[276]. The Labour Proclamation further governs employment relationship between a worker and religious or charitable organizations unless the Council of Ministers by regulation provides to the contrary.[277] Thus, Proclamation No. 568/2008 similarly applies to the above employment relationships thereby safeguarding the rights of persons with disabilities.

The Labour Proclamation does not apply to certain employment relationships. These include:[278]

- contracts for the purpose of educating or training other than apprenticeships
- managerial employees who are vested with the powers to lay down and execute management policies by law or by delegation of the employer
- Contracts of personal service for non-profit making purposes
- Contracts relating to a person who performs an act for consideration, at his own business or professional responsibility
- Contracts of employment relationship governed by special laws such as that concerning the armed forces, members of the Police Force, Judges of Courts, Prosecutors etc...

As the third category of persons on which the Proclamation No. 568/2008 exerts itself is those that are subject to the Labor Proclamation, persons with disability will not get the protection under the Proclamation if they fall in any of the above groups. Of course, this does not hold if the problem arises in relation to employment with the federal government. Again here, all that is being said is the Proclamation does not apply to the above employment

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[276] Ibid., Art 3(3)(a) and (b).

[277] Ibid Art 3(3)(b). On the issue of the applicability of Labour Law to religious institutions the Cassation bench of the Federal Supreme Court has ruled that the employees of such institutions are to be divided into two categories. The first category consists of those rendering 'spiritual services' inseparably linked to the core of the faith concerned such as priests, deacons etc.... The second category is those that engage in work that is not linked to the core of the religion concerned such as accountants, store keepers etc....As regards the first category, the Cassation Bench ruled that these are left for the religious institutions concerned and are beyond the scope of the Labour Law. As regards the second category, it ruled these are matters for labour law and the Council of Ministers can exercise the discretion vested in it as regards this matter to issue laws. *Hamerework* St Mary's Church Vs. Deacon Mihret Berhan, Agafari Abraham Tadesse and others, Federal Supreme Court, File Number 18419.

[278] Ibid Art 3(2).

relations save arguably for the very last group. This does not mean that these people cannot claim the equal protection of the law under Article 25 of the FDRE Constitution as argued already above. Nor does it mean that they cannot claim essentially the same rights under the recently ratified UN Convention on the Rights of Persons with Disabilities briefly discussed above. Thus, virtually every person with disability can claim the rights embodied in Proclamation No.568/2008 *albeit* on the basis of the Convention on the Rights of Persons with Disabilities.

5. The pillars of Proclamation No.568/2008

There are considerable differences in the ways in which legislations in different countries attempt to produce social change. Not only are the judicial structures and systems that form the context for interpretation of legislation different but also the legislative style such as focusing on proscribing certain conducts or encouraging certain behavior could be the basis for differentiation[279]. Following essentially the rights approach as will be discerned from the discussion under, Proclamation No.568/2008 relies more on proscribing and prescribing conduct rather than offering inducements to encourage employers to hire persons with disability. The prominent features of the Proclamation are:

- prohibition of discrimination;
- the principle of 'reasonable accommodation' which is related to the norm of non discrimination in the eyes of the Proclamation;
- limited affirmative action and
- reversal of burden of proof.

5.1. Prohibition of Discrimination

The principle of non-discrimination is inherently linked to the principle of equality. The bedrock of equality as enshrined in various conventions and the Universal Declaration of Human Rights is that all human beings are of

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[279] Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, 'Evaluation of the Common Wealth Disability Strategy', available athttp://www.fahcsia.gov.au/sa/disability/pubs/policy/cds_evaluation/Pages?p4.aspx accessed on July 24, 2009.

intrinsic equal value. Thus, every human being is to be accorded equal respect and equal concern irrespective of mental and physical differences.[280]

In relation to employment of persons with disability, discrimination occurs when an employer treats a job seeker or an employee unfavorably owing to disability. Particularly, the treatment is regarded as discriminatory when the disability in issue has no implication for job performance or only a slight implication that can be remedied by using appropriate equipment[281] or through other means that do not cause undue burden on the employer.[282]

Three types of discrimination are known to take place in relation to employment of persons with disabilities. These are direct discrimination, indirect discrimination and harassment. Direct discrimination[283], the most obvious of the three, implies less favorable treatment of one person as compared to another person in a *similar or comparable* situation. If, for example, a person with some sight problems is fired from a job after revealing this fact to the employer even though that does not affect his ability to fulfill the requirements of the job, there is a direct discrimination on the basis of disability. For direct discrimination to occur it is not necessary that:[284]

a) the prescribed *criterion* be the only or the dominant basis for the unfavorable treatment; or

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[280] International Labor Organization, cited at note 30 above, p. 13.

[281] Ibid p 15

[282] ibid

[283] Though Ethiopian law does not define what 'dierect' discrimination is some other laws do. The 1995 Disability Disctimination Act of UK does, for instance, under 3A(5) provide that ' a person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.' One note here that the comparator is not a non-disabled person but specifically ' a person not having that particular disability'. This formulation enables a claim to be brought even in cases where a person is treated unfairly owing to prejudices or hostility to particular types of disabilities compared to others. Akhlaq Choudhurry, 'Direct Discrimination and Disability-related Discrimination',available at: http://www.11kbw.com/articles/docs/DirectDiscriminationandDisability2007.pdf accessed on Sep 14, 2010.

[284].Office of Anti-Discrimination Commissioner of Tasmania, Australia http://www.antidiscrimination.tas.gov.au/information_on_the_act/direct_and_indirect_discrimination, accessed on August 12, 2010.

b) the person who discriminates regards the treatment as unfavorable; or
c) the person who discriminates has any particular motive in discriminating.

Indirect discrimination is a less overt form of discrimination. It takes place when an employer imposes a condition, requirement or practice which in the particular circumstance is unreasonable and has the effect of disadvantaging a member of a group of people that share or are believed to share a prescribed attribute; or any of the characteristics imputed to the particular attribute more than a person who is not a member of that group. The person who discriminates need not be aware that the condition, requirement or practice disadvantages the group of people for indirect discrimination to occur.[285] For instance, if an employer requires *all* employees to pass a demanding physical test before being recruited to a particular position when in fact physical fitness is not an inherent requirement of the position, he is engaging in indirect discrimination against persons with some form of physical disability or even elderly job seekers.[286] So, indirect discrimination implies that criteria that appear neutral at first sight but when applied result in excluding persons with disability or putting them at a disadvantage compared to others are used. In other words, the criteria or policy followed by the employer may seem fair because it applies to everybody but a closer look will reveal that certain groups such as persons with disability are being treated unfairly. This is a disguised or subtle discrimination. Harassment, which may result in creating a hostile work environment that forces a person with disability to quit the job, is also regarded as the third form of discrimination.[287]

Proclamation No.568/2008 outlaws all the three forms of discrimination. It provides that,[288] 'any law, practice, custom, attitude, or other discriminatory situations that impair the equal opportunities of employment of a disabled person are illegal'. This blanket prohibition is obviously aimed at, among others, the more overt discrimination or direct

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[285] Ibid.

[286] Ibid.

[287] Ibid. Harassment means offensive or intimidating behavior, language occurring at work or a work-related setting which aims to humiliate, undermine or injure its target or has that effect.
http://www.direct.gov.uk/en/Employment/ResolvingWorkplaceDisputes/DiscriminationAtWork/DG_10026557 accessed on September 18, 2010.

[288] Proclamation 568/2008, Art 5(1).

discrimination that persons with disability may face when seeking employment or already in employment relationship. The law gets more particular by explicitly prohibiting the employer from using selection criteria that makes reference to 'disabilities' of a candidate unless the nature of the work dictates otherwise[289]. This prohibition addresses the direct type of discrimination.

Proclamation No.568/2008 also prohibits indirect discrimination perpetrated such as by using criteria which do not directly refer to disabilities but are all the same used in relation to recruitment, promotion, placement, transfer or other employment conditions with the effect of prejudicing the equal employment opportunity of persons with disability because they are applied to everybody. [290] Particularly, Proclamation No.568/2008 does prohibit treatment of people in different situations in an identical way. This is the import of Article 5(3) which states not providing 'reasonable accommodation' is a form of discrimination. With a view to remedying the disadvantages that a disabled person may face in the process of seeking a job or while at work the law is requiring the employer to make accommodation for the person with disability so long as the accommodation is reasonable. All what this means is that an employer who treats a person with disability and one without disability in an identical way is actually engaging in discrimination outlawed by the Proclamation. Though admittedly this conclusion is a subject of debate in other jurisdictions with similar laws[291] one may contend that here the discrimination being prohibited is indirect discrimination by criteria that appear to be neutral but have the effect of putting the person with disability in a disadvantaged position.

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[289] Ibid Art 4(3)

[290] Ibid Art 5(2).

[291] Whether accommodation requirement such as this are normatively similar to the more traditional prohibition of discrimination is a hotly debated issue. Many contend that there is fundamental normative difference between antidiscrimination requirements and accommodation mandate. According to them, antidiscrimination requirements call on employers not to act on illegitimate preferences, such as prejudice on the basis of the color of skin that they should not have in the first place. In contrast, accommodation mandates prohibit employers from acting on the normally legitimate desire to save money. So, it is held that, accommodation rules are redistributive rather than anti-discriminatory. Samuel Bagenstos, 'Rational Discrimination, Accommodation and the Politics of Disability Civil Rights,' Virginia Law Review, (2003), Vol. 89, No. 5 Pp. 827-828.

The third type of discrimination identified as that manifested by harassment is also outlawed explicitly by Proclamation No.568/2008 *albeit* only in relation to women with disabilities. The duty of the employer in this regard is further limited to cases of 'sexual violence'[292]. This prohibition of discrimination does not seem broad enough to effectively combat discriminatory effects of harassment in relation to employment of persons with disability. For one thing, it applies only to women. The other thing is that it applies only to the sexual form of it. Even at that, it refers to 'violence' which implies that the law will be of very limited utility if the term violence is taken literally.

5.2. Provision of Reasonable Accommodation

Different legal systems require different approaches as to the positive measures that an employer should take in relation to the employment of persons with disability. The two that stand out are the quota system and the requirement of the provision of reasonable accommodation.

The quota system has some three variants.[293] The first is the quota levy scheme whereby a binding quota is set so that employers covered by the law are required to make sure that a specified percentage of their employees are persons with disability. Those who do not fulfill this requirement may be bound to pay a fine or a specified levy. The money so obtained is then pooled in a special fund to be used for enhancing employment opportunities for persons with disabilities. In some cases the option to hire or pay the fine/levy may be left open for the employer.[294] Usually this fund is administered for the said purpose by the public authorities though exceptionally social partners are involved such as in France.[295] The second is a binding quota without an effective sanction. In this system, employers are required to hire a quota of persons with disability but the obligation is not backed with an effective sanction either because the law does not provide for any sanction or they are there in the law but are not enforced. Some times the enforcement may be lacking because public authorities have taken the decision not to enforce the law in the book.[296] The third is a non-binding quota based on recommendation.

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[292] Proclamation 568/2008, Art 6(1)(d).

[293] International Labour Office, Achieving Equal Employment ...Guidelines cited at note 50 above pp. 35-40.

[294] Id. p. 38.

[295] Id. p. 36.

[296] Id. p. 38

Under this form, compliance with the quota is voluntary. This system is unlikely to have much effect on the number of people with disabilities that get employment[297].

Proclamation No.568/2008 does not adopt any variant of the quota system. It rather requires that every employer make 'reasonable accommodation' for persons with disability. Where the right to equal opportunity vested in the person with a disability is violated because of the employer's failure to provide 'reasonable accommodation', the omission on the part of the employer is regarded as discrimination.[298] According to the Proclamation 'reasonable accommodation' refers to 'an adjustment or accommodation with respect to equipment at work place, requirements of the job, working hours, structure of the business and working environment with a view to accommodate persons with disability to employment'. [299]

Proclamation No.568/2008 clarifies the limits to the obligations of employers in regard to accommodation by clearly stating that an employer is relieved from this duty where taking the measures creates 'undue burden' on it.[300] Thus, the creation of undue burden is an acceptable ground for not making accommodation for a person with disability. In a bid to further clarify this limit, the law defines undue burden as:[301]

> ... an action that entails considerable difficulty or expense on the employer in accommodating persons with disabilities when considered in light of the nature and cost of the adjustments, the size and structure of the business, the cost of its operation and the number and composition of employees.

The principle of reasonable accommodation that Proclamation No.568/2008 adopts emanates from recognition that workplace barriers keep many persons with disabilities from performing jobs which they can do with some form of accommodation. There are a number of possible reasonable accommodations that an employer may have to provide starting from the time of recruitment all the way to workplace etc...[302] The US law which

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[297] Id. p. 40.

[298] Proclamation 568/2008 Art 5(3).

[299] Ibid Art 2(5).

[300] Ibid Art 6(2).

[301] Ibid Art 2(6).

[302] At the recruitment stage, for instance, if a job applicant that stammer is being interviewed reasonable accommodation requires that s/he be given extra time for

embraces the same principle as that in the Proclamation identifies the following among others as 'reasonable accommodations':[303]

- making existing facilities accessible;[304]
- job restructuring;[305]
- part-time or modified work schedules;
- acquiring or modifying equipment;
- changing tests,[306]training materials, or policies;
- providing qualified readers or interpreters; and
- reassignment to vacant position.[307]

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interview, as a matter of right even though that may result in delays. It may also require that such person be given the chance after the interview to write up what he was unable to express particularly when fluency is not an inherent requirement of the position s/he is seeking. Stammeringlaw.org.uk, Employment: Examples of Reasonable Accommodation, http://www.stammeringlaw.org.uk/employment/ra.htm, accessed on August 14, 2010.

[303] The US Equal Employment Opportunity Commission, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002), p. 4 available at: http://www.eeoc.gov/policy/docs/accommodation.html, Accessed on Oct 7, 2009.

[304] Ibid. For instance, if a cashier gets easily fatigued owing to lupus, and as a result, has difficulty finishing her shift such employee's request for a stool is a reasonable accommodation. This is so because this is a common sense solution to remove a work place barrier resulting from being required to stand when the job can be effectively done sitting down.

[305] Ibid. According to the Equal Opportunity Commission, this refers to modifications such as reallocating marginal job functions that an employee is unable to perform owing to a disability and/or altering when and or how a function, essential or marginal, is performed. So, an employer may switch the marginal functions of a certain position between two employees to accommodate the employee with disability.

[306] Ibid. According to the US Equal Employment Opportunity Commission, an employer must provide reasonable accommodation to a qualified applicant with a disability that will enable the individual to have an equal opportunity to participate in the application process and be considered for the job unless that causes 'undue hardship'. This is so even where the employer believes that it will be unable to provide this applicant with accommodation on the job.

[307] Ibid. The Americans with Disability Act specifically lists 'reassignment to a vacant position as a form of reasonable accommodation. This type of accommodation must be provided to an employee who, because of disability, can no longer perform the essential functions of her/his current position with or without reasonable accommodation, so long as the employer can not show that would cause undue hardship. Note however that the employee must be qualified for the new position and

In the USA, reasonable accommodation is also to be accorded with respect to benefits and privileges of employment. The benefits envisaged by the US law include but are not limited to, employer sponsored: a) training b) services such as employee assistance programs, credit unions, transportation etc...c) social functions etc.... In other words, equality of opportunity in relation to employment is inclusive of all employment related benefits[308]. This wide understanding seems to be in line with the Ethiopian Proclamation as it is based on the rights approach implying the employee with disability is not in anyway being done favors.

As is the case in Ethiopia, in the US the only statutory limit to 'reasonable accommodation' is what is known in their legal parlance as 'undue hardship'. The US Equal Employment Commission underscores that 'undue hardship' refers to significant difficulty or expenses and focuses on the resources of and circumstances of a particular employer in view of the costs or difficulties of providing a specific accommodation. In other words, undue hardship refers not only to financial difficulty, but to accommodations that are 'unduly extensive, substantial, disruptive or those that would fundamentally alter the nature or operation of the businesses'.[309]

If an employer is to discharge its obligations with respect to reasonable accommodation, it must have a comprehensive disability management strategy. The strategy should cover the entire employment relationship starting with the recruitment process and going all the way to job retention by persons with disability. The ILO Code of Practice underscores the need for such a holistic strategy. Particularly, employers must adopt a strategy for managing disability as an integral part of their overall employment policy and specifically as part of the human resources development strategy.[310]

As one of the components of this strategy employers are expected to conduct job analysis. This means with respect to each job, they have to make a detailed list of the duties that a particular job involves and the skills required. This will indicate what exactly the worker has to do, how he or she has to do it, why he or she has to do it and what skill is involved in

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be able to perform the essential functions of the latter with or without reasonable accommodation. The employee need not however be the best qualified person for the new position in order to get the reassignment.

[308] Ibid p. 11.

[309] Ibid p. 5.

[310] International Labour Office, cited at note 2 above p. 10.

doing it. The analysis may also include facts about tools to be used and machines operated, if that is the case.[311] Having such a clear and detailed view of what a particular position entails and what is expected from the person who occupies such a position can greatly facilitate the employment of persons with disabilities. This will, among other things, guide those in charge of recruitment in screening applicants, interviewing and making decisions regarding employment. Consequently, they will be able to hire persons with disability who would otherwise be rejected using some hazy standards. The employer will have also clear view of what accommodation needs to be made and the precise implication of the accommodation on it, thus, limiting the possibility of engaging in discrimination while the employment lasts and enhancing the chances for job retention.

Where the employer fails in his/her duty to make reasonable accommodation the person with disability has the right to sue and enforce his/her right. Thus, in a way the enforcement of the right is in the hands of the affected person with disability. This could be a positive aspect of the 'reasonable accommodation' approach if courts are accessible and persons with disabilities are sufficiently sensitized of their rights. The approach is certainly better than the non-binding quota system and quota without effective sanctions approach such as owing to deliberate decision by public authorities not to enforce the law. Unfortunately, an early survey of some of the biggest employers[312] in Addis Ababa conducted by the author in March 2010, almost two years after the issuance of Proclamation No.568/2008 when writing this piece revealed that the reality on the ground is still a far cry from what the Proclamation envisages. It is perhaps too early to evaluate implementation and impact of the Proclamation. In any event, that is beyond the scope of the current topic. It suffices to indicate that the law is

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[311] Ibid. p 6

[312] The persons who filled out questionnaires were: Habtamu Fantaye,Commpensation and Labour Relations Manager at Ethiopian Telecommunictions Corporation; Genet Aman, Human Resource Administrator at Ethiopian Electric Power Corporation; Samuel Asfaw, Legal Services Manager at Total Ethiopia Share Company; Hailegiorgis Gemede, Employee Recruitment and Selection Team Leader at Ethiopian Postal Services; Yossief Mulugeta, Director, The Ethiopian Human Rights Council; Damtew W/Tekle, President, Labour Union of the Commercial Bank of Ethiopia; Mohammed Beyar, Director for Human Resource Development and Administration at the Ministry of Labour and Social Affairs. Other pertinent officials who responded but on condition of anonymity were from The Commercial Bank of Ethiopia , NIB International Bank Share Company, and Bank of Abyssinia.

still little known by decision makers in the human resource management departments of even the biggest employers.

5.3. Limited Affirmative Action

One way in which Proclamation No. 568/2008 attempts to address the employment problems of persons with disability is by providing for affirmative action in some circumstances. This is provided for under Articles 4(2), 5(4) and 6(1) b of the same. The first of these three provisions states that where a person with disability having the necessary qualification scores equal or close score to that of another candidate preference must be given to the candidate with disability. Article 5(4) simply underscores that affirmative actions taken to create equal opportunity for persons with disability may not be regarded as discriminatory. All it is doing is assuring employers that any measure of support aimed at persons with disability, they might take, will not result in contravention of the law prohibiting discrimination. Yet another provision of limited application is to be found under Article 6(1) b. This provision provides that every employer has the responsibility to take affirmative action in favour of women with disability taking into account their multiple burdens that arise from their gender and disability. This relatively broad measure of affirmative action is confined in its application to women with disability to the exclusion of males.

5.4. Reversal of Burden of Proof

Proclamation No.568/2008 aims at making enforcement of the prohibition of discrimination easier for persons with disability. One of the ways[313] in which it does so is by providing for procedural rules that facilitate judicial enforcement of the right of people with disability to equality of opportunity in matters of employment. The reversal of burden of proof is aimed at this. It provides:[314]

> Any person with disability who alleges that discrimination on the ground of his disability existed with respect to recruitment, promotion, placement, transfer or other conditions of employment may institute a suit to the

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[313] Art 10 which allows associations of which a person with disability is a member to institute legal action on his or her behalf is also a procedural law aimed at making enforcement of the rights of persons with disability.

[314] Proclamation 568/2008, Art 7.

competent court on the issue *without the requirement of burden of proof* .(Emphasis added).

According to Article 7 (2) of Proclamation No.568/2008, it is for the defendant to the suit above to prove that there was no discrimination. The onus of proof lies with the defendant. This is a stark departure from the process of litigation as it exists in Ethiopia. The rule is party presentation. Each party must allege facts to support his claim and introduce evidence that will prove the existence of these facts.[315]

If the above is taken to mean the person with disability has to simply make an allegation of discrimination without showing anything, the defendant will be in extremely difficult position. In other words, s/he will be clueless as to the facts from which the person with disability came to the conclusion that there was discrimination. Thus, the person will be completely in the dark as to what to prove or disprove in the court.

Cognizant of this, other jurisdictions which provide for such a rule in discrimination disputes require the person with disability to allege certain facts and make a *prima facie* case.[316] The Amended Burton rules could particularly provide good starting point for the interpretation of Article 7 of Proclamation No.568/2008. The Barton guidelines require:[317]

1. claimant to prove certain facts showing *prima facie* discrimination;

2. claimant will fail if he does not prove facts;

3. court should keep in mind that the outcome at this stage will depend on inferences the court will make from proven facts;

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[315] Allen Sedler, Ethiopian Civil Procedure, (Haileselassie I University, Faculty of Law ,Oxford University Press 1968) 120. Art 222(1)(f) of the Civil Procedure Code Decree 52/1965 embodies this rule.

[316] European Council Directive 2000/78/E, The UK Procedural Rules of 2009 on Disability and Grievance, The American Case Law in Barton Vs EAT as amended by Court of Appeals.

[317] Sue Johnstone, 'Burden of Proof Guidelines Revised', Equal Opportunities Review', available at http://www.michaelrubenstein.co.uk/default.aspx?id=1034337, accessed on March 24, 2010. Also see http://ww.thompsons.law.co.uk/ltext/1470002.htm, accessed on March 24, 2010.

4. tribunal should bear in mind that it is difficult to get a direct proof of discrimination. So, only indirect proof suffices;

5. tribunal could, but is not obliged to, draw inferences of discrimination;

6. tribunal must assume there is no adequate explanation by the employer;

7. court must take into account, if there are any codes of practice, whether they have been adhered to. If not, discrimination is inferred;

8. if facts are proved and inferences can be made from them burden of proof shifts to employer;

9. Employer must prove, 'on balance of probability,' that the treatment was in 'no sense on grounds of disability' and

10. since the facts to prove an explanation are usually with the employer, he/she is expected to provide cogent evidence.

The lack of clarity in the law in this regard is possibly attributable to the fact that the term burden of proof is used in two different senses often in a confusing way. These are the burden of production and the burden of persuasion. The former refers to the burden of going forward with the evidence, i.e, proceeding with evidence on a particular issue at the start of the case. This burden ordinarily lies with the same party who ultimately has the burden of persuasion but not necessarily.[318] The burden of persuasion in contrast refers to establishing the fact in the courts mind by preponderance of evidence or beyond reasonable doubt depending on the nature of the case at the court. If the court is left in equilibrium as to the existence of the fact, the party with the burden of persuasion fails.[319] It may be contended that the reversal of burden of proof Article 7 of Proclamation No. 568/2008 talks about is the burden of persuasion. To hold otherwise would be to put the employer in extremely difficult position as he would not know what facts to prove or disprove in order to show that the employer's behavior was not discriminatory.

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318. Robert A. Melin, Evidence in Ethiopia, Unpublished Material Available at the Library of the Faculty of Law , Addis Ababa University (1972) pp 308-309

319 Ibid.

Conclusion

There are various conceptual approaches to disability which in turn determine the type of policy and legal response to the problem. The Proclamation to Provide for the Right to Employment of Persons with Disability is inspired by the 'rights approach'. It sees the issue of disability through the lens of diversity. It, thus, regards employment as the right of persons with disability. To safeguard this right of persons with disability it prohibits discrimination. More importantly, it equates failure to provide 'reasonable accommodation' to persons with disability to discriminatory practice. To ensure that persons with disability enforce their rights in courts of law, in this respect, it provides favorable procedural rules. Namely, it reverses the burden of proof and allows unions and other associations in which the person with disability is a member to institute action on his behalf. Its definition of disability too is expansive even superseding analogous legislations of developed countries and some international instruments. In sum, the Proclamation is modern in both approach and content, following the more recent 'rights strand' of the social model. Whether it is compatible with the economic, social, cultural, legal and institutional reality on the ground and hence will make difference in the lives of persons with disability is an open question.

Some Thoughts on the Benefits and Costs of the Regulatory Framework on Access to Genetic Resources and Benefit Sharing in Ethiopia

Fikremarkos Merso* and Imeru Tamrat**

Introduction

Historically, genetic resources (GRs) were considered the "common heritage of mankind" and were freely exchanged among countries globally. States had always allowed access to GRs found within their territory and permitted their export for the purpose of scientific research, plant breeding or conservation, free of charge.

The advance made in molecular biology and genetic engineering by developed countries in the late 70s and 80s enabled them to manipulate genetic resources, mainly accessed from biodiversity rich developing countries, to develop new products of commercial value and the protection of genetic resources through intellectual property rights (IPRs). The protection of GRs by IPRs gave them economic value with commercial benefits accruing to industries in developed countries with no flow of benefits to developing countries which are the major suppliers of GRs .

This situation led developing countries to question the fairness of maintaining the traditional system of free access to GRs in the face of private property claims on such resources through IPRs, a practice which they considered contrary to the principle of the "common heritage of mankind". Developing countries began to voice their concerns for the need to regulate access to GRs at the international level and the share in the benefits derived from accessing their GRs by the industrialized North. This concern provided one of the main impetus to the genesis of the negotiations that culminated in the adoption of the Convention on Biological Diversity (CBD).[320] Ethiopia has put in place a regulatory regime on access to genetic resources and benefit sharing (ABS) following the basic tenets of the CBD and it has gained some experience in ABS agreements.

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[320] The Convention on Biological Diversity was adopted at Rio in 1992 and came into force in 1993, UN Doc. UNEP/Bio.Div/N7-INC S/4.

The basic objective of this article is to examine whether or not the current ABS law of Ethiopia can facilitate more open access to genetic resources for research and innovation and realize the intended benefits, both monetary and non-monetary. Within the ambit of this general objective, the article seeks to address the following specific questions:

1. How are decisions made on access requests?
2. What are the roles of the communities and the state in the ABS process?
3. How to use access to GRs for poverty alleviation and economic development in the country?
4. What are the likely benefits and costs of the regulatory regime?
5. What lessons are to be learnt from the ABS experience of the country?

The article will first give some background to ABS with the view of setting the context for the discussion on the above questions in the subsequent sections.

1. Background

The CBD has brought a paradigm shift in GR governance and in many ways it represents a major departure in international environmental law in general, and GRs regulation in particular. The CBD is the first binding multilateral regime to affirm the principle of sovereignty of states over their GRs, which contrasts with the traditional understanding that GRs were the 'common heritage of mankind' and should thus be accessed freely.[321]

States are sovereign over their GRs in the sense that the "[a]uthority to determine access to the resources rests with national governments and subject to national legislation."[322] Accordingly, "[a]ccess to genetic resources shall be subject to the prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party."[323] The CBD further states that access, where granted, shall be on mutually agreed terms.[324] National governments thus exercise sovereignty over their GRs by regulating access to the resources and granting access based on prior informed consent (PIC).

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[321] Article 1 of the *International Undertaking on Plant Genetic Resources* (Resolution 8/23, twenty-second Session of the FAO Conference, Rome, 1983), unequivocally states that plant GRs were the 'common heritage of mankind.'

[322] CBD, Article 15.1.

[323] *Ibid.*

[324] *Ibid.* Article 15.4.

While the CBD unequivocally affirms the sovereignty of states over their GRs, it also states that conservation of biodiversity is a 'common concern of mankind.'[325] In fact, the whole fabric of the CBD is underpinned by the interaction between the principle of states' sovereignty over their GRs and the idea that biodiversity in general is a 'common concern of mankind.' While unequivocally affirming the sovereignty of states over their GRs, the CBD has also tried to tame this principle by encouraging Parties to refrain from imposing unnecessary restrictions on access to the resources.[326] It does not, however, provide some of the restrictions which may be considered "unnecessary". It appears that this is something left to the determination of national laws. Naturally, the CBD's principle of states' sovereignty over their GRs has attracted more attention than its call for a facilitated access to the resources. Indeed, compared to the situation in the pre-CBD era where GRs were freely moving across regions and countries as 'the common heritage of mankind', the CBD may not take credit for facilitating access to GRs. It appears that the main concern of the parties to the CBD was the hitherto uncompensated commercial use of GRs by western companies without there being benefit sharing and their interest was more in controlling access rather than in promoting it.

The issue of access to GRs is intrinsically tied to 'benefit sharing', another important principle introduced by the CBD. In relation to that, the CBD provides that parties:

> [s]hall take legislative, administrative or policy measures... with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.[327]

While the CBD leaves the specific arrangement of benefit sharing to the parties concerned based on mutually agreed terms, it also provides some guidance as to what is to be shared and how it is to be shared. In relation to the former, the CBD requires share of the results of research and development and the benefits arising from the commercial or other

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[325] *Ibid.* Third paragraph of the preamble.

[326] *Ibid.* Article 15.2.

[327] *Ibid,* Article 15.7.

utilization of GRs. Though the commercial exploitation of GRs without benefit sharing had been the main concern in the pre-CBD era, the Convention requires benefit sharing not only from the commercial use but also other uses of GRs. In relation to how benefits are to be shared, the CBD simply states that the benefits should be "fair and equitable" without providing any guidance on what these terms mean. Once again, the determination of this issue is also left to national governments. What the foregoing show is that the CBD is a framework agreement providing only general principles, leaving the determination of several important issues to national governments.

In relation to intellectual property rights (IPRs) the CBD states:

> The Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives.[328]

Similarly, the CBD makes a direct reference to IPRs in the context of access to and transfer of technology. Accordingly, Parties are required to transfer and/or facilitate access and transfer of technologies to other parties under fair and most favorable terms including on concessional and preferential terms - technologies that are relevant to the conservation and sustainable use of biological diversity.[329] For technologies covered by IPRs, the terms must be 'consistent with the adequate and effective protection of intellectual property rights and in accordance with international law.' Furthermore, the CBD provides that its provisions "[s]hall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity."[330] The relationship between IP rights and ABS has not thus been clearly articulated by the CBD. As a result, IPR issues relating to ABS have been discussed at the various meetings of the Conference of the Parties (COP)[331] to the CBD. More importantly, in 2002, at its sixth meeting, the

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[328] *Ibid*, Article 16.5.

[329] *Ibid*, Articles 16.1 and 16.2.

[330] *Ibid*, Art. 22.1.

[331] The COP is the governing body of the CBD and takes decisions on the implementation of the different provisions of the Convention. The COP holds

COP adopted the Bonn Guidelines which provide some guidance on ABS including IPRs.[332] Nonetheless, despite the different efforts at the CBD to examine the relationship between IPRs and ABS, no conclusion has yet been reached on the impact of IPRs on ABS.[333] It is to be noted, however, that the whole philosophy of ABS has been built on the assumption that GRs would be accessed and commercialized where IPRs could play an important role towards its achievement.

The synergy between IPRs and ABS could be viewed from three different perspectives. First, an ABS law may prohibit IPRs or certain kinds of IPRs on the accessed resources. For example, the law could prohibit patents on some of the GRs accessed. Second, there could be a provision in the ABS law requiring PIC of providers before acquiring IPRs on products derived from or processes based on the accessed GRs. Such laws may demand benefit sharing from the IPR holder such as royalties or joint ownership of IPRs. Third, there could be a provision in the ABS law requiring proof of PIC and benefit sharing in relation to IPRs applications involving the GRs (defensive use).

Ethiopia is a party to the CBD and has been an active player in the negotiations for the implementation of the ABS provisions at both the international and national levels. It has also spearheaded the OAU model legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Genetic Resources formally endorsed by the OAU Heads of State in 2000 and recommended

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meetings annually and as of May 2006 has held 8 conferences. It is reported that to date the COP has taken 182 decisions on substantive and procedural issues. For details about the COP and its activities so far, see CBD's website: http://www.biodiv.org/convention/cops.asp (accessed on 25 May 2009).

[332] CBD COP 6, Decision VI-24 adopted the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilization (the Bonn Guidelines); see http://www.biodiv.org/doc/meetings/cop/cop-6/official/cop-06-06-en.pdf (accessed on 3 May 2009). The Bonn Guidelines were first introduced by the Swiss Government based on a survey conducted by Swiss Companies in relation to the implementation of the ABS provisions of the CBD. The Guidelines were presented by Swiss officials at COP4, at two Expert Panel meetings on ABS as well as COP5. The Open-Ended Ad Hoc Working group on ABS held in Bonn in October 2001 finalized the Guidelines and they were finally adopted by the COP in April 2002 in The Hague (COP6).

[333] CBD (2001), "Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing, Report on the Role of Intellectual Property Rights in the Implementation of Access and Benefit Sharing Arrangements", UNEP/CBD/WG-ABS/1/4.

for implementation at the national level within the continent.[334] As will be discussed in detail subsequently, Ethiopia issued a law on access to genetic resources and benefit sharing in 2006, primarily in line with its obligations under the CBD but also, it seems, taking into account its obligations under other international agreements such as the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR).[335] The aim of this article is not to discuss in detail the provisions of the latter international agreements but to highlight the provisions related to ABS in such instruments where relevant with appropriate analysis as to their implications on national regulation on access to GRs.

2. Ethiopia's biodiversity and Emergence of Regulation

Ethiopia has historically been considered home to many cultivated crops and an important centre of diversity. It is one of the centers of crop diversity identified by the famous explorer, Nikolai Vavilov on the bases of, among other things, ancient agricultural civilization and the diversity of cultivated species.[336] It has further been noted that:[337]

> In and of itself Ethiopia could be regarded as a Vavilov Centre. Its fantastic terrain of mountains, valleys and plateaus, combined with a long history of cultivation, make the country one of the most botanically diverse and important points in the globe. Ethiopia is home for major world crops like sorghum and many millets, as well as coffee.... Thousand of years of farming have made the region a secondary centre of diversity of wheat and barely as well.

The country possesses a high genetic diversity in four of the world's widely grown food crops (wheat, barely, sorghum, peas), in three of the world's most important industrial crops (linseed, bean, cotton), in the world's important cash crops (coffee), and food crops of regional and local

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[334] Available at http:www.grain.org/brl/oau-model-law-en.cfm (accessed 9 June 2009).

[335] The International Treaty on Plant Genetic Resources for Food and Agriculture, adopted in November 2001 by FAO Conference (Resolution 3/2001) and came into force on 29 June, 2004.

[336] Vavilov, NI (1962) Five Contents, State Publishing House of the Geographical Literature, Moscow.

[337] Fowler, C. and P.R. Mooney (1990), Shattering: Food, Politics and the Loss of Genetic Diversity, University of Arizona Press, Tuscon, AZ.

importance (teff, finger millet, noug, sesame, enset).[338] The World Conservation Monitoring Centre has designated Ethiopia as a 'Group I Country', a category which includes the 25 most bio-diverse countries in the world based on species richness and endemism.

Different reasons explain the country's richness in diversity. First, the country's geographical position, range of altitude, rainfall pattern, and soil variability has enabled the development of a wide-range of diversity. The topography of the country which ranges from 110 meters below sea level to 4,620 meters above sea level has created a conducive environment for the development of a wide variety of flora and fauna. Second, the long practice of selection and adaptation by Ethiopian farmers of wild varieties to different weather and ecological conditions has also assisted in the creation of a wide-range of genetic diversity.[339] Third, Ethiopia is also a socio-culturally diverse nation with about 80 ethnic groups each with its own culture, tradition and innovation practices. The different traditional farming and innovation practices have also contributed to the country's richness in diversity.[340]

The Ethiopian farming communities, which constitute about 85 percent of the population, highly depend on biodiversity to meet their basic needs such as food, shelter, fuel, medicine, and transportation. For example, more than 80 percent of Ethiopians get their healthcare services from traditional healers who completely rely on biodiversity and more than 95 percent of traditional medicine is of plant origin.[341]

The issue of regulations on access to GRs in Ethiopia is a relatively new development, as it is in other developing countries. In consonant with the understanding that GRs were the 'common heritage of mankind', the GRs of the country were freely accessed, taken out of the country and used for

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[338] See the Second Country Report of Ethiopia to the CBD, available at http://www.biodiv.org/doc/world/et/et-nr-02-en.pdf (accessed on 2 June 2009).

[339] Fowler, C. and P.R. Mooney (1990), Shattering: Food, Politics and the Loss of Genetic Diversity, University of Arizona Press, Tuscon, AZ.

[340] Engles, J.M. and Hawks, J.G., The Ethiopian Gene Center and its Genetic Diversity, in Engles, J.M. and Hawks, J.G. & M. Worede (eds) (1991) Plant Genetic Resources of Ethiopia, Cambridge University Press, New York.

[341] Demissiew, S. et al (2005), 'Biological Resources of Ethiopia and Status of Global Utilization and Intellectual Property Claims' paper presented at the Institute of Biodiversity Conservation and Research, Addis Ababa, 21 November 2005.

different purposes. Ethiopia has contributed significantly to the collection of germplasm at the Consultative Group on International Agricultural Research (CGIAR) system. Out of the total accession the system holds worldwide, 22,135 (accounting for 3.3 percent of the total) were collected from Ethiopia- the largest from Africa.[342]

Nevertheless, there are no comprehensive studies on the GRs that have been taken out of the country and held in *ex situ* collections or exploited for commercial purposes. As there were no regulations in place until recently, it is not possible to get any record on the extent of access and use of the GRs of the country. There is only patchy information which does not show the full picture and the few known cases suggest that the GRs of the country were freely accessed, taken out and exploited commercially without the country getting any benefits.[343] Some of the resources were even protected by IPRs on the understanding that they were modified from their original state.[344]

The issue of access to GRs and benefit sharing has become an important regulatory agenda in Ethiopia with the shift in global GR governance following the coming into force of the CBD. Legislation on access to GRs was envisaged by the 1997 Environmental Policy of Ethiopia (EPA). Moreover, the 1998 National Policy on Biodiversity Conservation and Research has broadly outlined the issues of access to GRs and benefit sharing. In terms of legislation, a general framework on access to GRs was provided for by the *Institute of Biodiversity Conservation and Research*

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[342] Information from the System-Wide Information Network for Genetic Resources (SINGER), available at http://singer.grinfo.net/overview/origcty.php?reqid=1157016268.0992 (accessed on 23 April 2009).

[343] A study by the Rural Advancement Fund International (RAFI), now Action Group on Erosion, Technology and Concentration (ETC Group), shows that Ethiopian barley and sorghum varieties were used in the US generating $150 million and $12 million a year respectively. Another case identified by the study is *Endod*, known as the African soapberry plant and which has been used by the Ethiopian Communities as a laundry soap and Shampoo. The University of Toledo has applied for a patent on the use of *Endod* to control zebra mussels which is expected to generate millions of dollars. See RAFI (1994).

[344] For example a variety of *Teff*, a crop which originated from and widely grown in Ethiopia mainly to make, *Injera*, a flat bread staple food in Ethiopia was taken from Ethiopia and protected by a plant variety right in the US by the *Teff* Company (Plant breeder's certificate No. 090033) without there being any benefit sharing either to the country of the communities that have been preserving and improving the *Teff* GRs.

Establishment Proclamation (hereinafter IBCR Establishment Proclamation).[345]

The IBCR Establishment Proclamation states that any person who wants to collect, dispatch, import or export any biological specimen from or to the country should first obtain a permission from the Institute of Biodiversity Conservation and Research (IBCR).[346] Engaging in any of the above activities without permission from the IBCR became a criminal offence punishable with imprisonment ranging from five to ten years and fine from 15,000 to 20,000 Birr.[347] However, despite its use as a regulatory regime on access to GRs the IBCR Establishment Proclamation does not contain the main elements of an ABS regulation as envisaged by the CBD. The enactment of a comprehensive regulatory framework on ABS had to wait until January 2006, when the country enacted the *Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation*[348] (the ABS Law).

3. Overview of the Current ABS Regulatory Regime

3.1. General

The objective of the ABS Law is "[t]o ensure that the country and its communities obtain fair and equitable share from benefits arising from the utilization of the resources so as to promote the conservation and sustainable utilization of the country's biodiversity."[349] The ABS Law, thus, aims to achieve the same objective of the CBD through the use of fair and equitable share of the benefits from the use of the GRs of the country as the main instrument. This clearly suggests that the law is informed by the provisions of the CBD and this has actually been stated in the preamble. A statement in the preamble also suggests that the ABS Law was informed by the African Model Law as well. Through the ABS Law, the country is, thus, implementing its rights and obligations under the CBD and adapting the African Model Law to its own needs and circumstances. Nonetheless, Article 15.2 of the ABS Law states that access to GRs covered by

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[345] The Institute of Biodiversity Conservation and Research Establishment Proclamation No. 120/ 1998.

[346] Ibid, Article 12.

[347] Ibid, Article 13. Birr is the local Ethiopian currency. The exchange rate of 1US$ against a Birr is roughly about 12.50 Birr.

[348] The Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation, Proclamation No. 482/2006.

[349] Ibid, Article 3.

international treaties to which the country is a party would be regulated in accordance with the rules in those treaties, implying that access to GRs covered by the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR), a treaty ratified by the country would be regulated in accordance with the provisions of the latter. The details on access to GRs covered under the Multilateral System, as envisaged by the ITPGR, are to be determined by regulations.

The ABS Law applies to GRs both *in situ* and *ex situ* conditions. The law does not make distinction between the GRs of the country found *in situ* or *ex situ* in the country or outside. Nor does it make any exception to GRs held in *ex situ* in the country but originated from other countries. The ABS Law has also made no distinction between GRs accessed before and after the CBD came into force.

3.2. Access Conditions and Procedures

In Ethiopia, access to GRs can only be made with a written permit to be issued by the Institute (the Institute of Biodiversity Research), a Federal institution, based on the principle of PIC.[350] However, the ABS Law has made a few exceptions to the rule. One such exception is the customary use and exchange of GRs by and among the Ethiopian communities which is excluded from the ABS Law (Article 4.2(a)). The second exception is that national public research and higher learning institutions as well as intergovernmental institutions based in the country may get a special access permit for facilitated access without the need to strictly follow the standard access procedure, provided that the purpose is only for development and academic research and that such activities are undertaken within the country.[351] The ABS Law has no rules in relation to the conditions and the minimum obligations to be assumed by the applicant for such facilitated access. It appears that the determination of such issues is left to the exclusive discretion of the Institute.

Access to GRs by foreigners is subject to additional requirements. First, foreign applicants should provide a letter of assurance from 'the competent authority' of his/her national state or domicile assuming the obligation to uphold or enforce the access obligations.[352] It is not clear who would be 'the competent authority' or how this authority enforces the obligations

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[350] Ibid, Article11 (1).

[351] ABS Law, Article15.1.

[352] Ibid, Article 12.4.

assumed by the applicant. In the ABS Agreements the country has concluded (to be discussed later) representatives from the embassies of the countries of origin of the companies (applicants) countersigned the agreements but only as witnesses. Second, the collection of GRs by foreigners should be accompanied by the personnel of the Institute or the relevant institution designated by the Institute.[353]

As in the case of the CBD and the African Model Law, the first important condition for access to GRs under the ABS Law is PIC. As noted, access to GRs in Ethiopia requires the PIC of the Institute.[354] Nevertheless, even if the term 'prior informed consent' is defined under Article 2.11[355] of the ABS Law, the definition does not clearly show what sort of information should be provided by the applicant in order to satisfy the PIC requirement. It appears that the information required for PIC purpose is to be determined by regulations. The PIC of the communities is not required under the ABS Law. Communities may only request the Institute to restrict or withdraw its PIC when they think that the access would likely be detrimental to their socio-economic life or their natural or cultural heritage, but the Institute has no obligation to accept their request.[356]

The second important condition for access to GRs in Ethiopia is benefit sharing. The ABS Law states as one pre-condition for access, that the state and the concerned local communities shall obtain fair and equitable share of the benefits from the utilization of GRs accessed (Article 12.3) and provides a non-exhaustive list of benefits which may possibly be shared.[357] The ABS Law entitles the state and local communities to share benefits arising out of the exploitation of GRs.[358] But a closer look at this provision suggests that local communities do not actually have the right to participate

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[353] Ibid, Article 12.5.

[354] Ibid, Articles 12.1 and 12.2.

[355] "Prior informed consent" is defined as "the consent given by the state and the concerned local community based on an access application containing a complete and accurate access information to a person seeking to access a specified genetic resource or community knowledge."

[356] The ABS Law, Article 7.d.

[357] Including license fee, upfront payment, milestone payment, royalty, research funding, joint ownership of IPRs, employment opportunity, participation of Ethiopians in the research, priority to supply raw materials of GRs for producing products there from, access to products and technologies developed through use of the GRs, training at both institutional and local levels, provision of equipment, infrastructure and technology support (Article 19).

[358] The ABS Law, Article 9.

and negotiate benefits from the use of "their" GRs; rather, the government negotiates and determines the benefits and they are entitled to a share of the benefits that accrue to the state. In relation to financial benefits, communities are entitled to claim 50 percent of such benefits accrued to the state.[359] This means that the government and the applicant determine the parameters of benefit sharing, the communities having no influence on the determination of the benefit from 'their resources.' They do not have any role in setting the terms of the agreement or the amount of benefits. They do not, for example, have the right to say that the benefit is unfair or inequitable.

No mechanism has been designed to ensure that the communities would get even their share of the benefits in practice. For example, no single community was identified in the ABS Agreement discussed below in this paper for the purpose of benefit sharing.

The ABS Law further states that the money (share of the communities) shall be put to the 'common advantage of the concerned local communities' the implementation of which is to be determined by regulations to be issued by the state. It means that the government will determine the manner of use of the share of the communities. The ABS agreements did not clarify this issue either. They simply envisage a fund which shall be used for improving the living conditions of 'the local farming communities'. As noted, ensuring benefit sharing to local communities with their informed and full participation is the main objective of the ABS Law, but whether this objective has been translated into its provisions is questionable. Although the law places a great deal of importance on communities and emphasizes their participation and decision making, that has remained largely at the level of rhetoric and in fact the law accords all the decision making power to the government.

[359] Ibid, Article 9.2.

CONDITION OF ACCESS

11. Prohibition

1/ Without prejudice to the provisions of sub-article 2(a) of Article 4 of this Proclamation, no person shall access genetic resources or community knowledge unless he is in possession of an access permit granted by the Institute.

2/ Unless explicitly expressed, the granting of permit to access genetic resources shall not be construed to constitute permit to access the community knowledge associated therewith and vice versa.

3/ Without prejudice to the provisions of sub-article 2(b) of Article 4 of this Proclamation, no person shall export genetic resources out of the country unless he is in possession of an export permit granted by the Institute.

4/ Notwithstanding the provisions of sub-article (1) of this Article, organs of the state which are empowered by law to conserve genetic resources may not be required to obtain access permit from the Institute to collect genetic resource or community knowledge in the discharge of their duties; provided however, that they may not be allowed to transfer the genetic resources or community knowledge to third persons or export same out of the country unless they are given explicit permit by the Institute. When conducting collection of genetic resources and community knowledge, employees of such institutions need to have letters to this effect.

12. Basic Pre-Conditions of Access

1/ Access to genetic resources shall be subject to the prior informed consent of the Institute.

2/ Access to community knowledge shall be subject to the prior informed consent of the concerned local community.

3/ The state and the concerned local community shall obtain fair and equitable share from benefits arising out of the utilization of genetic resources and community knowledge accessed.

4/ An access applicant who is a foreigner shall present a letter from

the competent authority of his national state or that of his domicile assuring that it shall uphold and enforce the access obligations the applicant shall have.

5/ In cases of access by foreigners, the collection of genetic resources and community knowledge shall be accompanied by the personnel of the Institute or the personnel of the relevant institution to be designated by the Institute.

6/ The research using genetic resources accessed shall, unless found impossible, be carried out in Ethiopia and with the participation of Ethiopian nationals designated by the Institute.

7/ Where the research on the genetic resources accessed is permitted to be carried out abroad, the institution sponsoring or hosting the research shall give a letter of guarantee assuring the observance of the access obligations by the access applicant and the institution.

3.3. The ABS Law and Intellectual Property Rights

Despite its heavy reliance on the African Model Law, which has unequivocally banned patents on life forms and biological processes in general[360], the ABS Law has no provision on the issue of the patentability or otherwise of life forms and biological processes. It could be said that the ABS Law is not the appropriate law to deal with IPRs, but it is within the bound of reason to expect the ABS Law, which after all regulates access to GRs, to provide rules on what should and should not be done with the accessed genetic resources.

The Proclamation Concerning Inventions, Minor Inventions and Industrial Designs[361] (hereinafter Proclamation on Inventions) excludes from patentability only plant and animal varieties and essentially biological processes for the production of plants and animals.[362] This would mean that microorganisms could be patentable subject matter in Ethiopia as they are not specifically excluded from patentability. The position taken by the Proclamation on Inventions is largely compatible with Article 27.3(b) of the TRIPs which allows members to exclude from patentability plants and

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[360] The African Model Law, Article 9.1.

[361] Proclamation Concerning Inventions, Minor Inventions and Industrial Designs, Proclamation123/1995.

[362] Ibid, Article 4.

animals which right should logically include plant and animal parts as well. Ethiopia is in the process of accession to the WTO and it appears that the ABS Law has cautiously refrained from adopting the African Model Law approach on patentability of life forms and biological processes thereby avoiding possible conflict with the TRIPs Agreement.

One of the obligations of the access permit holder under the ABS Law is that, "Where he seeks to acquire intellectual property rights over the genetic resource accessed or parts thereof, [s/he must] negotiate new agreement with the Institute based on the relevant Ethiopian Laws."[363] The language used in the ABS Law in relation to IPRs is general and vague. First, the phrase 'intellectual property rights over the accessed genetic resources or parts thereof' seems to imply that IPRs could be claimed on the GRs as they are or on the parts such as the isolated or purified genes from the accessed GR. However, it is difficult to imagine that the law is allowing IPR over the resources as they are. There is no reason for IPR claim on the GRs or parts thereof without there being human innovative intervention.

In view of the fact that monopoly rights through IPRs are increasingly perceived as stifling research and development, particularly in the life sciences, it is difficult to imagine that Ethiopia is providing more extensive IPR protection than what the TRIPs Agreement requires. Unfortunately, the Proclamation on Invention is silent on the possibility or otherwise of the patentability of GRs as they are or their parts. But given the fact that the exclusion specifically refers to plant and animal varieties and that as a matter of interpretation of law an exception should be interpreted narrowly, one may argue that parts of GRs may be a subject of patents as long as they qualify as 'invention' and meet the patentability requirements under the Proclamation on Inventions. However, the protection criteria under the Proclamation on Inventions do not allow IPR protection on the accessed GRs or parts thereof without there being an adequate modification (innovation) made on them.[364]

While this cautious approach towards IPRs is understandable in the context of avoiding conflicts with other treaties, particularly the TRIPs Agreement,

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[363] The ABS Law, Article17.12.

[364] The Proclamation on Inventions requires that what could be patented is an invention and that the invention should satisfy the standard patentability criteria: novelty, inventive step and industrial application (See Articles 2.3 and 3.2, 3.4 and 3.5).

the law should have made the issue of IPRs on the accessed GRs clearer by stating that IPRs may not be claimed on the accessed GRs or their parts as they are or even if isolated or purified and that IPR claims on improvements on the accessed resources or products made from them would be governed by the relevant IPR laws of the country. On the top of the foregoing, the ABS Law requires the access permit holder to recognize the locality from where the GR was accessed as origin in any application for commercial property protection of the product developed thereof such as in applications for an IPR.[365]

One of the proposals developing countries tabled for discussion in the TRIPs Council, within the context of the review of Article 27.3(b), calls for the amendment of the TRIPs Agreement so as to require patent applicants to: 1) disclose the source/origin of GRs used in an invention and 2) provide proof of prior informed consent of the providers and benefit sharing thereof (the disclosure requirements).[366] However, the obligation under the ABS Law is only to 'recognize' as origin the locality from where the GRs were accessed and does not extend to the other elements of the 'disclosure requirements' which are being discussed at the TRIPS Council of the WTO. It is also interesting to note that the ABS Law requires recognition not just of the country but also of the locality wherefrom the GRs were accessed. This requirement is the invention of the Ethiopian regulatory regime.

3.4. Relation with the Plant Variety Protection and the Patent Laws

One of the requirements for the grant of plant breeders' rights (PBRs) as stated in the Proclamation to Provide for Plant Breeders' Right[367] (hereinafter the PBR Law) is that the breeder has to prove that he/she has obtained the GRs used to develop the variety in accordance with the

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[365] Ibid, Article 17.14.

[366] See proposals from different Members in the WTO documents from the African Group, IP/C/W/404, IP/C/M/40; Andean Community, IP/C/M/37/Add.1; Brazil, IP/C/W/228, IP/C/M/46, IP/C/M/42, IP/C/M/39, IP/C/M/38, IP/C/M/37/Add.1, IP/C/M/36/Add.1, IP/C/M/33, IP/C/M/32, IP/C/M/29; IP/C/M/28, IP/C/M/27; Brazil and other developing countries, IP/C/W/403, IP/C/W/429/Rev.1, IP/C/W/356; China, IP/C/M/47, IP/C/M/37/Add.1, IP/C/M/36/Add.1; Colombia, IP/C/M/46, IP/C/M/42, IP/C/M/40, IP/C/M/38, IP/C/M/37/Add.1, IP/C/M/36/Add.1; Ecuador, IP/C/M/47, IP/C/M/25; India, IP/C/W/198, IP/C/W/195, IP/C/M/45, IP/C/M/42, IP/C/M/40, IP/C/M/36/Add.1, IP/C/M/30, IP/C/M/24; Indonesia, IP/C/M49, IP/C/M/47, IP/C/M/36/Add.1; Kenya, IP/C/M/47, IP/C/M/46, IP/C/M/42, IP/C/M/40, IP/C/M/37/Add.1, IP/C/M/36/Add.1, IP/C/M/28; Pakistan, IP/C/M/36/Add.1; Peru, IP/C/M/36/Add.1, IP/C/M/40; Thailand, IP/C/M/42, IP/C/M/25; Venezuela, IP/C/M/40, IP/C/M/36/Add.1, IP/C/M/32; Zimbabwe, IP/C/M/36/Add.1.

[367] A Proclamation to Provide for Plant Breeders' Right, Proclamation No.481/2005.

relevant laws on access to GRs.[368] Thus, proof of the fact that the GRs were accessed in accordance with the ABS Law is a condition for the grant of the right of a plant breeder.

This obligation needs to be analyzed under different scenarios. To begin with, the PBR applicant may not have accessed and used Ethiopian GRs at all in which case he/she need not prove anything except a mere declaration to that effect. As noted earlier, the requirement, as it stands now, does not apply in cases where the GRs of the country were not used in the development of the new plant variety on which a PBR is claimed.

On the other hand, the PBR applicants might have accessed and used Ethiopian GRs through different ways. First, the resources could have been accessed from within Ethiopia, either from *in situ* or *ex situ* sources. As discussed, access to these resources is dependent upon PIC of the Institute. The PBR Law states that the applicant should prove that he/she has obtained the GRs used to develop the variety in accordance with the relevant laws on access to GRs.[369] A person may access the GRs of Ethiopia only if he/she is in possession of a written access permit granted by the Institute[370] and it is this access permit that has to be presented as a proof that access was made in accordance with the ABS Law. The applicant is not required to prove that he/she actually obtained the PIC or fulfill benefit sharing obligations because under Article 12 of the ABS Law, PIC and benefits sharing are pre-conditions for the grant of the access permit and possession of the permit implies that the requirements for access were complied with.

Second, some of the GRs of Ethiopia might have been accessed in accordance with a multilateral system established by treaties to which Ethiopia is a party (such as the ITPGR) in which case the applicant should provide a proof to that effect possibly by presenting the material transfer agreement on such resources. As noted, the ABS Law does not have detailed rules on access based on the multilateral system. The specific requirements in such cases are yet to be determined by regulations to be issued under the ABS Law.

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[368] Ibid, Article 14(3).

[369] Ibid.

[370] The ABS Law, Article 11.

Third, GRs taken out of Ethiopia through different means and channels and preserved in the different *ex situ* collections might have been used in the development of the plant variety. While the CBD does not deal with GRs accessed before it came into force and there are no international rules governing such resources (except the ITPGR in relation to specific number of varieties), the ABS Law has already claimed sovereignty over such resources and the applicant should arguably present the same proof as those GRs accessed from inside the country. As noted, Ethiopia has contributed significantly to the germplasm collection at the CGIAR and it appears that the ABS Law extends the country's sovereignty over such resources with the exception of the specific GRs included in the Multilateral System of access at the ITPGR. A breeder who has used such resources to develop a plant variety should present the same proof to the effect that access was made in accordance with the ABS Law of the country.

Failure to prove that GRs used in the development of the new plant variety were accessed in accordance with the ABS Law of the country would result in the right being denied.[371]

4. Ethiopia's Experience in ABS Agreements

In 2005, Ethiopia has successfully concluded what may be called the first ABS agreement for a duration of ten years, the *Agreement on Access to, and Benefit Sharing from Teff*[372] GRs (the *Teff* ABS Agreement) with the Health and Performance Food International bv., a Dutch Company(the Company).[373]

Under the *Teff* ABS Agreement, the Company is entitled to access and use *Teff* GRs specified in Annex 1 for the purpose of developing food and beverage products listed in Annex 3 to the agreement.[374] Furthermore, the Company is entitled to develop new *Teff* varieties suitable to its business.

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[371] The PBR Law, Article 22.

[372] *Teff* (*Eragrostis teff*) is a small cereal grain, closely resembling millet that is originated from and widely grown and used in Ethiopia to make *injera*, fermented, flat bread that is the most popular staple in the local diet. *Teff* is a major contributor to nutrition in the Ethiopian diet

[373] *Agreement on Access to, and benefit sharing from, Teff Genetic Resources*, concluded between the Institute of Biodiversity Conservation and Research (Provider), the Ethiopian Agricultural Research Organization and Health and Performance Food International bv., (the Company), signed on 5 April 2005.

[374] Ibid, Sections 4.1 and 4.2.

The Company has in turn agreed to acknowledge the fact that the *Teff* GRs it acquires or will acquire are of Ethiopian origin irrespective of their source.[375] The Company has also agreed to share benefits arising from the utilization of the GRs of *Teff* including upfront payment in lump sum, annual royalty of 30 percent of the net profit from sale of seeds of the *Teff* varieties, annual license fee, annual contribution (5 percent of its net profit which should not be less than 20,000 Euro per year) to a fund to be used for improving the living conditions of local communities and for developing *Teff* business in Ethiopia.[376]

In addition to the financial benefits, the Company has also agreed to share its research results especially the knowledge and technologies it may generate using *Teff* GRs (except when it constitutes undisclosed information) to the Ethiopian public research institutions as well as to involve Ethiopian scientists in its research.[377] The *Teff* ABS Agreement was made before the country had put in place its ABS regime. As the Agreement was concluded after the country had already become a party to the CBD, the dearth of specific national ABS regulations did not prevent it from making ABS Agreements. The *Teff* ABS Agreement was concluded following the basic tenets of ABS as encapsulated in the CBD and the Bonn Guidelines.[378]

More recently, Ethiopia has also concluded its second ABS Agreement, the *Agreement on Access to, and Benefit Sharing from Vernonia* with Vernique Biotech Ltd, a British Company. Vernonia (*vernonia galamensis*), a plant regarded for long as weed by Ethiopian farmers, produces an extraordinary oil- a potential source of epoxy compounds currently being produced from petrochemicals.[379] It has even been said that the plant has the potential to become 'the industrial soya bean of the 21st century.'[380] As the main elements of the two agreements are similar, the discussion in this section focuses on the *Teff* ABS Agreement.

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[375] Ibid, Section 3.3. Even if there is a dispute between Ethiopia and other countries in relation to the origin or the source of the GRs, the Company has the obligation of recognizing them as originated from Ethiopia even if the source might have been a different country.

[376] Ibid, Section 8.

[377] Ibid, Sections 8.6 and 8.7.

[378] Ibid, Sections 3.6 and 15.

[379] The Australian, "Ethiopian 'green chemical' plant could weed out polluting glue", 10 August 2006.

[380] Ibid.

Some observations could be made in relation to this agreement. First, as discussed, the Ethiopian ABS Law entitles communities to some rights in relation to ABS. But these community-friendly provisions have not been clearly articulated in the *Teff* ABS Agreement. While the PIC of the communities is not required for the purpose of access to GRs under the ABS Law, no single community was identified in the *Teff* ABS Agreement even for the purpose of benefit sharing. In the agreement the Company (applicant) has agreed to contribute 5 percent of its net profit to a fund which shall be used, among other things, for the purpose of improving the living conditions of 'the local farming communities'.[381] Given the difficulty in identifying a particular community, it is very likely that this general reference to communities will continue even in future agreements. This represents an important challenge to the implementation of the rights of the communities as envisaged in the CBD as well as in the national laws. Under such circumstances the government would likely continue to be the major or even the only player in ABS regulation in Ethiopia.

Second, as discussed, the provisions of the ABS Law dealing with IPRs are general and vague. On the other hand, the *Teff* ABS Agreement has come up with a clearer provision on IPRs. In the agreement, the issue of IPR was settled as follows: while the Company was prohibited from claiming IPR 'over the genetic resources of Teff' or 'any component of the genetic resources', plant variety rights could be obtained over *Teff* varieties to be developed by the company.[382] Thus, it clearly provides, unlike the ABS Law, what could be protected by IPRs and what could not be. As said, this makes the ABS transaction transparent and predictable. Similarly, while the ABS Law requires negotiation in the event of IPR claim relating to the accessed GRs, in the *Teff* ABS Agreement the issue of IPRs was determined at the time of the conclusion of the agreement where the Ethiopian Agricultural Research Organization (EARO), a public agricultural research institution, would be the co-owner of any IPRs on plant varieties the company would develop from the accessed *Teff* GRs.[383]

The *Teff* ABS Agreement provides that its provisions are to be interpreted in light of the provisions of the CBD and the Bonn Guidelines.[384] As noted, the

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[381] The *Teff* ABS Agreement, Section 8.4.
[382] Ibid, Section 5.
[383] Ibid, section 5.2.
[384] Ibid, Section 15.

CBD is just a framework agreement and does not obviously offer much help in interpreting the specific provisions of the agreement, especially in relation to IPRs. However, the Bonn Guidelines require clear and transparent policy on IPR issues and they are based on the understanding that IPR is the driving force behind benefit sharing.

Under the *Teff* ABS Agreement, it is one of the obligations of the Company to acknowledge, in all its publications and applications for the registration of *Teff* varieties and other IPRs over products derived from the *Teff* GRs that Ethiopia is the country of origin of *Teff*.[385] Again the Agreement requires acknowledgment of Ethiopia as origin of the resource unlike the ABS Law that requires recognition of the locality from where the resources were accessed. The requirement in the *Teff* Agreement is to 'acknowledge' and not limited to IPR applications but applies even in case of publications relating to the accessed GRs.

Third, the ABS Agreement clearly shows that most of the monetary benefits are dependent on the profits the companies (the users) make from the commercialization of the products from the accessed GRs. Whether the country will actually get the financial benefits is uncertain. Financial benefits from ABS agreements are unpredictable and any over-expectation in this regard is unwarranted. Needless to say, most of the commercialization of the products derived from the GRs and their IPR protection will take place outside the country, and Ethiopia does not have the capacity to follow up the commercial exploitation of the products or their IPR protection outside its borders.[386] To that extent, whatever benefit may accrue depends on the goodwill of the users of the resources, in this particular case, the Company. ABS agreements should rather pay more attention to non-financial benefits such as research capacity building which are more feasible and predictable because they are immediate and do not depend on the companies making profit.

Fourth, one of the major weaknesses of the ABS Agreements is that they fail to create the necessary relationship and synergy with the international agreements dealing with ABS issues to which the country is a party, and

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[385] Ibid, Section 8.11.

[386] The *Teff* ABS Agreement has provided for monitoring and follow-up mechanisms (section 16) but these mechanisms are largely based on the reports to be submitted by the Company. The provider is entitled to review the bookkeeping as well as the relevant administrative details through an independent accountant but how far this would be implemented on a regular basis is not clear.

other relevant laws of the country. The 'applicable laws' specifically stated in the *Teff* ABS Agreement, for example, are the CBD, the ITPGR, the Bonn Guidelines, COP Decisions and the International Convention for the Protection of New Varieties of Plants (UPOV Convention).[387] This raises different issues. To begin with, it is not clear why the provisions of the UPOV Convention should at all be applicable even to interpret the Agreement while the country has refrained deliberately from adopting it. This may raise an issue of a constitutional nature as it involves the application of an international treaty not ratified by the parliament. Furthermore, the relevance of the ITPGR whose *modus operandi* is underpinned by a multilateral system of access to a limited number of GRs, as opposed to the ABS Law with its bilateral approach, remains unclear.

5. Critical evaluation of the ABS regulatory regime: Research and Innovation at Risk?

The idea of private ownership of knowledge is alien to the Ethiopian communities where the tradition is sharing, and exchange of information. This is done because it is the only way for their survival. An Ethiopian commentator noted that communities in Ethiopia do not really appreciate the need for regulation of access to GRs as the system they are used to is based on the exchange and open access to genetic material and farmers are always amused to hear that some of their local varieties collected and claimed to be improved to some extent, might get legal protection ensuring exclusive rights to the IP holders.[388] Now Ethiopia is confronted with the challenges of how to reconcile the values, traditions and customs of its communities which are basically open and free, with the ever encroaching global economic regulation which is based on privatization of knowledge and information.

At a broad and strategic level, therefore, the ABS law in Ethiopia is a response to this trend and is informed by the North/South debate related to the historical problems associated with flow of GRs and their commercial

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[387] The *Teff* ABS Agreement, Section 15. The International Convention for the Protection of New Varieties of Plants of December 2, 1961 as revised on November 10, 1972, on October 23 1978 and on March 19, 1991. UPOV is the French acronym for the French name of the UPOV, *L'Union internationale pour la protection des obtentions végétales.*

[388] Damena, W., (2003), 'Access to Genetic Resources in Ethiopia', in K. Nandozie etal. (eds), African Perspectives on Genetic Resources: A handbook of Laws, Policies and Institutions, Environmental Law Institute, Washington, DC.

exploitation by private entities without compensation. The political and ideological debate surrounding GRs has obviously shaped the law.

Indeed, in view of the current global environment which does not allow free access and sharing of GRs the only option left to countries like Ethiopia is to regulate access and flow of the resources. The issue is not thus whether Ethiopia should regulate access to its GRs; it is rather how to regulate it. The experience so far suggests that a strict state controlled access and benefit sharing regime may not necessarily be the answer. The implications of a stringent regulatory regime on other equally important considerations such as research and development need to be considered carefully.

Ethiopia, which perceives itself as rich in biological diversity, may hope to earn profit or make economic gains from its GRs. Even if the priority of the government is poverty alleviation and all the policies and strategies should ultimately reflect this policy direction, expectations of direct financial benefits to be used for poverty alleviation should not be overstated. There is no evidence that even in the so-called megadiverse countries, where more access to GRs has been made for commercial purposes, bioprospecting played a major role in poverty alleviation or economic development even if one may still argue that it is too early to make conclusions at this stage. A research in the area notes, " there is little evidence to date of major benefits being derived in the form of royalties and milestone payments, and it seems that in-kind benefits such as research capacity and building scientific infrastructure will have the most potential both now and in the future."[389] What did Ethiopia get from the *Teff* agreement in terms of direct financial benefits? Not yet except perhaps a license fee. Other financial benefits such as royalties are yet to come in the future but are not certain to come. There is, therefore, a need to develop a more strategic approach to ABS in Ethiopia.

Bioprospecting may still help to alleviate poverty in other ways. Effective regulations on access to GRs may contribute to poverty reduction by creating the basis for leveraging capacity building and transfer of technology through collaborative research such as by allowing access to new plant varieties with important qualities to improve the productivity of

389. K. Nandozie etal. (eds) (2003), African Perspectives on Genetic Resources: A handbook of Laws, Policies and Institutions, Environmental Law Institute, Washington, DC.

agriculture thereby improving the livelihood of poor farmers. Capturing non-monetary benefits may actually be more easily negotiated than the more elusive negotiation for securing monetary benefits which may not be of much significance in most cases. In fact, developing the country's capacity to build its own scientific infrastructure and research capacity through collaborative research using its GRs as a bargaining chip would ultimately ensure the acquisition of more significant benefits from access to the nation's GRs by adding value on the resources.

One important concern regarding stringent requirements on access to GRs is how far these affects research and development. The ABS law stipulates that the Institute of Biodiversity may provide facilitated access for certain group of applicants. Such a permit is to be issued for the benefit of three kinds of applicants: public research institutions, higher learning institutions and intergovernmental institutions based in the country. The permit is ,thus, to be given for institutions rather than individuals even if the purpose is research. For example, such permits are not available to Ethiopians studying abroad who want to access GRs for research purpose- they have to go through the standard access procedures unless they are affiliated to public research institutions or higher learning research institutions. This may affect research negatively. Also absent in this exception are the NGOs. These organizations could play an important role by preserving GRs and doing research on GRs for the benefit of farmers and communities. It is not clear why they are not included in the special access procedure.

There could also be cases where the public research institutions and the universities engage in research jointly with private institutes. In all such cases the special permit will not be applicable. This permit does not also apply to foreign research institutes and higher learning institutions. While it is understandable that such foreign institutions could be driven by private commercial interests, foreign non-commercial institutions are not exempted from the strict access requirement. This blanket exclusion of foreign institutions may have a negative impact on scientific research and exchange of information. At least, the special permit should have been applicable to joint research projects between Ethiopian research institutions and foreign counterparts. These joint programs not only allow control and supervision over the resources, they also allow for capacity building for local research institutions and facilitate transfer of technology.

As noted, the exception for facilitated access does not apply to international research institutes such as the CGIAR even if the purpose is research and

development. The CGIAR has been operating under the principle of free flow of resources and information associated therewith. Ethiopia has contributed a lot to this research system and in a way contributed to the international agricultural research and improvement of crops for food security though the Green Revolution spearheaded by the CGIAR though that had not significantly changed the food security problem of the country. In view of the fact that the CGIAR system has over 40 per cent of accession on food crops, the cost-benefit analysis of limiting access to the system should be worked out carefully. It is also true that Ethiopia is not "self-sufficient" in all its needs for GRs and it still needs resources and knowledge from other countries and research institutes. Nevertheless, the access law seems to give emphasis on the country as provider of GRs not as a recipient of the resources. Of course, given the fact that the resources collected under the free access era are being appropriated by private parties and controversy is already raging as to the status of the already collected resources, Ethiopia may have genuine concerns on providing free access to more resources. In the face of increasingly dominant private power and appropriation of GRs through IPRs, Ethiopia has no option but to regulate the access to its GRs. But again the major issue is as to how to balance the different interests so that regulation would not have undesired consequences. In any case, the law doses not lay down the conditions for facilitated access to GRs. The conditions of such facilitated access and the obligations to be assumed by the applicant are to be determined by the Institute as appropriate. This wide discretion without guidance may put the researchers at the mercy of the bureaucracy and is open to red tape and abuse.

It is important to note that despite the community friendly provisions of the ABS Law, the outcome may result in centralization of the power of the government. Communities have actually limited rights in GR governance. They do not have the right to give their PIC for access to their GRs; nor do they have a direct right of benefit sharing. The government determines how the communities utilize their share of the benefits. The law has granted significant power to the government while limiting the rights of communities.

It seems strange that the ABS Law, while standing on the premise that communities have been responsible for the conservation and preservation of GRs and consistently referring the GRs as 'their[communities'] resources', failed to grant them the right to say no to access to 'their' resources. Nevertheless, the issue of securing the PIC of communities is

challenging since it involves issues like defining the relevant community, the issue of representation, etc. Several cases indeed show the difficulty in obtaining PIC of communities. The problem in getting PIC from the Indian Kani tribal community and from the South African San people are good examples here. Thus, while requiring the PIC of the communities for access to GRs appears a logical outcome of the premises on which the ABS Law stands, the absence of the requirement makes the access procedure easier since securing the PIC of communities is obviously a complex task. The experience shows that communities have not had any say in the ABS agreements and the whole business was undertaken by the government and the companies concerned. But there should be a mechanism in place ensuring participation of the communities in the ABS decision making process as they are the first to be affected positively or negatively by the whole system.

Lastly, the law should be intended both to regulate and facilitate access and should not prohibitively be restrictive. Excessive regulation may increase transaction costs and discourage use of GRs. Clear and well thought-out policy objectives that articulate priorities, strategies and required incentives on access to GRs could help in addressing the country's need to boost its national capacity in research and innovation of its rich GRs and greatly contribute to poverty alleviation and food security objectives.

Conclusion

The analysis in this article has led to the following findings. First, the expectation for benefit sharing appears to be exaggerated and financial benefits are uncertain to accrue. The amount of the financial benefits from ABS even if they accrue is quite limited to contribute to poverty alleviation and economic development in a meaningful way. The focus should rather be on the use of access to GRs as a bargaining chip for technology transfer and capacity building which would contribute more to poverty alleviation and economic development than the financial benefits. Second, with the expectation of benefits, the regulatory regime puts stringent and unpredictable requirements on access to GRs for the purpose of research and development. The authors argue that the cost-benefit analysis of such a requirement for research and development has to be worked out. In this regard, it is worth emphasizing that there should be a clear, transparent and simplified access for research both by local and international research institutions to promote facilitated access for research and development. Third, the regulatory regime seeks to empower communities in the whole business of ABS. Nonetheless, much of what has been said about

communities remains at the level of rhetoric. This is so because local communities have only very limited power in the business while the government monopolizes almost all the decision-making power. It is clear that a mechanism has to be put in place to enable communities to participate and play a greater role in the decision making process.

Criminalization and Punishment of Inchoate Conducts and Criminal Participation: The Case of Ethiopian Anti-Terrorism Law

Wondwossen Demissie Kassa*

Introduction

Ethiopia has been a victim of terrorist acts for over a decade. These acts include attempted assassinations on the Egyptian President and the Minster of Transportation and Communication of the Federal Democratic Republic of Ethiopia, and bombings in hotels and public transportation. Convinced that the ordinary penal legislation and procedural laws in place are not adequate to effectively deal with cases of terrorism[390], the House of Peoples' Representatives adopted a special law[391] in August 2009.

The law deals with substantive and procedural matters. The substantive part, *inter alia*, criminalizes different conducts (steps) in a criminal process towards the commission of a terrorist act. Other than actual perpetration of a terrorist act, the law prohibits planning, preparation, conspiracy and attempt to commit a terrorist act. Similar punishment is prescribed for all these conducts. Furthermore, the law proscribes participation in a secondary capacity in the commission of a terrorist act. Participations in the form of incitement, assistance before, during or after the commission of the terrorist act are prohibited.

This article treats selected issues relating to the substantive part of the Ethiopian Anti- Terrorism Law.[392] Its first part, after a brief discussion on relevant provisions of the law that criminalize the above referred conducts, assesses the aptness of their criminalization in light of different criminal law theories. It explores different concerns arising from innocuousness, equivocality and remoteness of the conducts. The second part evaluates the

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[390] 3rd and 4th paragraphs of the preamble part of the Proclamation on Anti-Terrorism (Proc. No. 652/2009)

[391] For a survey of other governments which have passed special laws on terrorism refer to C. Lumina, "Counter-terrorism legislation and the protection of human rights: A Survey of Selected International Practice, Afr. Hum. Rts. L.J. Vol. 7 (2007), pp.35—68.

[392] On the procedural and evidentiary aspects of the law refer to: Wondwossen Demissie, 'Reflective Analysis of Procedural and Evidentiary Aspects of the Ethiopian Anti-Terrorism Law' in Wondwossen Demissie (ed.), Human Rights in Criminal Proceedings: Normative and Practical Aspects: Ethiopian Human Rights Law Series Vol. III (2009), pp. 42-111.

equitability of the punishments prescribed for these conducts in light of different criminal law theories focusing on the doctrine of proportionality.

The article concludes that it is neither appropriate nor supported by major criminal law theories for the Ethiopian Anti-Terrorism Law to criminalize inchoate conducts (other than attempt) and unsuccessful instigation and assistance. Subjecting these conducts to punishment as severe as applicable to completed crime is found to be another problematic area of the law. If, in view of the special nature of terrorism, criminal law has to intervene before attempt stage is reached, the paper recommends a system of preventive detention in place of punishment. This system, if properly regulated, by allowing the government to step in at the earliest possible time, can ensure prevention of commission of a terrorist act without unjustifiably subjecting the 'suspects' of inchoate conducts to punishment.

I. Criminalization

1. Inchoate Conducts

Carrara's definition of 'crime' has influenced the Ethiopian criminal law.[393] Carrara defines crime as "the violation of legal prescription, resulting from human behavior, whether positive or negative, which is prohibited under the pain of a criminal sanction."[394] This definition has three elements, viz., legal, material and moral ingredients.[395]

Many activities may be carried out before an offence is fully consummated. Joshua Dressler succinctly describes the criminal process as follows.[396]

> When a person intentionally commits a crime, it is the result of a six stage process. First, the actor conceives the idea of committing a crime. Second she evaluates the idea, in order to determine whether she should proceed. Third, she fully forms the intention to go forward. Fourth, she prepares to commit the crime, for example, by obtaining any instruments

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[393] P. Graven, An Introduction to Ethiopian Penal Law, (1965), p.57. Graven is referring to Article 23 of the 1957 Penal Code which defined a crime and listed down its elements. This is valid for the definition of crime under Article 23 of the 2004 Criminal Code as well for this provision does not have a significant difference from its predecessor.

[394] Ibid.

[395] Id. pp.57-59

[396] J. Dressler, Understanding Criminal Law (3rd ed., 2001), P.373

> necessary for its commission. Fifth, she commences commission of the offence. Sixth, she completes her actions, thereby achieving her immediate criminal goal.

These six steps in the criminal process can be grouped into two categories: internal and external phases. The first three, which fall under the internal phase, are merely intellectual activities. The actor starts to think about the commission of a crime, evaluates the idea of committing the crime and decides to go forward and commit the crime. In the other three steps, which are in the external phase, the doer progressively manifests his thought by overt acts.[397] It is at the third stage that the actor forms the necessary *mens rea* to commit a crime. Activities that come after the formation of the *mens rea,* which are intended to facilitate the commission of the targeted offence, but short of attainment of the criminal goal are referred as inchoate conducts.[398] They include preparation, attempt, and conspiracy.[399]

There is no consensus at what stage in the criminal process should the police intervene.[400] On the one hand, there is a need for prevention of consummation of a crime which calls for early intervention in the criminal process. On the other hand, there is a risk that such license to the police would be detrimental to the interest of innocent persons. Joshua Dressler indicated the conflicting interests at stake as follows.[401]

> The earlier the police intervene to arrest for inchoate conduct, the greater the risk that suspicious looking, but innocent, conduct will be punished, or that a person with a less than fully formed criminal intent will be arrested before she has had the opportunity to reconsider and voluntarily desist. On

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[397] Normally, the first three steps are not seen as criminal conducts and hence not punishable for the person's thoughts are not yet externally manifested. Also, punishing the 4th stage is not common. There is more or less a consensus on criminalization and punishment of the fifth stage. Ibid.

[398] These are also known as imperfect or incomplete conducts. (Ibid). The proximity of one inchoate conduct to the commission of the actual crime differs from that of the other. As will be explained below, the more remote the conduct from the actual crime the less it is within the ambit/realm of criminal law.

[399] Solicitation is also treated as one of the inchoate conducts. But for the purpose of this material it is treated as a form of participation in an offence.

[400] Remoteness and equivocality of preparatory acts made most Criminal Codes not to declare preparatory acts as being unlawful and punishable. P. Graven, cited above at note 4, p.69.

[401] Dressler, cited above at note 7, p. 374.

> the other hand, the longer the law requires police officers to abstain from intervention, the greater the risk that an actor will successfully complete an offence.

The Ethiopian Anti-terrorism Proclamation[402] (hereinafter the Proclamation or the Anti-terrorism law), authorizes arrest of persons who have reached at the third stage in the process of committing a terrorist act (planning stage). [403] Article 4 of the Anti-terrorism law criminalizes incomplete conducts as follows:

> Whosoever plans, prepares, conspires or attempts to commit any of the terrorist acts stipulated under sub articles (1) to (6) of Article 3 of this Proclamation is punishable in accordance with the penalty provided for under the same Article.

A definition for what constitutes planning is provided nowhere in the Proclamation. Ordinarily, to plan to commit a crime is to decide to commit a crime and to devise how to proceed so as to achieve a criminal goal. It is merely a mental exercise not manifested by external conducts. It refers to the third step in the criminal process where the person merely forms a *mens rea*.[404]

Once a person decides to commit a crime and designs how to go about it, the next step is to make the necessary preparations to realize the plan. Preparatory acts signify the transition from the internal to the external phase in carrying out a crime. Preparations are said to be made where the perpetrator takes "such steps as are, objectively or according to his estimation, necessary to ensure the offence can be committed ..."[405]

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[402] The Proclamation can be cited as the "Anti-Terrorism Proclamation No. 652/2009"

[403] Article 27 of both the 2004 Criminal Code and the 1957 Penal Code criminalizes one's intentional conduct when he reaches at the fifth stage (attempt) in the criminal path. Article 26 of both Codes provides: "Acts which are committed to prepare or make possible a crime, —, are not usually punishable—." Preparatory acts are punishable only in exceptionally specified cases. See for example Article 254 of the Penal Code and Article 256(b) of the Criminal Code. Though the caption of Article 274 of the Criminal Code seems to criminalize preparatory acts, its content does not. Articles 257(b) and 274(b) of the Criminal Code criminalizes planning stage of crimes against the State and the law of nations respectively. So do Articles 254 and 269(b) of the 1957 Penal Code.

[404] That 'planning' refers to a distinct conduct that comes before preparation in the criminal process can be inferred from the fact that the law puts the two (planning and preparation) distinctly as separate punishable conducts.

[405] Graven, cited above at note 4, p.67.

A criminal attempt—the fifth stage in the criminal process—refers to an act that constitutes a substantial step towards the commission of the targeted offence. A person is said to have attempted to commit a crime where he begins to commit the crime. As there is an overt act in both attempt and preparation (as opposed to planning) and as the two are steps in a continuum, it may be difficult to draw a clear line between preparation and attempt. By reasoning *acontrario* from the *Expose des Motifs* ,[406] Philippe Graven derived the following principles to make distinction between the two steps in the process of commission of crime:[407]

> There is no attempt unless an offence is in the course of being executed; an offence is not in the course of being executed unless the act done reveals not only the doer has a criminal intent, but also that he is determined to carry it out; the doer may not be deemed to have a criminal intent which he is determined to carry out unless he does something which is neither equivocal nor remote.

Conspiracy, another criminalized inchoate conduct, refers to an agreement between two or more persons to commit a crime.[408] It exists where there is unity of mind between or among the persons involved. Conspiracy, being merely an intellectual activity as is planning, falls in a criminal process, under the third stage where there is no overt act. However, some scholars argue that conspiracy is different from planning for there is more determination to commit the crime in the former.[409] Moreover,

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[406] Article 26 of the 1957 Penal Code provides that preparatory acts are, in principle, not punishable.

[407] Graven, cited above at note 4, p.70.

[408] Article 38 of the Criminal Code. By virtue of Article 36 of the Anti terror law, the Criminal Code provisions are applicable to the extent that they do not contravene with the proclamation.

[409] Archbold indicates that where several persons enter into agreement to commit a crime, their individual intention passes from being secrete intention to the overt act of mutual consultation and agreement. He is of the opinion that an engagement by two or more persons is conspiracy even if the conspirators do nothing in furtherance of the engagement. For him, "where two agree to carry it (the crime) into effect the very plot is an act itself." Archbold, quoted in Graven, cited above at note 4, p.108. For Graven, too, where there is conspiracy, the agreement of the persons involved is to be treated as an advancement of the intention of each. He described conspiracy as "a collective preparation for an offence." By so describing, he equates conspiracy with preparation

involvement of more than one person may for several reasons make conspiracy more dangerous than individual determination (planning) to commit a crime.[410] When seen from a different angle, the involvement of several persons in the planning of a crime can be a factor that militates against the successful execution of the plan. As noted by Goldstein: [411]

> it is as likely that conspiracies will frustrate as that they will promote crime: with more people involved, there is an enhanced risk that someone will leak information about the offense, turn against others, or try to convince colleagues to desist from their criminal endeavor.

Article 4 of the Proclamation criminalizes conspiracy to commit a terrorist act. The Proclamation does not say anything as to the effect of conspiracy where the conspirators succeeded in committing a terrorist act. Will they be charged for the conspiracy and for the terrorist act concurrently or will the conspiracy be subsumed under the substantive crime? In the Criminal Code, unless conspiracy is an ingredient element of the committed crime, the conspirators will be charged concurrently for two crimes: conspiracy and the committed substantive crime.[412] The Proclamation does not

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stage of an offence which is closer than planning to the commission of the offence. Graven, cited above at note 4, p.109

[410] First "out of fear of co-conspirators, loyalty to them, or enhanced morale arising from the collective effort, a party to a conspiracy is less likely to abandon her criminal plans than if she were acting alone." Second "collectivism promotes efficiency through division of labor; group criminality makes the attainment of more elaborate crimes possible." Dressler, cited above at note 7, p.425, note 17. As is indicated in one U.S. Supreme Court case, "the strength, opportunities, and resources of many are obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer." Dressler, cited above at note 7, p.425, note15.

[411] Abraham S. Goldstein, "Conspiracy to Defraud the United States," Yale L. J. Vol. 68 (1959), P.414 quoted in Dressler cited above at note 7, P. 425, note 18.

[412] Graven, cited above at note 4, p.110. Conspiracy, under the Criminal Code, is relevant in two ways. Firstly, By virtue of Article 84(1) (d) of the Code, it serves as a ground to aggravate punishment, which is so where the targeted offence is committed. In such cases, the offenders are basically to be punished for the offence committed. That the crime is a result of conspiracy would be considered as an aggravating circumstance while the punishment is calculated. Secondly, it is treated as a crime in and by itself, which is the case where the targeted offence is not committed. Legal provisions that punish conspiracy can be categorized into two: those laws that punish conspiracy to commit specifically listed offences and that which punish conspiracy in general. To the first belong Articles 257, 274 and 300 of the 2004 Criminal Code. It is only under Article 300 that mere conspiracy –agreement to commit a crime (without

expressly indicate that conspiracy is an element of the crime of a terrorist act. But for an act to be a terrorist act, as can be understood from the definition under Article 3 of the Proclamation, *inter alia*, it is required that the actor does any of the acts listed there under, with an intention to advance *" political, religious or ideological cause."* It is not common for an individual, without being a supporter or member of a certain group, to have a desire to advance the aforementioned causes. In view of the fact that conspiracy is normally a permanent, though tacit, element of a terrorist act, it would not be right to punish the doer for both the conspiracy and the substantive terrorist act.

2. Participation

Crime can be committed by one or several persons. Where several persons are involved in the commission of a crime, they may be primary or secondary participants depending on their degree of participation.[413] This section is concerned with secondary participation in the commission of a terrorist act: incitement[414] and complicity and a related but different type of involvement in the commission of the crime, namely accessory after the fact.

2.1 Incitement

The Proclamation criminalizes and punishes incitement to commit a terrorist act. The way crime of incitement is treated in the Proclamation is different from that of the Criminal Code. The cumulative reading of Article 2(6)[415] and Article 4 of the Proclamation indicates that, unlike in the

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more) is punishable. In the other two, there should be something more– formation of a band or group with the object of committing the crimes referred there under. The second category constitutes Article 478 of the Criminal Code which criminalizes conspiracy for the purpose of preparing or committing crimes against public safety or his health, the person or property, or persuades another to join such conspiracy provided that the offences are punishable with rigorous imprisonment for five years or more.

[413] See in general Graven, cited above at note 4, pp. 93-108.

[414] It is also referred as solicitation or instigation. Generally it refers to an intentional invitation, request, command, or encouragement of another to engage in a crime. The invitation, request, command or encouragement is considered as an *actus reus* of the crime of incitement and the specific intent that the other party consummate the solicited crime is the *mens rea*. Dressler, cited above at note 7, p.415-416

[415] Article 2(6) provides: " "incitement" means to induce another person by persuasion, promises, money, gifts, threats or otherwise to commit an act of terrorism even if the incited offence is not attempted"

Criminal Code[416], inciting another to commit a terrorist act is punishable even where the terrorist act is not attempted. Whether incitement, as defined under the Proclamation, requires the incited person (at least) to have agree and decide to commit the crime or that mere inducement on the part of the instigator suffices is not clear.[417]

Article 2(6) of the Proclamation, unlike the corresponding provision in the Criminal Code, does not expressly require that incitement be intentional. Though unclear, this should not be construed as criminalizing incitement committed by negligence. [418]

2.2.. Complicity

In criminal law, any sort of assistance provided to the perpetrator before or during the commission of a crime is treated as complicity. An assistance, to be considered as complicity in the commission of a crime must have been

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[416] As can be inferred from the reading of Article 36(1) and (2) of the 2004 Criminal Code it is one thing to be guilty of crime of instigation and it is another to be liable to punishment for having instigated the commission of crime. Same is true under Article 35(1) of the 1957 Penal Code. In both Codes, to say that incitement takes place, there is no need to establish the fact that the incited person has attempted to or committed the intended offence. (The Amharic version of Article 35 of the 1957 Penal Code, however, requires that the instigated person is made to have committed the incited offence.) Without prejudice to the exceptions where an instigator is subject to punishment without the principal offence being attempted or committed, it is only where the targeted offence is at least attempted that punishment would be due to the instigator. Articles 274 and 480 of the Criminal Code criminalize mere public provocation of others to do wrongs. Moreover, soliciting individuals to engage in criminal activities is criminalized under Articles 301, 332 and 350 of the Criminal Code.

[417] As all inducements constituting incitement are punishable under the Proclamation, as opposed to in the Criminal Code, whether mere inducement, without successfully convincing the instigated person to agree and decide to commit the crime, constitutes incitement or not has a practical significance. Philippe Graven interpreted 'incitement,' as defined under Article 35 of the 1957 Penal Code, as requiring a causal relation between the inducement and what the instigated person decides to do. For him, "there is no instigation unless one causes another to take the decision to commit an offence." Graven emphasizes on the fact that the instigated person being induced or persuaded by the instigator and determined/decided to commit the crime than the actual attempt or commission of the crime. For Graven, making the instigated person to be committed to carry out the crime is critical to determine whether or not instigation exists. Graven, cited above at note 4, p.100

[418] By virtue of Article 59(2) of the Criminal Code, which is applicable to terrorism cases pursuant to Article 36 (2) of the Proclamation, crimes committed by negligence are punishable only where there is an express provision to that effect.

given knowingly.[419] In the words of Philippe Graven, a person is an accomplice only in so far as he is aware that he is assisting the principal actor in the commission of the crime and he does it with an intention to assist; if assistance is provided by negligence there is no complicity.[420] For the accomplice to be punished, the crime for the commission of which he extended assistance should be committed or at least attempted.[421]

The Proclamation criminalizes assistance provided before the commission of a terrorist act as an independent principal offence.[422] This approach has resulted in three interrelated consequences which would not have ensued had these acts been treated as assistance. First, he who does any of the acts listed under Article 5 of the Proclamation, which are meant to facilitate the commission of a terrorist act, is subjected to a criminal proceeding and punishment even where the principal terrorist act is not committed or attempted. Second, engaging in such acts negligently is treated as a criminal conduct. Third, the punishment prescribed for these acts, as opposed to normal case of principal-accomplice relation, is different from the punishment for a principal terrorist act. Treating assistance to commission of a terrorist act leniently, though a departure from a commonly accepted treatment accorded to accomplices and principal offenders, rightly responds to the criticism made in connection with the equal treatment of unequals in the criminal process. According to critics, making one whose participation in an offence is substantial (the principal actor) and one whose involvement is not equally significant (the assistance provider) subject to

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[419] An intention to aid the primary party to commit the offence charged is broken down into "dual intents' (1) the intent to assist the primary party; and (2) the intent that the primary party commit the offence charged. People v. Burns, 242 Cal. Rptr. 573,577 (Ct. App.1987).

[420] Graven, cited above at note 4, p.105.

[421] These features of complicity are incorporated under Article 37 of the Criminal Code and Article 36 of the 1957 Penal Code.

[422] Article 5 (1) of the Proclamation provides: " Whosoever knowingly or having reason to know that his deed has the effect of supporting the commission of a terrorist act or a terrorist organization:

a) Provides, prepares or gives forged or falsified document;
b) Provides a skill, expertise or moral support or gives advice;
c) Provides, collects or makes available any property in any manner
d) Provides or makes available monetary, financial or other related services;
e) Provides or makes available any explosive, dynamite, inflammable substances, firearms or other lethal weapons or poisonous substances; or
f) Provides any training or instruction or directive;

is punishable with rigorous imprisonment from 10 to 15 years."

the same punishment is inconsistent with the retributive principle of just deserts.[423]

The Proclamation is silent about assistances, other than those listed under Article 5, which may be given before or during the commission of the crime. By virtue of Article 36(2) of the Proclamation, these cases are treated in accordance with Article 37 of the Criminal Code where none of the above three consequences would ensue.

2.3. Accessory after the fact

Ordinarily, an accessory after the fact is one who, with knowledge of another's guilt, intentionally assists the perpetrator of a crime to avoid arrest, trial, or conviction.[424] As opposed to instigation and assistance where a secondary offender participates before or during the commission of a crime, in the case of accessory after the fact, the 'assistance', where there is any, to the perpetrator comes after the offence is committed or attempted. Strictly speaking an accessory after the fact does not participate in the commission of the main offence for he comes in to the picture after the crime has been committed. He commits a separate offence.

The Proclamation devotes couple of provisions to accessory after the fact in the context of crimes of terrorism.[425] Article 5(2) of the Proclamation[426] prohibits harboring, helping to escape or concealing someone who has committed a terrorist act. Article 9 of the Proclamation[427] prohibits possessing and dealing with proceeds of a terrorist act.[428]

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[423] Dressler, cited above at note 7, p.471.

[424] State v.Ward,396 A.2d at 1047 ibid, p.465.

[425] Under the Criminal Code there are three cases where one may be treated as an accessory after the fact and face punishment. The first is harboring and aiding an offender in order to save him from prosecution as provided under Article 445. The second one is hiding a convicted person to save him from serving the sentence as provided under Article 460. The third one, as provided under Article 682, is receiving property which has been obtained by a crime committed by another.

[426] Article 5(2) provides: "whosoever harbors or helps to escape or conceals someone whom he knows to have committed terrorist act mentioned under this Proclamation is punishable with rigorous imprisonment from 10 years to life.

[427] Article 9 provides: "whosoever knowingly or having reason to know that a property is a proceed of terrorist act acquires or possesses or owns or deals or converts or conceals or disguises the property is punishable, subject to the property being forfeited, with rigorous imprisonment from 5 to 15 years.

[428] As provided under Article 2(2) of the Proclamation "proceeds of terrorism" refers to "any property, including cash, derived or obtained from property traceable to a

3. Aptness of Criminalizing Inchoate Conducts and Participation

Many would agree that prevention of commission of crime is better than punishing the offender afterwards. Prevention is possible where the law allows the Police to step in at some stage in the criminal process but before the commission of a crime.[429] Apparently, Article 4 of the Proclamation, which criminalizes plans, preparations, conspiracies and attempts to commit a terrorist act, is aimed at prevention of crime. As rightly stated by Philippe Graven, "the need to prevent the commission of offences makes it impossible to wait until this behavior has borne fruit before the law can run its course".[430]

True, the law that criminalizes inchoate acts, by allowing the government to act before the offence is fully consummated, increases the chance of preventing terrorist acts from being committed. However, giving such mandate to the police is risky for it may result in an unintended effect of violating the rights of those who have never thought about a terrorist act or those who may have thought about it but would, nonetheless, have dropped their thoughts.

Because planning is not manifested by external acts, it is not difficult to imagine the possibility of persons who have never thought of committing a terrorist act being wrongly apprehended and subjected to criminal proceedings. Similarly, the facts on the basis of which the Police suspect one of preparing to commit a terrorist act may be so equivocal that there is a chance of a wrong person being apprehended. [431] Moreover, because

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terrorist act, irrespective of a person in whose name such proceeds are standing or in whose possession or control they are found".

[429] In this connection Joshua Dressler indicated that "criminalizing inchoate offences would provide a basis for official police intervention in order to prevent the consummation of an offence." Dressler, cited above at note 7, P. 381.

[430] Graven, cited above at note 4, p.67.

[431] That is so because activities which are preparatory to commit a crime can as well be done for a perfectly lawful purpose. If, for instance, someone, having decided to commit a terrorist act, resolves to use a gun and buys the same to use for his purpose he is at the stage of preparation. However, gun may be bought for several purposes including lawful ones. It is the concerned person alone who knows exactly for what purpose he bought the gun. Buying a gun is therefore an equivocal activity. In so far as the only purpose of buying a gun is not a preparation for committing a terrorist act, there is a risk that he who buys a gun for a purpose unrelated to commission of a terrorist act may be apprehended and subjected to a criminal proceeding.

instigation, planning, preparation and conspiracy[432] to commit a terrorist act are remote from the commission of the substantive crime, there is a possibility of one who may have dropped the idea of committing the crime being apprehended.

Basically, the above mentioned difficulties are attributed to the fact that inchoate acts are remote and equivocal.[433] Remoteness and equivocality make proving the conducts and relating them with the substantive offence and the required degree of certainty difficult. Moreover, their remoteness makes inchoate acts innocuous. A brief discussion on how remoteness and equivocality of inchoate conducts militate against their criminalization follows.

3.1. Lack of social harm

Different authorities[434] agree on the central place of harm in criminal law. Social harm is so vital that Joshua Dressler described it to be the body—the linchpin—of the crime.[435] As inchoate acts do not normally hurt anyone, the harm requirement implies that such acts, being harmless[436], are beyond the

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[432] The agreement among conspirators to commit a crime which is treated as the "concrete" and "unambiguous" evidence of their dangerousness and culpability is said to be proved only inferentially. Even if the agreement is conclusively proved to exist, "the potential temporal remoteness of the agreement to the target offence increases the likelihood that some conspirators who would later renounce their intentions, for whose intentions were not strongly held when the agreement was formed, will be punished." Dressler, cited above at note 7, p.425.

[433] There is difference among inchoate conducts in terms of their proximity to the substantive crime and equivocality. For there is no overt act in cases of planning and conspiracy, the issue of equivocality, which is necessarily of acts, is not relevant for them. It is their remoteness from the substantive crime that is relevant. As will be explained below, the more remote and equivocal a conduct is the less within the realm of criminal law it will be.

[434] Albin Eser indicated social harm being an ingredient of the *actus reus* element of an offence. A. Eser, "The Principle of harm in the concept of crime: A comparative Analysis of the criminally protected Legal Interests," 4 Duq.L.Rev.345 (1965) p. 386. Joel Feinberg's 'harm principle' advocates that "the only good reason to subject persons to criminal punishment is to prevent them from wrongfully causing harm to others." J. Feinberg, "Harm to others, the moral limits of the Criminal law," in D. N. Husak, "The Nature and Justifiability of non consummate offences" 37 Ariz. L.Rev. (1995), p.156. According to Feinberg, "acts of harming are the direct objects of the criminal law." J. Feinberg, Harm to Others (1984).

[435] Dressler, cited above at note 7, p.109.

[436] Because it is a common knowledge that criminal laws punish attempt, one of the inchoate offences, some preferred to describe the aforementioned objection as 'absurd.'

reach of criminal law. The issue is not as simple as that, though. Opinions on the requirement of harm for criminalization in general and its relevance to inchoate conducts in particular are diverse.[437]

Proponents of the theory of retributivism [438] contend that punishment in the absence of social injury[439] is unjustified. It is where a person causes harm that he takes something from the society. Only then is a debt owed which gives rise to the society's entitlement to take something from him by means of punishment.[440] An opposing view comes from Utilitarianism[441] which contests the requirement of actual social harm for criminalizing a given conduct. So long as the actor's conduct threatens the society with injury, there is enough reason for punishment. For a utilitarian, harm should not be waited for to punish a conduct. It has to be avoided through deterring dangerous conducts by detaining dangerous people before they cause harm.[442] In support of this assertion, Douglas Husak stated that legislators

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Husak, cited above at note 45, p.159. Moreover, this 'no harm no crime' position seems to be objectionable in the light of the fact that some consummated criminal conducts may cause no injury in the ordinary sense of the term. Though driving while intoxicated, irrespective of its consequences, is a crime, it is hardly possible to see the injury arising from such conduct, if nobody is hurt and no property is damaged.

[437] For example John Austin stated: "generally attempts are perfectly innocuous, and the party is punished— in respect of what he intended to do." This is to say two things. First, there is no social harm when a crime is merely attempted. Second, because attempts, without causing social harm are punishable, infliction of punishment is not conditioned on social harm. J. Austin, "Lectures on Jurisprudence 523" in Dressler, cited above at note 7, P.378.

[438] For more on retributivism theory refer to Dressler, cited above at note 7, pp. 13-23 and pp.52-54.

[439] Some who are of the view that social harm is significant to condemn and punish a conduct construe 'social harm' broadly. In their view, society is wronged when an actor invades any socially recognized interest and diminishes its value. For instance, Albin Eser defines social harm as "the negation, endangering, or destruction of an individual, group or state interest which was deemed socially valuable." Eser, cited above at note 45, p. 217.This definition is said to be broad enough to meet the concern raised in connection with criminal conducts that do not cause actual injury but only jeopardizes a socially valued interest, like the case of drunk driving. Dressler, cited above at note 7, p.110.

[440] Dressler, cited above at note 7, p.109.

[441] For more on utilitarianism theory refer to Dressler, cited above at note 7, pp. 13-23 and 50-52

[442] Id., p.109.

pass criminal laws "not only to prevent conduct that causes actual harm, but also to prevent conduct that creates risk of harm."[443]

There are other competing theories[444] on the relevance of social harm to criminalization: subjectivism and objectivism. Subjectivism, in determining guilt, focuses on an actor's subjective state of mind (*mens rea*) to assess his dangerousness and bad character. According to this theory, conduct of the actor (*actus reus*) which may or may not bring about an injury should not be a determinant factor indicating whether or not the actor should be punished. It asserts that "the act of execution is important only so far as it verifies the firmness of the actor's intent."[445] It follows that an act, irrespective of its innocuousness, that clearly shows the actor's commitment to carry out a criminal plan is sufficient to justify punishment for an inchoate conduct. [446] As opposed to subjectivists, objectivists believe that an actor's conduct is punishable where its criminality is "objectively discernable at the time that it occurs."[447] In other words, "acts performed, without any reliance on the accompanying *mens rea* of the actor, must mark her --- conduct as criminal in nature."[448] It is where the conduct speaks for itself that the actor should be subject to punishment. The conduct's criminality would be so certain, for an objectivist, when the unconsummated offence causes social harm.[449]

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[443] He believes that the requirement of social harm for criminalizing a given conduct was developed with consummate offences in mind. Hence, he suggests a reformulation of the harm principle of criminal law so as to make it relevant to non consummate offences. He suggests the harm principle to be reformulated as "criminal liability is unjustified unless conduct harms or risks harm to others." Husak, cited above at note 45, pp.165, 159.

[444] These theories are developed in connection with criminalization of attempt, one of the inchoate offences. For the details on the theories see P. H. Robinson & J. M. Darley, "Objectivist versus Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory", 18 Oxford J. Legal Studies 409 (1998).

[445] Fletcher at 138, in Dressler, cited above at note 7, p.379.

[446] Dressler, cited above at note 7, p.379. This theory seems to require an overt act without which it is hardly possible to verify the firmness of the actor to pursue his plan to commit a crime.

[447] Fletcher, cited above at note 56, p.116, in Dressler, cited above at note 7 , p.379.

[448] United States v. Oviedo, 525 F.2d 881, 885(5th cir.1976).

[449] Harm may have different forms such as "disturbing social repose," Clark v. State, 8 S.W. 145, 147 (Tenn. 1888); "unnerving---the community," Fletcher at 144, in Dressler, cited above at note 7, p.379; or by causing apprehension, fear or alarm in the society because the actor has patently "set out to do serious damage --- and to break the accepted rules of social life." Thomas Weigend, "Why Lady Eldon Should be acquitted: The Social Harm in Attempting the Impossible", 27 DePaul L.Rev. 231 (1977).

Though for different reasons, all the foregoing theories support criminalizing criminal attempt, one of the inchoate conducts. Attempts are punishable, for subjectivists, on the basis of defendant's *mens rea*. Where an actor reaches at a stage which is beyond the point of no return (which signifies the attempt stage) he must have performed conducts that can reasonably show his intention to commit the crime and hence sufficient to justify punishment irrespective of occurrence of a harm. From an objectivist perspective, if the actor takes critical steps towards the commission of crime, which signifies attempt, there would be appreciable fear or alarm in the society that its rules are about to be violated (social harm) and the criminality of such conducts is objectively discernable in which case infliction of punishment is appropriate.

Similarly, proponents of utilitarianism and retributivism agree that punishing attempt is justified. For one group of retributivists (culpability-retributivists) one who reaches at the point of no return to commit a crime but failes to attain his goal is morally as culpable as another who succeeds in his endeavor. It would not be acceptable for the law to "allow the lucky attempter off, while it punishes the successful wrong doer."[450] For the other group of retributivists (Harm-retributivists) the attempter, by his actions, "disturbs the order of things ordained by law,"[451] thereby causing social harm, the restoration of which requires that he be punished. For utilitarians, even if the attempter does not succeed in his criminal endeavor, he represents an ongoing threat to the community. Punishment would incapacitate and thereby deter him from committing crime. Punishing him deters other potential criminals as well.[452]

It is hardly possible to justify punishment of plan, preparation, and conspiracy to commit terrorist act by the above theories[453]. At these stages,

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[450] The American Law Institute, comment to Article 5, at 294 in Dressler, cited above at note 7, p.382

[451] A. Ashworth, "Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law," 19 Rutgers L.J. (1988), pp. 724-725.

[452] A person, who thinks that he will avoid detection, apprehension and punishment if he successfully commits a crime but would be apprehended while attempting the crime for poor execution, may be deterred by punishment of attempts.

[453] For retributivists and objectivists social harm is a necessary element which does not exist in cases of inchoate acts. At the time one plans or more than one persons conspire to commit a terrorist act, their intention is not yet manifested by overt acts without which there cannot be a reasonable threat for the community that its rules are about to

unlike attempt, there is neither actual nor threat of harm. There is no actual harm for the crime is not consummated. There is no threat of harm for reasons related to temporal remoteness. George Fletcher's view on the matter is in order. For him, where a conduct is criminalized "the assumption is that a neutral third party observer could recognize the activity as criminal even if she had no special knowledge about the offender's intention."[454] As the fact that a terrorist act is to be committed cannot be objectively discerned from plans, preparations and conspiracy, the social harm that is said to be existent in attempts does not exist in such cases making them unsuitable for criminalization and punishment.

Douglas N. Husak, in an attempt to draw a distinction between justifiable and non justifiable non consummate offences, developed five requirements that should be met for the proscription of a conduct as non consummate offence to be justified.[455] According to one of the requirements– the *causal* requirement – a non consummate conduct, to be justifiably proscribed, should reasonably be appreciated as having created the risk of actual

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be breached. In the absence of externally manifested conduct, there is nothing from which criminality of the one who planned or those who agreed to commit a terrorist act is to be discerned. By the same token, when one prepares to commit a terrorist act, though he is closer to the anticipated offence as compared to the aforementioned two inchoate acts, his preparatory acts are not proximate enough to the offence so as to create alarm or fear in the community. Those inchoate acts do not make the society to feel that the concerned persons are moving towards the commission of a terrorist act. Even for utilitarians and subjectivists, who do not require actual social harm, infliction of punishment on he who plans, conspires or prepares for the commission of a terrorist act cannot be justified. Though, under both theories, social harm is not required for punishment, there should be dangerous conduct which threatens the society which is missing at the stages of planning, conspiracy and preparation. Short of such conduct, utilitarian theory does not support infliction of punishment. What is important, for subjectivists, is the actor's intention. In so far as the actor's intention to commit a terrorist act is verifiable, punishing the actor is justifiable even without existence of actual or risk of social harm. But, punishing the aforementioned unconsummated acts cannot be justified even under subjectivist theory for there is no overt act from which the intention and the firmness of the actor's intent can be verified.

[454] Fletcher, cited above at note 56, p.116, in Dressler, cited above at note 7, p.379.

[455] The five principles are: 1) consummate criminal harm requirement, 2) high culpability requirement, 3) causal requirement, 4) proximity requirement, and 5) persistence requirement. If a conduct is proscribed as a nonconsummate offence in the absence of any of these requirements, the proscription is unjustifiable in which case the state is said to have used its law making power illegitimately. Douglas N. Husak, "The Nature and Justifiability of Nonconsummate Offences," 37 Ariz. L. Rev.(1995), pp. 169-178

harm.[456] Though planning, conspiracy and preparation increase the likelihood that a terrorist act may be committed, it does not necessarily mean that there is a genuine risk[457] of commission of a terrorist act that calls for their proscription.[458]

Criminalizing and punishing unsuccessful[459] assistance and incitement is equally worrisome. As the Proclamation criminalizes and punishes mere incitement and assistance to the commission of a terrorist act, even where the principal offence is not committed or at least attempted, the punishment imposed in such cases is inflicted in the absence of social harm, making its fairness questionable. Inflicting as severe a punishment on such futile exercises as that where the terrorist act is fully consummated, as will be discussed in Section II below, in particular does not make sense.

3.2. Pragmatic Concerns

Criminalization of planning to commit a terrorist act is objectionable for two practical reasons. First, it is not practically possible to accurately know what is in a person's mind. As correctly pointed out by Goldstein the requirement of an act as a constituent element of an offence is "deeply rooted in skepticism about the ability---to know what passes through the minds of men."[460] Philippe Graven, in the following paragraph, expresses the possible risk of abuse if one were to be punished for his thoughts:[461]

> With a view to or generally under the guise of, safeguarding the alleged general interests, political, religious or others, action is taken against persons whose only mistake is or may be that they do not think along official lines, on the ground that they create a social danger and a menace to the

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[456] As actual harm occurs where the crime is consummated, there can only be risk of actual harm where there is risk of the offence being consummated.

[457] No genuine risk in the sense that there is wide chance for that plan not to be pursued

[458] Criminalizing attempt, where there is incontrovertible risk of actual harm, satisfies this requirement.

[459] Instigation or assistance is futile where, despite everything is done on the part of the instigator or provider of assistance, the substantive crime—terrorist act—is not even attempted.

[460] A. S. Goldstein, "Conspiracy to Defraud the United States", Yale L. J. vol.68 (1959), p. 405.

[461] Graven, cited above at note 4, p.67

community, and punishments are imposed only on the basis of suspicion.

On the other hand, for there is no way to show that a person has thought of committing a crime of terrorism except on those rare occasions where the offender declares his intention, it would be as good as providing a law which may be impossible to enforce. And it is difficult to see the good of providing for a law which undermines the enforcement capacity of the law enforcing agencies and which would ultimately become obsolete.

Second, even under the assumption that we could read a person's mind, there is still another practical reason that would make punishing thoughts objectionable. If thoughts were punishable, virtually all people, most of whom are law abiding, would have been subject to criminal law for they think of committing a crime at one time or another.[462] Criminal law is not to be used "to purify thoughts and perfect character." [463] As asserted by the U.S. Supreme Court, "the aim of the law (criminal) is not to punish sins, but is to prevent certain external results."[464] It is only those thoughts that would end up with the commission of the intended crime that are harmful and hence to be prevented ahead of time. Unfortunately, there is no way to distinguish "between desires of the day dream variety and fixed intentions that may pose a real threat to society."[465] In view of this difficulty, criminalization of planning would result in a high probability of punishing those who would not have pursued their thoughts to the end. Where, because of the difficulty in differentiating the injurious thoughts from desires of the day dream, there is a risk of apprehending and punishing wrong persons, the law should not criminalize such thoughts. As rightly stated by Blackstone, it is better that ten offenders escape than to make an innocent suffer.[466]

3.3. Lack of Logic/Fairness

Renouncing one's pursuit of criminal activity is a mitigating factor while assessing punishment. Depending on circumstances, there is a possibility

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[462] R. G. Singer and J. Q. La Fond, Criminal Law; Examples and Explanations, (2004), p.35

[463] United States v. Hollingsworth, 27 F.3d 1196, 1203 (7th Cir. 1994) (*en banc*) .

[464] Commonwealth v. Kennedy, 48 N.E. 770,770 (Mass.1897).

[465] Powell v. Texas, 392 U.S. 514, 543 (1968) (Black and Harlan, JJ. ,concurring).

[466] 4 William Blackstone, Commentaries on the Laws of England 358 (1765) in J. Dressler, Understanding Criminal Procedure, (3rd ed., 2002), p.30.

for he who renounces his criminal conduct to be free from punishment.[467] This is a clear recognition that there is a possibility of desisting from a criminal activity at any stage in the criminal process – planning, preparation, conspiracy or attempt. This is an approach consistent with the requirement that society must give each person some breathing space, i.e., the opportunity to choose to desist from wrongful activity.[468]

If one is apprehended at the stage of planning, preparation or conspiracy, he is being denied the opportunity to renounce his plan or decision and get acquittal or at least benefits from mitigation of punishment. As pointed out by Joshua Dressler "the earlier the police intervene to arrest for inchoate conduct, a person with a less than fully formed criminal intent will be arrested before she has had the opportunity to reconsider and voluntarily desist."[469] To the extent the law recognizes and rewards renunciation of criminal design, which can be done at any point in the criminal process, but at times it punishes, with no chance of mitigation, those who plan, prepare or conspire, without more, suffers from illogicality.[470]

3.4. Punishment not serving its purpose

There are two major theories on the purpose of punishment: utilitarian and retributivist. Utilitarianism is a consequentiality theory which advocates that "actions are morally right if, but only if, they result in desirable consequences."[471] This theory justifies punishment on the ground that its threat or actual infliction results in reduction of crime – deterrence function

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[467] Article 28 (1) of the Criminal Code of the Federal Democratic Republic of Ethiopia

[468] Dressler, cited above at note 7, p.83.

[469] Id. p.374.

[470] One who committed the crime intentionally might get a mitigated punishment than the one who is apprehended before the commission of the crime. That is so for Article 82(e) of the 2004 Criminal Code allows the court to reduce punishment where the one who commits the crime delivers himself to the authorities or when, on being charged, he pleads guilty. Ultimately, it would be a matter of chance that one is apprehended at earlier stage in the criminal process than the other which does not justify the harsh treatment of the former.

[471] There are two types of moral reasoning. The first one emphasizes on actions as means to good ends which is known as "teleological" or "consequentialist" view. Another form of moral reasoning which focuses on actions as ends in themselves is known as 'deontological" view which is essentially nonconsequentialist. To this approach belongs the other theory of punishment. Dressler, cited above at note 7, pp.13-14.

of punishment.[472] For a utilitarian, a person contemplating criminal activity will balance the expected benefits of his contemplation against its risks such as likelihood of successful completion of the crime, the risk of apprehension and conviction, and the severity of the possible punishment. Then he will avoid criminal activity if the perceived potential pain (punishment) outweighs the expected potential pleasure (criminal rewards).

Retributivist theory of punishment looks at actions as ends in themselves. This theory evaluates the action itself irrespective of its ultimate effects on others. For the retributivist, punishment is legitimately inflicted when it is deserved. In so far as, the criminal has committed a crime by his own free will, retributivists advocate, he has to be punished whether or not his punishment results in a reduction of crime.[473]

In view of the remoteness and equivocality of plans, preparations, and conspiracy, it is hardly possible to see how the deterrent or retributive purposes of punishment may be served by punishing such conducts. As has been shown earlier, their criminalization creates a room for apprehending and punishing the wrong persons[474]. Where wrong persons are punished neither retributive nor deterrent purpose of punishment would be served. To the contrary, punishment in such cases might be counterproductive. First, those who are wrongly subjected to punishment may develop a sense of revenge against the public. Second, if potential offenders know that the

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[472] Punishment is believed to serve its deterrence function in two ways, namely general deterrence and specific/individual deterrence. The first one, as its name implies, refers to cases where punishing a criminal passes a message to the general community to forego criminal conduct in the future. The idea is one's punishment teaches the community what conduct is impermissible; it instills fear of punishment in would be violator's of law. The specific deterrence function of punishment, the second way, refers to the fact that the criminal himself who is subjected to punishment and felt its pain will get lesson not to engage in criminal activities in the future.

[473] Dressler, cited above at note , p.13-14 and p.16.

[474] 'Wrong persons' here refer to those who have never thought of committing a terrorist act or those who might have thought but would have desisted from pursuing their thoughts. Had there been a means which would allow us to identify those who planned and prepared to commit a terrorist act that would pursue their plan to its end if not apprehended timely from those who would not, then having a law that allows the police to arrest the former category of persons would have been perfect to prevent commission of the intended crime and to deter others. But that is not humanely possible. It is only where the actor's conducts are closer to the commission of the crime that one can reasonably be certain about the actor's determination. This makes punishing inchoate conducts problematic.

system does not screen wrong doers from non wrongdoers, they will be encouraged to try their criminal thoughts. Such system may even tempt some innocent members of the community to think about committing a crime for they may feel that if one's innocence does not guarantee his freedom from arrest and perhaps from punishment, it is better to be punished after committing a crime. Also, the system may make people to be frightened away even from some of their legitimate endeavors to avoid the indiscriminate treatment of the system which is equally undesirable.

Punishment of plans in particular, is not likely to produce effect on the society as thoughts, unlike conduct, almost certainly cannot be deterred.[475] Even if the law that criminalizes inchoate conducts were to have a contribution in shaping citizens' attitude on terrorism by preventing them from planning or thinking about terrorism, it will still be criticized for going outside of its legitimate purpose. As has been said, the purpose of punishment is not to punish *sins and purify thoughts* but to prevent certain external results.[476]

3.5. Downsides of Criminalizing Inchoate Conducts

As argued earlier criminalization of planning to commit a terrorist act (in so far as not manifested by conduct) amounts to prohibition of pure thought about commission of a terrorist act. Hence, its constitutionality can be challenged for being an infringement of freedom of thought guaranteed by Article 27 of the FDRE Constitution and other provisions of international[477] and regional[478] human rights instruments. The Human Rights Committee, in its General Comment No.22, indicated that Article 18 of the International Covenant on Civil and Political Rights, which provides for the right to freedom of thought, does not permit any limitations whatsoever on the right.[479] In the case of *Stanley v. Georgia*[480] the U.S. Supreme Court, in relation to the First Amendment to the U.S. Constitution which is understood to guarantee freedom of thought, concluded that "the state --- cannot constitutionally premise legislation on the desirability of controlling

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[475] Dressler, cited above at note 7, p.82.

[476] Commonwealth v. Kennedy, 48 N.E. 770,770 (Mass. 1897).

[477] Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights.

[478] Article 18 of the African Charter on Human and Peoples' Rights

[479] General Comment No.22: The Right to freedom of thought, conscience and religion (Art.18), ccpr/c/21/Rev.1/Add4,, 07/30/1993

[480] Stanley v. Georgia, 394 U.S. 557,566 (1969).

a person's private thoughts."[481] In another case[482], Judge Williams noted that First Amendment protection of freedom of thought extend protection even to ideas that are immoral or contemplate criminal conduct[483].

In the event that the law passes constitutional scrutiny, because punishment itself is evil, "if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."[484] Bentham argues that punishment ought not to be inflicted, *inter alia*, where it is unprofitable or too expensive.[485]

Following are some of the negative impacts of criminalizing inchoate conducts that should be balanced against the possible benefits of their criminalization. First, criminalizing plans, preparations and conspiracy, is likely to result in apprehension of wrong persons which, as argued earlier, is counterproductive in the struggle against terrorism. The drawback of arresting the wrong persons is that the acquittal rate would be high as a consequence of the difficulty of proving their guilt to the necessary degree.[486] As the deterrent effect of punishment is very much related with the likelihood of actual infliction of the punishment[487], high rate of acquittal may become detrimental to the criminal justice administration in general and to preventing terrorist acts in particular.

The second negative consequence of such laws is what Bentham calls the "evil of coercion or restraint"[488] of the laws on those who respect it. As applied to the issue at hand, it refers to the burden the law imposes on the

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[481] Constitutional Law—Freedom of Thought—Seventh Circuit Upholds City's Order Banning Former Sex Offender from Public Parks,— *Doe v. City of Lafayette*, 377 F. 3d 757 (7th Cir. 2004), Harv. L. Rev., vol. 118, note 42, p.1057

[482] Doe v. City of Lafayette, 377 F.3d 757 (7th Cir. 2004)

[483] Constitutional Law—Freedom of Thought—Seventh Circuit Upholds City's Order Banning Former Sex Offender from Public Parks, cited above at note 92.

[484] J. Bentham, An Introduction to The Principles of Morals and Legislation, (4th ed., 1965) p.170.

[485] Id., p.171

[486] Even where the arrested persons have in fact planned or prepared to commit a terrorist act, remoteness and equivocality would still make it difficult to prove their involvement by a necessary degree of proof.

[487] Steven Klepper and Daniel Nagin argued "an increase in the *likelihood* of punishment will deter more effectively than an increase in the *severity* of punishment." S. Klepper and D. Nagin, The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited, 27 Criminology (1989), p. 721.

[488] Bentham, cited above at note 95, p.175.

society by prohibiting engaging in lawful activities which could, at times, be construed as preparation for committing a terrorist act. Because of the equivocality and remoteness of the conducts from the actual crime, activities which are performed for a purely lawful purpose might be perceived as preparatory acts for the commission of a terrorist act. Also, Article 5 of the Proclamation punishes he who, *having reason to know* that these activities would have the effect of supporting the commission of a terrorist act or a terrorist organization, engages in activities listed there under. It is not difficult to imagine possibilities where one might engage in any of those acts for a purpose not related to terrorism. This law exposes such person to the risk of being held criminally responsible. The punishment for a negligently provided assistance being as harsh as for that provided intentionally makes the law's absurdity vivid.

In Bentham's view, "punishment is warranted only to the extent that its beneficial effects in discouraging criminal behavior outweigh the harm it produces."[489] Considering the harms that may result from criminalizing and punishing these inchoate conducts, it seems that these conducts should not be punishable. By criminalizing these pre attempt activities, the Ethiopian legislature has joined the club of those who are criticized for not giving sufficient attention to Bentham's restraining principle--that against the preventive benefits of punishing must be weighed the pain of those punished.[490]

3.6. Preventive Detention—alternative to punishment

Waiting till a crime is fully consummated or attempted for the criminal law to be applied may not be advisable in some cases. Precluding earlier stages in the criminal process (inchoate conducts) from falling within the ambit of criminal law may cause some potential offenders to believe that in so far as their plan is not aborted ahead of time, they can avoid detection and apprehension after the commission of the crime. Others may not be worried about apprehension and subsequent punishment after the commission of crime. They may even perceive the punishment as a reward. What is important for them is successful execution of the crime no matter what it takes. This is true for terrorists who employ suicide bombing as a means of committing the terrorist act even at the expense of their lives.

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[489] Bentham, quoted in A. V. Hirsch, "proportionality in the Philosophy of Punishment", Crime and Justice, vol.16 (1992), p.58.

[490] Ibid.

If criminals perceive punishment following the commission of a terrorist act as a reward, it would not serve its deterrent purpose. That is, such offenders are so committed for the perpetration of the offence (at any cost) that possible punishment that follows commission of terrorist act would not discourage them from committing the crime. This is a case where Bentham's assumption[491] that potential offenders will avoid commission of crime if they believe that they will be apprehended and punished does not work.

There is another problem, unique to terrorism, that makes Bentham's assumption irrelevant. Where a terrorist act is intended to be committed by suicide bombing or other means that endangers the life of the doer, the society will not have an opportunity to try and punish the criminal. It might be too late to try the offender after the commission of the crime.

Given these attributes of terrorism, having criminal laws that deal with inchoate conducts seems necessary. However, it need not be by criminalizing and punishing inchoate conducts. As shown above criminalizing and punishing inchoate conducts have several disadvantages. Punishment should be confined to the minimum possible for it is an evil in itself. As the justification for early intervention is to get a reasonable assurance that the intended crime be not realized, any means that can serve this purpose at a lower cost would make infliction of punishment unnecessary.

The idea of preventive detention[492] is in order. Applying preventive detention instead of punishment, where one is suspected of inchoate conducts, if not abused, would have the following benefits. First, those,

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[491] Jeremy Bentham, Principles of Penal Law, in Dressler, cited above at note 7, p.14.

[492] For the purpose of this article 'preventive detention' refers to detention of a person upon a reasonable threat that he is planning, preparing or conspiring towards commission of a terrorist act. There is no consensus on the aptness of preventive detention. For arguments against and for preventive detention see generally: M. Corrado, "Punishment, Quarantine and Preventive Detention," Cr. Justice Ethics 15 (1996) pp. 3-13 and P. Montague, "Justifying Preventive Detention," Law and Philosophy Vol.18 No.2 (1999), pp.173-185. The idea of preventive detention was incorporated under Article 145 of the 1957 Penal Code. Graven indicated that in Ethiopia prevention of crime, which is the goal of criminalizing preparatory acts, can be attained by applying this provision. Article 141 of the 2004 Criminal Code, which corresponds to Article 145 of the 1957 Penal Code, is drafted in such a manner that it is only one who is suspected to have committed a crime (not one who is suspected to have planned or is preparing) who may be subjected to detention.

who would have gone to the extent of committing the crime, will, as a result of the detention, be prevented from pursuing their plan, preparation or conspiracy. As far as this category is concerned, the law serves the main goal of prevention of a terrorist act without the avoidable evil – punishment. As suggested by Jeremy Bentham, using punishment is unnecessary where the purpose of punishment can be achieved at a cheaper rate.[493] Second, those who, even without the preventive detention, would have desisted from their criminal design would be rightly saved from punishment.[494] Third, as regards those who prefer to continue in their pursuit of criminal thought of committing a terrorist act, even after release from detention, their dangerous disposition becomes clear which makes infliction of punishment to be most appropriate. The fact that they were detained in connection with suspicion that they were involved in conducts related with terrorism can be considered as aggravating factor.

Adopting preventive detention in place of punishment increases the legitimacy of the law by addressing the concerns raised in the preceding pages. The advantage of preventive detention over criminalization and punishment can also be seen from cost minimization viewpoint. The system suggested avoids a costly full-fledged investigation and trial.

II. Proportionality of Punishment

The Ethiopian Anti-terrorism law authorizes the law enforcement agencies to intervene at the earliest possible time in the process of the commission of a terrorist act. The law punishes plans, preparations, conspiracy and attempts to commit terrorist acts. It provides for similar punishment for all these non-consummated acts and the fully consummated terrorist act. The aptness of subjecting inchoate conducts to punishment be as it may, the issue to be dealt hereunder relates to the propriety of subjecting these conducts to the punishment as that of the completed crime. Also, participants in a terrorist act are subject to punishment. Whether the punishment prescribed to the participants meets the requirement of equitability is another subject of discussion in this section. Basically, this section evaluates the extent to which the doctrine of proportionality is incorporated in the Proclamation.

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[493] Bentham, cited above at note 95, p.177.

[494] Though subjecting them to preventive detention in itself is not appropriate, it is better than subjecting them to punishment.

The principle of proportionality—that the severity of punishment be proportionate to the gravity of the actor's criminal act—is a basic requirement of fairness.[495] As Feinberg has put it "justice requires that the punishment fit the crime."[496] Furthermore, "safeguarding offenders against excessive, disproportionate or arbitrary punishment" is acknowledged to be one of the purposes of modern criminal laws.[497]

The need for proportionality between the gravity of the crime and the punishment is recognized under both theories of punishment. For retributivists, the appropriate level of punishment is to be determined by taking the crime's two basic components, namely the harm inflicted by the actor and the actor's moral blameworthiness. Utilitarian philosophy is said to direct that "punishment be neither too little nor too much, but rather that it be proportional"[498] to the dangerousness of the crime committed.[499]

It has been shown earlier that punishing plans, preparations and conspiracy is not justified under both theories. As the theories do not accept criminalization of these conducts, they do not deal with the extent of punishment for the conducts. For both theories support criminalization of attempts, they deal with the appropriate punishment to be attached to them. After briefly looking at the factors they take into account to calibrate the appropriate level of punishment for attempts vis-à-vis completed offence, we will try to extend the arguments for the other inchoate offences.

Both schools of thought split into two on whether attempt should be punished as severely as the completed offence. Culpability-retributivists, who emphasize more the blameworthiness of the actor than the harm, believe that a failed attempt should be punished as severely as a completed crime. For this group, a person deserves punishment proportional to her

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[495] Hirsch, cited above at note 100, p.55.

[496] J. Feinberg, the Expressive Function of Punishment, in B. E. Harcourt, "Joel Feinberg on Crime and Punishment: Exploring the Relationship Between The Moral Limits of the Criminal law and The Expressive Function of Punishment", 5 Buff. Crim. L. Rev. 2001-2002, p.161.

[497] To mention few, Model Penal Code, Paragraph 1.02 (2) (c), the 1991 English Criminal Justice Act, the 1988 Swedish sentencing law, and sentencing guidelines of Minnesota, Washington State, and Oregon.

[498] Dressler, cited above at note 7, p.50.

[499] The dangerousness of the crime is to be measured by predicting the overall harm that may arise from the commission of the offence in the future by the offender at hand and by others. Dressler, cited above at note 7, p.50.

culpability whether or not the intended harm results. The one who attempted but failed to commit the crime and the one who succeeded in committing the crime are equally culpable which calls for equal punishment.[500]

Harm-retributivists argue that punishment should be determined on the basis not only of culpability but also of harm. They admit that both the successful and the unsuccessful ones are equally blameworthy which makes both of them eligible for penal sanction. Regarding the appropriate degree of punishment, the extent of the resulting harm should be taken into consideration. Since the harm caused by an attempt is necessarily less than that caused by the successful commission of a crime, a criminal attempt is always a lesser offence which deserves a less severe punishment than the consummated crime.[501]

In the utilitarian school of thought, too, there are supporters of equal punishment as there are advocators for lenient punishment of attempts. Those who advocate equal punishment believe that both the attempter and the one who succeeds in committing the crime are equally dangerous and in need of rehabilitation. Because their intention and criminal resolve is the same, they are equally dangerous calling for similar punishment.[502]

Those utilitarians who object to similar punishment for attempt and completed offence advance two reasons in support of their position. First is the difference in the degree of obstinacy and wickedness in an attempt and a completed offence. In this regard, Ashworth noted that "from the moment the defendant's conduct crosses the threshold of an attempt, up until the completion of the crime, the punishments should ideally be graded with increasing severity."[503] Second reason is that making the punishment for attempts less severe serves as an incentive for one who is at the stage of attempt to desist before completing the crime. Mitigated punishment is said to provide "an encouragement to repentance and remorse."[504]

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[500] Id. pp.383-384.

[501] Id., p.384.

[502] Id., p.383.

[503] Ashworth, cited above at note 62, p.739.

[504] 4 Blackstone at *14 in Dressler, cited above at note 7, p.383. As stated by Jermey Bentham the reduced punishment serves as an incentive to the actor to desist before completing the crime. Jermey Bentham, Theories of Legislation 427 (1931) in Dressler, cited above at note 7, p.383.

It is clear from the preceding paragraphs that both retributivists and utilitarians determine punishment on the basis of certain criteria. Determinant factors for the severity of punishment in the cases of consummated offences and attempt--blameworthiness of the doer and harmfulness of the conduct-- are not present in the case of other inchoate conducts.[505] That is, the inchoate conducts under discussion are so remote and equivocal that neither culpability of the actor can reasonably be verified nor can harm be felt by the public. In such a case, both harm and culpability retributivists would not be in a position to calibrate the punishment proportional to the conducts. For the same reasons of remoteness and equivocality, the dangerousness of the actor cannot be measured as a result of which a utilitarian could not opine on the appropriate degree of punishment.

Once inchoate conducts are criminalized, perhaps by a political decision, punishment would follow where the doctrine of proportionality becomes relevant[506]. Because the conducts are remote from the principal offence, there is a chance that the actors would desist from their criminal activity which makes them less culpable/blameworthy than those who have attempted or committed a crime whose determination to commit the crime is certain. It follows that the closer the conduct to actual commission of the crime, the more the severe the punishment should be. As stated by Blackstone "for evil, the nearer we approach it, is the more disagreeable and shocking, so that it requires more obstinacy and wickedness to perpetrate an unlawful action, than barely to entertain the thought of it."[507] Moreover, these conducts are innocuous. It is, then, a simple logic that the punishment (if there should be one) to those conducts be less severe than the punishment for an attempt or commission of a crime. [508]

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[505] Absence of factors on the basis of which punishment is to be calculated is a clear indication that their criminalization is not supported by criminal law theories.

[506] If punishment is to be determined by disregarding the proportionality requirement, it would simply be decided randomly which would become another reason for objecting the law.

[507] 4 Blackstone at *14 in Dressler, cited above at note 7, p.383

[508] For harm-retributivists, to whom punishment should be decided on the basis of harm resulting from the wrongful conduct, the punishment for planning or preparing to commit a crime should necessarily be of a lesser severity than that for attempt and consummated offence since the harm arising from such conducts (if there is any) is obviously lesser than that arising from attempt or consummated offence. Also, it would be only logical to assume that culpability-retributivists, whose judgment on the extent of punishment depends on blameworthiness of the actor, would support a less severe punishment to those who are at the stage of planning, preparation or

As stated by Feinberg:[509]

> Justice does require that in some sense the punishment fit the crime. The degree of the disapproval expressed by the punishment should fit the crime only in the unproblematic sense that the more serious crimes should receive stronger disapproval than the less serious ones, the seriousness of the crime being determined by the amount of harm it generally causes.

No reasonable mind would argue that planning to commit a terrorist act is equally dangerous as actually committing the terrorist act. Where their resemblance in terms of resulting harm or blameworthiness of the persons concerned cannot be established, there cannot be a valid and convincing reason for similar punishment. To provide similar punishment for both inchoate and consummate offences conveys a wrong message to the public that both conducts are equally harmful and both doers equally culpable. This is an approach inconsistent with the expressive function of punishment. In this connection, Hart indicates that disproportionate sanctions pose the "risk --- of either confusing common morality or flouting it and bringing the law into contempt."[510]

These ideas are well reflected in the Criminal Code. In cases where the Code criminalizes plans, preparations and conspiracy the punishment is significantly lower than the punishment for attempt or consummated

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conspiracy as compared to those who went as far as committing or attempting to commit an offence. The implication of Blackstone's statement on the same is pertinent. According to Blackstone, "for evil, the nearer we approach it, is the more disagreeable and shocking, so that it requires more obstinacy and wickedness to perpetrate an unlawful action, than barely to entertain the thought of it."
4 Blackstone at * 14 in Dressler, cited above at note 7, p.383. Hence the argument against punishment or for mitigated punishment of inchoate offences gains its strength as the conducts become far from the crime. In the path of crime, remoteness and equivocality - reasons advanced for abolition and/or mitigation of punishment for inchoate offences— progressively vanishes as actors advance and approach to the actual commission of the crime. Hence, in the path of a crime, the punishment should be graded with increasing severity as one is approaching to the actual crime.

[509] Feinberg, cited above at note 107, p.161

[510] H.L.A.Hart, Punishment and Responsibility: Essays in the Philosophy of Law (1970), p.25

offence.[511] Unlike the Criminal Code, the Proclamation, disregards the effects of remoteness and equivocal nature of the inchoate conducts as factors that determine the extent of punishment and prescribes for similar punishment to all criminalized inchoate conducts and consummated terrorist act. Subjecting one who has planned, taken preparatory steps or conspired with others to commit a terrorist act to the same punishment as one who has committed a terrorist act makes the law unfair.[512]

The preamble of the 2004 Criminal Code[513] made it clear that deterrence is the primary purpose of punishment under the Ethiopian criminal law indicating that it is influenced by utilitarian principles.[514] Hence, a reference to utilitarian principles and rules relating to proportionality would be in order.

Punishment for a utilitarian is justified by its use to prevent commission of all offences. Where it is not possible to prevent commission of all offences, the next object of punishment is to prevent the worst offence. From this develops one of the rules of calibrating punishment which is: "the punishment system should be designed in such a way that it induces the actor to choose the less mischievous of the two wrongful acts."[515] It follows from this rule that plans, preparations, and conspiracy to commit an offence, being less mischievous than committing or attempting to commit the crime, the punishment for the former conducts should be less severe than the punishment for the latter ones. Such system of punishment would make the actor who has already planned or made preparatory acts to think

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[511] Compare the punishment provided under Article 256 (b) (for preparation) with the punishments provided under Articles 238, 240 and 246 (principal crimes); the punishment under Article 257 (b) (for conspiracy and planning) with the punishments under Articles 238, 240 and 246 (principal crimes); the punishment provided under Article 274 (planning and conspiracy) and punishment provided under Articles 269 and 270 (principal crimes).

[512] It is stated in the preamble part of the 2004 Criminal Code that one of the factors that necessitated the revision of the 1957 Penal Code is recognition that applying double standard (regular Penal Code and the Revised Special penal Code) for similar matters disregards equality among citizens. The problem of applying double standard would surface where inchoate conducts in the 2004 Criminal Code and the Anti-Terrorism Proclamation are treated differently.

[513] The Criminal Code of the Federal Democratic Republic of Ethiopia 2004, p.III-IV.

[514] Though the anti-terror law does not make an explicit reference to utilitarian rules and principles the relevance of these rules and principles can be inferred from Article 36(2) of the law.

[515] Bentham, cited above at note 95, p.181

twice before proceeding to the actual commission of the crime. This approach is consistent with Blackstone's idea that the punishment for inchoate offences and complete offence should be different so that the actor would be encouraged to repent.[516] If similar punishment is prescribed to both inchoate and complete offences, then once a person plans or takes preparatory steps, there is nothing that discourages him from proceeding to the actual criminal conduct. To the extent that the punishment system does not contribute in discouraging criminals from proceeding further in their criminal design, it is defective for it fails to serve its purported purpose – prevention of the commission of crime.[517] If planning, preparing, attempting and committing an offence would subject an actor to similar punishment, he might think "since I'll be punished (same punishment) any way, I might as well go and do what I decided to do."[518]

Among Bentham's rules of determination of punishment, the rule that runs " when a man has resolved upon a particular offence, the next object is, to induce him to do no more mischief than what is necessary for his purpose" is pertinent to calibration of punishment of participants in the commission of a given offence. [519] The application of this rule requires that the punishment for mere incitement to commit a terrorist act should be less severe than that for inciting another and continuing to coordinate the commission of the crime. Instigating one to commit a crime is one mischief and continuing to coordinate the commission of the crime is another mischief. In such cases "the punishment should be adjusted in such manner to each particular offence that for every part of the mischief there may be a motive to restrain the offender from giving birth to it."[520] If one knows that instigation is punishable as severe as committing the crime, once he starts to induce another, then he will proceed and commit the crime by himself or continue to provide the necessary support to the instigated person as there is no (additional) punishment for all activities that come after instigating

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[516] 4 Blackstone at *14, in Dressler, cited above at note 7, p.383.

[517] It would not be wrong to argue that the system that punishes consummated and non consummated offences similarly tempts those who have already started the criminal process to come to the end pursuing on their plan as doing so does not have any additional negative consequence. Perhaps, one may believe that if to be punished, it is better to be punished for the complete offence than for mere plan, preparation or attempt

[518] Graven, cited above at note 4, p.68

[519] Bentham, cited above at note 95, p.181

[520] Ibid.

the other person. The same is true with accomplice.[521] If one who provides assistance before the commission of a crime knows that he will be subject to the same punishment whether or not he continues his involvement in the commission of the crime, he will be encouraged to do his best to ensure the perpetration or completion of the crime.

Moreover, by subjecting instigators and accomplices to similar punishment irrespective of the fact that the principal crime (terrorist act) is attempted or committed, the Proclamation deviates from the requirement that the extent of punishment should partly depend on the degree of harm.[522]

Another strange position of the Proclamation relating to extent of punishment is that it prescribes equal punishment irrespective of the type of *mens rea*. As stated under Article 5 of the Proclamation, assistance, be it provided intentionally or negligently, would subject the provider to the same punishment. Likewise, Article 9 of the Proclamation prescribes similar punishment for one who *knowing* that a property is a fruit of terrorist act possesses, owns, deals, converts or conceals and another *having a reason to know* about the source of the property (but as a matter of fact does not know) does the same act.[523]

Subjecting a person who engages in a criminal act intentionally and another who does the same act negligently to similar punishment is not sound. Compared to intention, negligence constitutes a lower degree of criminal guilt.[524] To provide similar punishment for negligently and deliberately

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[521] Even if, in principle, the punishment for instigation, accomplice and actual perpetration of a crime is subject to the same punishment, Articles 36 and 37 of the 2004 Criminal Code authorizes the court, where circumstances justify, reducing the punishment to be imposed on an accomplice and instigator. That is not the case under the Anti-terrorism Proclamation.

[522] The Criminal Code, in principle, punishes instigation and accomplice only where the principal offence is at least attempted. The amount of punishment where such participations are punishable without the principal offence being attempted is significantly lower than the punishment where the principal crime is committed. See Articles 255, 301, 332, and 355 of the Criminal Code.

[523] Article 682 of the Criminal Code treats receiving made intentionally and deliberately differently. Also, Article 683 (3) of the Code makes clear that knowledge aggravates punishment on an accessory after the fact.

[524] Graven, cited above at not 4, p.159. The punishment prescribed under sub articles 1, 2 and 3 of Article 682 and Article 683(3) of the Criminal Code reflects the difference in culpability depending on whether the crime of receiving is committed intentionally or negligently.

committed offences conveys a wrong message to the public that both conducts are equally dangerous and both doers equally culpable. This is a disservice to the expressive function of punishment. Hart's observation in connection with disproportionate punishment is once more pertinent. For him, disproportionate sanctions pose the "risk --- of either confusing common morality or flouting it and bringing the law into contempt."[525]

The application of the Proclamation results in unwarranted differential treatment of providers of assistance in the commission of a terrorist act. Assistance, given before the commission of a terrorist act, which is in the form of those listed under Article 5 of the Proclamation, is treated as separate offence.[526] The Proclamation is silent as to other forms of accessory before the fact and any assistance provided during the commission of a terrorist act. In such cases, the relevant provisions of the Criminal Code apply.[527] Hence, any sort of assistance not envisaged under Article 5 of the Proclamation (be it provided before or during the commission of the crime) is to be treated in accordance with the principle provided under Article 37 of the Criminal Code. This gives rise to the following consequences. First, a person whose assistance to the commission of a terrorist act does not fall under Article 5 of the Proclamation is treated as an accomplice only where he provided the assistance intentionally. Second, he will be subject to punishment only where the principal terrorist act is at least attempted. Third, where he is to be punished, he will be subject to the same punishment as the perpetrator of the terrorist act which is more severe than that provided under Article 5 of the Proclamation.

The punishment prescribed for conducts that come after the terrorist act is committed or attempted are manifestly disproportional with both the culpability of the doer and the harm that may possibly arise from these conducts. A comparison with the approach taken by the Criminal Code makes the point clear. The punishment to be imposed on a person who harbors or helps to escape or conceals someone who has committed

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[525] Hart, cited above at note 121, p.25.

[526] It follows that the provider of any of the assistances envisaged under Article 5 of the Proclamation is treated as principal offender but not as a secondary participant.

[527] That is authorized under Article 36(2) of the Proclamation. Theoretically one may argue that where the Proclamation lists down specific types of assistances the implication is that it excludes other types of assistance from being criminalized. In my opinion, this opinion makes Article 36 of the Proclamation useless.

crimes[528] which are as grave or even graver than a terrorist act is by far less severe than the punishment on one who harbors or helps to escape or conceals one who has committed a terrorist act.

Conclusion

The desire to prevent commission of crime necessitates early intervention in the criminal process. However, at what stage in the process should the intervention be made has to be carefully decided. There is a consensus that it is appropriate to step in when one reaches the point of no return in the criminal process. However, criminalization of inchoate conducts other than attempt is not supported by major criminal law theories. Equivocality and remoteness of these conducts give rise to different concerns that militate against their criminalization. For one or another reason, the criminalization of planning, preparation, and conspiracy by the anti-terror Proclamation is not justified. Criminalizing and punishing instigation and participation where the terrorist act is not attempted is unreasonable. Far from serving the intended purpose of prevention of a terrorist act, their criminalization may rather become counterproductive in the struggle against terrorism.

Once criminalized, normally the punishment to be attached to these conducts should be determined by taking the degree of harm caused on the public and the culpability of the doer into consideration. Assessment of the punishment prescribed for these conducts in the anti-terrorism law in light of the factors that influence determination of punishment and a comparison with relevant provisions of the Criminal Code clearly show that the law does not take into account these factors. The punishment set by disregarding these factors is simply arbitrary.

If, in view of the special nature of terrorism, criminal law has to intervene before attempt stage in the criminal process is reached, a system of preventive detention is recommended in place of punishment. This system, by allowing the government to step in at the earliest possible time, would ensure prevention of commission of a terrorist act without unjustifiably subjecting the 'suspect' to punishment.

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[528] Crimes against the constitution and constitutional order, and crimes against humanity can be mentioned as examples. As provided under Article 445 of the Criminal Code provides "whoever knowingly saves from prosecution a person who has fallen under a provision of criminal law, whether by warning him or hiding him, by concealing or destroying the traces or instruments of his crime, by misleading investigation, or in any other way, is punishable with simple imprisonment or fine."

A Note on the Ethiopian Arbitration and Conciliation Center

Betelhem Tilahun*

Introduction

Due to lack of professional ADR services that meet international standards, many companies in Ethiopia that work in partnership with foreign investors are forced to consent to arbitration clauses that call for the involvement of foreign ADR offices in the event of a dispute. In such circumstances, more often than not, local companies do not have the financial means to travel overseas and employ foreign ADR services. The availability of institutionalized, cost effective and time saving ADR mechanisms as a means of resolving disputes will not only impact on the lives of those communities at grassroots level, but will also encourage foreign investment. Many foreign and international businesses check on the availability of effective ADR service before they decide to bring their business and investments to a country.

The Ethiopian Arbitration and Conciliation Center (EACC) was established on 12th August 2003 by a group of lawyers who wanted to provide professional alternative dispute resolution (ADR) services to local and international actors. The EACC believes that ADR with its multiple benefits meets the needs of modern communities. Since its establishment, the EACC has made a considerable impact on the promotion and provision of ADR in Ethiopia. Among the services it provides and the activities it undertakes are the arbitration and mediation services on various disputes including commercial, family, construction and labor disputes. In addition to its head office in Addis Ababa, the EACC has set up branch offices in Mekelle, Hawassa, Arba Minch, Dire Dawa, Adama, Bahir Dar and Harrar.

The major objectives of the EACC are:

- Providing affordable and a speedy system of dispute resolution;
- Providing ADR services by making available a wide range of expertise to resolve commercial and non-commercial disputes;
- Providing professional ADR training for those who wish to qualify as arbitrators and mediators;

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- Organizing and providing facilities for arbitrators, mediators and conciliators;
- Conducting research on ADR and disseminating the findings with the objective of introducing to the public the benefits of using ADR services; and
- Working together with the government in order to introduce new laws on ADR and to create better awareness on ADR.

The following sections explain the practical steps taken by the EACC in order to achieve its objectives enumerated above.

1. The provision of ADR services

1.1. ADR services at the EACC's head office

The EACC has actually provided cost effective ADR services that are speedy and conducted within a non adversarial atmosphere. The EACC provided mediation and arbitration services at its head office in Addis Ababa. Specifically the EACC has provided ADR services in relation to trade disputes, labor disputes, construction disputes and family disputes. The EACC employed voluntary arbitrators and mediators who bave been trained by the EACC and who are willing to provide free arbitration and mediation services at the EACC's head office. The EACC also has a roster of trained ADR professionals. The names, details and qualifications of these professionals is recorded in the roster and regularly updated. This roster is available not only for the EACC but also can be accessed by others who want to contact the mediators and arbitrators.

1.2. ADR services in sub-cities and kebeles in Addis Ababa

The EACC has now set up ADR centers in three sub cities. Prior to setting up sub city offices, EACC was providing ADR services from twelve kebeles across Addis Ababa. The Kebele services have now been phased out and replaced with the sub city offices.

1.3. Regional ADR services

The EACC has set up branch offices in seven regions and had been providing free ADR services using the expertise of those who it had trained as mediators and arbitrators. So far the EACC has set up ADR offices in Mekelle, Dire Dawa, Bahir Dar, Hawassa, Arba Minch, Adama and Harrar. The EACC has built its own ADR center at Arba Minch while it is in the process of building another one in Bahir Dar. The regional offices were set

up in cooperation with the respective regional Justice Bureaus, the regional City Councils and local kebeles. The regional offices are run by full time coordinators recruited by the EACC. The EACC has also provided training on ADR skills in the regions to, *inter alia*, community and religious elders, social court judges and professionals.

1.4. Court annexed mediation service

The EACC had been providing court annexed mediation service in Addis Ababa. The EACC provided mediation service for cases sent to it by the Civil Division of the Federal High Court on the basis of the agreement concluded between the Federal Supreme Court and the EACC. Moreover, the EACC entered into an agreement with the Federal First Instance Family Court to provide mediation service for cases that are referred to it by the latter.

1.5. Roster of ADR professionals

The EACC has compiled a roster of trained ADR experts which is regularly updated. The EACC refers to the roster when selecting suitable mediators and arbitrators to resolve disputes. The roster is an exhaustive list of ADR experts trained by EACC which is also accessible by all those who need information on mediators and arbitrators for different kinds of disputes.

2. Research and Law Reform

2.1. Draft Law

In its attempts to bring about law reform on ADR, the EACC commissioned a research with a view of proposing appropriate legislation on ADR in Ethiopia. In order to facilitate the process, the EACC organized and held two brain storming workshops. A number of professionals including members of parliament, prominent lawyers and university professors took part in these brainstorming workshops. The discussions during the workshops contributed towards the development of a draft law on ADR in Ethiopia.

The draft law was also sent overseas for consultations to an EACC's partner organization, STITT Feld Handy Group, an ADR Chamber in Canada. The draft law was eventually presented to the Ministry of Justice. The EACC hopes that the draft law will be adopted by the Parliament.

2.2. Rules of Arbitration and Mediation

The EACC hired the services of professional lawyers who are well versed in the area of ADR to prepare the 'Rules of Arbitration and Mediation'. The rules are meant to be used by mediators and arbitrators in resolving disputes at the EACC. Among other things, the rules provide guidance on the appointment of mediators and arbitrators, explain the roles of mediators and arbitrators in resolving disputes, and set out procedural matters.

2.3. Research on disputes resolved through ADR mechanisms

The EACC conducts research on disputes that have been resolved through ADR mechanisms. The EACC editorial team meets regularly to collect and edit cases resolved through ADR services of the EACC. The outcome of the research is published through on EACC journals of arbitral awards

3. Public Education

3.1. Training

A. Training on ADR mechanisms

In order to make ADR widely available, the EACC from time to time provides training on mediation and arbitration skills to individuals drawn from various sections of the society. Initially, the EACC training targeted various professionals including practicing lawyers, employees of the Ministry of Labor and Social Affairs, employees of Ethiopian Women Lawyers Association. members of the Confederation of Ethiopian Trade Unions, members of the Civil Engineers Association, members of Consulting Engineers and Architects Association and members of the Employers Federation.

Subsequently the EACC provided training on ADR to university students, law enforcement officers, judges, lawyers, prosecutors, and HIV desk representatives working in various kebeles. The EACC has also trained individuals from various areas in Addis Ababa including those involved in traditional dispute resolution such as religious leaders and community elders. In addition, EACC has trained numerous social court judges and registrars. Moreover, the EACC has trained persons drawn from various sections of the society in the regions. The EACC employs some of the trainees as ADR experts in its centers in Addis Ababa and the regions. The training is conducted by local and foreign ADR experts, and members of EACC's international partners.

B. Training of trainers course

The EACC conducts 'training of trainers' courses. The first such training was provided in March 2007 and targeted 30 trainees while in January 2009, the EACC held another similar training for 52 professionals. These trainings are designed to equip those who had already completed the training on ADR mechanisms with the capacity and skills to provide training on ADR mechanisms.

3.2. Awareness creation workshops

As part of its public education program, EACC organized and held a number of workshops in order to promote the notion of ADR. The workshops had different themes including the importance of ADR mechanisms, the strategy to be employed for a better application of ADR services, the role of lawyers and other professionals and institutions in promoting and providing ADR services and the relationship between customary methods of dispute resolution and modern ADR mechanisms. The participants of the workshops included academics, public officials, professionals, and religious and community leaders.

3.3. Publications

A. Journal

The EACC publishes journals on arbitral awards. The journals contain a number reports on selected cases resolved through ADR mechanisms. Each report contains:

- A short and precise list of all the legal questions raised in the case
- A brief summary of the plaintiff's pleading
- A brief summary of the respondent's reply
- A declaration as to which party prevailed
- The issues that the arbitrators raised
- Details of the arbitration proceedings
- The award passed by the arbitration panel
- The decree passed by the arbitration panel
- Dissenting opinion of an arbitrator, if any
- Decision of an Appellate Court, if the arbitral award was appealed to an ordinary court.

B. Newsletters and Brochures

The EACC publishes a quarterly newsletter to publicize its activities and popularize ADR mechanisms. The newsletter is distributed free of charge. The EACC also prepares brochures that contain information about its services in a manner that is accessible to the public.

C. National Arbitration Moot Court Competition

The EACC organizes national moot court competition in partnership with other institutions. In 2009 the EACC organized the firs national moot court competition in partnership with the American Bar Association-Rule of Law Initiative, the WTO-Accession Plus and the School of Law of Addis Ababa University. Twenty seven students and their advisors drawn from Addis Ababa University, Mekelle University, Jimma University, Hawassa University, Gonder University, Haramaya University and Bahir Dar University took part in the competition. The students and their advisors were given training on ADR mechanisms ahead of the competition.

EACC is now organizing its second round of the national arbitration moot competition and has already given ADR training to those university students selected to take part in the competition.

D. ADR Clubs

The EACC sets up ADR clubs in order to create awareness on ADR and its benefits. For instance the EACC has succeeded in setting up ADR clubs in eight colleges in Arba Minch. The EACC plans to do the same in other regions. Such clubs encourage students to resolve their disputes peacefully through mediation and help foster better relationships in educational institutions by assisting students to gain an insight into peaceful methods of dispute resolution. Students are also encouraged to pursue professional training on ADR.

E. Resource Center

The EACC maintains a resource center at its head office. The resource center is stocked with a books and documents on ADR and related topics. The resource center is open for professionals on ADR, academics and students who want to expand their knowledge on ADR.

F. Website

The EACC's website, www.eacc.com.et, is up and running and provides a detailed and up to date information for those who seek information on EACC's activities

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መዝገቡ ተመርምሮ ተከታዩ ፍርድ ተሰጥቷል።

ፍ ር ድ

በዚህ መዝገብ የቀረበው የመያዣ ውል ይፍረስልን ጥያቄ ነው። አመልካች ለፌ/መ/ደረጀ ፍርድ ቤት ባቀረቡት ክስ ሐሚድና ቤተሰቡ የግብርና ውጤቶች ኃ/የተ/የግ/ማህበር ከተጠሪ ላይ ለወሰደው ብድር አመልካች በአ/አበባ ከተማ ወረዳ 23 ቀበሌ 12 ውስጥ የሚገኘውን ቤት በመያዣ ያስመዘገቡ ሲሆን አቶ ሐሚድ ይስሐቅ የተባሉ ግለሰብም 2 ቤቶች በመያዣ ሰጥተዋል ተበዳሪው ብድሩን አጠናቆ ባለመክፈሉ ባንኩ በመያዣ የያዛቸውን ቤቶች በሃራጅ ለመሸጥ በመንቀሳቀሱ ባንኩ የአቶ ሐሚድ ይስሐቅ ቤቶች በሐራጅ ሽጦ እዳውን በሙሉ ከፍሎ አጠናቋል። እዳው ተከፍሎ ስለተጠናቀቀ በመያዣ የሰጠሁት ቤት ካርታ እንዲመለስልኝ ብጠይቀው ፈቃደኛ አልሆነም። የመያዣው ውሉ ከተፈረመ 10 አመት ያለፈው በመሆኑ ቀሪ ሆኗል። ስለዚህ ባንኩ ቤቴን በሐራጅ ለመሸጥ የጀመረውን እንቅስቃሴ እንዲያቆም የያዘው ካርታ እንዲመለስ ያልተከፈለ እዳ ካለ የሂሳብ መግለጫ እንዲያቀርብና ቀሪውን ገንዘብ ከፍዬ ቤቴ ከመያዣነት እንዲለቀቅልኝ በማለት ጠይቀዋል። ፍ/ቤቱም ግራ ቀኙን ካከራከረ በኋላ ተበዳሪው የወሰደው ብድር ተከፍሎ ያልተጠናቀቀ በመሆኑና በፍ/ሀ/ቁ/ 3058/1/ የተመለከተው የ10 አመት ጊዜ ከማለፉ በፊት በመያዣ ንብረቱ ላይ እንቅስቃሴ የጀመረ ስለሆነ ክሱ ተቀባይነት የለውም በማለት ወስኗል። በዚህ ውሳኔ ላይ አመልካች ለፌ/ከፍተኛ ፍ/ቤት ይግባኝ ያቀረቡ ቢሆንም የስር ፍ/ቤት ውሳኔ ፀንቶባቸዋል። የአሁኑ የሰበር አቤቱታ የቀረበው በዚህ ውሳኔ ላይ ነው። የአመልካች ዋነኛ አቤቱታ የመያዣው ውል ከተመዘገበ 10 አመት ስላለፈው በፍ/ሀ/ቁ 3058/1/ መሰረት መያዣው ቀሪ ነው የሚል ነው። ይህ ችሎትም ይህንኑ የአመልካችን ቅሬታ ለመመርመር አቤቱታው ለሰበር ችሎት እንዲቀርብ በማድረግ ግራ ቀኙ ክርክራቸውን በጽሑፍ አቅርበዋል። ችሎቱም መዝገቡን እንደሚከተለው መርምሯል።

አመልካች ሐሚድና ቤተሰቡ የግብርና ውጤቶች ኃ/የተ/የግ/ማህበር ለወሰደው ብድር ቤታቸውን በመያዣ ሰጥተዋል። የመያዣ ውሉም የተመዘገበው በ1987 ዓ.ም. መሆኑን እንዲሁም ተበዳሪው ድርጅት ብድሩን መክፈል ባለመቻሉ ተጠሪ ለአመልካች ጥቅምት 24 ቀን 1992 ዓ.ም. ማስጠንቀቂያ መስጠቱን አመልካች አልካደም። አመልካች መያዣው ቀሪ ነው በማለት የሚከራከሩት የፍ/ሕ/ቁ 3058/1/ በመጥቀስ ነው። በመሆኑም ይህን ድንጋጌ መመልከት ያስፈልጋል። አመልካች የጠቀሱት ይህ ድንጋጌም እንደሚከተለው ይነበባል።

የማይንቀሳቀስ ንብረት የመያዣ መብት ውጤት የሚኖረው ከተፃፈበት ቀን አንስቶ እስከ አስር ዓመት ድረስ ነው።

በዚህ ድንጋጌ መሰረት አንድ የመያዣ ውል ውጤት የሚኖረው መያዣው ከተመዘገበበት ቀን አንስቶ እስከ 10 ዓመት ድረስ ነው። በመሆኑም በመያዣ ውሉ ምክንያት በሚገኙ ማናቸውም መብቶች መገልገል የሚቻለው ይኸው የተወሰነው ጊዜ ከማለፉ በፊት ይሆናል ማለት ነው። ይህ የጊዜ ዘመን ሲራዘም የሚችለው 10 ዓመቱ ከማለፉ በፊት ውሉ እንዲታደስ አዲስ ምዝገባ ተከናውኖ ከሆነ ብቻ እንደሆነ ከፍ/ሕ/ቁ 3058/2/ እንገነዘባለን። በመሰረቱ ይህ ህግ አመልካች እንደሚሉት የይርጋ ድንጋጌ አይደለም። ይርጋ ማለት በህግ ተሰይቶ ከተቀመጠው የጊዜ ገደብ ቢኒላ በአንድ ጉዳይ ክስ ለማቅረብ የሚከለከልበት የህግ ፅንሰ ሃሳብ ነው። በመሆኑም ይርጋ አንድ ሰው በጉዳዩ ላይ መብት ያለው ቢሆንም እንኳን ይህንን መብቱን ለመጠየቅ የማይችልበትን ገደብ የሚመለከት ነው። ይህ ክልከላም ተፈጻሚ የሚሆነው ክስ ከቀረበ በኋላ ተከሳሹ የይርጋ መቃወሚያ አንስቶ የተከራከረ ከሆነ ነው። ከሳሽ ክስ የማቅረብ መብቱ በይርጋ ቀሪ ከሆነ ቢኒላ ክስ አቅርቦ ተከሳሽ ክሱ በይርጋ ቀሪ መሆኑን በመግለፅ ካልተቃወመ ክሱ ተቀባይነት አግኝቶ መታየት ይቀጥላል። የጊዜ ገደቡ ቦግለፉ ብቻ ፍ/ቤት የይርጋውን በራሱ አነሳሽነት አንስቶ ክሱን ውድቅ ሊያደርግ አይችልም። የፍ/ሕ/ቁ/3058/1/ የሚያስቀምጠው የይርጋን ጽንሰ-ሐሳብ አይደለም። የተጠቀሰው አንቀፅ የሚናገረው በህጉ የተመለከተው የጊዜ ገደብ ማለፉ የመያዣው ውሉን ቀሪ (lapse) የሚያደርገውና ከዚህ ጊዜ ቢኒላ መያዣ ውሉ ተጠቃሚ የሆነው ሰው በመያዣው ላይ ያለው መብት የሚያበቃበትን ሁኔታ ነው። የመያዣ ውሉ ከተመዘገበ ቢኒላ 10 ዓመት ሆኖት እንደሆነና እንዲታደስ ካልተጠየቀ ቢያቂ ባይኖርም አቃቤ መዝገቡ መያዣውን እራሱ ሊሰርዘው እንደሚገባ የፍ/ሕ/ቁ 1632/2/ ተመልክቷል። በመሆኑም መያዣ ሰጪው 10 ዓመት በማለፉ መያዣው እንዲሰረዝ ጥያቄ ባያቀርብም መዝጋቢው አካል ራሱ ምዝገባውን ሰርዞ መያዣውን ቀሪ ሊያደርገው ይገባል።

በሌላ በኩል መያዣው ነሐሴ 17 ቀን 1987 ዓ.ም. የተመዘገበ ቢሆን በመያዣ የተያዘው ቤት አመልካች ክስ እስከመሰረቱበት ህዳር 12 ቀን 1999 ዓ.ም. ድረስ አለመሸጡን ከመዝገቡ መረዳት ይቻላል። አመልካችም ይህንኑ ጊዜ መሰረት አድርገው ነው መያዣው ቀሪ ነው ያሉ የሚከራከሩት። ተጠሪ በበኩሉ መያዣው ከተመዘገበ ቢኒላ ተበዳሪው እዳውን ባለመክፈሉ 10 ዓመቱ ሳያልፍ

ጥቅምት 24 ቀን 1992 ዓ.ም. ማስጠንቀቂያ በመስጠት የይርጋ ጊዜን ማቋረጥ የሚቻለው ለዋና እዳ እንጂ ለማይንቀሳቀስ ንብረት መያዣ አይደለም የሚል ነው። ከፍ ሲል እንደተመለከትነው በፍ/ህ/ቁ 3058 ስር የተቀመጠው የጊዜ ገደብ የይርጋ ጊዜ ገደብ ባለመሆኑ ስለይርጋ ማቋረጫ ያቀረቡት ክርክር ተቀባይነት የለውም። በሌላ በኩል ግን ባለገንዘቡ የመያዣ ውሉ ከተመዘገበበት ቀን ጀምሮ 10 ዓመት ከማለፉ በፊት በመብቱ መገልገል ጀምሯል ሊባል የሚችለው መቼ ነው? የሚለው ሊታይ ይገባል። በአዋጅ ቁጥር 97/90 መሠረት ለሰጠው ብድር መያዣ ባንክ ብድር ካልተከፈለው የ30 ቀናት ማስጠንቀቂያ በመስጠት ንብረቱን ለመሸጥና የባለቤትነት ስሙን ለግዢ ለማስተላለፍ እንደሚችል በቁጥር 3 ስር ተመልክቷል። በመሆኑም ባንኮች የመያዣ መብታቸውን መገልገል የሚጀምሩት ማስጠንቀቂያ በመስጠት ለመሆኑ ከዚህ ድንጋጌ መረዳት ይቻላል። በተያዘው ጉዳይ ቢሆን ተጠሪ ለአመልካች ጥቅምት 24 ቀን 1992 ዓ.ም. ማስጠንቀቂያ በመስጠት በመብቱ መገልገል ጀምሯል። መያዣው ከተመዘገበበት ጊዜ ጀምሮ ሲቆጠር ደግሞ ማስጠንቀቂያ የተሰጠው 10 ዓመት ሳያልፍ ነው። ተጠሪ ማስጠንቀቂያ ከሰጠ በኋላ ቤቱን ሳይሸጥ የ10 ዓመቱ ጊዜ አልፎ ሊሆን ይችላል። የቤቱ ሽያጭ ሳይጠናቀቅ 10 ዓመቱ ማለፉ ብቻውን ግን መያዣውን ቀሪ አያደርገውም። ሊታይ የሚገባው ተጠሪ በመብቱ መገልገል የጀመረበት ጊዜ ነው። ከዚህ አኳያ ሲታይ ደግሞ መያዣው ቀሪ የሚሆንበት የህግ መሰረት የለም። በዚህም ምክንያት የስር ፍ/ቤቶች የአመልካችን ክስ ውድቅ በማድረግ የሰጡት ውሳኔ መሰረታዊ የህግ ስህተት አለው ለማለት አልተቻለም።

ው ሳ ኔ

1. የፌ/መ/ደረጃ በመ/ቁ 78317 ታህሳስ 09 ቀን 2000 ዓ.ም. እንዲሁም የፌ/ከፍተኛ ፍ/ቤት በመ/ቁ 64469 ጥር 05 ቀን 2001 ዓ.ም. የሰጡት ውሳኔዎች በፍ/ሥ/ሥ/ህ/ቁ. 348/1/ መሰረት ፀንተዋል።

2. ውሳኔው ስለፀና ይህ ችሎት ሰኔ 29 ቀን 2001 ዓ.ም. የሰጠው የእግድ ትዕዛዝ ተነስቷል። ትዕዛዙ ተነስቷል። ትዕዛዙ ለሚመለከተው ክፍል ይተላለፍ።

መዝገቡ ተዘግቷል። ለመዝገብ ቤት ይመለስ።

የማይነበብ የአምስት ዳኞች ፊርማ አለበት።

ወ/ኅ

Federal Supreme Court Cassation Bench: File No. 44800

Justices: Menberetsehai Tadesse
Hirut Melese
Tafesse Yirga
Almaw Wole
Ali Mohammed

Petitioner: Ato Aburazak Hamid

Respondent: Commercial Bank of Ethiopia
October 5, 2002 E.C

Civil Code: application by the petitioner that there is a fundamental mistake of law in the application of Article 3058(1) of the Civil Code by the Federal First Instance Court and Federal High Court.

Held: Article 3058(1) does not provide a period of limitation. Creditors commence to exercise their rights as a mortgagor starting from the date of the issuance of default notice.

Summary of Judgment

The relief sought in this file is the cancellation of contract of mortgage. In his statement of claim presented to the Federal First Instance Court, the petitioner stated that Hamid and Family Agricultural Products Private Limited Company mortgaged the dwelling house located in Woreda 23, Kebele 12 to secure the payment of the loan that it took from the respondent. Moreover, Ato Hamid Isac also mortgaged two additional dwelling houses for to secure the payment of the same loan. Upon the failure of the petitioner to repay the loan, the respondent bank proceeded with the sale of the two houses mortgaged by Ato Hamid Isac and discharged the whole debt. However; the petitioner contended that the bank has failed to hand over the title deed of the house in spite of the fact that the debt has been reclaimed. The petitioner went on to argue that since ten years have lapsed after the making of the contract of mortgage, the obligations arising out of it cannot be exercised owing to lapse of period of limitation. The petitioner further pleaded the court to oblige the bank to

desist from activities aimed at the sale of his house, to hand over the title deed over the house and if the bank claims outstanding debt to present financial statement to that effect so that the petitioner can effect the payment of the debt, if any and to bring the mortgage to an end.

The court decided that the statement of claim is not acceptable since the entire debt has not yet been repaid and the respondent has commenced the process for the sale of the mortgage before the lapse of the ten years period of limitation provided under Article 3058(1) of the Civil Code . Following the appeal the petitioner took from this decision, the Federal High Court confirmed the decision of the Federal First Instance Court. This petition is presented to the Cassation Division on account of this decision. The principal argument of the petitioner is that the contract of mortgage had been extinguished as it has been more than ten years since its entry was made. The cassation division has examined the matter as follows.

The petitioner mortgaged his house for the debt that Hamid and Family Agricultural Products Private Limited Company took from the respondent. This contract of mortgage was registered in 1987 E.C. The respondent gave the Private Limited Company a default notice written on October 24, 1992 E.C for its failure to repay the debt. The petitioner did not contest these facts. The petitioner contention that the contract of mortgage is extinguished is based on Article 3058(1) of the Civil Code which provides that the 'registration of a mortgage shall be effective for ten years from the day when the entry was made'.

According to this provision, a mortgage shall produce legal effects for ten years since its entry was made. Therefore it would be possible to exercise all the rights that emanate from the contract of mortgage before the lapse of this period. It is possible to gather from the reading of Article 3058(2) that the period can be prolonged provided that a new entry is made with a view to renew the contract. However, this provision is not a rule on period of limitation as alleged by the petitioner. Period of limitation refers to a concept whereby it is prohibited to institute a legal action after the lapse of the period specified in the law. Consequently, it is a limitation prohibiting one from exercising rights even if one has certain rights. This prohibition

from instituting legal action takes effect if the defendant invokes lapse of period of limitation by way of preliminary objection. If the defendant fails to invoke this as a preliminary objection when the plaintiff brings legal action, then the matter would be a subject of judicial consideration. The court can not dispose the case by invoking lapse of period of limitation on its own motion. Article 3058(1) does not enunciate the concept of period of limitation. This provision submits that the lapse of the period specified therein would have the effect of extinguishing the contract and the rights thereof would come to an end. Article 1632(2) of the Civil Code calls upon the keeper of registers to cancel the contract of mortgage if it has been ten years since its entry has been made and no request has been to renew it. Thus, the keeper of registers may rescind the entry of the mortgage if it has been years since its entry was made whether or not the mortgagee as applied for such a cancellation.

The entry of the mortgage in the case at hand was made on August 17, 1987 E.C. The house mortgaged was not sold until the date the petitioner instituted the legal action i.e. November 12, 1999 E.C. the petitioner contends that the contract of mortgage is extinguished based on these dates. The respondent, on its part, contended that it has placed the debtor in default on October 24, 1992 E.C before the lapse of the period of limitation. Consequently, the respondent submitted that the period of limitation did not lapse. The petitioner did not deny the fact that he has been given the said default notice. However, his contention is based on the argument that the interruption of period of limitation by giving default notice applies to the principal obligation not to the ancillary obligation of the contract of mortgage. As stated above, since the period stated under Article 3058(1) is not a period of limitation, his arguments concerning interruption of period of limitation are not warranted. However, the issue as to when the creditor is said to have started availing itself of its rights under the contract after the date of entry of the contract of mortgage calls for scrutiny. The bank can proceed with the sale of the immovable mortgaged as a real security for the debt it furnished should the principal debtor fail to pay by giving a default notice of a month, pursuant to Article 3 of Proclamation 97/90. As a result, it is possible to understand from this provision that banks commence exercise of their rights as a mortgagor starting from the issuance of default

notice. In the case at hand, the respondent has already commenced exercise of its rights under the contract of mortgage by giving default notice on October 24, 1992 E.C. The default notice was served before the lapse of the entry of the contract of mortgage. Ten years have lapsed since the respondent served default notice without disposing the house. The mere fact that ten years period lapsed before the culmination of the sale of the house does not render the contract of mortgage of no effect. What matters most is the date the respondent commenced exercise of its rights under the contract. From this point of view, there is no legal basis for the contract of mortgage to be extinguished. Therefore, it is not possible to say that there is fundamental mistake of law in the decisions of the lower courts dismissing the statement of claim of the petitioner. The decisions of both the federal first Instance court and that of the federal high court are confirmed.

የአዲስ አበባ ከፍተኛ ፍርድ ቤት
ሰኔ 3 ቀን 1979 ዓ.ም.

ዳኞች ሀ.
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ተከሳሽ፡- የመቶ አለቃ ሁንዴ ለሜቻ ከወህኒ ቤት ቀርቧል። ተከላካይ ጠበቃ አቶ ዮሴፍ ሙሉጌታ ቀረቡ። መዝገቡ ያደረው ለውሣኔ ስለሆነ የሚከተለውን ፍርድ ሰጥተናል።

ፍ ር ድ

ዓቃቤ ሕግ በቁጥር 629/1754/ዘ 0/78 ጥር 15 ቀን 1978 ዓ.ም. በተጻፈ የክስ ማመልከቻ በተከሣሽ የመቶ አለቃ ሁንዴ ለሜቻ ላይ የመሠረተው ክስ የወንጀለኛ መቅጫ ሕግ ቁጥር 523 የተመለከተወን በመተላለፍ በአዲስ አበባ ከተማ ከፍተኛ 15 ቀበሌ 23 ክልል ውስጥ ጥቅምት 3 ቀን 1979 ዓ.ም. ከጧቱ 4 ሰዓት በሚሆንበት ጊዜ መንስኤው ባልታወቀ ምክንያት ሟች ወ/ሮ ጥሩነሽ ግራባ የተባሉትን ሰው በፋስ መጥረቢያ ከራሣቸው ላይ አንድ ጊዜ መትቶ በመግደሉ ተከሷል የሚል ነው።

ተከሣሽ የካቲት 4 ቀን 1978 ዓ.ም. በዋለው ችሎት እዚህ ፍ/ቤት ቀርቦ ክሱ በንባብ ከሰማ በኋላ ቅጅው ደርሶት እምነት ክህደት ሲጠየቅ የለእምሮ ህመምተኛ ስለሆንኩ የእምነት ክህደት ቃል መስጠት አልችልም፤ ፍ/ቤቱ ወደ ህክምና ይላከኝ በማለት ስላመለከተ ወደ አማኑኤል ሆስፒታል ተልኮ የለእምሮ ጤንነቱ እንዲመረመር ተደርጓል።

የአማኑኤል ሆስፒታልም በቁጥር አስ/1020/82/79 ጥቅምት 26 ቀን 1979 ዓ.ም. በጻፈው ደብዳቤ ተከሣሽ ሁንዴ ለሜቻ በአሁኑ ወቅት አእምሮው የተቃወሰ አለመሆኑንና ወንጀሉንም በፈጸሙበት ጊዜ እብደት እንዳልነበረው በማረጋገጥ ለፈጸመው ወንጀል ተጠያቂ መሆኑን የሆስፒሉ ሕጋዊ የሕክምና ኮሚቴ እንደወሰነ ገልጿል።

ከዚህ በኋላ ተከሣሹ በተከላካዩ ጠበቃ በአቶ ዮሴፍ ሙሉጌታ አማካይነት እየተረዳ ለቀረበለት የእምነት ክህደት ጥያቄ ጥፋተኛ አይደለሁም ሲል ክዶ ተከራክሯል።
ዓቃቤ ሕግ እንደክሱ አቀራረብ የሚያስረዱ ምስክሮች ያሉት መሆኑን በመግለጽ እንዲቀርብለት አሳሳቦ ሁለት የሰው ምስክሮች 2 ገጽ የጽሁፍ ማስረጃ አቅርቦ አሰምቷል።
1ኛ/ የዓቃቤ ሕግ ምስክር ወ/ሮ ናርዶስ ወልደሰንበት የሰጡት ቃል ተከሣሹን አውቀዋለሁ። የጋብቻ ዝምድና አለን። የባለቤቱ ወንድም የልጅ ልጅ ነው። የተከሰሰበትን አላውቅም። ተከሣሽ ከየት እንደሆነ አላውቅም መስከረም 30 ቀን 1978 ዓ.ም. ከቀኑ 6 ሰዓት ላይ ወደ እኛ ቤት መጥቶ የትክክለኛ ሰው አነጋገር

አይናገርም፤ ሰውነቱንም ለመቆጣጠር አይችልም። ባዶ እጁን በመያዝ ከእኛ ቤት ተቀምጦ ሁኔታው ስላሰጋን እያባበልነው ከሰነበተ በኋላ ጥቅምት 3 ቀን 1979 ዓ.ም. ጨርሶ አእምሮውን ሳተና እየሮጠ በየሰው ቤት መግባት በየጫካው መሄድ ጀመረ። በዚህ ጊዜ እኔ እርሱን መያዝ አቅቶኝ ሰው ለእርዳታ እንዲመጣልኝ ጩኸት በማሰማት እርሱን በመከታተል ላይ ሣለሁ ልደርስበት አልቻልኩም። እርሱ እየሮጠ ሄደ። ጩኸት ሰምቼ ወደ ተጮኸበት ቦታ ስደርስ ሰዎች በብዛት ተሰብስበዋል። ተከሣሽ ከእኛ ቤት ሲወጣ ያልያዘውን መጥረቢያ በእጁ ይዞ ዘራፍ እኔ ማነኝ እያለ ሲፎክር አገኘሁት፤ ብለው የመሰከሩ ናቸው።

2ኛ/ የዓቃቤ ሕግ ምስክር አቶ ታዬ በትሩ የመሰከረው ተከሣሽን አውቀዋለሁ፤ ከእርሱ ጋር ጸብም ሆነ ዝምድና የለኝም። የተከሰሰው ሰው በመጥረቢያ በመምታቱ ነው። ጥቅምት 3 ቀን 1979 ዓ.ም. ከጧቱ 4 ሰዓት በሚሆንበት ጊዜ በከፍተኛ 15 ቀበሌ 23 ክልል 1ኛ/ እኔ 2ኛ/ ጀማነህ ኃይሌ እና 3ኛ/ ሰማ በየነ የተባልነው የአብዮት ጥበቃ አባላት በሮንድ ሥራ ላይ ተሰማርተን በመዘዋወር ላይ ሳለን አንዲት ስማቸውን የማላውቃቸው ሴት ወደ እኛ ዘንድ መጥተው አንድ ሰው በጩቤ ሰው ሊገድልብኝ ነውና እርዱኝ ባሉት መሠረት ከእሣቸው ጋር ሄደን ከአንድ ቤት አጠገብ ልንደርስ ስንል ብዙ ሰዎች ተሰብስበው አየን። ከዚያም ከእኔ ጋር የነበሩት ሁለት የአብዮት ጥበቃ አባላት ከሰዎች መካከል ገብተው እኔ ከመንገድ ላይ ሳለሁ ተከሣሽ ሰዎች ከከበቡት ቤት ውስጥ በእጁ መጥረቢያ ይዞ ወጥቶ "ይህ ወታደር ማንን ለመግደል ነው የመጣው።" በማለት ወደ እኔ በመጠጋቱ በመጥረቢያ ሊመታኝ ሲል በመሸሽ ወደ አንድ የእጥር በር ካለው ቤት እንደገባሁ ተከሣሹ ተከታትሎ መጥቶ በመጥረቢያ አጥሩን ከመታው በኋላ ከግቢው ውስጥ ገብቶ አንዲት ቆማ የነበረችውን ሴት "ኃይለሥላሴን የገደለው ማነው? ብሎ ጠይቋት "እኔ አላውቅም" ስትለው በመጥረቢያ ከጆሮ ግንዷ ላይ አንድ ጊዜ መትቷት ወደቀች። በዚህ ጊዜ እኔም ለሕይወቴ ስለፈራሁ በአጥሩ በኩል ዘልዬ ወደ ቀበሌው ጽ/ቤት ሄድኩ። ከዚያው እንዳለሁ አምቡላንስ መጥቶ የተመታችውን ሴት ወደ ሆስፒታል ወሰዷት በዚያኑ ዕለት የተመታችው ሴት ሞተች ማለትን ሰማሁ። ተከሣሹ በዕለቱ ሽሚዝ ብቻ ለብሷል። እኔ እየሮጥኩ የብረት አጥር ካለው ቤት ሰገባ ከተመታቸው ሴት ሌላ አልነበረም። እኔ እየሮጥኩ ስገባ ከግቢ ውስጥ የተመታችው ሴት ቆማ ነበር። ተከሣሹ ይዞት የነበረው መጥረቢያ እጀታው እንጨት ነበር። ተከሣሹ አልቦት የመናደድ ሁኔታ ይታይበት ነበር እኔ የደንብ ልብስ ለብሼ ነበር በማለት አስረድቷል።

ዓቃቤ ሕግ የሰው ምስክር ያበቃ መሆኑን በመግለጽ የሚች አስክሬን በዳግማዊ ምኒልክ ሆስፒታል ተመርምሮ በቁጥር 2898/44/78 ህዳር 2 ቀን 1978 ዓ.ም. በተጻፈ ደብዳቤ ሽኝነት ሁለት ገጽ የአማርኛና የእንግሊዝኛ ትርጉም ቀርቦ ከመዝገቡ ጋር የተያያዘ ሲሆን ፍሬ ሃሳቡም የራስ ቅሏ ከኋላ በኩልና በራሷ ጎን በኩል ያለው ስፌት ተላቋል። የቀኝ የራስ ጎንና የቀኝ ጆሮ ግንዷ አጥንት ተሰብሯል። የራስ ቅሏ መሠረተ አጥንት ተሰብሯል። በአንጎሏ ሽፋንና በሁለቱም ራሷ ጎን የተቋጠረ ደም ተገኝቷል። አንጎሏ ተሰርጉዶ ተቀጥቅጦአል። ለሞት

ያበቃትም 1ኛ አንጎሏ በመጎዳቱ። 2ኛ የራስ ቅሏ በመሰባበሩ 3ኛ ራሷ ላይ ጉዳት ስለደረሰባት መሆኑን የሚገልጽ ነው።

ዓቃቤ ሕግ ማስረጃ ያበቃ መሆኑን ስለገለጸ ፍ/ቤቱ ክስና ማስረጃውን መርምሮ ተከሣሹ መከላከል የሚገባው መሆኑን ብይን ሰጥቷል።

ተከሣሽ በተከላካይ ጠበቃው አማካይነት የሰውና የጽሁፍ ማስረጃ ያለው መሆኑን በመጥቀስ የሚከተለውን የመከላከያ ጭብጥ አስመዝግቧል።

1ኛ/ ተከሣሹ በውትድርና ሥራው ላይ ሣለ ጥሩ መኮንን እንደነበረና ከጊዜ በኋላ የአእምሮ ህመም አድሮበት በየጊዜው ይታመም እንደነበር ከዚያም እየተገደደ ወደ ሆስፒታል ይወሰድ የነበረ መሆኑን እንዲሁም ህመሙ በተነሳበት ጊዜ በንብረትና በሰው ላይ አደጋ ያደረሰ እንደነበረና ለማድረስም ይሞክር የነበረ መሆኑን።

2ኛ/ ተከሣሹ ህመሙ በሚነሳበት ጊዜ አእምሮውን መቆጣጠር የማይችል መሆኑንና በቁጥጥር ሥር እየዋለ ወደ ሆስፒታል ይገባ የነበረ መሆኑን እንዲሁም በንብረትና በግለሰብ ላይ አደጋ ያደርስ የነበረ ለመሆኑና በተለይም የተከሰሰበትን ወንጀል በፈጸመበት ሰሞን ቤተሰቦቹ አስረውት ሣለ የታሠረበትን ገመድ በጥሶ ከቤት በመውጣት ወንጀሉን የፈጸመ መሆኑን ያስረዳሉ የሚል ነው።

1ኛ/ የመከላከያ ምስክር ሻለቃ መኮንን ጥላሁን የመሰከረው ተከሣሹን አውቀዋለሁ። ጸብም ሆነ ዝምድና የለንም። ተከሣሽና እኔ የምንተዋወቀው ከ1977 ዓ.ም. እስከ 1978 ዓ.ም. ድረስ አብረን በውትድርና ሥራ በምንሠራበት ጊዜ ነው። ተከሣሽና እኔ አብረን በሠራንበት ጊዜ ውስጥ እርሱ የዕዝ ቁንጮ ተረኛ መኮንን ሆኖ ሲሠራ ምክንያቱን አላውቅም፤ የደንብ ልብሱን አውልቆ በመጣል ቱታ እየለበሰ ብዙ በመለፍለፍ ሰዎችን እየረበሸ የክበቡን መስተዋት ማለት የመስኮት መስተዋት በመስበርና የራሱን ሻንጣ ቀድዶ በመጣል እንዲሁም ከአሳራባች ክፍል የሚገኘውን የመገናኛ ሬዲዮ በማበላሸት በጥበቃ ሥር ለትንሽ ጊዜ አቆይተነው ነበር። ሆኖም ሁኔታው ሊሻሻል ስላልቻለ በቁጥጥር ሥር ለትንሽ ጊዜ አቆይተነው ነበር። ሆኖም ሁኔታው ሊሻሻል ስላልቻለ በቁጥጥር ሥር እንዳለ ዋናው መሥሪያ ቤት ወደሚገኝበት ደብረዘይት ላክነው። ተከሣሽ ከላይ የተገለጹትን ድርጊቶች የፈጸመው በአንድ ሰሞን ነበር። ተከሣሽ ይህን ሁሉ በሚፈጽምበት ጊዜ አእምሮው ትክክል እንዳልነበረ ሰው ሁኔታ ነው። ተከሣሹ ወደ ደብረዘይት የተላከው በጥር ወር 1977 ዓ.ም. ሲሆን በመጋቢት ወር 1977 ተመልሶ መጥቶ ለተወሰነ ጊዜ በጥሩ ሁኔታ ሲሠራ ከቆየ በኋላ በነሐሴ ወር 1977 ያው የተለመደው ህመሙ ተነሳበትና ተመሳሳይ ችግሮች እንዳይፈጽም በማለት አሥረነው አንዳንድ ህክምና ሲደረግለት እንደቆየ ሰውነቱን መቆጣጠር ችሎ ስለነበር ዕረፍት ስጡኝ ብሎ ከእሥራቱ ፈትተነው በዓይነ ቁራኛ ይጠበቅ ነበር። እንዴት እንደጠፋ አይታወቅም፤ጠፍቶ ወደ ደብረዘይት ሄዶ ናሮ ለህክምና እንደተላከ በመቁጠር ደብዳቤ ጻፉለት ተብለን ቴሌግራም አስተላልፈናል፤ በማለት አስረድቷል።

2ኛ/ የመከላከያ ምስክር ወ/ሮ ብዙነሽ ገብረሕይወት የመሰከረችውን ተከሣሹን ለአንድ ቀን ብቻ አይቸዋለሁ። ከእርሱ ጋር ጸብም ሆነ ዝምድና የለንም። ቀኑንና ወሩን አላስታውስም፣ በግምት አንድ ዓመት ከስምንት ወር ይሆነዋል፤ ከምሠራበት መሥሪያ ቤት ቆይቼ ወደ ቤቴ እንደገባሁ ከውጭ እንጨት ትፈልጥ የነበረችው ልጄ ውብነሽ ማሞ የምትፈልገውን እንጨት በመተው መጣብኝ ብላ ወደ ቤት በመግባት በሩን ዘጋች። በዚህ ጊዜ ማንን ነው መጣብኝ የምትይው ስላት ቀደም ሲል ትንንሽ ከሆኑ የሠፈር ልጆች ጋር እያጨበጨበ ሲጫወት ያየሁትን ተከሣሽን የአባባ ገለታ ወንድም መሆኑን ገለጸችልኝ። ከዚያም ልጄ እንጨት ትፈልጥበት በነበረው መጥረቢያ ተከሣሹ የዘጋነውን በር መፍለጥ ጀመረ። ልጄም ኧረ በአባባ ገለታ "በኢየሱስ ክርስቶስ በይ" ብላኝ እኔም በኢየሱስ ክርስቶስ ብለው በሩን ከመፍለጥ አልታገሰም። በመካከሉ የአባባ ገለታ ባለቤት ወ/ሮ ናርዶስ የተባሉት መጥተው ምነው ልጄ የዘመድ ቤት እንዲህ ታደርጋለህ" ሲሉት መፍለጡን አቁሞ መጥረቢያውን ከትከሻው ላይ እንዳደረገ ሄደ። እኔና ልጄ በሩን በመክፈት ስንመለከት ተከሣሹ የመንግሥት ፈረስ የሚቀመጥበትን ቤት በር በመጥረቢያው ፈለጠውና በሩ ተከፈተ። ከዚያም ተከሣሽ ወደ በአታ ቤተክርስቲያን የሚያመራውን መንገድ ይዞ እንደ ሄደ ከፈረስ ቤቱ የነበሩት ሰዎች ተከሣሽ ሰው ገድሎ ሄደ እያሉ ሲጯጯሁ ሰማሁ። ተከሣሽን በዚያን ዕለት ያየሁት በበሩ ቀዳዳ ነው። አለባበሱ ደህና ነበር በማለት አስረድታለች።

3ኛ/ የመከላከያ ምስክር አቶ ይደግልኝ ገብረሚካኤል የመሰከረው ጥቅምት 3 ቀን 1978 ዓ.ም. ከጧቱ በግምት ከሰዓት እስከ አራት ሰዓት ባለው ጊዜ ውስጥ በከፍተኛ 15 ቀበሌ 23 ክልል ውስጥ ከልጆቼ ጋር ሆኜ ፀሐይ እየሞቅሁ ሰውነቴን ሳዝናና ተከሣሽ እጅ ጉርድ ነጭ ሸሚዝ ለብሶ ከእኔ ግቢ ውስጥ ሲገባ አይቼው ወደ እኔ ይመጣል ብዬ ስጠባበቀው ውሾቹ ባሉበት በኩል ቀጥታ ሄዶ ውሾቹን በማለፍ የስዕል ሥራ ከምሠራበት ክፍል ውስጥ ገባ። በዚህ ጊዜ እኔም በመቆጣት ተከሣሽ ወዳለበት ክፍል ውስጥ ገባሁና በመያዝ ወደ ውጭ ጠምዝዤ አስወጣሁት። ስመለከተው በእጁ የመጻፊያ እርሳስ ይዞ ወጋሁህ ሲለኝ በመካከሉ ውብዓለም እደግልኝ የተባለችው ልጄ ተከሣሹን "የአባባ ገለታ ዘመድ ነው። ዕብድ ነው የተባለው መቶ አለቃ ነው።" አለችኝ። በዚህ ጊዜ አባባ ገለታ ጎረቤት ስለነበሩ አይዞህ በማለት ተከሣሽን አቅፍ አድርጌ በማግባባት ወደ ውጭ ለማውጣት ስሞክር ተከሣሽ "ይኸው ሰይጣን" በማለት መሬቱን በድንጋይ እየደበደበ "ልቀቀኝ ልግደለው" ሲል ውሾቹ ይጮሁ ስለነበር "አሁንም ልቀቀኝ ሰይጣኑን ልግደለው" በማለት እስከ ውሾቹ አፍ ድረስ ተጠጋ። ይህ ሁሉ ሲሆን የአባባ ገለታ ባለቤት መጥተው ሁኔታውን ይመለከቱ ነበርና "እቤቱ ድረስ ወስደህ አባክህ አሰርልኝ" ብለውኝ ለመውሰድ ሞክሬ ከአቅሜ በላይ ስለሆነብኝ ለቀቁሁትና ከግቢዬ ወጥቶ ሄደ፡ በማለት አስረድቷል።

የተከሳሽ ጠበቃ ቀሪዎቹን የመከላከያ ምስክሮች አልፈልጋቸውም አሉ። በጽሁፍ ማስረጃ በኩል 1ኛ ሚያዝያ 30 ቀን 1979 በቁጥር 11/22/9279 ከአየር ኃይል ሆስፒታል የተጻፈው ደብዳቤ ሲሆን ፍሬ ሃሣቡም የመለያ ቁጥር ኤ 09070 መቶ

አለቃ ሁንዴ ለሜቻ የአእምሮ መረበሽ ስለደረሰበት በ16/5/77 ከጅጅጋ ጣቢያ ከአንድ ጤና ረዳት ጋር ወደ አየር ኃይል ሆስፒል ተልኮ ነበር። ለሶስት ሣምንታት ያህል በሆስፒታላችን ሲረዳ ከቆየ በኋላ ለከፍተኛ ህክምና 07/6/77 ወደ ጦር ኃይሎች ሆስፒታል ተልኮ በአእምሮ እስፔሻሊስት ከታየ በኋላ ሐኪሙም የአእምሮ መረበሽ /ኒሮሲስ/ እንዳለበት አመልክተው መድኃኒትና የ15 ቀን እረፍት ተሰጥቶት ከተመለሰ በኋላ በማማስቱ ማለትም በ8/6/77 ከሆስፒታላችን በሙሉ ጤንነት መውጣቱን ከጤና ፋይሎች መረዳታችንን እንገልጻለን የሚል ነው።

2ኛው ግንቦት 4 ቀን 1979 በቁጥር 23/ሀ/2788/79 በአገር መከላከያ ሚኒስቴር የአየር ኃይል 1ኛው ሚሳይል ሬጅመንት ለፍ/ቤቱ የጻፈው ደብዳቤ ሲሆን ፍሬ ሃሣቡም መኮንኑ ጅጅጋ በነበሩበት ጊዜ ከ1977 ጀምሮ አልፎ አልፎ ራሣቸውን ሲያማቸው እንደነበርና በዚሁ ምክንያት ሐኪም ቤት ሄዶ ከሰው ጋር ያላቸውን ግንኙነት በመቀነስ አንዳንድ ከሥነ ሥርዓት ውጭ የሆኑ ድርጊቶች መፈጸማቸውን፣ ከፈጸሙትም ውስጥ፣

1ኛ/ ፈቃድ ሳይሰጣቸው ከሥራቸው ላይ ጠፍተው መሄድ፣
2ኛ/ ቀይ ጨርቅ ከራሣቸው ላይ በመጠምጠም ብዛት ያላቸውን መጻሕፍት ተሸክመው መዞር፣
3ኛ/ ለሠራዊቱ አገልግሎት የሚውሉ ብርቅና ውድ ንብረቶችን መሰባበር፣
4ኛ/ ካምፕ ነዋሪ የሆኑትን አባሎች ሌሊት እንቅልፍ መንሳት፣
5ኛ/ ሲያደርጉ የነበሩት እንቅስቃሴ ከዕለት ዕለት እየባሰ በመሄዱ በቤት ውስጥ እንዲታሠሩ ተደርጎ የታሠሩበትን ገመድ በመበጣጠስ ከጅጅጋ ደብረዘይት ድረስ ጠፍተው መምጣታቸውን ጠቅሶ መኮንኑ የነበሩበት ቅርንጫፍ መሥሪያ ቤታችን በቴሌግራም ቁጥር 23/ቀ/0974/79 አረጋግጦልናል። እኛም መኮንኑ እዚህ ከደረሱ በኋላ አስፈላጊውን የጤንነት ምርመራ እንዲያደርግላቸው በደብዳቤ ቁጥር 23/ሀ/143/78 መሠረት መስከረም 13 ቀን 1978 ወደ አየር ኃይል ህክምና ክፍል ልከናቸዋል። የሕክምና ክፍሉም ከ15/1/78 ጀምሮ የሁለት ሣምንት የበሽታ ዕረፍት ስጥቷቸው በዚሁ በተሰጣቸው የሐኪም እረፍት ተጠቅመው ከቤተሰባቸው ጋር በመኖር ላይ እንዳሉ በ3/2/78 የሰው መግደል ወንጀል ፈጽመዋል ተብለው መታሠራቸውን እናውቃለን የሚል ነው።

ተከሣሹ በተከላካይ ጠበቃው በአቶ ዮሴፍ ሙሉጌታ እየተረዳ ጠቅላላ የመከላከያ ማስረጃ ያበቃ መሆኑን ስላረጋገጠ ግራ ቀኙ ወገኖች የፍርድ ሃሳባቸውን እንዲያቀርቡ ፍ/ቤቱ ትእዛዝ ሰጥቷል።

ይሁንና ዓቃቤ ሕጉም ሆነ ተከሣሽ የፍርድ ሃሳባቸውን አላቀረቡም። በወ/መ/ሕግ/ሥ/ሥ/ ቁጥር 148 መሠረት የሚደረገው የመጨረሻ ንግግር የግራ

ቀኑ ተከራካሪ ወገኖች መብት እንጂ ግዴታ ባለመሆኑ ለማቅረብ እንዲፈልጉ ተቀጥሮ ታልፏል።

ፍ/ቤቱ የክሱን ፍሬ ነገር ከህግና የመከላከያ ማስረጃው ይዘት ጋር በማገናዘብ አንድ በአንድ መርምሯል።

ተከሣሹ የመቶ አለቃ ሁንዴ ለሜቻ መንስኤው በውል ተለይቶ ባልታወቀ ምክንያት ሚች ወ/ሮ ጥሩነሽ ግራባን በፋስ መጥረቢያ አንድ ጊዜ ከራሷ ላይ መትቶ ገድሏል በመባል በቀረበበት ክስ ክዶ የተከራከረ ቢሆንም ሁለት የዓቃቤ ሕግ ምስክሮች ቀርበው አድራጎቱን በመዘርዘር መስክረውበታል።

የሚች ሕይወት ያለፈው በደረሰባት ምት ምክንያት መሆኑን ከዳግማዊ ምኒልክ ሆስፒታል የተሰጠው የአስክሬን ምርመራ ውጤት አረጋግጧል።

ተከሣሹ በበኩሉ በተከላካይ ጠበቃው አማካይነት እየተረዳ 3 የመከላከያ ምሥክሮች አቅርቦ ያሰማ ሲሆን ሁለት ገጽ የጽሁፍ ማስረጃም አያይዟል። የመከላከያ ማስረጃው ይዘት በጥቅል ሲጤን ተከሣሹ አሁን የተከሰሰበትን ሰው የመግደል ወንጀል በአጋጣሚው የአእምሮ መታወክ ህመም የተነሳ የባህርይ ለውጥ ማሳየቱንና የማሕበራዊ ግንኙነቱም እየተበላሸ መሄዱን፣ እንዲሁም ይህን ወንጀል ከመፈጸሙ ቀደም ሲል ጤነኛ አእምሮ አለው የሚሰኝ ሰው ሊያደርገው የማይገባውን ልዩ ልዩ ድርጊት ይፈጽም የነበረ መሆኑን የሚጠቁም ነው።

ተከሣሹ እዚህ ፍ/ቤት የካቲት 4 ቀን 1978 ዓ.ም. በዋለው ችሎት ቀርቦ በተጠየቀበት ወቅት የአእምሮ በሽተኛ መሆኑን በመግለጽ የህክምና እርዳታ እንዲደረግለት ጠይቆ ወደ አማኑኤል ሆስፒታል ሄዶ እንዲመረመር የተደረገ ሲሆን የአማኑኤል ሆስፒታልም በቁጥር አስ/1ውቤ/82/79 ጥቅምት 26 ቀን 1979 ዓ.ም. በተጻፈ ደብዳቤ ተከሣሹ ወንጀሉን በፈጸመበት ጊዜ እብደት ያልነበረውና ምርመራውንም ባደረገበት ወቅት አእምሮው ያልተቃወሰ ጤነኛ መሆኑን በመግለጽ ለፈጸመው ወንጀል በኃላፊነት ሊጠየቅ የሚችል መሆኑን አረጋግጧል።

እዚህ ላይ ተገናዝቦ መታየት የሚገባው ነጥብ ስለተከሣሹ የአእምሮ ጤንነት ጉዳይ ተቀባይነት የሚኖረው ማስረጃ የዘመኑ ቴክኖሎጂ ባፈራው ሣይንሳዊ የህክምና ዘዴ በመጠቀም በሳል የሕክምና ባለሙያዎች የሰጡት ማረጋገጫ ወይስ በአካባቢ ሁኔታ የተነገረው የምሥክርነት ቃል ነው የሚለው ነው።

የድርጊቱን አፈጻጸም ሁኔታ ለማጣራትና የተከሣሽን የወንጀል አድራጎት ለማረጋገጥ ከተሰበሰበው የዓይንና የአካባቢ የሕግና የመከላከያ ማስረጃ አኳያ ተከሣሹ የአእምሮ መታወክ ህመም ይታይበት እንደነበረ ጠቋሚ ሁኔታዎች መኖራቸው ግልጽ ቢሆንም የአማኑኤል ሆስፒል ሕጋዊ የህክምና ኮሚቴ ግን ተከሣሹ ወንጀሉን በፈጸመበት ጊዜ እብደት ያልነበረበትና በአሁኑ ወቅትም የአእምሮ መታወክ ህመም የሌለበት መሆኑን በመግለጽ ለፈጸመው ወንጀል

በኃላፊነት ሊጠየቅ የሚገባው መሆኑን በማረጋገጡ ፍ/ቤቱ ማስረጃነቱን አምኖ እንዲቀበለው አድርጎታል። ምክንያቱም ተከሣሹ ወንጀሉን ከመፈጸሙ በፊትም ሆነ በኋላ ያሳየው የነበረው ባሕርይ ጤነኛ አእምሮ ያለው ሰው የሚያደርገውን ዓይነት ነው ተብሎ በአካባቢ ሁኔታ የተጠቆመውን አጠራጣሪ ነጥብ ለማጣራት ፍ/ቤቱ በወ/መ/ሕግ ቁጥር 51 መሠረት የሕክምና ምርመራ እንዲደረግ አዝዞ የተገኘው ማረጋገጫ ተከሳሽ ጤነኛ መሆኑን የሚያመለክት ነው።

በአጠቃላይ ተከሣሹን በቀረበበት ሰው የመግደል ወንጀል ክስ ክዶ የተከራከረ ቢሆንም ባቀረበው የዓቃቤ ሕግ ማስረጃ የተመሰከረበት ከመሆኑም በላይ በአቀረበው የመከላከያ ማስረጃ አልተደገፈም። ምንም እንኳን ተከሣሹ የአእምሮ መታወክ ህመም ያለበት መሆኑን ይሠራበት ከነበረው የአየር ኃይል ጠቅላይ መምሪያ በተጻፈለት ደብዳቤና በአቀረበው የሰው ማስረጃ ለማስረዳት ቢሞክርም የአእምሮ ጤንነትን በተመለከተ በቂ የህክምና ምርመራ አድርጎ ማረጋገጫ ከሰጠው የአማኑኤል ሆስፒታል የተሰጠው ምስክርነት የተከሣሹን ጤናማነት የሚያመለክት በመሆኑ ለፈጸመው ወንጀል በኃላፊነት ከመጠየቅ የሚያድንበት ሕጋዊ ምክንያት አልተገኘም።

ስለዚህ ተከሳሽ የመቶ አለቃ ሁንዴ ለሜቻ የተመሠረተበትን ሰው የመግደል ወንጀል የተጠናቀረውንም የዓቃቤ ሕግ ማስረጃ በመከላከያ ማስረጃ ከአማኑኤል ሆፒታል በተሰጠው ምስክርነት መሠረት ለፈጸመው ድርጊት በኃላፊነት ሊጠየቅ የሚገባው መሆኑን ስለአረጋገጠ ለክሱ በተጠቀሰው የወ/መ/ሕግ ቁጥር 523 መሠረት ጥፋተኛ ነው ብለናል።

ስለቅጣቱ ዓቃቤ ሕግ ያሳሰበው ስለ ተከሣሹ የቀድሞ የሕይወት ታሪክ የሚያቀርበው ሪከርድ ስለሌለ ጥፋተኛ ነው በተባለበት ሕግ መሠረት ተመጣጣኝ ቅጣት ይወሰንበት ብሏል።

የተከሳሽ ተከላካይ ጠበቃ ያሳሰቡት ተከሣሹ ደካማ እናትና አባቱን ከመርዳቱም በላይ ደካማ ዘመዶችንም የሚረዳ ባለትዳር ስለሆነ ፍ/ቤቱ ይህንኑ ሁሉ በመመልከት ከፍተኛ አስተያየት አድርጎና በውትድርና 11 ዓመታት ያገለገለውን ተመልክቶ ዝቅተኛ ቅጣት ይወሰንልኝ ብሏል።

ዓቃቤ ሕጉና የተከሣሽ ተከላካይ ጠበቃ ያቀረቡትን የቅጣት ሃሣብ አገናዝበን የታሠረው አንድ ዓመት ከ6 ወር ከአንድ ቀን የታሠረውን ለቅጣቱ በቂ አድርገን ወስነናል።

ተከሣሹ ከእሥራቱ እንዲፈታ ለአ.አ. ወህኒ ቤት ይጻፍ የይግባኝ መብት የተጠበቀ ነው።

የዳኞች ፊርማ፡- ሀ፣ ለ፣ ሐ፣

Addis Ababa High Court
Sene 3, 1979 E.C.
Judges: Unidentified
Prosecutor : Unidentified
Defendant: Lieutenant Hunde Lemecha represented by Defense Counsel Ato Yoseph Mulugeta

Summary of the Judgment

The defendant is charged with under Article 523 of the 1957 Penal Code[529] for killing Wro. Tirunesh Garba with an axe on Tikimt 3, 1979. He was sent to a mental hospital for examination and the medical report submitted confirmed that the defendant had no mental disturbance or insanity at the time of committing the crime.
The defendant pleaded not guilty. The prosecution called the following witnesses:

1. Wro. Nardos W/Senbet testified that the defendant is her relative. The witness testified that on Tikimt 3, 1979 the defendant came to her house at 12:00 p.m., run amok and entered different houses in the neighborhood. She tried to stop the defendant but failed to do so. While running after the defendant, she saw many individuals gathered at a place and some were crying. She arrived at the specific spot and saw the defendant holding an axe which he didn't have while he was with her a while ago. She heard him asking the crowed who they think he was.

2. Ato Taye Betru, a neighborhood guard on patrol at the relevant time, testified that a woman seeking help approached him and told him that a man was about to chop another individual. He went to the spot with his colleagues and saw the defendant holding an axe. The defendant then approached him and asked him who he came to kill. When the defendant came after him he fled the scene and went in to a nearby house. The defendant then sort of knocked on the fence of the house he entered with his axe and asked the woman he found in the premise 'who killed Emperor Haile Selassie?'. She responded that she did not know the killer and he struck her around

[529] The defendant was charged under the Penal Code of 1957 which is repealed by the Criminal Code of 2004.

her ear with his axe. The victim was taken to a hospital and died on the same day. The witness testified that the defendant was sweating and looked angry.

The prosecutor submitted a post mortem examination medical report which stated that the victim died as a result of the blow that she received from the defendant.

The defense on its part called the following witnesses:

1. Major Mekonnen Tilahun told the court that the defendant was his colleague. The witness testified that he had observed the defendant taking off his military uniform and walking around in track suit, talking a lot and disturbing others, and breaking the windows of the military meeting hall. The witness further made the following testimony. The defendant was put under detention for the above acts. Since his situation could not improve, the defendant was eventually remanded to the Army Head Quarters. Though he rejoined the army after sometime, he relapsed into his previous behavior and received treatment while under detention. The defendant was then given sick leave when he fled to Debre Zeit.

2. Wro. Bizunesh G/Hiwot , a resident of the neighborhood, testified that the defendant came to her house and picked an axe left idle in the premise and started to hit the gate of her fence and could not stop his act even when implored by her. He then left the house upon a plea from one of his relatives and then went to a nearby government barn and started to axe the door. She then saw him walking in the direction of the Ba'eta Church and eventually heard people raising hue and cry and shouting that he has killed a person.

3. Ato Yidegilign G/Michael, also a resident in the neighborhood, testified that the defendant came to his house and threatened to stab him with a pencil and that while he was pushing him out, he started to hit the ground yelling to be left alone. The witness testified that he drove the defendant out of his house by twisting his arm.

The defense also adduced the following written pieces of evidence:

1. A letter written by the Air Force Hospital, which states that the defendant was suffering from mental disturbance and was treated at the hospital for three weeks. The letter states that the defendant was sent to the Army Hospital in Addis for further treatment. The letter further states that the defendant was diagnosed with neurosis at the Army Hospital and fully recovered upon leaving the hospital.

2. Another letter written by a Division in the Ministry of Defense of which the defendant was a member states that the defendant, while serving in Jijiga, used to suffer from occasional headache, deterioration of personality and poor social relations. The letter also confirms that the defendant was admitted to hospital and has committed the following acts: abandoned his duty without permission, broke valuable properties that belonged to the army, disturbed camp residents at night, and eventually went to Debre Zeit without obtaining leave.

The Court pointed out that main issue in the case is whether it is the certified medical evidence or circumstantial evidences that should tip the balance of admissibility. Though it was proved by circumstantial evidence gathered from the scene of the crime that the defendant was suffering from mental disturbance, the medical evidence proves that he committed the crime while in a normal state of mind. The Court has accepted the certified medical evidence from the Amanuel Hospital as the most reliable. The prosecution has also presented evidence adduced to the Court and the testimony of witnesses which were not rebutted by the defendant. Therefore, the Court found the defendant guilty of the charge brought against him under Article 523 of the 1957 Penal Code. After weighing the aggravating and mitigating and circumstances adduced by the prosecution and defense, the court pronounced the following sentence.

In principle, penalty should be fixed based on the prior history of a defendant, taking into account the reason that prompted the act, and the seriousness of the offence. Since the prosecution has not submitted any evidence that shows that the defendant is a recidivist,

the Court has drawn a conclusion that the defendant has no crime record. Moreover, the Court noted that though it is medically proved that the defendant was sane at the time of committing the crime, it is hard to accept that the defendant was normal when he committed the crime against a person whom he has never met. Thus, the Court noted that for this reason it was difficult to apply Arts.48-51[530] of the Code.

The Court after examining the defendant's past military service and other mitigating circumstances adduced by the defense and noting that the defendant's state of mental health prior to and while committing the crime indicate that he was suffering from a undetected health problem which could not be diagnosed through medical examinations, and in light of the overall objectives of the law, sentenced him to a year and thirty one days imprisonment.

[530] These are provisions that deal with the standards of the defense of insanity and procedures to be followed in case when insanity is raised as a defense.

የመሬት ይዞታ መብትና በመሬቱ ላይ የተሠራ ቤት ባለቤትነት ጥያቄ: በፍርድ ላይ የቀረበ ትችት

ሞላ መንግሥቱ*

መግቢያ

በዚህ ርዕስ የሚተቹት ሁለት የፌዴራል ጠቅላይ ፍ/ቤት የሰበር ውሳኔዎች ናቸው። ሁለቱን ውሳኔዎች በአንድ ርዕሰ ስር ለመተቸት የተፈለገውም አንድም ፍርዶቹ ተመሳሳይነት ስላላቸው ነው። ሁለተኛም ፍ/ቤቱ በተመሳሳይ ጉዳዮች የሚሰጣቸው የተለያዩ ውሳኔዎች የተጣጣሙ መሆን አለመሆንናቸውን ለማመልከት ሲሆን ሶስተኛም በውሳኔዎቹ የሚታዩትን ችግሮች ተደጋጋሚ መሆን አለመሆን ለማሳየት ነው።

በትችቱ የመሬት መብት የይዞታ መብት ሲሆን በመሬቱ ላይ የሚሠራው ቤት መብት ግን የባለቤትነት መብት መሆኑ መብቶቹን ከመወሰን አንፃር የፈጠረውን መሳከርና የፍትሐብሔር ሕጉ ድንጋጌዎች በእነዚህ መብቶች ላይ ያላቸው ተፈፃሚነት ከሕገ መንግስቱና ሌሎች አግባብ ያላቸው ሕጐች ድንጋጌዎች ጋር እንዴት ተጣጥመው መተግበር እንዳለባቸው ከፍርድ ቤቱ ውሳኔዎች አንፃር የጉዳዮቹን ዝርዝር ለማየት ይሞከራል።

I. ውሳኔ አንድ[531]

የአቶ አድነው አወቀ ይዞታ በሆነው በአዲስ አበባ የሚገኝ መሬት ላይ ቁጥር 560(ሀ) እና 560(ለ) የሆኑ ቤቶች ነበሩ። ባቤት ቁጥር 560(ሀ) አቶ አድነው አወቀ ከነቤተሰቦቻቸው የሚኖሩ ሲሆን በቤት ቁጥር 560(ለ) ደግሞ አቶ ገዛኸኝ አወቀ ይኖሩ ነበር።

የአቶ አድነው አወቀን መሞት ተከትሎ የሚች ባለቤት የነበሩት ወ/ሮ ዳሳሽ ባይነሳኝና ልጆቻቸው ገነት አድነውና ደሣለኝ አድነው በጋራ በመሆን ቁጥሩ 560(ለ) የሆነውን ቤታችንን በኃይል ገብቶ በመያዝ እየተጠቀመበት ስለሚገኝ ቤቱን እንዲለቅልን ይወሰንልን በማለት ለፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት በአቶ ገዛኸኝ አድነው ላይ ክስ ያቀርባሉ። ተከሣሹ በበኩላቸው ክስ የቀረበበትን ቤት የሠራሁት ራሴ ስለሆንኩ ከሣሾች ምንም ዓይነት መብት የላቸውም፤ የቤቱ ባለቤትም እኔ እንጅ እነሱ አይደሉም። ስለዚህም ክሱ ውድቅ ተደርጐ በነፃ ልሰናበት በማለት ተከራከሩ።

ፍ/ቤቱ የከሣሽና የተከሳሽን የጽሑፍና የቃል ክርክር ከመረመረ በኋላ:-

1) ቁጥር 560(ለ) የሆነው ቤት ባለቤት ከሣሾች ናቸው ወይስ ተከሣሽ?

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*ሌክቸረር፣ሕግ ት/ቤት፣ አዲስ አበባ ዩኒቨርስቲ

[531]በፍትሐብሔር መዝገብ ቁጥር 05950 በ9/3/98 ዓ.ም በፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት የተሰጠ ውሳኔ

2) ባለቤቱ ተከሣሽ ናቸው ከተባለ በማን ይዞታ ላይ ነው ቤቱን የሠሩት? የሚሉ ጭብጦችን በመያዝ መርምሮ ውሳኔ[532] ሰጥቶባቸዋል። በውሳኔውም ቤቱን የሠራው ተከሣሽ መሆኑ ስለተረጋገጠ የቤቱ ባለቤትም እሱ ነው ካለ በኋላ ቤቱን የሠራውም የከሣሾች አውራሽ በሆኑት በሟቹ በአቶ አድነው አወቀ ይዞታ ላይ በእሳቸው ፈቃድ መሆኑን ማረጋገጡን አብራርቷል። ፍ/ቤቱ በመቀጠልም ከሣሾች ቤቱ የተሠራበትን ዋጋ ከፍለው ቤቱን ከተከሣሽ መረከብ የሚችሉ መሆኑን ከጠቀሰ በኋላ ሆኖም ተከሣሽ ቤቱን የሠራው ቦታው የከሣሾች አውራሽ ይዞታ መሆኑን እያወቀ ስለሆነ ከሣሾች መክፈል የሚገባቸው በፍትሐ ብሔር ሕግ አንቀጽ 1180 በተደነገገው መሠረት ቤቱ የተሠራበትን ዋጋ 1/4 ብቻ ነው በማለት ወስኗል።

ተከሣሽ በዚህ ውሳኔ ቅር በመሰኘት ይግባኝ ለፌዴራል ከፍተኛ ፍ/ቤት ያቀረበ ቢሆንም ፍ/ቤቱ መልስ ሰጭን አስቀርቦ ግራቀኙን ክክራክረ በኋላ ይግባኙን ውድቅ በማድረግ የስር ፍ/ቤቱን ውሳኔ አጽንቷል።[533] የስር ተከሣሹ በመቀጠልም የይግባኝ ሰሚውን ፍ/ቤት ውሳኔ በመቃወም ውሳኔው መሠረታዊ የሕግ ስህተት ያለበት መሆኑን ዘርዝሮ ለፌዴራል ጠቅላይ ፍ/ቤት ሰበር ችሎት አቤቱታውን አቀረበ።

በዚህ አቤቱታውም፦

1. ከሣሾች በቤት ቁጥር 560(ለ) ላይ መብት ወይም ጥቅም ያላቸው መሆኑን ሳያረጋግጡ በከሣሽነት እንዲከራከሩ ፍ/ቤቱ በመፍቀድ ክርክሩ እንዲቀጥል ማድረጉ መሠረታዊ የሕግ ስህተት ነው፤
2. ክርክሩ የተነሳበት ቤት የተሠራበት ቦታ የአቶ አድነው አወቀ ይዞታ ነው ተብሎ መወሰኑ የፍትሐ ብሔር ሕግ አንቀጽ 1140 ትርጉምን ያልተከተለ በመሆኑ መሠረታዊ የሕግ ስህተት ነው ፤
3. ክርክር የተነሳበት ቤት የተሠራበት ቦታ የአንደኛ ከሣሽ ባለቤትና የሌሎች ከሣሾች አውራሽ ነው ተብሎ መወሰኑ በአዋጅ ቁጥር 47/1967 መሬት የመንግሥት ነው ተብሎ የተደነገገውን የሚቃረን በመሆኑ ውሳኔው መሠረታዊ የሕግ ስህተት ስላለበት ሊሻር ይገባዋል በማለት ጠይቋል።

የሰበር መልስ ሰጭዎችም ባቀረቡት መልስ፦

1. ክርክር የተነሳበት ቤት የተሠራው በአቶ አድነው አወቀ ይዞታ ቦታ ላይ መሆኑ በፍ/ቤቱ ስለተረጋገጠና ተከሣሽም በቦታው ላይ ቤቱን እንድሠራ አቶ አድነው አወቀ ፈቅደውልኛል በማለት ከሚጠቀምበት በሰተቀር በስጦታ የተሰጠው ለመሆኑ ወይም ቦታው የራሱ ለመሆኑ ያቀረበው ማስረጃ ባለመኖሩ፤

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[532] ፍ/ቤቱ ሁለተኛውን ጭብጥ መመርመሩ አስፈላጊ የሚሆነው ቤቱን የሠራው በራሱ መሬት ላይ ከሆነ የቤቱ ባለሐብትነቱ የማይካ መሆኑንና ቤቱ የተሠራው በሌላ ሰው ይዞታ መሬት ላይ ከሆነ ግን የቤቱ ባለሐብትነት ባለይዞታው ቤቱ ሲሠራ ባኑት ተቃውሞ ወይም ባሳዩት ዝምታ ወይም በሰጡት ፈቃድ ላይ ተመሥርቶ የሚለያይ መሆኑን ከሕጉ ጋር በማገናዘብ መደምደሚያ ላይ ለመድረስ እንደሆነ መገንዘብ ይቻላል።

[533] በመዝገብ ቁጥር 43119 ህዳር 9 ቀን 1999ዓ.ም የፌደራል ከፍተኛ ፍ/ቤት የሰጠው ውሳኔ

2. ተከሣሽ በክርክሩ ላይ በፍ/ቤት ለቀረበለት ጥያቄ በሰጠው መልስ ቤቱን ሠራሁ የሚልበት ቦታ የአቶ አድነው አወቀ መሆኑን አረጋግጦ ያስረዳ በመሆኑ፣
3. የቤት ቁጥር 560(ለ) የተሠራበት ቦታ ይዞታ የአቶ አድነው አወቀ መሆኑ ባቀረብነው ማስረጃ በፍ/ቤቱ ተረጋግጦ የተሰጠ ውሳኔ በመሆኑ.
4. ይግባኝ ሰሚው ፍ/ቤትም ውሳኔውን ተቀብሎ ያፀደቀው ምንም ዓይነት የሕግ ስህተት የሌለበት መሆኑን በማረጋገጥ ስለሆነ፣

ውሳኔው የሕግ ስህተት አለበት የሚባልበት ምንም ምክንያት ባለመኖሩ ሊፀና ይገባዋል በማለት ተከራክረዋል። የሰበር ሰሚው ፍ/ቤትም የግራቀኙን ክርክር ከሰማ በኋላ "የሰበር አመልካች ክስ የቀረበበትን ቤት ለከሣሾች ሊያስረክብ ይገባል ወይስ አይገባም" የሚል ጭብጥ በመያዝ በጉዳዩ ላይ ውሳኔ ሰጥቷል።[534]

የሰበር ችሎቱ ውሳኔ፣

የተከበረው የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ችሎት "በፍትሐብሔር ሕጉ ስለንብረት በጠቅላላው በሚደነግገው ሶስተኛ መጽሐፍ ሥር በአንቀጽ 1178(1) ባለመሬቱ በግልጽ እየተቃወመው ማንም ሰው በሌላ ሰው መሬት ላይ ሕንፃ የሠራ እንደሆነ በሕንፃው ላይ አንዳችም መብት ሊኖረው እንደማይችል የተመለከተ ሲሆን ነገር ግን ባለመሬቱ ሳይቃወም በመሬቱ ላይ ሕንፃ የሠራ ሰው የዚሁ ሕንፃ ባለሀብት ሊሆን እንደሚችል ቀጥሎ በሚገኘው በቁጥር 1179 (1) ላይ ተመልክቷል። እንዲህ በሆነ ጊዜም ባለመሬቱ ከባለ ሕንፃው ጋር የተስማሙበትን ግምት በመክፈል ወይም በግምቱ ያልተስማማ እንደሆነ በቁጥር 1180 በተመለከተው መሠረት የሕንፃውን ግምት በመክፈል ሕንፃውን ማስለቀቅ እንደሚችል ተደንግጓል" ካለ በኋላ በመቀጠል፡-

> "ሕጉ በዚህ መልኩ የተቀረፀ ሲሆን በተያዘው ጉዳይ አመልካች ለክሱ ምክንያት የሆነውን ቤት የአንደኛ ተጠሪ ባለቤት የሁለተኛ እና ሶስተኛ ተጠሪዎች ደግሞ አባትና አውራሽ የሆኑት አቶ አድነው አወቀ በነበራቸው መሬት ላይ አመልካች ቤት እንዲሠሩ ፈቅደውላቸው ቤቱን የሠሩ መሆኑን የፌ/መ/ደ/ ፍ/ቤት በውሳኔው ላይ አስፍሯል።
> ከላይ በተጠቀሰው የፍ/ብ/ሕጉ ቁጥር 1179(2) መሠረት በሌላ ሰው መሬት ላይ ቤት (ሕንፃ) የሠራ ሰው የሕንፃውን ግምት ተቀብሎ ሕንፃውን ለባለመሬቱ ለማስረከብ የሚገደደው ባለመሬቱ ሳይቃወም ሕንፃውን የሠራ በሚሆንበት ጊዜ ነው። ነገር ግን በተያዘው ጉዳይ አመልካች ለክርክሩ ምክንያት የሆነውን ቤት የሠራው የአንደኛ ተጠሪ ባለቤትና የቀሪዎቹ ተጠሪዎች አውራሽ የሆኑት ሟች አቶ አድነው አወቀ ሳይቃወሙ በቀሩበት ሁኔታ ሳይሆን ይልቁንም ፈቃዳቸውን ሰጥተዋል በተባለበት ሁኔታ ከመሆኑም በላይ ሕጉ በወጣበት ዘመን

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[534] በሰበር መዝገብ ቁጥር ህዳር 24 ቀን 2000 ዓ.ም የፌደራል ጠቅላይ ፍ/ቤት ሰበር ችሎት የሰጠው ውሳኔ

ግለሰቦች በመሬት ባለቤትነት ረገድ መብት የነበራቸው ቢሆንም አሁን ባለው ሁኔታ ደግሞ በኢ.ፌ.ዴ.ሪ. ሕገመንግስት መሬት በግል ባለቤትነት መያዙ ቀርቶ የመንግስትና የሕዝብ ሀብት እንዲሆን የተደረገ ስለሆነ የፌ/መ/ደ/ፍ/ቤት ተጠሪዎች የመሬቱ ባለቤት ስለሆኑ አመልካች በመሬቱ ላይ የሠራውን ቤት የዋጋ ግምት 1/4 ከተጠሪዎች ተቀብለው ቤቱን ያስረክቡ በማለት የሰጠው ውሳኔ በዚህ ረገድ ከነበረው ሕግም ሆነ ከሕገመንግስታችን ጋር የተጣጣመ ሆኖ አልተገኘም፡፡ የፌዴራል ከፍተኛ ፍ/ቤትም ይህንኑ ሳያርም መቅረቱ የሕግ ስህተት ሆኖ ተገኝቷል" የሚለውን ምክንያት ከሰጠ በኋላ የሚከተለውን ውሳኔ ሰጥቷል፡፡ውሳኔውም፦

1. "የፌ/መ/ደ/ፍ/ቤት የሰጠው ውሳኔና የፌ/ከ/ፍ/ቤት የሰጠው ፍርድ መሠረታዊ የሕግ ስህተት የተፈፀመበት ስለሆነ በፍ/ሕ/ሥ/ቁጥር 348(1) መሠረት ተሽሯል፡፡
2. "አመልካች ለክሱ ምክንያት የሆነውን ቤት ለተጠሪዎች ሊያስረክብ አይገባም፡፡" የሚል ነው፡፡

II. ውሳኔ ሁለት[535]

አቶ ተመስገን ዳኘና ወ/ሮ እባቡ ቸኮል በምዕራብ ጉጃም ዞን በመርጠ ለማርያም ከተማ ቤት ሠርተው በጋብቻ ሲኖሩ ከቁዩ በኋላ ህፃን ዘላለም ተመስገንን ወልደው አቶ ተመስገን ዳኘ ከዚህ ዓለም በሞት ይለያሉ፡፡ ከዚህ በኋላ የሟች ሚስት የነበሩት ወ/ሮ እባቡ ቸኮል የሟች አባትና እናት የሆኑት ቄስ ገበዝ ዳኘ ካሳና ወ/ሮ ምትኬ አየለ ሟች በመርጠ ለማርያም ከተማ የሠራውን ቤትና ሌሎች የቤት ዕቃዎች በመያዝ ስለከለከሉኝ ቤቱንና ንብረቱን ያስረክቡኝ በማለት በራሳቸውና በህፃን ልጃቸው ስም ለምዕራብ ጉጃም ከፍተኛ ፍ/ቤት ክስ አቀረቡ፡፡ ተጠሪዎችም ቀርበው ቤቱን የሠራነው ራሳችን ስንሆን የተሠራውም የአንደኛው ተጠሪ ይዞታ በሆነ ቦታ ላይ ነው፡፡ በአመልካች የተዘረዘረው የቤት ዕቃም የለብንም በማለት ተከራክረው ክሱ ውድቅ እንዲደረግ ጠይቀዋል፡፡ ከሣሽም ቤቱን የሠሩት ሟች አቶ ተመስገን ዳኘና ወ/ሮ እባቡ ቸኮል መሆናቸውን ያስረዱልኛል ያሉዋቸውን ምስክሮች አቅርበው ያሰሙ ሲሆን ተጠሪዎችም በበኩላቸው ቤቱን የሠሩት እነሱ መሆናቸውንና ቤቱ የተሠራውም በነሱ ይዞታ መሬት ላይ መሆኑን ያስረዱልናል የሚሏቸውን ምስክሮች አቅርበው አስምተዋል፡፡ የመሬቱ ይዞታ የነሱ መሆኑን ለማሳየትም ከመርጠ ለማርያም ከተማ መሪ ማዘጋጃ ቤት የተላከ የጽሑፍ ማስረጃና አንደኛው ተጠሪ የከተማ ቦታ ኪራይ የከፈሉበትን ደረሰኝ አቅርበዋል፡፡

የከፍተኛው ፍ/ቤትም የግራ ቀኙን ክርክር ከተመለከተና ያቀረቡትን ማስረጃ ከሰማ በኋላ እስከ 1998 ዓ.ም የመሬቱን ግብር የከፈለው አንደኛው ተጠሪ

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[535] በሰበር መዝገብ ቁጥር 44221 መጋቢት 7 ቀን 2002 ዓ.ም የፌደራል ጠቅላይ ፍ/ቤት ሰበር ችሎት የሰጠው ውሳኔ

መሆኑን የመርጠ ለማርያም ከተማ ማዘጋጃ ቤት የገለጸ ሲሆን ከሣሽ ያቀረበችው ማስረጃ ግን የሰው ምስክር ነው። የማይንቀሳቀስ ንብረት ባለቤትነትን ደግሞ በሰው ማስረጃ ማስረዳት አግባብነት ያለው ባለመሆኑ ወ/ሮ እባቡ ቸኩልና ህፃን ዘላለም ተመስገን በቤቱ ላይ መብት የላቸውም የቤቱን ዕቃ በተመለከተ ግን ተጠሪዎች ለአመልካች በዓይነት ወይም ብር 3500.00(ሶስት ሽህ አምስት መቶ) ይክፈሉ በማለት ወሰነ።

አመልካች ይህን ውሳኔ በመቃወም ለአማራ ክልል ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት ይግባኝ አቀረበች። ይግባኝ ሰሚ ችሎቱም ተጠሪን አስቀርቦ የግራ ቀኙን ክርክር ከሰማ በኋላ የቦታው ባለይዞታዎች ተጠሪዎች ቢሆኑም ቤቱን የሠሩት በተጠሪዎች ፈቃድ አቶ ተመስገን ዳኘና ወ/ሮ እባቡ ቸኩል መሆናቸው በማስረጃ የተረጋገጠ ስለሆነ የቤቱ ባለሀብቶች ወ/ሮ እባቡ ቸኩልና ህፃን ዘላለም ናቸው በማለት ወሰነ።

ተጠሪዎችም በበኩላቸው የይግባኝ ሰሚው ችሎት ውሳኔ መሠረታዊ የህግ ስህተት አለው በማለት ለክልሉ ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት አቤቱታቸውን አቀረቡ። የክልሉ ሰበር ችሎትም የግራ ቀኙን ክርክር ከሰማ በኋላ አቶ ተመስገን ዳኘ ቤት የሠራው አንደኛው ተጠሪ የይዞታ ቦታቸውን ስለሰጡት ነው የተባለው የማይንቀሳቀስ ንብረት ላይ የሚደረግ ስምምነት በፍትሐ ብሔር ሕግ አንቀጽ 1723 የተደነገገውን ማሟላት የሚገባው ሆኖ ስለ አመልካቾች ይህን ፎርም ማሟላታቸውን የሚያስረዳ ማስረጃ አላቀረቡም። በሌላ በኩል ተጠሪዎች ግን በፍትሐ ብሔር ሕግ አንቀጽ 1195(1) በተደነገገው መሠረት ያስረዱ ሲሆን አመልካቾች ይህን ማስረጃ ለማፍረስ ያቀረቡት የሰው ምስክር በመሆኑ የክልሉ ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት ቤቱ የአመልካቾች ነው በማለት የሰጠው ውሳኔ መሠረታዊ የሕግ ስህተት አለበት ብሎ የቤቱ ባለቤቶች ተጠሪዎች ናቸው በማለት ወሰነ።

አመልካች የክልሉ ጠቅላይ ፍ/ቤት ሰበር ችሎት አንደኛ ተጠሪ ልጃቸው አቶ ተመስገን ዳኘ በይዞታ መሬታቸው ላይ ቤት እንዲሠራ የፈቀዱትና የተስማሙት በፍትሐ ብሔር ሕግ አንቀጽ 1723 በተደነገገው መሠረት አይደለም፤ ከዚህም በተጨማሪ ቤቱን የሠሩት ሟች ተመስገን ዳኘና ወ/ሮ እባቡ ቸኩል መሆናቸውን በሰው ምስክር ማስረዳታቸው ተገቢነት የለውም በማለት የቤቱን ባለቤትነት ለተጠሪዎች እንዲሰጥ መወሰኑ መሠረታዊ የሕግ ስህተት አለበት በማለት ለፌዴራል ጠቅላይ ፍ/ቤት ሰበር ችሎት የሰበር አቤቱታ አቀረቡ።

ተጠሪዎችም በበኩላቸው አንደኛ ተጠሪ ለሟች ተመስገን ዳኘ ክርክር የተነሳበትን ቤት እንዲሠራ ቦታ በስጦታ የሰጡ መሆናቸው በፍትሐ ብሔር ሕግ አንቀጽ 1723 ድንጋጌ መሠረት መፈፀሙን የሚያረጋግጥ ማስረጃ በከሣሾች በኩል አልቀረበም። ከዚህም በተጨማሪ በአሁኑ ጊዜ ባዶ ቦታ የመንግሥት በመሆኑ ስጦታ ተሰጥቷል ቢባል እንኳ ፈራሽ ነው በማለት ተከራክረዋል።

የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ችሎትም የግራ ቀኙን ክርክር ከሰማ በኋላ "ክርክር የተነሳበት ቤት ባለሀብት ማን ነው?" የሚለውን ጭብጥ በመያዝ አመልካችና ተጠሪዎች ያቀረቧቸውን ማስረጃዎች ተቀባይነት አግባብ ካላቸው የሕግ ድንጋጌዎች ጋር በማገናዘብ ውሳኔ ሰጥቷል።

የሰበር ችሎቱ ውሳኔ

የፌዴራል ጠቅላይ ፍ/ቤቱ ሰበር ችሎት ተጠሪዎች በሚመለከተው የመንግሥት አካል በሕጋዊ መንገድ የቤት መሥሪያ ቦታ የተሰጣቸው መሆኑን የመርጠ ሰማርያም ከተማ ማዘጋጃ ቤት በፃፈው ደብዳቤና አንደኛው ተጠሪ ባቀረቡዋቸው የቦታ ግብር ደረሰኞች ተገጋግጧል። ሆኖም ተጠሪዎች ያቀረቡዋቸው እነዚህ የጽሑፍ ማስረጃዎች በፌዴራል ሕገ መንግሥቱ አንቀጽ 40(3) መሠረት ባለሀብት ከሆነው መንግሥትና ሕዝብ የኪራይ ክፍያ እየከፈሉ ቦታውን ለቤት መሥሪያነት፣ እንዲጠቀሙበት በይዞታነት የተሰጣቸው መሆኑንና ባለይዞታዎችም በሕገመንግሥቱ አንቀጽ 40 (7) መሠረት መሬቱን የመጠቀም፣ በመሬቱ ላይ ቋሚ ማሻሻያ ለማድረግ፣ የማይንቀሳቀስ ሐብት ለማፍራትና በሚያፈሩት ሐብት ላይ ሙሉ የባለቤትነት መብት ያላቸው መሆኑን የሚያስረዱና በአጠቃላይም በመሬቱ ላይ የባለይዞታነትና የመጠቀም መብት ያላቸው መሆኑን የሚያረጋግጡ ናቸው ካለ በኋላ እነዚህ በተጠሪዎች የቀረቡ ሰነዶች ተጠሪዎች በመሬቱ ላይ ያላቸውን የይዞታ መብት የሚያረጋግጡ እንጂ ተጠሪዎች በተሰጣቸው ቦታ ላይ የተሠራው ቤት የእነሱ መሆኑን የሚያረጋግጡ የባለቤትነት የምስክር ወረቀት አይደሉም በማለት አብራርቷል።

በዚህ ማብራሪያ ላይ በመመሥረትም የአማራ ክልል ጠቅላይ ፍ/ቤት ሰበር ችሎት ተጠሪዎች ያቀረቡት ሰነድ በፍትሐ ብሔር ሕግ አንቀጽ 1195(1) መሠረት የቤቱ ባለሀብት መሆናቸውን በአጥጋቢ ሁኔታ ያስረዳል በማለት የሰጠው ውሳኔ የመሬት ይዞታና ተጠቃሚነትን በማስረዳትና የማይንቀሳቀስ ንብረት ባለቤትነትን በማስረዳት መካከል ያለውን ልዩነት ያላገናዘበና መሠረታዊ የሕግ ስህተት ያለበት ነው በማለት ተችቷል።

ሰበር ችሎቱ በመቀጠልም ተጠሪዎች ቤቱ የተሠራበት መሬት ባለይዞታ መሆናቸው ተረጋግጧል። ሆኖም አንድ የመሬት ባለይዞታ የሆነ ሰው በይዞታው ላይ ሌላ ሰው ቤት እንዲሠራ የፈቀደ እንደሆነና ፈቃድ የተሰጠው ሰውም በሌላ ሰው የይዞታ መሬት ላይ ባገኘው ፈቃድ መሠረት ቤት የሠራ እንደሆነ የቤቱ ባለሀብት በባለይዞታው ፈቃድና ስምምነት ቤቱን (ሕንፃውን) የሠራው ሰው እንደሆነ በፍትሐ ብሔር ሕግ አንቀጽ 1179 (1) ተደንግጓል። በዚህ ጉዳይ የመሬቱ ባለይዞታዎች ተጠሪዎች ቢሆኑም አንደኛው ተጠሪ ሚች ልጃቸው ተመስገን ዳኘና ባለቤቱ ወ/ሮ እሳቡ ቸኮል በይዞታ መሬታቸው ላይ ቤት እንዲሠሩ በሰጡት ፈቃድና ስምምነት መሠረት ክርክር የተነሳበትን ቤት የሠሩ መሆኑን በሰው ምስክር አስረድተዋል በማለት አብራርቷል። በማያያዝም አንድ ሰው የአንድ ንብረት ባለሀብት የሚሆነው በገንዘቡ፣ በጉልበቱ ወይም በፈጠራ ችሎታው ያፈራው መሆኑ ሲረጋገጥ እንደሆነ በሕገመንግሥቱ አንቀጽ 40 (2)

የተደነገገ ሲሆን ተጠሪዎች ግን የመሬቱ ባለይዞታ ከመሆናቸው በስተቀር ቤቱን በገንዘባቸው ወይም በጉልበታቸው የሠሩት ለመሆኑ አላስረዱም ብሏል።

በዚህም መሠረት የክልሉ ጠቅላይ ፍ/ቤት ሰበር ችሎት አንደኛ ተጠሪ ሚች ልጃቸው ተመስገን ዳኘ በይዞታ ቦታቸው ላይ ቤት እንዲሠራ መስማማታቸውን የሚያረጋግጥ ውል ለማዋዋል ሥልጣን ባለው ወይም በፍ/ቤት መዝገብ ሹም ፊት የተደረገና በፍትሐ ብሔር ሕግ አንቀጽ 1723(1) መሠረት የተደረገ ውል አልቀረበም በማለት የሰጠው ትርጉም ስህተት ያለበት ነው። ምክንያቱም አ/ድ ሰው በፍትሐ ብሔር ሕግ አንቀጽ 1179(1) መሠረት ባለ ይዞታው ሳይቃወም ወይም በባለይዞታው ፈቃድና ስምምነት የሌላ ሰው ይዞታ በሆነ መሬት ላይ ቤት የገነባ መሆኑን በማናቸውም ተአማኒነትና ክብደት ባለው ማስረጃ ለማስረዳት ይችላል በማለት አብራርቷል።
ከላይ የተነሱትን ምክንያቶች መሠረት በማድረግም ሰበር ችሎቱ በማጠቃለያው የቦታው ባለይዞታዎች ተጠሪዎች መሆናቸው ለሰር ፍ/ቤት በቀረበው ማስረጃ የቀረበ ሲሆን ቤቱን የሠሩት ደግሞ በተጠሪዎቹ ፈቃድና ስምምነት ሚች አቶ ተመስገን ዳኘና ባለቤቱ ወ/ሮ እባቡ ቸኮል መሆናቸው በማስረጃ ተረጋግጧል ካለ በኋላ በዚህም ምክንያት በፍትሐ ብሔር ሕግ አንቀጽ 1179(1) መሠረት የቤቱ ባለሀብቶች ሚች አቶ ተመስገን ዳኘና ወ/ሮ እባቡ ቸኮል ናቸው። ይህም በመሆኑ የአማራ ክልል ጠቅላይ ፍ/ቤት የሰበር ችሎት ከላይ የተገለፁትን የሕግ ድንጋጌዎች በመተላለፍ የቤቱ ባለቤት የመሬቱ ባለይዞታዎች የሆኑት ተጠሪዎች ናቸው በማለት የሰጠው ውሳኔ መሠረታዊ የሕግ ስህተት ያለበት በመሆኑ ውሳኔው ተሽሯል፤ የአማራ ክልል ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት የሰጠው ውሳኔ ፀንቷል በማለት ወስነ።

III. ትችት፣
1/ ለፌዴራል ጠቅላይ ፍ/ቤት ሰበር ችሎት ቀርበው ውሳኔ የተሰጠባቸው ሁለቱም ጉዳዮች የመሬቱ ባለመብትነት የአንድ ሰው ሆኖ በመሬቱ ላይ የተገነባውን ቤት የሠራው ግን በመሬቱ ላይ መብት ያልነበረው ሌላ ሰው በሚሆንበት ጊዜ የቤቱ ባለቤት የሚሆነው ማን ነው? የሚለውን ጥያቄ መልስ የሚመለከቱ ናቸው። ይህ ማለት ደግሞ ሁለት የተለያዩ መሬትን የሚመለከቱ መብቶች ተገናኝተው አንድ ንብረት እንዲፈራ በሚያደርጉበት ጊዜ የባለቤትነት ጥያቄው የሚፈታው በምን ሁኔታ ነው የሚለውን ጥያቄ መመለስ እንደማለት ነው።

የሰበር ችሎቱ ውሳኔ በሰጠባቸው እነዚህ ሁለት ጉዳዮች ቤቶች የተሠሩት የሌላ ሰው ይዞታ በሆነ መሬት ላይ የመሬቱ ይዞታ መብት ባልነበራቸው ሰዎች እንደሆነ በበቂ ሁኔታ መረጋገጡን ከችሎቱ ውሳኔ መገንዘብ ይቻላል። ችሎቱ ይህን ካረጋገጠ በኋላ ቀጥሎ በጥልቀት የመረመረው የሌላ ሰው ይዞታ በሆነ መሬት ላይ ቤቶች የተሠሩት ባለይዞታዎች ፈቅደው ነው ወይስ ሳይፈቅዱ የሚለውን ጥያቄ ነው። ይህን ጥያቄ ለመመለስ ጉዳዩን ለመመርመር ትኩረት የሰጠበት ምክንያት ደግሞ የጥያቄው መልስ አንዱ ወይም ሌላው መሆን የቤቱ ባለቤትነት ከተከራካሪ ወገኖች አንዱ ወይም ሌላው በመሆን እንዲወሰን ለማድረግ

በኢትዮጵያ የፍትሐ ብሔር ሕግ በግልጽ የተደነገገ መሆኑን በውል በመገንዘብ እንደሆነ መረዳት ይቻላል። የኢትዮጵያ የፍትሐብሔር ሕግ ደግሞ በሌላ ሰው መሬት ላይ ቤት በሚሠራበት ጊዜ የቤቱ ባለቤት ማን እንደሆነ ለመወሰን የሚያስችሉ ሁለት ሁኔታዎችን በግልጽ አስቀምጧል። እነዚህም አንደኛ የመሬቱ ባለቤት ቤቱ በመሬቱ ላይ እንዳይሠራ እየተቃወመ ከተሠራ የቤቱ ባለቤት የመሬቱ ባለቤት ይሆናል።[536]

ሁለተኛ የመሬቱ ባለቤት ቤቱ በመሬቱ ላይ ሲሠራ ተቃውሞ ሳያነሳ ከተሠራ የቤቱ ባለቤት ቤቱን የሠራው ሰው ይሆናል[537] የሚሉ ናቸው። እዚህ ላይ መገንዘብ የሚኖርብን በይዞታ መሬት ላይ ሌላ ሰው ቤት ሲሠራ ተቃውሞ አለማንሳትና በይዞታ መሬት ላይ ሌላ ሰው ቤት እንዲሠራ መፍቀድ የተለያዩ ነገሮች መሆናቸውን ነው። ከዚህም በተጨማሪ መጤን ያለበት ጉዳይ በመሬቱ ባለይዞታ ፈቃድ አንድ ሰው ቤት በሚሠራበት ጊዜ የቤቱ ባለቤት ማን ይሆናል የሚለውን ጉዳይ የኢትዮጵያ የፍትሐብሔር ሕግ ከላይ በተመለከትናቸው አንቀጾች ያልደነገገ መሆኑን ነው።

ሕጉ ይህን ያልደነገገበት ምክንያት ደግሞ የድንጋጌዎቹ ዓላማ በባለ መሬቱና ቤቱን በሠራው ሰው መካከል ግልጽ ስምምነት በሌለበት ሁኔታ ለሚፈጠረው የንብረት መብት አሻሚነት መፍትሄ መስጠት በመሆኑ ነው። ለምን ቢባል የመሬቱ ባለይዞታ ፈቅዶ ቤቱ ከተሠራና በስምምነቱ ባለይዞታው በቤቱ ላይ መብት እንደሚኖረው ካልገለፀ የቤቱ ባለቤት ቤቱን የሠራው ሰው እንዲሆን የተስማማ በመሆኑ የቤቱን ባለቤትነት ለመወሰን ወሳኙ ስምምነታቸው ስለሆነ የሕጉን ጣልቃገብነት የሚጠይቅ ጉዳይ ባለመኖሩ ነው። እዚህም ላይ መገንዘብ ያለብን ባለመሬቱ ሳይቃወም አንድ ሰው በሌላ ሰው ይዞታ መሬት ላይ ቤት ሲሠራም ሆነ በመሬቱ ባለይዞታ ስምምነት ቤት ሲሠራ በሁለቱም ሁኔታዎች የቤቱ ባለቤት የሚሆነው ቤቱን የሠራው ሰው ነው ያልን ቢሆንም በመካከላቸው መሠረታዊ የመብት ልዩነት ያለ መሆኑንም ጭምር ነው ምክንያቱም ባለይዞታው ሳይቃወም ቤቱ በተሠራ ጊዜ የሠራው ሰው የቤቱ ባለቤት ቢሆንም የመሬቱ

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[536] አሁን ባለው የኢትዮጵያ ሕግም የመሬት ባለቤትነት ባይኖርም የመሬት ባለይዞታው ይዞታውን ያለመነጠቅ መብቱ የተጠበቀ በመሆኑ እንዲይሠራ እየተቃወመ በይዞታው ላይ ሌላ ሰው ቤት ከሠራ የቤቱ ባለቤት እሱ ይሆናል። ምክንያቱም በመሬቱ ላይ ቤቱ ከተሠራ በኋላም የመሬት ባለይዞታነቱ እንደተጠበቀ የሚቀጥል በመሆኑ ነው።

[537] የመሬቱ ባለይዞታ ተቃውሞ ሳያነሳ በሌላ ሰው መሬት ላይ ቤት ሲሠራበት የሚችለው ባለይዞታው የቤቱን መሠራት እያወቀ ወይም ሳያውቅ ሊሆን ይችላል። በሰው ይዞታ ላይ ቤቱን የሠራው ሰውም ቤቱን የሠራው የመሬቱ ይዞታ የሌላ ሰው መሆኑን እያወቀ ወይም ሳያውቅ መብት ያለው መስሎት ሊሆን ይችላል። እነዚህን ሁኔታዎች በማገናዘብም ሕጉ ቤቱ የተሠራው የመሬቱ ባለይዞታ ሳይቃወም ከሆነ የመሬቱ ይዞታ በባለይዞታው እጅ ይቆያል፤ የቤቱ ባለቤትነት ግን የሠራው ሰው ይሆናል በማለት ሁለቱም መብቶች ተጣጥመው እንደሚቆዩ በሚያሳይ ሁኔታ ከደነገገ በኋላ የመሬት ይዞታውና የቤቱ ባለቤትነት ተጣጥመው መቀጠል ካልቻሉ ግን ቤቱን የሠራው ሰው ለቤቱ መሥሪያ ያወጣውን ወጭ ተክሶ የመሬት ባለይዞታው በመሬቱ ላይ ያለውን መብት የቤቱን ባለቤትነት ጨምሮ በተሟላ ሁኔታ እንዲገለገልበት በማስቻል ይደነግጋል።

ባለይዞታ በፈለገ ጊዜ በሕጉ መሠረት የቤቱን ዋጋ በመክፈል የቤቱ ባለቤት መሆን የሚችል ሲሆን[538] በባለይዞታው ፈቃድ ቤት ከተሠራ ግን ቤቱን የሠራው ሰው የቤት ባለቤትነት መብት በማንኛውም ጊዜ በመሬቱ ባለይዞታ ሊነካ የማይችል በመሆኑ ነው።[539]

የሰበር ችሎቱ በቀረቡለት ጉዳዮች የግራ ቀኙን ክርክርና የቀረቡትን ማስረጃዎች ተመልክቶ አመልካቾች በሌላ ሰው ይዞታ መሬት ላይ ቤት የሠሩት በባለይዞታዎች ፈቃድ መሆኑ መረጋገጡን በውሳኔው ገልጿል። ችሎቱ ከቀረቡት ክርክሮችና ማስረጃዎች ያረጋገጠው ይህ ከሆነ ቀጥሎ የምንመለከተው በጉዳዮቹ ላይ የተሰጡት ውሳኔዎችና ለውሳኔዎቹ የተሰጡት ምክንያቶች አግባብ ካላቸው የሕጉ ድንጋጌዎች አንፃር ትክክል መሆን አለመሆናቸውን ነው።

የሰበር ችሎቱ እነ ወ/ሮ ዳላሽ ባይነሰኝና አቶ ገዛኸኝ አድነው ተከራካሪ በሆኑበት በመጀመሪያው ጉዳይ ተከሳሹ አቶ ገዛኸኝ አድነው የቤቱ ባለቤት ናቸው ቤቱንም የመሬቱ ባለይዞታዎች ለሆኑት ከሳሾች ለእነ ወ/ሮ ዳላሽ ሊመልሱ አይገባም በማለት የወሰነው፦

> በፍ/ብ/ሕ/ቁጥር 1179(2) በተደነገገው መሠረት በሌላ ሰው መሬት ላይ ቤት የሠራ ሰው የሕንፃውን ግምት ተቀብሎ ሕንፃውን ለባለመሬቱ ለማስረከብ የሚገደደው ባለመሬቱ ሳይቃወም ሕንፃውን የሠራ በሚሆንበት ጊዜ ነው። በተያዘው ጉዳይ ግን አመልካች ቤቱን የሠራው የ1ኛ ተጠሪ ባለቤትና የሌሎች ተጠሪዎች አውራሽ የሆኑት ሟች አቶ አድነው አወቀ ሳይቃወሙ በቀሩበት ሁኔታ ሳይሆን ይልቁንም ፈቃዳቸውን ሰጥተዋል በተባለበት ሁኔታ ከመሆኑም በላይ ሕጉ በወጣበት ዘመን ግለሰቦቹ በመሬት ባለቤትነት ረገድ መብት የነበራቸው ቢሆንም አሁን ባለው ሁኔታ ደግሞ በኢ.ፌ.ዴ.ሪ. ሕገመንግሥት መሬት በግል ባለቤትነት መያዙ ቀርቶ የመንግሥትና የሕዝብ የተደረገ ስለሆነ የፌ/መ/ደ/ፍ/ቤት ተጠሪዎች የመሬቱ ባለቤት ስለሆኑ አመልካች በመሬቱ ላይ የሠራውን ቤት የዋጋ ግምቱን 1/4 ከተጠሪዎች ተቀብለው ቤቱን ያስረክቡ በማለት የሰጠው ውሳኔ በዚህ ረገድ ከነበረው ሕግም ሆነ ከሕገመንግሥታችን ጋር የተጣጣመ ሆኖ

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[538] በሌላ ሰው ይዞታ ላይ ቤት የሠራው ሰው በመሬቱ ላይ ምንም መብት እንደሌለው እያወቀ ከሠራው ጥፋተኛ ቢሆንም የመሬቱ ባለይዞታም የቤቱን መሠራት ካልተቃወመ ለተፈፀመው ጥፋት አስተዋጽኦ አድርጓል። ስለዚህም ሕጉ የመሬት ባልይዞታው ባለመቃወሙ የቤቱን ባለቤትነና ለሠራው ሰው የሰጠ ሲሆን ቤቱን የሠራው ሰውም በመሬቱ ላይ መብት እንደሌለው እያወቀ ቤቱን ስለሠራው የቤቱ ዋጋ 1/4 ብቻ ተከፍሎት ባለሀብትነቱን እንዲለቅ በመወሰን አስታራቂ በሆነ ሁኔታ ደንግጓል።

[539] አንድ የመሬቱ ባለይዞታ በይዞታው ላይ ሌላ ሰው ቤት እንዲሠራ ከፈቀደ በመሬቱ ላይ ያለው መብት ለሌላ ሰው እንዲተላለፍ ተስማምቷል ማለት ስለሆነ በተሠራው ቤት ላይ ምንም ዓይነት መብት ሊኖረው አይችልም።

አልተገኘም። የፌዴራል ከፍተኛ ፍ/ቤትም ይህን ሳያርም መቅረቱ የሕግ ስህተት ሆኖ ተገኝቷል የሚል ምክንያት በመስጠት ነው።
ችሎቱም ከላይ በትክክል እንዳተተውም የሰበር አመልካቹ ቤቱን ሠሩ የተባለው በመሬቱ ባለይዞታ ፈቃድ እንጅ በዝምታ ድርጊቱን ሳይቃወሙ በቀሩበት ሁኔታ አይደለም። ፍ/ቤቱ ይህን እንደ መነሻ መጥቀሱ ደግሞ ሳይቃወሙ መቅረትና ፈቃድ መስጠት ውጤታቸው የተለያየ መሆኑን ለማመልከትና ቤቱ የተሠራው የመሬቱ ባለይዞታ ሳይቃወም በቀረበት ሁኔታ ቢሆን ኖሮ እንደነገሩ ሁኔታ የቤቱን ሙሉ ዋጋ ወይም የዋጋውን 1/4 ከፍሎ ለመውሰድ ሕጉ ይፈቅድለታል የሚለውን መቀበሉን ለመገመት ያስችላል። ይህ ደግሞ ከሕጉ ጋር የሚጣጣም ውሳኔ ነው።

በዚህ መነሻነትም ችሎቱ ለውሳኔው መሠረት አድርጉ የጠቀሰው የመሬቱ ባለይዛታ ፈቅደው ቤቱ መሠራቱንና በአሁኑ ጊዜ መሬት የመንግሥትና የሕዝብ ሀብት ነው የሚሉትን ሁለት ምክንያቶች ነው።በእርግጥም የመሬት ባለይዞታው ፈቅዶለት አንድ ሰው ቤት ከሠራ የመሬቱ ባለይዞታ ቤቱ እንዲመለስለት ለመጠየቅ አይችልም በማለት ችሎቱ በአንደኛ ምክንያትነት ያስቀመጠው ከሕጉ ጋር የሚጣጣም ነው። ምክንያቱም ብበታች ፍ/ቤት የተጠቀሰው የፍትሐ ብሔር ሕግ አንቀጽ 1179 የመሬቱ ባለይዞታ ተቃውሞ ሳያነሳ ቤቱ በተሠራበት ጊዜ የሚነሳውን የቤት ባለቤትነት ጥያቄ የሚመለከት እንጅ ባለይዞታው ፈቅዶ ቤት በሚሠራበት ጊዜ የሚነሳ የቤት ይገባኛል ጥያቄን የሚመለከት ድንጋጌ ባለመሆኑ ነው።

ይሁን እንጅ የመሬቱ ባለይዞታዎች በይዞታቸው ላይ የተሠራውን ቤት ለማስመለስ መብት የማይኖራቸው በአሁኑ ጊዜ መሬት የመንግሥትና የሕዝብ ሀብት ስለሆነ ነው በማለት ችሎቱ በሁለተኛ ምክንያትነት የጠቀሰው ነጥብ ግን በተለያዩ ምክንያቶች ትክክል ነው ለማለት አስቸጋሪ ነው። ምክንያቱም አንደኛ የመሬት ባለይዞታው ፈቅዶ በመሬቱ ላይ ቤት ከተሠራ ቤቱ ይመለስልኝ ብሎ መጠየቅ የማይችል ለመሆኑ ፈቃዱን መስጠቱ ብቻ በቂ ነው። ፈቃድ ሰጥቶ በይዞታ መሬት ላይ ቤት እንዲሠራ ማድረግ ሳይቃወሙ ከተሠራበት ሁኔታ የሚለይ በመሆኑ በፍትሐ ብሔር ሕግ አንቀጽ 1179 ስር የሚወድቅም አይደለም የሚለው ምክንያት በቂ ሆኖ ሳለ አጠቃላይ የሆነ የሕገመንግሥት ድንጋጌ በተጨማሪ ምክንያትነት መጥቀሱ አስፈላጊ መስሎ አይታይም። ሁለተኛም ሁለቱ ምክንያቶች ተደበላልቀው መቅረባቸው ችሎቱ ለውሳኔው የሰጠውን ምክንያት በግልጽና በማያሻማ ሁኔታ በቀላሉ ተረድቶ ከውሳኔው ትምህርት ለማግኘት አስቸጋሪ አድርጉታል። በሶስተኛ ደረጃም የመሬት ባለቤትነት የመንግሥትና የህዝብ ሀብት መሆን ባለይዞታዎች በባዶ መሬታቸው ላይ ምንም መብት የላቸውም ማለትም አይደለም።

ባለይዞታው ከባለቤት በተለየ ቦታውን ማድረግ የማይችለው ነገር መሸጥ ነው።በአሁኑ ሁኔታም የመሬቱ ባለይዞታ እየተቃወመ በመሬቱ ላይ ሌላ ሰው ቤት ቢሠራበት በፍትሐ ብሔር ሕግ አንቀጽ 1178 መሠረት የቤቱ ባለቤት እሱ ይሆናል። እንዲሁም በይዞታ መሬቱ ላይ ሌላ ሰው ቤት ሲሠራ ሳይቃወም

በቀረበትም ሁኔታ እንደዚሁ በፍትሐ ብሔር ሕግ አንቀጽ 1179(2) በተደነገገው መሠረት እንደነገሩ ሁኔታ ቤቱ የተሠራበትን ዋጋ ወይም 1/4ኛውን ከፍሎ ቤቱን የማስመለስ መብት አለው። ምክንያቱም የመሬት ባለቤትነትም ሆነ የመሬት ይዞታ መብት ሁለቱም የንብረት መብቶች በመሆናቸው ነው።

በኢትዮጵያ ሕጐች መሠረት መሬትን በተመለከተ የይዞታ መብትና የባለቤትነት መብት ያላቸው መሠረታዊ ልዩነትም መሸጥ የመቻልና ያለመቻል ጉዳይ ነው። የፍትሐብሔር ሕጉም መተርጐም ያለበት በአሁኑ ጊዜ የመሬት ይዞታ እንጂ ባለቤትነት ስለሌለ ድንጋጌው አግባብነት የለውም በሚል ሳይሆን እንደ አግባቡ (Mutatis mutandis) ለይዞታም ተፈፃሚነት እንዳለው ተደርጐ ነው።

ከላይ በተጠቀሰው ምክንያት ችሎቱ የመሬቱ ባለይዞታ ቤቱ ሊመለስለት የማይገባው የመሬት ባለቤትነት የመንግሥትና የሕዝብ እንጅ የሱ ባለመሆኑም ጭምር ነው በማለት የሰጠው ምክንያት በአንድ በኩልም ትክክል ያልሆነ በሌላ በኩልም በተጠቀሰበት ሁኔታ እንኳ ግልጽ ያልሆነና የሚያምታታ ነው። ስለዚህም የሰበር ችሎቱ የበታች ፍ/ቤት ውሳኔ "ከነበረው ሕግ (ከፍ/ብ/ሕጉ) ጋር የተጣጣመ አይደለም" በማለት የሰጠው ምክንያት ትክክል ሆኖ ሳለ "ከሕገመንግሥታችን ጋርም የተጣጣመ ሆኖ አልተገኘም" በማለት የሰጠው ትችት ግን ግልጽ ያልሆነ በቂ ምክንያት ያልተሰጠበትና የተሳሳተ መስሎ ይታየኛል።
2/ የሰበር ችሎቱ እነ ወ/ሮ እባቡ ደሴና ቂሰ ገበዝ ዳኘ ካሣ ተከራካሪ በሆኑበት ሁለተኛው ጉዳይም የቤቱ ባለቤቶች ቤቱን የሠሩት ሚች አቶ ተመስገን ዳኘና ባለቤታቸው የነበሩት ወ/ሮ እባቡ ቸኮል ናቸው በማለት የወሰነው፡-

> የመሬት ባለይዞታ የሆነ ሰው በይዞታው ላይ ሌላ ሰው ቤት እንዲሠራ የፈቀደ እንደሆነና አንድ ሰው በሌላ ሰው ይዞታ ላይ በባለ ይዞታው ፈቃድ ቤት የሠራ መሆኑ ከተረጋገጠ የቤቱ ባለሐብት በባለይዞታው ፈቃድና ስምምነት ሕንፃውን የሠራው ሰው እንደሆነ በፍ/ብ/ሕግ ቁጥር 1179(2) ተደንግጓል

በማለት ካተተ በኋላ የመሬቱ ባለይዞታዎች ተጠሪዎች ቢሆኑም በይዞታ መሬታቸው ላይ አመልካቾች ቤት እንዲሠሩበት በሠጡት ፈቃድና ስምምነት መሠረት ቤቱን የሠሩት አቶ ተመስገን ዳኘና ወ/ሮ እባቡ ቸኮል መሆናቸው በማስረጃ ተረጋግጧል የሚል ማብራሪያ በመስጠት ነው። ከዚህ በመቀጠልም አንድ ሰው የአንድ ንብረት ባለሐብት የሚሆነው በገንዘብ በጉልበቱ ወይም በፈጠራ ችሎታው ያፈራው መሆኑ ሲረጋገጥ እንደሆነ በሕገመንግሥቱ አንቀጽ 40(2) ተደንግጓል። ተጠሪዎች ደግሞ የመሬቱ ሕጋዊ ባለይዞትዎች ከመሆናቸው በስተቀር ቤቱን በገንዘባቸው ወይም በጉልበታቸው የሠሩት መሆኑን አላስረዱም በማለት አትቷል። በዚህ ላይ በመመሥረትም፡-

> የክልሉ ጠቅላይ ፍ/ቤት ሰበር ችሎት አንደኛ ተጠሪ ሚች ልጃቸው ተመስገን ዳኘ በቦታው ላይ ቤት እንዲሠሩ የተስማሙ ለመሆናቸው ውል ለመዋዋል ስልጣን ባለው ወይም በፍ/ቤት መዝገብ ሹም ፊት የተደረገና በፍትሐብሔር ሕግ ቁጥር 1723(1) መሠረት የተደረገ ውል አልቀረበም

በማለት የሰጠው ትርጉም ስህተት ያለበት ነው። ምክንያቱም በፍትሐብሔር ሕግ አንቀጽ 1179(1) መሠረት አንድ ሰው ባለይዞታው ሳይቃወም ወይም በባለይዞታው ፈቃድና ስምምነት በሌላ ሰው ይዞታ ላይ ቤት የገነባ መሆኑን በማናቸውም ተዓማኒነትና ክብደት ባለው ማስረጃ ማስረዳት የሚችል በመሆኑ ነው በማለት የውሳኔውን ምክንያት አብራርቷል።

ሰበር ችሎቱ በማጠቃለያውም ክርክር የተነሳበትን ቤት በተጠሪዎች ቦታ ላይ በተጠሪዎች ፈቃድና ስምምነት የሠሩት ሟች ተመስገን ዳኘና ወ/ሮ እባቡ ቸኮል መሆናቸው ለሰር ፍ/ቤት በቀረበ ማስረጃ የተረጋገጠ ስለሆነ በፍትሐብሔር ሕግ አንቀጽ 1179(1) መሠረት የቤቱ ባለሐብቶች ሟች ተመስገን ዳኘና ወ/ሮ እባቡ ቸኮል ናቸው በማለት ደምድሟል።

የሰበር ችሎቱ የክልሉን ጠቅላይ ፍ/ቤት ሰበር ችሎት ውሳኔ ለመሻር የሰጣቸው ምክንያቶች ሶስት ናቸው። እነርሱም፦

1. አንድ ሰው በሌላ ሰው ይዞታ መሬት ላይ በባለ ይዞታው ፈቃድ ቤት የሠራ እንደሆነ በባለይዞታው ፈቃድ መሥራቱን በማናቸውም ተአማኒነትና ክብደት ባለው ማስረጃ ማስረዳት ይችላል።
2. አንድ ሰው በሌላ ሰው ይዞታ መሬት ላይ በባለ ይዞታው ፈቃድ ቤት የሠራ እንደሆነ የቤቱ ባለቤት ቤቱን የሠራው ሰው እንደሚሆን በፍትሐብሔር ሕግ አንቀጽ ር 1179(1) ተደንግጓል፣
3. አንድ ሰው የአንድ ንብረት ባለሐብት የሚሆነው በገንዘቡ፣ በጉልበቱ ወይም በፈጠራ ችሎታው ያፈራው ሲሆን በመሆኑና የመሬቱ ባለይዞታዎች ደግሞ ቤቱን በገንዘባቸው ወይም በጉልበታቸው ሥላልሠሩት ባለቤት ሊሆኑ አይችሉም የሚሉ ናቸው።

በእርግጥም በይዞታ መሬት ላይ ሌላ ሰው ቤት እንዲሠራ መፍቀድ የይዞታ መብትን ለማስተላለፍ የተደረገ ሙሉ ስምምነት ሳይሆን ቤቱ እንዲሠራ ብቻ መፍቀድ በመሆኑ ችሎቱም እንዳለው በማንኛውም ዓይነት ማስረጃ ማስረዳት kፍትሐ ብሔር ሕግ አንቀጽ 1723(1) ድንጋጌ ጋር የሚጋጭ አይሆንም። ስለዚህም ችሎቱ ከዚህ ጋር በተያያዘ የሰጠው ምክንያትም ሆነ የሰጠው ውሳኔ ትክክል ይመስለኛል።

በባለይዞታው ፈቃድ የተሠራ ቤት ባለሐብት ቤቱን የሠራው ሰው እንደሚሆን በፍትሐ ብሔር ሕግ አንቀጽ 1179(1) ተደንግጓል በማለት ችሎቱ የጠቀሰው ግን በአንድ በኩል በባለይዞታው ተቃውሞ ሳይቀርብ ቤት መሥራትንና በባለይዞታው ፈቃድ ቤት መሥራትን አንድ አድርጐ መውሰድ ሲሆን በሌላ በኩልም አንቀጹ የማይለውን እንደሚል አድርጐ በመውሰድ ሌላ ሕግ እንደማውጣት ይሆናል። ምክንያቱም አንቀጽ 1179(1) የሚደነግገው የመሬቱ ባለይዞታ ሳይቃወም ሌላ ሰው በመሬቱ ላይ ቤት በሚሠራበት ጊዜ ያለውን ሁኔታ እንጅ ባለይዞታው ፈቃዱን በሰጠበት ጊዜ ያለውን ሁኔታ አይደለም። ከዚህም በተጨማሪ ችሎቱ ቀደም ብሎ በተመለከትነው በእነ ወ/ሮ ዳሳሽና በአቶ ገዛኸኝ አድነው መካከል በተካሄደው ክርክር በሰጠው ውሳኔ አንቀጽ 1179(1) በባለይዞታው ፈቃድ ቤት በሚሠራበት

ጊዜ ያለውን ሁኔታ የሚመለከት አይደለም በማለት ከሰጠው ምክንያት ጋርም የሚቃረን ይሆናል። ስለዚህም ችሎቱ የቤቱ ባለቤቶች ቤቱን የሠሩት አቶ ተመስገን ዳኘና ወ/ሮ እባቡ ቸኮል እንደሆኑ መወሰኑ ትክክል ቢሆንም ለዚህ ውሳኔ አንዱ ምክንያት የፍትሐ ብሔር ሕግ አንቀጽ 1179(1) ይህንን የሚደነግግ በመሆኑ ነው ማለቱ ግን የተሳሳተ ነው። ምክንያቱም በዚህ ጉዳይ ቤቱን የሠሩት ሰዎች የቤቱ ባለሐብቶች የሚሆኑት በአንቀጽ 1179(1) መሠረት ሳይሆን የመሬቱ ባለይዞታ በይዞታቸው ላይ ቤት እንዲሠራ የሰጡት ፈቃድ ቤቱን የሠራው ሰው የቤቱ ባለቤት እንዲሆን መስማማታቸውን የሚያረጋግጥ በመሆኑ ነው።
ችሎቱ በሶስተኛ ደረጃ የመሬት ባለይዞታዎች በመሬታቸው ላይ የተሠራው ቤት ባለሐብቶች የማይሆኑት በፌዴራል ሕገመንግሥት በተደነገገው መሠረት ቤቱን በገንዘባቸው ወይም በጉልበታቸው የሠሩት ባለመሆናቸው ነው በማለት የሰጠው ምክንያት የመሬት ይዞታ መብት ራሱን የቻለ የንብረት መብት መሆኑን የዘነጋ ትችት ነው። ምክንያቱም የመሬት ይዞታ መብት አለመነካት ወይም ከይዞታ አለመፈናቀል መብት በኢትዮጵያ ሕግ የተከበረ ከመሆኑም በላይ በአንድ ሰው ይዞታ ላይ ባለይዞታው እየተቃወመ በሌላ ሰው ቤት ቢሠራ በአሁኑ ጊዜም ቢሆን በፍትሐ ብሔር ሕግ አንቀጽ 1178 ቡተደነገገው መሠረት የመሬቱ ባለይዞታ የቤቱ ባለቤት የሚሆን መሆኑን የሚሸር ሕግ ስለሌለ ነው።

ስለዚህም የሰበር ችሎቱ አንድ የመሬት ባለይዞታ በመሬቱ ላይ የተሠራውን ቤት ራሱ በገንዘቡ ወይም በጉልበቱ ካልሠራው የቤቱ ባለሐብት ሊሆን ስለማይችል ተጠሪዎች ቂስ ገበዝ ዳኘ ካሣና ወ/ሮ ምትኬ አየለ የቤቱ ባለሐብት ሊሆኑ አይችሉም በማለት በተጨማሪ ምክንያትነት የጠቀሰው አንድም ለጉዳዩ አግባብ የሌለው ሁለተኛም የተሳሳተ ምክንያት ሆኖ ታይቶኛል፡

ማጠቃለያ

የተከበረው የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ችሎት በዚህ ትችት በተመለከትናቸው ሁለት ጉዳዮች የተነተናቸው ምክንያቶች አንዳንዶቹ ተገቢ የሆኑና የሰጣቸው ውሳኔዎችም ትክክል

ቢሆኑም፡-

1. አንድ የመሬት ባለይዞታ በመሬቱ ላይ ሌላ ሰው ቤት እንዲሠራ ፈቃዱን ሰጥቶ ቤቱ በተሠራበት ጊዜና ተቃውሞ ሳያነሳ በተሠራበት ጊዜ ተፈፃሚ የሚሆነውን የሕግ ድንጋጌ በተመለከተ ያለው አቋም ግልጽነት እንደሌለውና አንድ ወጥ እንዲልሆነ ተመልክተናል።
2. አንድ ሰው በባዶ መሬቱ ላይ መብት ሊኖረው የሚችለው የመሬት ባለቤትነት ባለበት ሁኔታ እንጅ መሬት የመንግሥትና የህዝብ ሐብት በሆነበት እንደኢትዮጵያ ባለ ሁኔታ የመሬት ባለይዞታዎች በይዞታቸው ላይ ሌላ ሰው ቤት ቢሠራ እነሱ ሳይቃወሙ በተሠራው ቤት ላይ ምንም መብት አይኖራቸውም የሚል በቂ የሕግ ድጋፍ የሌለው አቋም እንዲሰው ተገንዝበናል።

በአንድ ሰው የመሬት ይዞታ ላይ ባለይዞታው ሳይቃወም ሌላ ሰው ቤት በሚሠራበት ጊዜ የቤቱ ባለቤትነት መወሰን ያለበት መሬት የግል በነበረበት ጊዜ በወጣው የፍትሐብሔር ሕጉ ድንጋጌ መሠረት ብቻ ሳይሆን "በገንዘብ ወይም በጉልበት ያልተፈራ ንብረት ባለሐብት መሆን አይቻልም" በሚለው የፌዴራል ሕገመንግሥቱ ድንጋጌ መሠረትም ነው የሚል በአጠቃላይ የተደነገገውን ለዝርዝር ጉዳይ ተፈፃሚ ለማድረግ የሚሞክርና የመሬት ይዞታ መብትን አሳንሶ የሚያይ እምነት ያለው መሆኑን ተረድተናል።

አሁን ባለው የኢትዮጵያ የንብረት መብት ሕግ የመሬት ይዞታ መብትና የቤት ባለቤትነት መብት መሠረታዊ ልዩነት የይዞታ መብቱ በሽያጭ የማይተላለፍ መሆኑና የቤት ባለቤትነት መብት ግን በሽያጭ የሚተላለፍ መሆኑ ሆኖ ሳለ ችሎቱ ሁለቱን መብቶች እጅግ በማይገናኝ ሁኔታ የተለያዩ መሆናቸውን እንደሚያምን በሚያሳይ ሁኔታ በውሳኔው ማመልከቱን ተገንዝበናል።

ሦስተኛ ወገን መያዣው የኔ ነው በማለት በፍ/ቤት ክስ ሲያቀርብ መያዣው የመያዣ ሰጭው መሆኑን መያዣ ተቀባዩ ማስረዳት አለበት? የፌዴራል ጠቅላይ ፍ/ቤት የሰበር ችሎት በሰ/መ/ቁ. 51001 በሰጠው ፍርድ ላይ የተሰጠ አስተያየት

ንጋቱ ተስፋዬ

መግቢያ

ተንቀሳቃሽ ንብረትን የሚመለከት የመያዣ ውል የሚተዳደረው በፍትሐ ብሔር ሕግ ከቁጥር 2825 እስከ 2874 ባሉት ድንጋጌዎች ነው። የመያዣ ውል ማለት አንድ ባለዕዳ ለባለገንዘቡ የገባውን ግዴታ እንደሚፈጽም ዋስትና እንዲሆን መያዣ ተብሎ የሚጠራውን ዕቃ ለባለገንዘቡ ለመስጠት የሚገደድበት ውል ነው።[540] በመያዣነት የሚሰጠው አንድ ተንቀሳቃሽ ንብረት ወይም በጠቅላላው ዕቃ ተብለው የሚጠሩ ተንቀሳቃሽ ነገሮች ወይም ተንቀሳቃሽ ንብረትን የሚመለከት የገንዘብ መብት ወይም ሌላ መብት ሊሆን ይችላል።[541] የመያዣው ውል ከአምስት መቶ ብር በላይ የሆነ ግዴታን የሚመለከት ከሆነ ውሉ በጽሑፍ ካልተደረገ አይጸናም።[542] እንዲሁም፣ ዋስትና የተሰጠበት ግዴታ ከፍተኛ የገንዘብ መጠን በመያዣ ውሉ ካልተጠቀሰ ውሉ ፈራሽ ይሆናል።[543]

መያዣ ተቀባዩ ሊከፈለው የሚገባው ገንዘብ በሙሉ እስኪከፈለው ድረስ መያዣውን በራሱ ይዞታና ቁጥጥር ሥር አድርጎ የማቆየት መብት አለው።[544] የመያዣው ውል ለሦስተኛ ወገኖች መቃወሚያ እንዲሆን መያዣው በባለገንዘቡ ወይም ተዋዋዮቹ በመረጡት ሦስተኛ ሰው እጅ መቀመጥ ይኖርበታል።[545] በሕግ ተገልጾ ካልተፈቀደ በስተቀር የዕዳው መያዣ የሆነው ንብረት ከባለዕዳው እጅ ሳይወጣ በመያዣ እንደተሰጠ ሊቆጠር ስለማይችል መያዣው በባለዕዳው እጅ ይሆናል የሚል የመያዣ ውልም አይጸናም።[546] ሆኖም፣ ንብረቱ በባለዕዳው እጅ ቢሆንም መያዣ ተቀባዩ በንብረቱ ለማዘዝ የሚያስችሉና የንብረቱን ባለቤትነት

የጽሑፉ አቅራቢ የስቪሊንያ ባንክ የሕግ ማኅበረ ሲሆኑ፣ ከአዲስ አበባ ዩኒቨርሲቲ በ1972 የሕግ ባችለር ድግሪ (LLB)፣ ከዩሰ ዩኒቨርሲቲ በ1976 የሕግ ማስተርስ ድግሪ (LLM) ተቀብለዋል። ለበርካታ ዓመታትም በአዲስ አበባ ዩኒቨርሲቲ ስና በዩኒቲ ዩኒቨርሲቲ ኮሌጅ በሕግ መምህርነት ሰንሰግለዋል።

[540] *የፍትሐ ብሔር ሕግ ቁጥር 2825። እንግሊዝኛው A contract of pledge is a contract whereby a debtor undertakes to deliver a thing, called the pledge, to his creditor as security for the performance of an obligation ይላል።* (**ማሳሰቢያ**፣ *ተለይቶ ካልተገለፀ በቀር፣ በዚህ ጽሑፍ ውስጥ የተጠቀሱት ቁጥሮች በ1952 የወጣው የኢትዮጵያ የፍትሐ ብሔር ሕግ ቁጥሮች ናቸው።*)

[541] ቁጥር 2829(1)። *እንግሊዝኛው The pledge may consist of a chattel, a totality of effects, a claim or another right relating to movable property ይላል።*

[542] ቁጥር 2828(2)

[543] ቁጥር 2828(1)

[544] ቁጥር 2846

[545] ቁጥር 2852 ስና 2831

[546] ቁጥር 2832(2)። በሸቀጥ መያዣነት ብድር ሲሰጥ ስበጻሪውና የሸቀጡ ባለቤት የመጋዘኑን ቁልፍ በጋራ የሚቆጣጠሩበት (dual control) ስሥራር ከሕጉ ጋር ስደስማማም። ምን ጊዜም ቢሆን መያዣው በባለገንዘቡ ወይም በሦስተኛ ሰው እጅ መሆን ስበበት።

የሚያሳዩ ሰነዶች በእጁ ካደረገ ንብረቱን በእጁ እንዳደረገ ይቆጠራል::[547] መያዣው በመያዣ ተቀባዩ ወይም መያዣ ሰጭውና መያዣ ተቀባዩ በመረጡት ሦስተኛ ሰው እጅ የሚገኝ ከሆነ መያዣ ተቀባዩ ከንብረቱ ሽያጭ ዋጋ ላይ ከሌሎች ባለገንዘቦች ቀድሞ የመቀበል መብት አለው::[548]

በመያዣ የተሰጠው ዕቃ የኔ ነው የሚል ሦስተኛ ወገን ሲነሳ ባለገንዘቡ መያዣውን የተቀበለው የባለቤትነት መብት ከሌለው ሰው ላይ ቢሆንም እንኳ የመያዣው ውል በሚሰጠው መብት ሊሠራበት እንደሚችል በሕግ ተደንግጓል::[549] መያዣ ተቀባዩ በዕቃው ላይ ያለውን የመያዣ መብት የሚያጣው መያዣ ሰጭው ዕቃውን በመያዣ ለመስጠት መብት እንደሌለው እያወቀ ወይም ማወቅ ሲኖርበት መያዣውን በግዴለሽነት የተቀበለ መሆኑን ማስረዳት ከቻለ ብቻ ነው::[550] ዕቃው የኔ ነው ባዩ ይህን ማስረዳት ካልቻለ ዕቃውን ከመያዣ ተቀባዩ ሊወስድ የሚችለው ዕቃው በመያዣ የተሰጠበትን ዕዳ ለባለገንዘቡ በመክፈል ብቻ ነው::[551]

የሚንቀሳቀስ ንብረትን የሚመለከተው የመያዣ ሕግ ባጭሩ ከላይ የተገለፀው ሲሆን፣ ቁጥሌን የፌዴራል ጠቅላይ ፍ/ቤት የሰበር ችሎት ጥር 26 ቀን 2002 ዓ.ም በሰ/መ/ቁ. 51001 ፍርድ የሰጠበትን ጉዳይ እናያለን:: በዚህ መዝገብ አመልካቹ አቢሲንያ ባንክ አ.ማ. ሲሆን፣[552] ተጠሪው አቶ ዘውዱ ነጋ ነበሩ:: ጉዳዩ በተጀመረበት የፌዴራል ከፍተኛ ፍ/ቤት ከሳሽ የነበሩት ተጠሪው ሲሆኑ፣ ተከሳሹ ፐርፍ ኢንተርናሽናል ትሬዲንግ ኃ/የተ/የግ/ማኅበር (ከዚህ በኋላ ባጭሩ "ፐርፍ" የሚባለው) ነበር::

1. ፐርፍ ሰሊጥ እየገዛና ኢያስበጠረ ወደ ውጭ የሚልክ የንግድ ማኅበር ነው:: ፐርፍ ለዚህ ንግዱ ገንዘብ ስለአስፈለገው አመልካች ሰሊጥ በዋስትና እየያዘ ሳልተወሰነ ጊዜ የሚቆይ ብድር (credit facility) እንዲፈቅድለት ስለአመለከተ ጥቅምት 14 ቀን 1998 ዓ/ም በተደረገ ውል 2,500,000.00 ብር ብድር ተፈቀደለት:: ፐርፍ በዚህ ገንዘብ ለተወሰነ ጊዜ ከሠራ በኋላ የብድሩ መጠን ከፍ እንዲልለት አመለከተና መጋቢት 30 ቀን 1998 ዓ/ም በተደረገ ውል 500,000.00 ብር ተጨምሮለት የብድሩ መጠን ወደ 3,000,000.00 ብር ከፍ አለ:: በዚህ ገንዘብ እየሠራ ቆይቶ ጥሩ ውጤት ስለአገኘና የንግዱ መጠን እየጨመረ ስለሄደ ሰኔ 6 ቀን 1999 ዓ/ም በተደረገ ሦስተኛ ውል 2,000,000.00 ብር ተጨምሮለት የብድሩ መጠን ወደ 5,000,000.00 ከፍ አለ:: ፐርፍ በዚህ

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[547] ቁጥር 2830:: በመንገሥት ስካሰ የሚመዘገቡ ስንደ ሞተር ተሽከርካሪ ያሱ የባለቤትነት ማረጋገጫ ደብተር (ሲብሬ) ያሳቸው ተንቀሳቃሽ ንብረቶች መደም ዕቃዎች በመጋዘን ሰመቀመጣቸው መደም በመርከብ ሰመጫናቸው መደም በጉዞ ላይ ሰመሆናቸው የሚገዉዜና በሰነዱ ጀርባ ላይ ሰመያዣ ተቀባዩ ስንዲሰጡ የተጻፈባቸው (endorse የተደረጉ) ስንደ warehouse certificates, bill of lading, or way bill የመሳሰሱ ሰነዶችን ስበዳሪው ከተቀበሰ ዕቃዎች በስበዳሪው ይዞታ ሥር ስንዳሆኑ ይቆጠራሱ:: ሞተር ተሽከርካሪዎችን በሚመሰክት ግን የባለቤትነት ማረጋገጫ ደብተር (Title deed) ከመቀበሰ በተጨማሪ የመያዣ ውሱ በሚመሰክተው የመንገድ ትራንስፖርት መሥሪያ ቤት ስንዲመዘገብ ያስፈሰጋሱ::

[548] ቁጥር 2852(1) ስና 2857

[549] ቁጥር 2843:: የስንግዚዝኛው ቅጅ *The pledgee may exercise the right deriving from the contract of pledge notwithstanding that the pledge has been delivered to him by a person who was not authorized to dispose of it.* ይሳል::

[550] ቁጥር 2844(1)

[551] ቁጥር 2844(2)

[552] ዘክፍተኛው ፍ/ቤትና በመቀሳያ ፍ/ቤተ ይግባኝ ሰሚ ችሎት ስቢሲንያ ባንክ በቅደም ተከተሱ የመቃወም ዕመዉልካች ስና ይግባኝ ባይ ሆኖ ተከራክሯል::

በተፈቀደለት ገንዘብ ሰሊጥ እየገዛና እያስበጠረ ወደ ውጭ በመላክ ጠቀም ያለ የውጭ ምንዛሪ አስገኝ። የሚቀርብለት የግዥ ጥያቄ እየበዛ ስለሄደም ተጨማሪ ብድር እንዲሰጠው አመልክቶ የካቲት 7 ቀን 2000 ዓ/ም በተደረገ ውል 3,000,000 00 ብር ተጨምሮለት ጠቅላላው የብድር መጠን ወደ 8,000,000.00 ብር አደገ። ከላይ በተጠቀሱት አራቱም የብድር ውሎች ውስጥ ለተፈቀደው ብድር መያዣ የሚሆነው ሰሊጥ ዓይነትና ብዛት ተገልጿል።

1.1. መያዣ የሆነው ሰሊጥ ተበጥሮ ወደ ውጭ እስኪላክ ድረስ የሚቀመጠው ቃሊቲ አካባቢ በሚገኝ በናይል ቡና ላኪ ኃ/የተ/የግ/ማኅበር (ከዚህ በኋላ ባጭሩ "አስቀማጩ" በሚባለው) መጋዘን ውስጥ ነበር። ሰሊጡ በዚህ መጋዘን እንዲቀመጥ አመልካች፣ ፐርፍ እና አስቀማጩ ጎዳር 13 ቀን 1998 ዓ.ም. የሦስትዮሽ ውል ተዋውለዋል።[553] በዚህ የሦስትዮሽ ውል፣

- ፐርፍ የሚገዛውን ሰሊጥ በአስቀማጩ መጋዘን ለማስቀመጥና ከአመልካች ለሚወሰደው ብድር በመያዣ ለመስጠት፤ እንዲሁም የመጋዘን ኪራይ ለአስቀማጩ ለመክፈልና ሰሊጡን አስበጥሮ ወደ ውጭ በሚልክበት ጊዜ የሰሊጡን ዋጋ በቅድሚያ ለአመልካች ለመክፈል ተስማምቷል።

- አስቀማጩም ፐርፍ ወደ መጋዘኑ ያስገባውን ሰሊጥ ብዛትና ዋጋ ገልጾ አመልካች ሳይፈቅድ ሰሊጡ ከመጋዘኑ እንደማይወጣ በማረጋገጥ ለአመልካች በጽሑፍ ሊያሳወቅና ሰሊጡን በጥሩ ሁኔታ ሊይዝ ተስማምቷል።

- አመልካች ደግሞ ሰሊጡ በተቀመጠበት መጋዘን የራሱን ተቆጣጣሪ ሠራተኛ መድቦ የሰሊጡን ጥራት፣ አቀማመጥና አያያዝ ሊቆጣጠር፤ ሰሊጡ የተገዛበትን ዋጋ ሰባ በመቶ ወደ ፐርፍ ሂሳብ ገቢ ሊያደርግ እና ፐርፍ ወደ ውጭ የሚልከውን ሰሊጥ ዋጋ በቅድሚያ ሲከፍል ሰሊጡ ለውጭ ገበያ እንዲጫን ሊፈቅድ ተስማምቷል።

የብድሩ ገንዘብ ለፐርፍ የሚለቀቀው ሰሊጡ በመጋዘን ለመግባቱ ከአስቀማጩ ማረጋገጫ ሲቀርብ ነበር።

1.2. ተዋዋዮቹ ከላይ በተገለጸው የሦስትዮሽ ስምምነት መሠረት ከጥቅምት 1998 ዓ.ም ጀምሮ እስከ ጥቅምት 2001 ዓ.ም ድረስ ሲሠሩ ከቆዩ በኋላ ተጠሪ ጥቅምት 24 ቀን 2001 ዓ/ም በፐርፍ ላይ በፌዴራል ከፍተኛ ፍ/ቤት በመሠረቱት ክስ ምክንያት ችግር በመፈጠሩ ሥራው ሊቋረጥ ችሏል። ተጠሪ በመሠረቱት ክስ ፐርፍ በአደራ እንዲያስቀምጥ የሰጡትን ግምቱ ብር 2,934,183.00 የሆነ 2,257.064 ኩንታል የሁመራ ሰሊጥ ለማስረከብ ፈቃደኛ ስለአልሆነ ሰሊጡን እንዲያስረክብ እንዲወሰንና ጉዳዩ እስኪወሰን ድረስ ሰሊጡ እንዳይሸጥና ለሦስተኛ ወገን እንዳይተላለፍ የእግድ ትዕዛዝ እንዲሰጥላቸው አመለከቱ። ፍ/ቤቱም በአስቀማጩ መጋዘን የተቀመጠ ሰሊጥ ካለ በማንኛውም ሁኔታ ለሦስተኛ ወገን ሳይተላለፍ ታግዶ እንዲቆይ ትዕዛዝ ሰጠ።[554]

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[553] ይህ ውል የተደረገው የፍ/ብ/ሕ/ቁ. 2831 በሚፈቀደው መሠረት ነው።

[554] የኦ/መ/ቁ. 72845ን ይመልከቱ። ፐርፍ ጠቅላላ መጋዙ ብር 8,175,653.68 የሆነውን 5,766.14 ኩንታል የሁመራ ሰሊጥ ወደ አስቀማጩ መጋዘን ያስገባው ከየካቲት 7/2000 እስከ ግንቦት 19/2000 ዓ.ም ባለው ጊዜ

1.3. አስቀማጩ ይህ የእግድ ትዕዛዝ ሲደርሰው ጉዳዩን ወዲያውኑ ለአመልካች አሳወቀ:: አመልካችም ከስ የቀረበበትን 2,257.064 ኩንታል የሁመራ ሰሊጥ ጨምሮ TCF በአስቀማጩ መጋዘን ያከማቸውን 5,766.14 ኩንታል ሰሊጥ ለTCF ለሰጠው 8 ሚሊዮን ብር ብድር በመያዣ የያዘውና የቅድሚያ መብት ያለው መሆኑን በመግለጽ ሰሊጡን ሸጦ ለብድሩ መክፈያ ለማዋል እግዱ እንዲነሳለት ኅዳር 17 ቀን 2001 ዓ/ም በተጻፈ ማመልከቻ ጠየቀ:: ፍ/ቤቱም ማመልከቻውን ተቀብሎ ተጠሪ አስተያየት እንዲሰጡበት ትዕዛዝ በመስጠት ጉዳዩን ሊሰማ ቀጠሮ ያዘ::

1.4. አመልካች ባቀረበው ማመልከቻ ላይ ተጠሪ ኅዳር 24 ቀን 2001 ዓ.ም በተጻፈ ማመልከቻ በሰጡት አስተያየት፣

- *አመልካች ከTCF ጋር ባደረጋቸው አራት የብድር ውሎች ለሰጠው ብድር በመያዣ የያዘው ሰሊጥ ብዛት በብድር ውሎቹ ውስጥ መገለጹን፤*
- *አመልካችና TCF የተዋዋሉት የመጨረሻው የብድር ውል የተደረገው የካቲት 7 ቀን 2000 ዓ.ም መሆኑንና ለዚህ ብድር አመልካች በመያዣ የያዘው ጠቅላላ ዋጋው ብር 4,300,000.00 የሆነ በተለያዩ ጊዜያት ለመበጠር ወደ አስቀማጩ መጋዘን የሚገባ የሁመራና የወለጋ የሰሊጥ ምርት መሆኑ በውሉ ውስጥ መገለጹን፤*
- *ተጠሪ ለTCF ሰሊጡን በአደራ የሰጡት ግንቦት 19 ቀን 2000 ዓ.ም ሲሆን፤ ይህም አመልካች በተለያዩ ጊዜያት ለመበጠር ወደ አስቀማጩ መጋዘን የሚገባ የሁመራና የወለጋ የሰሊጥ ምርት በዋስትና ይዞ ለTCF ብድር ከሰጠ ከሦስት ወር በኋላ በመሆኑ የእነሳቸው ሰሊጥ የብድሩ መያዣ ነው ሊባል እንደማይችል፤*
- *ኅዳር 13 ቀን 1998 ዓ.ም አመልካች፣ TCF እና አስቀማጩ የተዋዋሉት የሦስትዮሽ ውል የብድሩ መያዣ የሆነው ሰሊጥ በ3ኛ ወገን እጅ እንዲቀመጥና የንብረቱን አጠባበቅ ለመወሰን በፍትሐ ብሔር ሕግ ቁጥር 2831 መሠረት የተደረገ መሆኑን፤*
- *TCF በተለያዩ ጊዜያት ለአመልካች የጻፋቸው ደብዳቤዎች የካቲት 7 ቀን 2000 ዓ.ም ከተደረገው የብድር ውል በኋላ የተጻፉና TCF በአስቀማጩ መጋዘን ያስገባውን ሰሊጥ እየገለጸ ብድሩ እንዲለቀቅለት የጻፋቸው ደብዳቤዎች[555] አራቱንም የብድር ውሎች ከመግለጽ በስተቀር የትኛው*

ውስጥ ሲሆን፣ ከዚሁ ሰሊጥ ውስጥ የተጠሪ ነው የተባለው 2,318 ኪሻ ወይም 2,257.064 ኩንታል የሁመራ ሰሊጥ ነው:: ተጠሪ የእኔ ነው ያሉት ሰሊጥ የተገዛበት ጠቅላላ ዋጋ ብር 4,288,421.60 ሲሆን፣ የእዚሁ ዋጋ 70 በመቶ 3,001,895.12 ነው:: ነገር ግን ከዚሁ ከስ ጋር በተያያዘ ተጠሪ የእኔ ነው ያሉበትን 3,121.17 ኩንታል ሰሊጥም ፍ/ቤቱ ለዳግባብ ለሰጠገደው የአመልካች መያዣ የሆነው ሰሊጥ ይዘ ጸሐፍ ለስከተጠናቀቀበት ሚያዝያ 2002 ዓ.ም ድረስ እንዳይነገደ ደገኖበ:: ከTCF ላይ ገንዘብ የሚጠይቁ ሰሎች ወገኖችም በTCF ላይ ለሰለሰፈረዱ ሰሊጡ ተሸጦ ይከፈሉን በማለት ይከራከራሉ::

[555] *ለአስቀማጩ ግንቦት 15 እና 16 ቀን 2000 ዓ.ም በቁጥር ናበዳ/7048/2000፣ ናበዳ/7067/2000፣ ናበዳ/7068/2000 እና ናበዳ/7069/2000 በጻፋቸው አራት ደብዳቤዎች TCF 2,318 ኪሻ ወይም 225,706.4 ኪሎ ግራም የሁመራ ሰሊጥ በመጋዘኑ ውስጥ ያስገባ መሆኑን ገልጿል:: TCFም ግንቦት 15 እና 19 ቀን 2000 ዓ.ም በጻፋቸው አራት ደብዳቤዎች ለአስቀማጩ ለረጋገጠ የገለበውን ሰሊጥ ለተፈቀደለት ብድር በመያዣ መስጠቱን ጠቅሶ ጥቅምት 14/1998፣ መጋቢት 30/1998/ ሰኔ 6/1999 እና የካቲት 7/2000 በተፈረሙት በሸቀጥ መያዣነት በተፈቀዱት የብድር ውሎች መሠረት ሰሊጡ የተገዛበት ዋጋ 70% የሆነው ገንዘብ ቁጥሩ C/A 077 በሆነው ተንቀሳቃሽ ሂሳቡ እንዲገባለት ጠይቆ ገቢ ተደርጎለታል::*

ሰሊጥ ለየትኛው ብድር መያዣነት እንደተሰጠ ስለማይገልጹ የቀረበው መቃወሚያ ውድቅ እንዲሆን አመለከቱ።

1.5. ከላይ የተገለጸው ክርክር ከተደረገ በኋላ ተጠሪና ፐርፍ ታኅሣሥ 14 ቀን 2001 ዓ.ም የእርቅ ስምምነት አድርገው ስምምነቱን ፍ/ቤቱ እንዲመዘግብላቸው ጠየቁ።[556] ፍ/ቤቱም ታህሣሥ 15 ቀን 2001 ዓ.ም በዋለው ችሎት ስምምነቱን መዝግቦ ተጠሪና ፐርፍ በስምምነቱ መሠረት ይፈጽሙ። ጥቅምት 26 ቀን 2001 ዓ.ም ፐርፍ በአስተግዳሮ መጋዘን ባስገባው ሰሊጥ ላይ ፍ/ቤቱ የሰጠው የእግድ ትዕዛዝ ተነስቷል በማለት መዝገቡን ዘግቶ ወደ መዝገብ ቤት መለሰው። ፍ/ቤቱ አመልካች ያቀረበውን አቤቱታ በሚመለከት ምንም ያለው ነገር የለም።

1.6. እንዲሁም፣ ተጠሪ የእርቅ ስምምነቱ ለአስቀግዳ እንዲደርሰውና በትዕዛዙ መሠረት እንዲፈጽም እንዲታዘዝ ታህሣሥ 17 ቀን 2001 ዓ.ም አመልክተው ፍ/ቤቱ በዚሁ ቀን በዋለው ችሎት የተዘጋውን መዝገብ አስቀርቦ አስቀግዳ በስምምነቱ መሠረት ሰሊጡን ለተጠሪ እንዲያስረክብ የእርቅ ስምምነቱ ይድረሰው በማለት ትዕዛዝ ሰጠ።

1.7. አመልካች ይህን እንዳወቀ ክርክር የተነሳበትን ሰሊጥ ለሰጠው ብድር በመያዣ ስለያዘውና የቅድሚያ መብት ስለአለው ፐርፍ ሰሊጡን ለተጠሪ ለማስረከብ ያደረገው ስምምነት የአመልካችን የመያዣ መብት ስለሚጎዳ ተፈጻሚ እንዳይሆን፤ ፐርፍና አስቀግዳ ሰሊጡን ለተጠሪ እንዲያስረክቡ የተሰጠው ትዕዛዝም እንዲታገድለት ጥር 22 ቀን 2001 ዓ/ም በተጻፈ ማመልከቻ ለፍ/ቤቱ አመለከተ። *ፍ/ቤቱም ተጠሪ ክሱ በመሠረቱበት ብር 2,934,183.00 ላይ ጸንጎት ከፍለህ አቤቱታው ለግራ ቀኙ ደርሷቸው ተዚጋጅተው ይቅረቡ፤ ታህሣሥ 15 እና 17 ቀን 2001 ዓ.ም ፍ/ቤቱ የሰጣቸው ትዕዛዞች ታግደዋል* በማለት ጥር 27 ቀን 2001 ዓ.ም በዋለው ችሎት ትዕዛዝ ሰጠ።[557]

1.8.አመልካች በትዕዛዙ መሠረት ጸንጎት ከፍሎ ፍ/ቤቱ ጉዳዩን ካየ በኋላ፣ የናይል ቡና ላኪ ኃ/የተ/የግ/ማ ፍ/ቤቱ በሰጠው ትዕዛዝ መሠረት ተከሳሹ ከመጋቢት 7 ቀን 2000 ዓ.ም ጀምሮ እስከ ግንቦት 18 ቀን 2000 ዓ.ም ድረስ ሰሊፕ በመጋዘኑ ማራገፉን፤ ሁሉም ሰሊጦች ስመቃወም አመልካች በሥስትዮሽ ስምምነት መሠረት ሪፖርት መደረጋቸውንና ከዚህ ውጭ ስመቃወም አመልካች ሳይገስጽ በተከሳሹ አማካይነት የተቀመጠ ሰሊፕ የለም ሲል አረጋግጧል። በመቃወም አመልካች የብድር ገንዘቡን ስተከሳሽ የሚሰቀው ይህ ሪፖርት ሲደርሰው በመሆኑ በመጋዘኑ ውስጥ ያሉ ሰሊጦች መያዣው ዋጋ የሚኖረው መያዣ ተቀባዩ በእጁ እድርጎ ሲያዝበት ነው በማለ ተክራከረዋል። በፍትሐብሔር ሕግ ቁጥር 2831 መሠረት የሚንቀሳቀስ ንብረት መያዣ በሦስተኛ ወገን እንዲቀመጥ ሲደረግ እንደሚችል የሚደነግግ በመሆኑ ተከሳሽ፣ በመቃወም አመልካችና ናይል ቡና ላኪ ያደረጉት የሦስትዮሽ ስምምነት ይህን የሚያንፀባርቅ በመሆኑ ከሳሽ ያቀረቡት ክርክር በሕጉ የተደገፈ አይደለም። ከሳሽና ተከሳሽ ያደረጉት

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[555] ተጠሪ እና ፐርፍ ታኅሣሥ 14 ቀን 2001 ዓ.ም ያደረጉት የእርቅ ስምምነት ፐርፍ 2,257.064 ኩንታል የዘሙቱ ሰሊጥ ከተጠሪ በእዳቸ መቀበሱንና በእስተግዳ መጋዘን ማስቀመጡን፤ ይህን ሰሊጥ ጥር 30 ቀን 2001 ዓ.ም በተጠሪ ስማስረከብና ተጠሪ ሰእርክረ ያመጡትን መጭ ስመክፈል ተስማምቶ በፍ/ሥ/ሥ/ሕ/ቁ. 276 መሠረት የግዳገል ስምምነት ማድረጋቸውን ይገልጻል።

ስምምነት ተፈጻሚ ሲሆን የሚችለው ተከሳሹ በመቃወም አመልካች ያልተያዘ ሰሊጥ በመጋዘን ሲያስገቡ ወይም የብድር ዕዳችውን ከፍለው ሰሊጡን ሲያስለቅቁ ብቻ ነው:: በመሆኑም በስምምነቱ መሠረት የማይፈፀም ቢሆን የሚነሳው የአፈጻጸም ጉዳይ ነው:: ይህም የአፈጻጸም መዝገብ ተከፍት ከሚታይ በስተቀር በዚህ ደረጃ የሚስተናገድ አይሆንም:: ፍ/ቤቱ ታህሣሥ 17 ቀን 2001 ዓ/.ም ገሬ ቀን በስምምነቱ መሠረት እንዲፈጽሙ የሰጠው ትዕዛዝ መታየት የሚገባው ከዚህ አንጻር ነው:: በመሆኑም በመቃወም አመልካች የእርቅ ስምምነቱ ይሠረዝልኝ በማለት ያቀረበውን አቤቱታ አልተቀበለም:: እንዲሁም የእርቅ ስምምነቱ የመቃወም አመልካችን መብት ያጣብባል ተብሎ የቀረበውን አቤቱታ ፍ/ቤቱ አልተቀበለውም:: ፍ/ቤቱ ጥር 27 ቀን 2001 ዓ/ም የሰጠውን እገድ እንስቷል፣" በማለት ሚያዝያ 2 ቀን 2001 ዓ.ም መዝገቡን ዘግቷል::[558]

2. አመልካች በዚህ ውሳኔ ቅር በመሰኘት በዋስትና በያዘው ሰሊጥ ላይ ተጠሪና ፒርፍ ያደረጉትን የእርቅ ስምምነት ፍ/ቤቱ መዝግቦ ሰሊጡ በእርቅ ስምምነቱ መሠረት ለተጠሪ እንዲሰጥ ማዘዙ የአመልካችን የመያዣ መብት ስለሚያሳጣ፣ እንዲሁም አመልካች በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 358 መሠረት ዳኝነት የከፈለበት አቤቱታ በአፈጻጸም ከሚታይ በስተቀር በዚህ ደረጃ የሚስተናገድ አይደለም ተብሉ ውድቅ መደረጉ አግባብ ስለአልሆነ እንዲሻርለት ለፌዴራል ጠቅላይ ፍ/ቤት ይግባኝ አቀረበ::[559]

ይግባኙን የሰማው የፌዴራል ጠቅላይ ፍ/ቤት ለእያንዳንዱ ብድር የተደረገ የሰሊጥ ብዛትና ዓይነት በእያንዳንዱ የብድር ውል እየተጠቀሰ ስለተቀመጠ ኅዳር 13 ቀን 1998 ዓ.ም የተደረገው የሶስትዮሽ ውል ድግግሞሽ ነው::[560] ይግባኝ ባይ አስቀድሞ የሰጠው ብድር በሚገባ ሁኔታ ገቢ ሳይደረግለት ሌላ ብድር ደርቦ መስጠት የለበትም::[561] አከራካሪው ሰሊጥ ወደ መጋዘን የገባው ከግንቦት 13 እስከ 18 ቀን 2000 ዓ.ም. ባለው ጊዜ ውስጥ ሲሆን፣ ይግባኝ ባይና ተከሳሹ ያደረጉት የመጨረሻ የብድር ውል የተደረገው የካቲት 7 ቀን 2000 ዓ.ም. ነው:: ብድሩ የተሰጠው ሰሊጡ ወደ መጋዘኑ ከመግባቱ በፊት በመሆኑ በብድር ውሉቹ ላይ የተጠቀሰው መያዣ ከአከራካሪው ሰሊጥ ጋር

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[558] *የፌደራል ከፍተኛ ፍ/ቤት መዝገብ ቁጥር 72845ን ይመልከቱ::*

[559] *ተጠሪም የአስቀማጩ መጋዘን ብዙ ምርት ስለተከማቸበትና አመልካች በሰሊጡ ላይ ምልክት አድርጎ በራሱ ቁጥጥር ሥር ስለአላደረገ መያዣዬ ነው ማለት ስለማይችል፣ ፍ/ቤቱ ሰሊጡ የአመልካች መያዣ ነው ማለት ይቻላል ያለው አግባብ ስለሆነ ይህ አቤቱታ ይታረምልኝ በማለት መስቀልኛ ይግባኝ አቅርቧል::*

[560] *ጠቅላይ ፍ/ቤት ለእያንዳንዱ ብድር መያዣ የሆነው ሰሊጥ ብዛትና ዓይነት በእያንዳንዱ የብድር ውል በመገለጹ ኅዳር 13 ቀን 1998 ዓ.ም የተደረገው የሦስትዮሽ ውል ድግግሞሽ ነው በማለት የገለፀው ስምምነቶችን በአግባቡ ባለማጤን ነው:: የሦስትዮሽ ውሉ ዓላማ መያዣው በ3ኛ ሰው እጅ እንዲቀመጥ ለማድረግ ነው:: የብድር ውሎቹ ዓላማ ደግሞ ለፒርፍ ብድር ለመፍቀድና የብድሩ መያዣ ምን እንደሆነ በትክክል ለማመልከት ነው:: በብድር ውሎቹም ውስጥ ለፒርፍ የተፈቀደው የብድር መጠንና የብድሩ መያዣም ፒርፍ ወደፊት በአስቀማጩ መጋዘን የሚያስገባው የጠለጋና የሁመራ ሰሊጥ ምርት መሆኑ በትክክል ተገልጿል::*

[561] *ጠቅላይ ፍ/ቤት "ይግባኝ ባይ አስቀድሞ የሰጠው ብድር ገቢ ሳይደረግለት ሌላ ብድር መስጠት የለበትም" ያለው አግባብ ነው:: አመልካች ባንክ እንደመሆኑ መጠን ብድር መስጠት የቀን ተቀን ሥራው ነው:: የንግድ ሥራው ለምን ነው ብሎ እስካመነ ድረስ መያዣ በመቀበል ወይም ያለመያዣ ብድር ሊሰጥ ይችላል:: ፍ/ቤቱ በቀረበለት ጉዳይ ላይ ተዋዋዮቹ ባደረጉት"ውልና በሕጉ መሠረት ውሳኔ መስጠት ነበረበት እንጂ፣ በአበዳሪና በተበዳሪ የንግድ ግንኙነት ጣልቃ በመግባት በፊት የሰጠሽውን ብድር ሳይከፍልህ ሌላ ተጨማሪ ብድር መስጠት የለብህም ማለት አይገባውም::*

ግንኙነት የለውም።[562] የብድር ውሉቹ ሰሊጡን በመያዣነት ያልጠቀሱት በመሆኑ በፍ/ብ/ሕ/ቁ. 2828(1) የተደረገ መያዣ አይደለም ብለናል በማለት ተጠሪና ፐርፍ ባደረጉት ስምምነት መሠረት እንዲፈፀም ውሳኔ ሰጥቷል።

3. አመልካች በዚህ ውሳኔ ቅር በመሰኘት ለፌዴራል ጠቅላይ ፍ/ቤት የሰበር ችሎት አቤቱታ አቀረበ። በአቤቱታውም፣

   - የብድሩ መያዣ በ3ኛ ሰው እጅ እንዲቀመጥ ኅዳር 13 ቀን 1998 ዓ.ም በፐርፍ፣ በአስቀማጩና በአመልካች መካከል በፍትሐብሔር ሕግ ቁጥር 2831(1) መሠረት የሦስትዮሽ ውል መደረጉን፤ በዚህ የሦስትዮሽ ውል መሠረት አመልካች ከፐርፍ ጋር የብድር ውሎች በመዋዋል በአስቀማጩ መጋዘን የሚቀመጠውን ሰሊጥ በዋስትና እየያዘ ከሰሊጡ ጠቅላላ ዋጋ ሰባ በመቶውን ለፐርፍ ሲያበድር መቆየቱንና ይህም ብድር 8 ሚሊዮን ብር መድረሱን፤
   - አመልካች የፈቀደው ብድር በተወሰነ ጊዜ የሚከፈል (Term loan) ሳይሆን እንደ ኦቨርድራፍት ብድር ባልተወሰነ ጊዜ የሚቆይ የብድር ሂሳብ (credit facility) መሆኑን፤
   - ፐርፍ ሰሊጡ ለብድሩ መያዣ ሆኖ በአስቀማጩ መጋዘን እንዲቆይ መስማማቱን፤ አስቀማጩም ሰሊጡን በመጋዘኑ ለማስቀመጥና ያለአመልካች ፈቃድ ላለመልቀቅ ተስማምቶ በዚሁ መሠረት ሲፈጽም መቆየቱን፤
   - ፐርፍ ሰሊጡን ከመጋዘን አውጥቶ መውሰድ የሚችለው የተበደረውን ገንዘብ በመክፈል መሆኑን፤ ፐርፍ ዕዳውን ባይከፍል አመልካች የ15 ቀን የጽሑፍ ማስጠንቀቂያ በመስጠት ሰሊጡን ለመሸጥ የሚችል መሆኑ በውሉ መገለጹን፤

562 ሰ/ፍ/ቤቱ ይህን ያለው ፐርፍና አመልካች ያደረጓቸውን የብድርና የመያዣ ውሎች በአግባቡ ከመረ ሳይሆን የመጨረሻው የብድር ውል የተደረገበትን ቀንና ሰሊጡ ወደ መጋዘን የገባባቸውን ቀናት በማነጻጸር ብቻ ነው። ፐርፍ በንግዱ ስለተሰማራና ከውጭ አገር በርካታ የገዥ ጥያቄዎች ስለቀረቡለት የተፈቀደለት የብድር መጠን የቀረበበትን የገዥ ጥያቄ ለማሟላት ስለማያስችለው የብድሩ መጠን ከፍ እንዲልለት አመልካች የብድሩን ጣሪያ ወደ 8 ሚሊዮን ብር ከፍ ለማድረግ የካቲት 7 ቀን 2000 ዓ.ም ተጨማሪ የብድር ውል ተፈርሟል። በዚህም የብድር ውሎች ውስጥ የብድሩ መያዣ ፐርፍ በአስቀማጩ መጋዘን የሚያስቀምጠው መጠኑ የተወሰነ የመጠንና የሁመራ ሰሊጥ መሆኑ በግልጽ ተጠቅሷል። አመልካች ለፐርፍ የ8 ሚሊዮን ብር የብድር ጣሪያ የፈቀደለት የካቲት 7 ቀን 2000 ዓ.ም በተደረገው ውል ብቻ ሳይሆን ቀደም ብለው በተደረጉት ሦስት ውሎች ጭምር ነው። የፐርፍ ሥራ ባደገ ቁጥር አመልካች የብድሩን ጣሪያ ከፍ ሲያደርግለት ቆይቷል። አመልካች ለፐርፍ የፈቀደው እንደ ኦቨርድራፍት ብድር ባልተወሰነ ጊዜ የሚቆይ የብድር ፋሲሊቲ እንጂ በተወሰነ ጊዜ የሚከፈል ብድር (Term loan) አይደለም። በተወሰነ ጊዜ የሚከፈል ብድር ቢሆን ተከፍሎ ሲያልቅ ውሉ ቀሪ ይሆናል። ይህኛው ግን ባልተወሰነ ጊዜ የሚቆይ ፋሲሊቲ በመሆኑ ፐርፍ የተፈቀደለትን ጣሪያ ሳያልፍ ከብድር ሂሳቡ ገንዘብ እያወጣ ሰሊጥ ሲገዛና ሲያበጥር ወደ ውጭ ሊልክ ይችላል። ገንዘብ የተለቀቀለትም በውሉ ላይ የተጠቀሰውን የሁመራ ሰሊጥ በአስቀማጩ መጋዘን ያስገባ በመሆኑ አስቀማጩ በሦስትዮሽ ውሉ መሠረት ለአመልካች በጽሑፍ እየገለፀ ፐርፍም ሰሊጡ የተገዛበት ዋጋ ሰባ በመቶ ወደ ሂሳቡ ገቢ እንዲደረግለት በጽሑፍ እየጠየቀ ነው። የመጨረሻው ውል የካቲት 7 ቀን 2000 ዓ.ም ቢደረግም፣ ፐርፍ በጥር ወር 2000 ዓ.ም መጨረሻ ላይ የተፈቀደለትን ገንዘብ ከፍሎ በመጋዘን በመያዣ ሰጥቶት የነበረውን ሰሊጥ በሙሉ ወደ ውጭ ለመላክ ከየካቲት 19 ቀን 2000 ዓ.ም ጀምሮ በመጋዘን ገብቶ የተከማቸውን ሰሊጥ በዋስትና በመያዝ ለፐርፍ ገንዘብ የተለቀቀለት ከየካቲት 19 እስከ ግንቦት 19 ቀን 2000 ዓ.ም ባለው ጊዜ ውስጥ ነው። ጠቅላይ ፍ/ቤት ይህን ለመረዳት በተከታታይ ሳያገናዝብ የብድሩ ገንዘብ ለፐርፍ የተለቀቀውና አመልካችም መያዣውን የተቀበለው የመጨረሻው ብድር ውል በተፈረመበት ቀን እንደሆነ በመቁጠር ትክክል ያልሆነ ውሳኔ ሰጥቷል።

- ለብድሩ በዋስትና ተይዞ በአስቀማጩ መጋዘን ተከማችቶ የሚገኘው የፐርፍ ሰሊጥ ክርክር የቀረበበትን ጨምሮ 6228 ኬሻ ወይም 5766.144 ኩንታል መሆኑን፤
- መያዣ የተሰጠበት የገንዘብ መጠን እና የብድሮቹ መያዣ ፐርፍ በአስቀማጩ መጋዘን የሚያስገባው የወለጋና የሁመራ ሰሊጥ መሆኑ በአያንዳንዱ የብድር ውል ውስጥ ስለመያዣ በሚለው አንቀጽ ሥር ተገልጸ እያለ ይግባኝ ሰሚው ጠ/ፍ/ቤት የብድሩን መያዣ በሦስተኛ ሰው ዘንድ ለማስቀመጥ የተደረገው የሰስትዮሽ ውል የፍ/ህግ ቁጥር 2828(1)ን ድንጋጌ እያሟላም፤ ሰሊጡ የብድሩ መያዣ መሆኑም በብድር ውሎቹ አልተጠቀሰም ማለቱ አግባብ አለመሆኑን፤
- አስቀማጩ እስከ ግንቦት 18 ቀን 2000 ዓ.ም. ድረስ ፐርፍ ወደ መጋዘኑ ያስገባው የሰሊጥ ምርት በሦስትዮሽ ውሉ መሠረት መሆኑን እና ለአመልካች ሳይገለጽ የተቀመጠ ሰሊጥ የሌለ መሆኑን ለፍ/ቤቱ በጻፈው ደብዳቤ ገልጾ እያለ ይግባኝ ሰሚው ፍ/ቤት ይህን ትቶ የብድር ውሎቹ ሰሊጡን በመያዣነት ያልጠቀሱት በመሆኑ የብድሩ መያዣ አይደለም በማለት ተጠሪና ፐርፍ ባደረጉት ስምምነት መሠረት እንዲፈፀም የወሰነው ሰሊጥን እንደሚመዘንብና የባለቤትነት ማረጋገጫ የምስክር ወረቀት እንደሚሰጥበት ልዩ ተንቀሳቃሽ ንብረት በመቁጠር መሆኑን በመግለጽ ውሣኔው ተሽሮ ክርክር የተነሳበት ሰሊጥ አመልካች በመያዣ የያዘው ነው እንዲባልለት አመልክቷል።

ይሁን እንጂ፣ የሰበር ችሎት የአመልካችን አቤቱታ እንዲህ በማለት ውድቅ አድርጎታል፤

> ለክርክሩ መነሻ በሆነው ሰሊጥ ላይ አመልካች መብት አለው ወይስ የለውም የሚለውን ነጥብ ከማየት በፊት *ከመሠረቱ ሰሊጡ የማን ንብረት ነው?* የሚለውን ጥያቄ መመለሱ አግባብ ይሆናል። ሰሊጡ የማን ነው? በሚለው ነጥብ ላይ በዝርዝር ክርክር የተደረገው በፌደራል ጠ/ፍ/ቤት ሲሆን፣ በዚህ ሂደትም ፍ/ቤቱ ሰሊጡ በተጠሪ ስም ከጎንደር ተጭኖ ወደ አዲስ አበባ መምጣቱንና የሥር ተከሳሽ ተቀብሎ በናይል ቡና ላኪ ኃ.የተ.የግል ማህበር መጋዘን ውስጥ ማስቀመጡን አረጋግጧል። ... ተጠሪ ሰሊጡን ወደ አዲስ አበባ ያመጣው ለመሸጥ እንደሆነ፣ ነገር ግን የገበያ ዋጋ ስለዋዠቀበት የተሻለ ገበያ እስኪያገኝ ድረስ በአደራ እንዲቀመጥለት ማድረጉን ፍ/ቤቱ ማጣራቱን በውሳኔው ላይ ገልጿል። ፍ/ቤቱ እነዚህን ማስረጃዎች ከመረመረ እና ከግራ ቀኙ ወገኖች የቀረበውን ክርክር አገናዝቦ ከመዘነ በኋላ ለክርክሩ መነሻ የሆነው ሰሊጥ የተጠሪ ንብረት ነው ወደሚለው መደምደሚያ ደርሷል። እንደምንመለከተው ለክርክሩ መነሻ የሆነው ሰሊጥ የተጠሪ ንብረት ስለመሆኑ በሕግና በፍሬ ነገር ረገድ የቀረበውን ክርክር የመመርመር ሥልጣን ባለው ጠ/ፍ/ቤት ተረጋግጧል። አመልካች የመያዣ ውል ያደረገው ከተጠሪ ጋር አይደለም። የመያዣ ውል አደረግሁ የሚለው ከሥር ተከሳሽ ፐርፍ ኢንተርናሽናል ትሬዲንግ ጋር ሆኖ መሠረቱም በየጊዜው ተሰጡ የተባሉት ብድሮች እንደሆኑ በክርክሩ ገልጾታል። *አመልካች በሰሊጡ ላይ መብት አለኝ የሚለው የመያዣ ውሉን መሠረት በማድረግ እስከሆነ ድረስ ሰሊጡ የመያዣ ሰጪው ንብረት መሆኑን ሊያስረዳ ይገባል።* እንደምናየው ግን የመያዣ ውል ማድረጉን

ከማሳየት አልፎ ለክርክሩ መነሻ የሆነው ሰሊጥ የመያዣ ሰጭው ንብረት መሆኑን ሲያስረዳ እንዳልቻለ ጠ/ፍ/ቤቱ አረጋግጦአል። በመሆኑም ለክርክሩ አልባት ለመስጠት መታየት ያለበት ሰሊጡ የማን ንብረት ነው ለሚለው ጥያቄ የተገኘው ምላሽ እንጂ አመልካች ከሥር ተከሳሽ ጋር የመያዣ ውል አድርጓል ወይስ አላደረገም የሚለው አይደለም። ... የቀረበው የሰበር አቤቱታ በሕግ አተረጓጎም ረገድ የተፈጸመ መሰረታዊ የሕግ ስሕተት መኖሩን የሚያሳይ ባለመሆኑ የሰበር ችሎቱ የሚያርመው አይሆንም።

4. የሰበር ችሎት ከላይ የተገለፀውን ለማለት ያስቻለውን የሕግ ድንጋጌ አልጠቀሰም። ተንቀሳቃሽ ዕቃን ስለያዘ ባለገንዘብ መብትና ግዴታ በሚደነግገው ንዑስ ክፍል ስር የተጻፈው የፍትሐ ብሔር ሕግ ቁጥር 2843 የሚደነግገው የሰበር ችሎት ከፊረደው በተለየ ነው። እንዲህ ይላል፤

ቁ. 2843 - መያዣው የኔ ነው ስለሚል ሦስተኛ ወገን

መያዣ የተቀበለ ባለገንዘብ ይህን መያዣ የተቀበለው የባለቤትነት መብት ከሌለው ሰው ላይም ቢሆን እንኳ የመያዣው ውል በሚሰጠው መብት ሊሠራበት ይችላል።

4.1. የሰሊጥ፣ የኑግ፣ የተልባ እና የሱፍ ምርቶች የቅባት እህል ምርቶች ናቸው። በተለይ የሰሊጥና የኑግ ምርቶች እስከሚበጠሩና ከተበጠሩም በኋላ ወደ ውጭ እስኪላኩ ድረስ በኬሻ እየተደረጉ በመጋዘን ይቀመጣሉ። እነዚህ ምርቶች ለንግድ ዓላማ በመኪና ተጭነው ሲጓጓዙና በመጋዘን ሲከማቹ የሰሊጡን ባለቤት የሚያውቁት አጓጓዡ እና በመጋዘን አስቀማጩ ብቻ ናቸው። ባንኮች እነዚህን የሀገር ምርቶች በመጋዘን እንደተቀመጡ በዋስትና በመያዝ ለነጋዴዎች ገንዘብ ያበድራሉ። በዋስትና በሚይዙበት ጊዜም ለምርቱ የባለቤትነት ማረጋገጫ አይጠይቁም። ቢጠይቁም ሊቀርብላቸው አይችልም። ምክንያቱም እንዲህ ላለው ተንቀሳቃሽ ንብረት የባለቤትነት ማረጋገጫ ሰርትፍኬት የሚሰጥ አካል የለም። በሕጉ መሠረት እንዲህ ያለውን ተንቀሳቀቃሽ ንብረት በእጁ የያዘው ሰው የንብረቱ ባለቤት እንደሆነ ይገመታል።[563]

4.2. በሰ/መ/ቁ. 51001 በተጠቀሰው ጉዳይ ፐርፍ ከዚህ በፊት ሲያደርግ እንደቆየው የሁመራ ሰሊጥ በአስቀማጩ መጋዘን አስገብቶ ከአመልካች ለሚወስደው ብድር በመያዣ ሰጥቷል። አስቀማጩም ፐርፍ 6=228 ኬሻ ወይም 5=766.14 ኩንታል የሁመራ ሰሊጥ በመጋዘኑ ማስገባቱንና አመልካች ካልፈቀደ በቀር ሰሊጡ ከመጋዘኑ እንደማይወጣ በማረጋገጥ ለአመልካች በደብዳቤ ገልጿል።[564] በዚህ መሠረት አመልካች ሰሊጡን በዋስትና በመያዝ ሰሊጡ የተገዛበትን ዋጋ ሰባ በመቶ በብድር ውሉ መሠረት ለፐርፍ ለቆለታል።

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563 ቁጥር 1193(1)

564 ፐርፍ ከየካቲት 19 ቀን 2000 ስሰከ ፖንቦተ 19 ቀን 2000 ዓ.ም ባሱተ ሦስተ ወራት ሙለጥ ለአመልካች በጻፋቸው 13 ደብዳቤዎች በአስቀማጩ መጋዘን 5,766.14 ኩንታል ሰሊጥ በብር 8,175,653.68 ገዝቶ ማስቀመጡን ገልጾ በብድር ውሉቹ መሠረት የሰሊጡ ዋጋ ሰባ በመቶ ብር 5,722,957.58 ወደ ሂሳቡ ገቢ እንዲደረግለት ጠይቆ ገቢ ተደርጎለታል። ከዚህ ሰሊጥ ሙለጥ ተመሪ የስኔ ነው ያሉተ 2,257.064 ኩንታል ሲሆን፣ ፐርፍ ይህን ሰሊጥ በብር 4,288,421.60 የገዛው መሆኑን ገልጾ የዚህ ሰባ በመቶ ብር 3,001,895.12 በሂሳቡ ገቢ እንዲደረግለት ጠይቆ ገቢ ተደርጎለታል።

4.3. ፐርፍ የተጠቀሰውን ሰሊጥ በመያዣ ለጥቶ ከአመልካች ብድር ከወሰደ በኋላ ብድሩን ሳይከፍል በአደራ የተቀበልኩት ነው በማለት የእርቅ ስምምነት እንዲያደርግና ሰሊጡን ለተጠሪ እንዲያስረክብ ሕግ አይፈቅድለትም::[565] ጉዳዩን በየደረጃው ያዩት ፍ/ቤቶች ግን የመያዣ ሕጉ የሚለውን ወደ ጎን በመተው ፐርፍና ተጠሪ ባደረጉት የእርቅ ስምምነት መሰረት ተጠሪ ሰሊጡን እንዲወስዱ ፈርደውላቸዋል::[566] እነዚህ ፍርዶች ሕጉን መሠረት ያደረጉ አይደሉም::

4.4. አመልካች ሰሊጡን በመያዣ በተቀበለበት ጊዜ ሰሊጡ የተጠሪ ንብረት መሆኑን አያውቅም:: ሊያውቅ የሚችልበት ሁኔታም አልነበረም:: ተጠሪም የፍትሐብሔር ሕግ ቁጥር 2844(1) በሚደነግገው መሠረት አመልካች ሰሊጡን ከፐርፍ ላይ በመያዣ የተቀበለው ፐርፍ የሰሊጡ ባለቤት አለመሆኑን እያወቀ ነው በማለት ያስረዱት ነገር የለም:: ይህን ነጥብ ተጠሪ ባላስረዱበት ሁኔታ ሰሊጡን ከአመልካች ተረክበው መውሰድ የሚችሉት በፍትሐብሔር ሕግ ቁጥር 2844(2) መሠረት ሰሊጡ መያዣ የሆነበትን ዕዳ ለአመልካች ከፍለው መሆን ነበረበት::

4.5. የባለቤትነት ማረጋገጫ የማይቀርብበትን ተንቀሳቃሽ ንብረት በእጁ የያዘው ሰው ባለቤት መሆኑን ለማመን በቂ ምክንያት ካለ ከዚህ ሰው ጋር የመያዣም ሆነ የግዥ ውል በመዋዋል ንብረቱን በእጅ ማድረግ ይቻላል:: ሻጩ ወይም በመያዣ የሰጠው ሰው በዕቃው ላይ መብት እንደሌለው ዘግይቶ ቢታወቅ በገዥው ወይም በመያዣ ተቀባዩ ላይ መቃወሚያ ሊሆንበትና በንብረቱ ላይ ያለውን መብት ሊያሳጣው አይችልም::[567] በዚህ ጉዳይ ሰሊጡን በአስቀማጩ መጋዘን አስገብቶ ያስረከበው ፐርፍ ነው:: አስቀማጩና አመልካቹ የሰሊጡ ባለቤት ፐርፍ ነው ብለው በቅን ልቦና ለመገመት በቂ ምክንያት አላቸው:: ፐርፍ ከዚህ በፊትም ሰሊጥ እየገዛና እያስበጠረ ወደ ውጭ ሲልክ የቆየ ነጋዴ መሆኑን አስቀማጩም አመልካችም ያውቃሉ:: ከማወቅም አልፈው ገንዘብ በማበጠርና በማበደር አብረው ሲሠሩ ቆይተዋል:: ሁኔታው ይህ ለመሆኑ ከበቂ በላይ ማስረጃ ቀርቦ እያለ የሰበር ችሎት አመልካች የመያዣ መብቱን ለማስከበር ሰሊጡ የመያዣ ሰጭው (የፐርፍ) መሆኑን ማስረዳት አለበት በማለት የወሰነው አላግባብ ነው::

4.6. አመልካች ሰሊጡ የፐርፍ አለመሆኑን እያወቀ በመያዣ ለመቀበሉ ተጠሪ አላስረዱም:: መያዣ ሰጭው በዕቃው ላይ መብት የሌለው መሆኑን መያዣ ተቀባዩ ያውቅ እንደነበር ዕቃው የኔ ነው ባዩ በማስረጃ ካላረጋገጠ በቀር መያዣ ተቀባዩ የመያዣው ውል በሚሰጠው መብት ሊሠራበት እንደሚችል የፍትሐብሔር ሕግ ቁጥር 2844(1) እና 2843 በግልጽ ይናገራሉ:: ንብረቱ የሌላ ሰው መሆኑን መያዣ ተቀባዩ ያውቃል ወይም ማወቅ ነበረበት ሊባል የሚችለው ንብረቱ በመንግሥት አካል የሚመዘገብና የባለቤትነት ማረጋገጫ የሚሰጥበት ቢሆን ነበር:: ለምሳሌ ተሽከርካሪ ወይም ስም የተጻፈበት አክሲዮን ቢሆን፣ መያዣ ተቀባዩ የንብረቱን ባለቤትነት ማረጋገጫ በማየት ባለቤቱን ሊያውቅ ስለሚችል ይህን ሳያደርግ የሌላ ሰው ንብረት ይዞ ከተገኘ የመያዣ ውሉ ውድቅ ሆኖ የንብረቱ ባለቤት የተያዘውን ዕቃ መልሶ ለመውሰድ

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[565] *ቁጥር 2843*

[566] *ቁጥር 2843 እና 2844*

[567] *ሶፐር 1161፣ 1162፣ 1163(2)፣ 2843 እና 2844(1)ን ይመልከቱ::*

ይችላል::[568] ንብረቱ የእኔ ነው የሚለው ሦስተኛ ወገን ይህን ሁኔታ ማስረዳት ካልቻለ ግን መያዣ ተቀባዩ የመያዣው ውል በሚሰጠው መብት እንዲሠራበት ሕግ ፈቅዶለታል:: ሁኔታው ከላይ እንደተገለፀው ሆኖ ሳለ የይግባኝ ሰሚው ችሎት የፈፀመው መሠረታዊ የሕግ ስሕተት እንዲታረምለት አመልካች ያቀረበው አቤቱታ ፍበሕግ አተረጓጎም ረገድ የተፈጸመ መሰረታዊ የሕግ ስሕተት መኖሩን የሚያሳይ ባለመሆኑ የሰበር ችሎቱ የሚያርመው አይሆንምን ተብሎ ውድቅ መደረጉ እጅግ የሚያስገርም ነው::

[568] ቁፐር 2844::

ዳኞች፣ ተገኔ ጌታነህ
መንበረፀሐይ ታደሰ
ሐጎስ ወልዱ
ሒሩት መለሠ
አልማው ወሌ

አመልካች፣ አቢሲንያ ባንክ - መርዓዊ ታደሰ ቀረበ።
ተጠሪ፣ ዘውዱ ነጋ ከጠበቃው ደሳለኝ አለሙ ክብረት ጋር ቀረበ።

መዝገቡን መርምረን የሚከተለውን ፍርድ ሰጥተናል።

ፍ ር ድ

በዚህ መዝገብ አከራካሪ ሆኖ የቀረበው ነጥብ ተጠሪ ንብረቱ ነው በማለት ክስ የመሠረተበት ሰሊጥ አመልካች ከሌላ ሰው ጋር ባደረገው ስምምነት በመያዣ የያዘው የመያዣ ሰጪው ንብረት ነው ወይንስ የተጠሪው ንብረት የሚለው ነው። ክርክሩ ከፌደራል ከፍተኛ ፍ/ቤት ሲጀመር ከሳሽ የነበረው ተጠሪ ሲሆን፣ ተከሳሽ ደግሞ ፐርፍ ኢንተርናሽናል ትሬዲንግ የሚባል ኩባንያ ነው። ተጠሪ ክስ ሊመሰርት የቻለው በአደራ ያስቀመጥኩትን 2,257,064 ኩንታል ነጭ የሁመራ ሰሊጥ ያልመለሰልኝ በመሆኑ በፍርድ ኃይል ተገዶ ይመለስልኝ በማለት ነው። ክሱን በተመለከተም ሰሊጡ እንዲታገድ ጥያቄ በመቅረቡ ፍ/ቤቱ ሰሊጡ በሚገኝበት በናይል ቡና ላኪ ኃ.የተ.የግ.ማ. መጋዘን እንዳለ ተከብሮ እንዲቆይ ትዕዛዝ ሰጥቷል። በሌላ በኩል ደግሞ ክርክሩ ከመወሰኑ በፊት ከሳሽና ተከሳሽ ጉዳዩን በእርቅ ጨርሰው ስለመጡ ይህንኑ ለፍ/ቤቱ አቅርበው በስምምነቱ መሠረት እንዲፈፀም ትዕዛዝ አሰጥተዋል። ቀደም ሲል ተሰጥቶ የነበረውን የእግድ ትዕዛዝም ፍ/ቤቱ አንስቶአል። አመልካች ክርክሩ ውስጥ የገባው ከዚህ በኋላ ነው።

ከመዝገቡ እንዳየነው አመልካች መቃወሚያ ያቀረበው በፍ/ብ/ሥ/ሥ/ሕግ ቁ. 358 የተመለከተውን ድንጋጌ መሠረት በማድረግ ሲሆን፣ ዳኝነት የጠየቀውም ከሣሽና ተከሣሽ ያደረጉት የእርቅ ስምምነት በመያዣ የያዝኩትን ሰሊጥ የሚመለከት በመሆኑ ይጎዳኛል፣ ይሰረዝልኝ በማለት ነው። ፍ/ቤቱ የሁሉንም ወገኖች ሃሳብ ከተቀበለ በኋላ፣ የአመልካችን መቃወሚያ ውድቅ በማድረግ ውሳኔ ሰጥቶአል። በሌላ በኩል ደግሞ አመልካች ውሳኔውን በመቃወም ለፌደራል ጠ/ፍ/ቤት ይግባኝ በማቅረቡ ክርክሩ በአመልካች እና በተጠሪ መካከል ተካሂዶአል። በመጨረሻም ፍ/ቤቱ የአመልካችን ክርክር ውድቅ በማድረግ ለክርክሩ መነሻ የሆነው ሰሊጥ አመልካች ለሥር ተከሳሽ ለሰጠው ብድር በመያዣነት የያዘው አይደለም። ሰሊጡ የሥር ተከሳሽ በአደራ ያስቀመጠው የተጠሪ ንብረት በመሆኑ በተጠሪ እና በሥር ተከሳሽ መካከል ታህሳስ 14 ቀን 2001 ዓ.ም. የተደረገው የእርቅ ስምምነት የፌደራል ከፍተኛ ፍ/ቤት በማፅደቁ ተገቢ ነው። በመሆኑም በስምምነቱ መሠረት ይፈጸም በማለት ወስኗል። የሰበር አቤቱታው የቀረበው በዚህ ላይ ነው።

በበኩላችንም አመልካች ታህሳስ 8 ቀን 2002 ዓ.ም. በጻፈው ማመልከቻ ያቀረበውን አቤቱታ መሠረት በማድረግ ተጠሪን አስቀርበን ክርክሩን ሰምተናል። በመቀጠልም

አከራካሪ የሆነውን ጭብጥ ከግራ ቀኝ ወገኖች ክርክር፣ አቤቱታ ከቀረበበት ውሣኔ እና ከሕጉ ጋር አገናዝበን መርምረናል።
ከሥር ጀምሮ ከተደረገው ክርክር መገንዘብ እንደቻልነው በተጠሪ እና በሥር ተከሳሽ መካከል የተፈጠረው ግንኙነት የተመሠረተው ግንቦት 17 ቀን 2000 ዓ.ም. በፊአሙት የአደራ ውል ላይ ነው። የአደራ ውሉ ከመፈረሙ በፊት ማለትም ከግንቦት 13 እስከ 18 ቀን 2000 ዓ.ም. ድረስ በነበሩት ቀናት ውስጥ ሰሊጡ ወደ መጋዘኑ ስለ መግባቱም በፊደራል ጠ/ፍ/ቤት በተደረገው ክርክር በማስረጃ የተረጋገጠ ስመሆኑ በውሳኔው ላይ ተመልክቶአል። ተጠሪ በአደራ አስቀማጩ ላይ ክስ የመሠረተው ሰሊጡን ሊመልስልኝ አልቻሰም በማለት ሲሆን፣ አመልካች ደግሞ ሰሊጡ በመያዣ የያዝኩት ነው። ለተጠሪ ሲሰጥ አይገባም የሚል መከራከሪያ ይዞ ነው ወደ ክርክሩ የገባው። የመያዣ ውሉ ተደረገ የተባለው በአመልካች እና በሥር ተከሳሽ (ሰሊጡን በአደራ አስቀምጦአል ተብሎ በተከሰሰው) መካከል እንደሆነም አላከራከረም። በመሆኑም ለክርክሩ መነሻ በሆነው ሰሊጥ ላይ አመልካች መብት አለው ወይስ የለውም የሚለውን ነጥብ ከማየት በፊት ከመሠረቱ ሰሊጡ የማን ንብረት ነው? የሚለውን ጥያቄ መመለሱ አግባብ ይሆናል።

የአመልካች ክርክር በዋነኛነት የተመሰረተው የሥር ተከሳሽ በናይል ቡና ላኪ ኃ.የተ.የግ. ማህበር መጋዘን በተለያዩ ጊዜያት የሚያስገባውን ሰሊጥ በመያዣነት ለመያዝ ጎዳር 13 ቀን 98 ዓ.ም. በተደረገው የሶስትዮሽ ውል አለኝ በሚለው ላይ ነው። ለክርክሩ መነሻ የሆነው መጠኑ በትክክል የተገለፀው ሰሊጥ በእርግጥ እና በተሰየ ሁኔታ በመያዣ ለመያዙ የሚያስረዳለት ሌላ ማስረጃ ግን አላቀረበም። ሰሊጡ የማን ነው? በሚለው ነጥብ ላይ በዝርዝር ክርክር የተደረገው በፊደራል ጠ/ፍ/ቤት ሲሆን፣ በዚህ ሂደትም ፍ/ቤቱ ሰሊጡ በተጠሪ ስም ከጎንደር ተጭኖ ወደ አዲስ አበባ እንዲመጣ በቀጥታ ለሥር ተከሳስም ተቀብሎ በናይል ቡና ላኪ ኃ.የተ.የግል ማህበር መጋዘን ውስጥ በማስቀመጡና፣ ለዚህም ግንቦት 8 ቀን 2000 ዓ.ም. የተጻፈ ቁጥር 0119 እና 0001 የሆኑ ግንቦት 9 ቀን 2000 ዓ.ም. የተፃፈ ቁጥሩ 0116 የሆነ ግንቦት 11 ቀን 2000 ዓ.ም. የተፃፈ ቁጥሩ 0117 የሆነ፣ ግንቦት 13 ቀን 2000 ዓ.ም. የተፃፉ ቁጥር 0118 እና 0119 የሆኑ እና ግንቦት 14 ቀን 2000 ዓ.ም. የተፃፈ ቁጥር 0120 የሆነ የማስጫኛ ሰነዶች በአስረጂነት መቅረባቸውን አረጋግጠዋል። የማስጫኛ ሰነዶች የመኪናው ታርጋ (ሠሌዳ) ቁጥር፣ የሹፌሩ ስም እና ስልክ ቁጥር፣ የጭነቱን ልክ፣ ወዘተ በዝርዝር የያዙ እንደሆኑም ጠ/ፍ/ቤት አረጋግጦአል። ከዚህም በተጨማሪ ተጠሪ ሰሊጡን ወደ አዲስ አበባ ያመጣው ለመሸጥ እንደሆነ፣ ነገር ግን በጊዜው የገበያ ዋጋ ስለ ዋገርቀበት የተሻለ ገበያ እስኪያገኝ ድረስ ብአደራ እንዲቀመጥለት ማድረጉን ፍ/ቤቱ ማጣራቱን በውሳኔው ላይ ተገልፏል። ፍ/ቤቱ እንዚህን ማስረጃዎች ከመረመረ እና ከግራ ቀኝ ወገኖች ክርክር አገናዝቦ ከመዘነ በኋላም ለክርክሩ መነሻ የሆነው ሰሊጥ የተጠሪ ንብረት ነው ወደሚለው መደምደሚያ ደርሶአል።

እንደምንመለከተው ለክርክሩ መነሻ የሆነው ሰሊጡ የተጠሪ ንብረት ስለመሆኑ በሕግና በፍሬ ነገር ረገድ የቀረበውን ክርክር የመመርመር ስልጣን ባለው ጠ/ፍ/ቤት ተረጋግጦአል። አመልካች የመያዣ ውል ያደረገው ከተጠሪ ጋር አይደለም። የመያዣ ውል አደረግሁ የሚለው ከሥር ተከሳሽ ፐርፍ ኢንተርናሽናል ትሬዲንግ ጋር ሆኖ መሠረቱም በየጊዜው ተሰጡ የተባሉት ብድሮች እንደሆኑ በክርክሩ ገልያታል። በሰሊጡ ላይ መብት አለኝ የሚለው የመያዣ ውሉን መሠረት በማድረግ እስከሆነ ድረስ ሰሊጡ የመያዣ ሰጪው ንብረት መሆኑን ሊያስረዳ ይገባል። እንደምናየው ግን የመያዣ ውል ማድረጉን ከማሳየት አልፎ

ለክርክሩ መነሻ የሆነው ሰሊጥ የመያዣ ሰጭው ንብረት መሆኑን ሊያስረዳ እንዴልቻለ ጠ/ፍ/ቤቱ አረጋግጦአል። በመሆኑም ለክርክሩ አልባት ለመስጠት መታየት ያለበት ሰሊጡ የማን ንብረት ነው ለሚለው ጥያቄ የተገኘው ምላሽ እንጂ አመልካች ከሥር ተከሳሽ ጋር የመያዣ ውል አድርጎአል ወይስ አላደረገም የሚለው አይደለም። በመጨረሻም በማስረጃ ተረጋግጦ በተደረሰው የፍሬ ነገር ድምዳሜ ላይ የቀረበው የሰበር አቤቱታ በሕግ አተረጓጎም ረገድ የተፈጸመ መሰረታዊ የሕግ ስህተት መኖሩን የሚያሳይ ባለመሆኑ የሰበር ችሎቱ የሚያርመው አይሆንም (የኢፌዲሪ. ሕገ መንግስት አንቀፅ 80/3/ሀ/ እና የፌደራል ፍ/ቤቶች አዋጅ ቁ.25/88 አንቀጽ 10 ይመለከተዋል።

ው ሳ ኔ

1. የፌደራል ጠ/ፍ/ቤት በፍ/ብ/ይ/መ/ቁ. 46144 ታህሳስ 1 ቀን 2002 ዓ.ም. የሰጠው ውሳኔ በፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 348/1/ መሠረት ፀንቷል።
2. አመልካች ያቀረበው የሰበር አቤቱታ ተቀባይነት የለውም ብለናል።
3. በዚህ ሰበር ችሎት ለተደረገው ክርክር የወጣውን ወጪና ኪሳራ በተመለከተ ግራ ቀኝ ወገኖች ይቻቻሉ። መዝገቡ ይመለስ።

ት ዕ ዛ ዝ

ታህሳስ 4 ቀን 2002 ዓ.ም. ተሰጥቶ የነበረው የእግድ ትዕዛዝ ተነስቶአል። ለሚመለከተው ይፃፍ።

የማይነበብ የአምስት ዳኞች ፊርማ አለበት።

Effect of Non-Renewal of Registration of a Contract of Mortgage under the Ethiopian Civil Code: A Case Comment

Aschalew Ashagre*

I. Introduction

In almost all jurisdictions, there are important security devices which are meant to secure the due performance of an obligation in general and contractual obligation in particular.[569] Mortgage is one of such security devices which is widely practiced in the world. According to Black's Law Dictionary, 'mortgage is a conveyance of title to property that is given as a security for the payment of a debt or the performance of a duty and that will become void [extinguished] upon payment or performance according to the stipulated terms'.[570] However, as we can easily observe, this definition cannot as such enable us to distinguish mortgage from other security devices particularly from that of pledge[571] as the definition does not tell us about properties which are brought under the ambit of mortgage.

Mortgage is established where a specific immovable property is made for the payment of money or the performance of an obligation. [572] Thus, mortgage, as a security device, pertains to an immovable property. The Ethiopian Civil Code (hereinafter Code) does not define mortgage although it has made it clear that a mortgage may charge an immovable only.[573]

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569 The term security devices encompass devises such as pledge, surety, lien, financial guarantee bond and the like, see for instance, Arkun Kimer Sen and Jitendra Kumar Mitra, Commercial Law Including Company Law, 21st ed., the World Press Private Limited, Calcutta, 1998 at. 402-409. See also M. Planiol, Treatise on the Civil Law, Translated by the Louisiana State Institute, 11th ed., Vol. 2, No. 2, 1939. In Ethiopia, too, surety has been dealt with Art. 1920-1951, and pledge has been regulated by Arts. 2825-2873 of the 1960 Civil Code of the Empire of Ethiopia while lien is essentially created by virtue of the law and found scattered in the Civil Code.

570 Bryan A. Garner, (Editor-in-Chief), Black's Law Dictionary, 8th ed., 2004, at 1031.

571 There are essential differences between mortgage and pledge with regard to formation, and the respective rights and duties of the parties involved, the consequences that each security device produce.

572 Arkumen Sen and Jitendra Kumar Mitra, Supra note, 1, at 402. Besides, mortgage is defined as "dead pledge". See Corpus Juris Secundum: A Complete Restatement of the Entire American Law, Vol. 58, at 23.

573 Civil Code of the Empire of Ethiopia (Civil Code), proclamation No. 165, 1960, Art. 3047.

However, the Code has also provided that a mortgage may charge certain kinds of movables where it is clearly provided by law.[574]

As far as the establishment of mortgage is concerned, the Code has incorporated three ways. These are: 1) Legal mortgage; 2) Judicial mortgage; and 3) Contractual mortgage.[575] Concerning the first, Article 3042 of the Code states that whosoever sells an immovable shall have a legal mortgage on such immovable as a security for the payment of the agreed price and for the performance of any other obligation laid down in the contract of sale. From this provision, it is possible to gather that the mortgage created by virtue of the law is an accessory obligation whose creation and existence hinges upon the creation and existence of the principal obligation - the contract of sale. In addition to this, a legal mortgage is created in favor of a co-partitioner of an immovable property.[576] In this case, too, for a legal mortgage to come into being, there must be a contract of partition of an immovable property. The second type of mortgage is judicial mortgage where a court or an arbitration tribunal may secure execution of its judgments, orders or awards by granting one party a mortgage on one or more immovables the property of the other party. This also indicates that mortgage is an accessory obligation for it is created by the court or an arbitral tribunal which entertains a case involving a principal obligation.

The other point worth considering in this introductory part, is the requirements that need to be satisfied for the establishment of a valid mortgage. In this regard, Article 3045 of the Code stipulates that the contract or other agreement creating mortgage shall be of no effect unless it is made in writing. Sub-article 2 of the same article adds that it shall be of no effect unless it specifies in Ethiopian currency the amount of the claim secured by mortgage.

Article 3045(1) reaffirmed what Article 1725 of the Code has stated that writing is a validity requirement to establish a contract of mortgage. In

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574 In Ethiopia, as a matter of exception; mortgage may be established on movable properties where such is specifically provided by law.

575 Civil Code, Supra note 5, Art. 3041.

576 Id, See Art. 3043 which stipulates that a co-partitioner shall have a legal mortgage on the immovable allotted to his co-particioners in accordance with the act of partition. Such mortgage shall secure the payment of any compensation in cash that may be due to him or such other compensation as may be due by the co-partitioner where he is dispossessed of any property allotted to him.

addition to the requirement of writing, the Code has provided another stringent requirement - the contract of mortgage shall be of no effect unless the amount of claim secured by the mortgage is specified in Ethiopian currency. Furthermore, there is also another stiff requirement that needs to be satisfied so that a valid mortgage will be established. This is registration of mortgage. In this regardd, Article 3052 of the Code declares that a mortgage, however created,[577] shall not produce any legal effect except from the day when it is entered in the register of immovable property at the place where the immovable mortgage is situate.[578]

To sum up, no valid mortgage can be established in Ethiopia unless the following elements are cumulatively satisfied. These are:

1. Mortgage must be made in writing;
2. The amount secured by the mortgage should be specified in Ethiopian currency (Birr).
3. The mortgage must be registered.

However, the concern here is on the legal effect of non-renewal of registration of contractual mortgage. This is the central issue in the case under consideration. This case comment is divided in to four parts. In the second part, summary of the facts of the case and holding of the court is

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[577] Bear in mind that the requirement of registration is applicable to all three types of mortgages i.e legal mortgage, contractual mortgage and judicial mortgage. In other words, mortgage produces the required legal effect when it is registered irrespective of the mode of establishment of the mortgage. We know that whether the requirement of registration provided under Art. 1723 of the civil code is a validity requirement or not has remained to be a thorny problem in Ethiopia since the Ethiopian Supreme Court has given different decisions on the same issue. See for instance, W/o Gorfe G/Hiwot V Aberrash Dubare and Ato Getachew. Nega, F. Sup. Ct., Cassation, civil file No. 21448, published in Ethiopian Bar Review, Volume 2, No. 1. at 181-190. See also another decision of the court, Nyala Insurance Corporation V Adugna Ejigu, Cassation, civil file No. 39336, (unpublished) which has gone at logger heads with the previous decision of the same court. See also an excellent article written in Amharic, Mekibid. Tsegaw, የማይንቀሰቀሱ ንብረቶችን የሚመለከቱ ውሎች እና የፎርም ጥያቄ፡ የወቅቱ አሳሳቢ ጉዳይ", Ethiopian Bar Review, Vol. 2, No. 1, at 153-180. However, when we come to the Civil Code dealing with mortgage, the law has left no uncertainty as it has made it clear that registration is a validity requirement.

[578] With regard to registration of immovable property in some selected jurisdictions in general and in Ethiopia in particular, consult Yohannes Heroui, "Registration of Immovables under the Ethiopian Civil Code: An overview in Comparative Perspective", Ethiopian Bar Review, Vol. 2, No. 2, 2008, at 31-98.

presented. The third part is devoted to analysis of the decision of the court. Finally, a concluding remark has been made.

II. Summary of the Facts of the Case and Holding of the Courts

On the 11th of Tahisas and on the 17th of Nehasie 1987 E.C., overdraft loan contracts were concluded between the Commercial Bank of Ethiopia (hereinafter the Bank) and Hamid and family Agricultural products Private Limited Company (hereinafter the PLC). The contracts were made in writing and duly signed by the contracting parties. In these contracts, the Bank advanced loans amounting to 2,250,000.00 (Two million, two hundred fifty thousand Birr) to the PLC. In order to secure the payment of the loan advanced to the PLC, a third-party mortgager called Ato Abdurazak Hamid gave his residential house in mortgage to the bank. The contract of mortgage was made in writing and was registered by the then Region 14 Administration, Urban development and Works Bureau.

Although the relationship between the bank and the PLC was smooth in the first four years, a dispute arose between them as the borrower declined to repay the loan in accordance with the terms and conditions of the contract. Because of this, the Bank put both the borrower and the third party mortgager in default by notice written on the 24th of Tikmit 1992 E.C. Having done this, the Bank sold the buildings of the principal debtor using its power of foreclosure. However, the Bank did not sell the building (Mortgage) belonging to Ato Abdurazak Hamid (the third party mortgager). Meanwhile, Ato Abdurazak invoked Article 3058[579] of the Civil Code and instituted a case at the Federal First Instance Court alleging the absence of a mortgage contract between him and the Bank. Ato Abdurasak prayed the Court to order the release of his house from encumbrance and return of the title deed. The Bank argued that because it gave default notice to the principal debtor and the third party mortgager in Tikimit 1992, the requirement of renewal of registration provided in Article 3058 of the Code was interrupted. Hence, the Bank argued that there was a valid mortgage contract. The Federal First Instance Court ruled in favor of the Bank by

[579] Article 3058 of the Civil Code provides that 'the registration of mortgage shall be effective for ten years from the day when the entry was made. The effect of such registration shall continue, where prior to the expiry of the period of ten years, a new entry is made with a view to renewing the first registration. In such case, the first registration shall be effective for ten years from the day when the new entry was made'.

explaining that absence of renewal of registration of mortgage contract provided under Article 3058 does not extinguish the mortgage contract concluded between the Bank and the third party mortgagor.[580]

Because the plaintiff was dissatisfied by the decision of the Federal First Instance Court, he appealed to the Federal High Court. The Federal High Court accepted the appeal and ordered the Bank to present its side of the story. The Bank raised the same argument that it raised at the First Instance Court. The Federal High Court, having heard the arguments raised by both parties, upheld the decision of the First Instance Court explaining it did not find factual as well as legal error committed by the lower court.[581]

Ato Abdurazak subsequently appealed to the Cassation Division of the Federal Supreme Court (hereinafter the Cassation Division) for the reversal of the decision of the lower courts arguing that their decision contained fundamental error of law. The Cassation Division accepted the application and summoned the Bank. The Bank, reiterated the argument it raised in the lower courts. It argued that because it gave a default notice to the principal debtor and the third party mortgager, there was no need to renew the registration of the mortgage despite the fact that ten years lapsed since the registration of the contract of mortgage.

The Cassation Division reasoned that the issued that needed its attention was whether giving default notice to the principal debtor and the third party mortgager was sufficient to maintain the validity and continuity of the mortgage contract despite the fact that the contract registered in 1987 E.C. was not renewed until 1997 (before the expiry of the ten years period stipulated under Article 3058 of the Code). Nonetheless, the Cassation

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580 See Abdurazak Hamid V. the Commercial Bank of Ethiopia, Civ. File No. 78317/2000, Federal First Instance Court. The crucial part of the decision reads" ሁለተኛውን ነጥብ በተመለከተ በከሳሽና በተከሳሽ መካከል ነሐሴ 11 ቀን 1987 ዓ.ም የመያዣ ውል [የማይንቀሳቀስ ንብረት] ስምምነት የተፈፀመ ሲሆን ተበዳሪው ገንዘቡን ባለመመለሱ ጥቅምት 02 ቀን 1992 ዓ.ም ለተከሳሽና ለተበዳሪው ተከሳሽ ማስጠንቀቂያ ሰጠቷል። ስለዚህ የ10 ዓመቱ ጊዜ ከመጠናቀቁና የመያዣ መብቱን ሳያጣ ተከሳሽ በመያዣው ንብረት ላይ እንቅስቃሴ የጀመረ በመሆኑ በዚህ ረገድ [ከሳሽ] ያቀረበውን ክርክር ፍ/ቤቱ አልተቀበለውም።"

581 See Abdurazak Hamid (appellant) v the Commercial Bank of Ethiopia, Federal High Court Civil, File No. 64469 (unpublished). Since recent times, Ethiopian courts have stopped giving adequate reasons for their decisions particularly when a case is dismissed or where the decision of a lower court is confirmed. In the case at hand, too, the Federal High Court did not give any reason as to why it confirmed the decision of the Federal First Instance Court except saying that there was no legal as well as factual ground that would justify the reversal of the decision of the lower court.

Division confirmed the decisions of the lower courts. In its decision, the Cassation Division essentially reasoned that because the Bank gave default notice to the applicant on the 24th of Tikimit 1992 E.C., and it commenced to exercise its right as a mortgagee and because the notice was given before the expiry of the ten years period stipulated in Article 3058 of the Code, the contract of mortgage continues to be valid despite the fact that the registration was no renewed.[582]

This writer believes that the decisions of the lower courts as well as the decision of the Cassation Division are erroneous. The following section provides the reasons.

III. Analysis and Comment

From the outset, this writer would like to point out that the Cassation Division of the Federal Supreme Court not only has the final judicial power in Ethiopia, but also the power to make laws. The latter is clearly provided in Article 2(1) of Proclamation No. 454/2005 which states that '[i]nterpretation of law by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be binding ôn federal as well as regional courts at all levels.'[583]

With this point in mind, let us move to the central theme of analysis i.e. whether the Cassation Division has clearly appreciated the essence and significance of registration of a contract of mortgage and its renewal when it entertained the dispute cropped up between the Bank and Ato Abdurazak. As was pointed out in my previous discussion, the contract of mortgage established between the Bank and Ato Abdurazak was made in writing and was registered by the competent authority as per Article 3052

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[582] See Abdurazak Hamid (applicant) V. Commercial Bank of Ethiopia, Federal Supreme Court (Cassation Bench), civil file No. 448000/2002, unpublished, Tikimit 5, 2002 E.C.) The case has also been produced in this very journal.

[583] Federal Courts Proclamation, Re-amendment Proclamation No. 454/2005, Federal Negarit Gazeta, Year 11 No 42, Art. 2(1). As far as the power of the Cassation Division of the Federal Supreme Court is concerned, see Kalkidan Aberra, "Precedent in the Ethiopian Leal system", Ethiopian Journal of Legal Education, Vol. 2, No. 1, January 2009, at 23-42. See also Muradu Abdo, "Review of Decisions of State Courts over State Matters by the Federal Supreme Court", Mizan Law Review, Vol. 1, No. 1, June 2007, at 60-74. Besides consult Yohannes Heroui, "ስለሰበር ሥልጣንና ሥርዓቱ ጥቂት ማስታወሻዎች", Ethiopian Bar Review Vol. 3, No. 1, March 2009, at 131-148.

of the Code. However, the registration was not renewed as required by Article 3058 of the Code.

The query is, therefore, what legal consequence is attached to the non-renewal of registration of a contract of mortgage? In Ethiopia, particularly when the Code was adopted, land was a private property to which great value was attached. Hence the law provided stronger protection to land. Because of this, a contract of mortgage which encumbered land was not allowed to continue for unlimited period of time. Thus, the Code stipulated that contract of mortgage should be made in writing and it should be registered and the registration should be renewed within ten years. Failure to renew the registration would make unsecured after the expiry of the ten years. Although the situation with regard to land has changed since 1974, the requirements of renewal of registration of mortgage contract has not been changed since those requirements are also applicable to mortgage of buildings and other properties as there is no law which has either expressly or impliedly affected the applicability of Article 3058 of the Code.

That a contract of mortgage duly established and registered continue to exist with the existence of the principal obligation is not arguable because Article 3058 has declared that the registration of a mortgage shall be effective for ten years from the day when the entry was made. This means that although a mortgage contract is made in writing by specifying the amount secured in Ethiopian currency and registered by the competent authority, the registration serves only for ten years. After the expiry of the ten years period, the contract of mortgage shall be extinguished by virtue of the law. No step, no activity and no measure, taken by the mortgagee, play a role for the resurrection of the contract of mortgage, which is not renewed. In this case, there shall not be mortgage or mortgagee relationship even if the principal obligation subsists. This means that the former secured creditor has become a rank-and-file creditor.

As shown in the subsequent analysis, the Cassation Division rendered its decision in disregard of what the law clearly stipulates as critically discussed above. The Cassation Division based its decision on other extraneous and irrelevant factors. In fact, in spite of the fact that the initial life span of a mortgage contract is only ten years, such life span can be extended by renewing the registration. In this regard, Article 3058(2) of the Code stipulates that the effect of such registration [the registration made at the time of the creation of the mortgage] shall continue where prior to the expiry of the period of ten years, a new entry is made with a view to

renewing the first registration. Sub-article 3 of the same article further provides that in such a case, [in the case of renewal of registration] the first registration shall be effective for ten years from the day when the new entry was made. From these provisions of the Code, it is not difficult to gather that a contract of mortgage co-exists with the existence of the principal obligation so long as there are continuous renewals of registration within ten years. Accordingly, it is undoubtedly clear that a contact of mortgage cannot exist perpetually despite the continuity of the principal obligation unless the registration is renewed in accordance with Article 3058 of the Code.

This is what the law-maker desired to regulate as far as the validity and continuity of mortgage contract in Ethiopia is concerned. However, the Cassation Division did not reflect the intention of the law-maker despite the blunt language of the Code. As mentioned under section two above, the contracts of mortgage established between the Bank and Ato Abdurazak were registered on the 11th of Tahisas and on the 17th of Nehassie 1987 E.C. This demonstrates that, as per Article 3058 of the Code, the mortgage contract registered on the 11th of Tahisas 1987 had undoubtedly expired after the 11th of Tahisas 1997 E.C. while the contract of mortgage registered on the 17th of Nehasie 1987 E.C had expired after the 17th of Nehassie 1997 E.C. as no renewal of registration was made before the extinction o the first registrations. The conclusion to be drawn from this is that the Bank lost its security right over the building owned by Ato Abdurazak. However, the Bank contended that the ten years requirement of renewal was interrupted as the Bank gave notice to the principal debtor and the third party mortgager - Ato Abdurazak. The latter, on the other hand, vehemently argued that absence of renewal of registration extinguished the contract of mortgage. Despite this argument of Ato Abdurazak and despite the clear message of Article 3058 of the Code, the Cassation Division ruled in favor of the Bank.

The lower courts based their decisions on the grounds of interruption of period of limitation. Consequently, they misapplied the law. The Cassation Division also misapplied the law by fully endorsing the wrong decision of the lower courts. This is because although Art. 3058 of the Code requires renewal of registration a contract of mortgage, the Cassation Division reasoned that despite absence of renewal of registration, giving default notice and starting the process of foreclosure would maintain the validity and continuity of the contract of mortgage established between the Bank and Ato Abdurazak. Therefore, it is natural to ask as to how giving default

notice or commencing foreclosure is equated with renewal of registration of a contract of mortgage. The question is: do grounds, which interrupt period of limitation have any thing to do with renewal of registration of a mortgage contract?

The answer is in the negative. However, the Cassation Division seems to have based its decision on Article 1851 of the Code which regulates the conditions which interrupt the running of period of limitation as far as the principal obligation is concerned. As a matter of fact, the Cassation Division did not cite the article expressly. However, the decision seems to have been influenced by this article as the court has reasoned:

> ... በሌላ በኩል ግን ባለገንዘቡ የመያዣ ውሉ ከተመዘገበበት ቀን ጀምሮ 10 ዓመት ከማለፉ በፊት በመብቱ መገልገል ጀምሯል ሊባል የሚችለው መቼ ነው? የሚለው ሊታይ ይገባል:: በአዋጅ ቁጥር 97/90 መሠረት ለለጠው ብድር መያዣ ባንክ ብድር ካልተከፈለው የ30 ቀናት ማስጠንቀቂያ በመስጠት ንብረቱን ለመሸጥ... እንደሚችል ተመልክቷል::... ተጠሪ ለአመልካች ጥቅምት 24 ቀን 1992 ዓ.ም ማስጠንቀቂያ በመስጠት በመብቱ መገልገል ጀምሯል:: ... የቤቱ ሽያጭ ሳይጠናቀቅ 10 ዓመት ማለፉ መያዣውን ቀሪ አያደርገውም::

The decision of the Cassation Division is wrong because starting to exercise the right of foreclosure as provided by Proclamation No. 97/1998 does not replace the requirement of renewal of registration. This proclamation is meant to avoid the effect of Article 2851 and Article 3060 of the Code. It has not affected the existence and continuity of Article 3058 of the Code. Therefore, the proclamation does not have any relevance to the issue at hand. In addition to this proclamation, the decision of the Cassation Division was impliedly supported by Article 1851 of the Code. In fact, this article was cited by the Bank consistently as the major base of its argument. Therefore, it is logical to assume that the Court accepted the arguments of the Bank although the decision has no where cited Article 1851 of the Code.

However, Article 1851 of the Code is also irrelevant to the case at hand. This is because Article 1851 of the Code is meant to regulate the situation which interrupt period of limitation with regard to the principal obligation. A close reading of Article 1851 of the Code shows that the provision does not have any nexus, whatsoever, with the requirement of renewal of a mortgage contract under Article 3058 of the Code. Article 1851 of the Code states that 'the period of limitation shall be interrupted where the debtor admits the claim in particular by paying interest or installments or producing a pledge or guarantee in the creditor brings an action for the

debtor to discharge obligations.' The issue here is whether this article is applicable to the principal claim or the accessory obligation. This article is applicable to the principal claim-the claim that the bank had against Hamid and Family PLC. When we closely scrutinize the elements incorporated in this article, we can understand that these are not meant to renew the registration of mortgage.

At this juncture it is worth reiterating that the general provisions of Book IV, Title XII of the Civil Code are applicable to any contractual relations as clearly stipulated in Article 1676(1) of the Code, we must not forget that the general provisions of should not have primacy over provisions of the Code applicable to certain special obligations by reason of their origin and nature. This is clearly stipulated under Article 1676(2) and Article 1677(2) of the Code. One special contract having its own special feature is a contract of mortgage governed by the special provisions of the Code. The formation, the respective rights and duties of the parties and the continuity or otherwise of the contract of mortgage is governed by Articles 3047 and 3116 of the Code. Hence, it is wrong to resort to the general provisions of the Code while special provisions specifically and clearly regulate a certain situation.

The crucial issue presented to the Cassation Division of was whether a contract of mortgage whose registration was not renewed could give rise to any legal effect. The Cassation Division ruled contrary to Article 3058 of the Code as it has concluded that the commencement of exercising the right of foreclosure was tantamount to renewal of registration and the right of the Bank over the mortgaged property remained intact. The decision of the court did not take into consideration the clear meaning of Article 3058 of the Code. Instead, the court tried to interpret the article while the article does not invite interpretation. By doing so, the court arrived at a wrong conclusion and gave a decision which is extremely detrimental to the interest of Ato Abdurazak.

Courts in Ethiopia, and elsewhere in the world, are prevented from creating rights and obligations which are not contemplated by the law-maker and the contracting parties. In this regard, Article 1713(2) of the Code states that the court may not make a contract under the guise of interpretation. The word "interpretation" employed here may pertain to interpretation of laws or contracts. Hence, where the law is clear, courts do not depart from the clear message of the law and give decision which vitiates the intention of

the legislature. In connection with this, a renowned scholar explained that:[584]

> ...the judicator is to discover and to act upon the true intention of the legislature-the *mens* or *sententia legis*. The essence of the law lies in its spirit, not in its letter, for the letter is significant only as being the external manifestation of the intention that underlies it. Nonetheless, in all ordinary cases, the courts must be content to accept the *litera legis* as the exclusive and conclusive evidence of the *sententia legis*. They must in general take it absolutely for granted that the legislature has said what it meant, and meant what it has said. Judges are not at liberty to add or to take from or modify the letter of the law, simply because they have reason to believe that the *sententia legis* is not completely or correctly expressed by it.

IV. Conclusion

The Cassation Division of the Federal Supreme Court has been conferred with the power to revise court decisions that contain basic error of law. Moreover, interpretation of a law by the Cassation Division made by not less than five judges is binding on Federal as well as Regional courts of all levels. Thus, it is clear that well reasoned decisions of the Cassation Division contribute immensely towards the uniform of application of laws in the country. It is also true that wrong decisions by the Cassation Division will have serious repercussions. One instance of a wrong decision by the Cassation Division is the case at hand. Because the Cassation Division misapplied Article 3058 of the Code, its decision will be detrimental to other parties who may bring cases involving the same issue in the future. Therefore, it is the opinion of this writer that the Cassation Division should revise its decision in the case at hand and render the correct interpretation of Article 3058 of the Code as explained in the section above.

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[584] P.J. Fitzgerald, Salmond on Jurisprudence, Sweet and Maxwell, Universal Law Publishing Co. Pvt. Ltd, 12th ed, 2009.

David Turton (ed.), *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (Eastern African Studies, James Currey, Ohio University Press and Addis Ababa University Press 2006, 246 pages)

Wondemagegn Tadesse *

As young as it is, the Ethiopian federalism needs the lessons of every theory and practice of federalism to become a mature and successful federal system. The failure/success of Ethiopian federalism, as anybody could guess, will have significant implications on this part of Africa, not to mention its effects on 'nations, nationalities, and peoples' inhabiting the country. That is why more and more works on federalism are called for specifically identifying challenges and opportunities of other federations, which could lend theoretical and practical lessons to learn for Ethiopian federalism. From this, one could easily see the immense value this book would have to the ongoing debate on Ethiopian federalism. From the West to Africa and Asia, several lessons are delivered in the book. An anthology in which ten writers have taken part, the book discusses the notion of federalism from the perspectives of constitutional law, politics, linguistics, anthropology, and peace studies.

In the introductory part of the book (pp. 1-31), the editor David Turton sets out the aims and assumptions of the contributions found in the book and relates arguments made by the contributors. In the words of the editor, the aim of the introductory part is to "summarize and draw connections between the main arguments and conclusions of the contributors ..." It is an excellent introduction which provides the reader with a concise account of the main arguments, issues, and challenges of multination federalism that one could only find after reading all the nine subsequent parts of the material. Turton also adds his own reflections on several issues of concern to multination federalism. Unlike older federations in the West, which he claims, were mostly designed for 'administrative convenience and bureaucratic efficiency', Turton traces Ethiopian federalism to the model of federalism developed by Lenin, a model aimed at providing 'a degree of autonomy and self-determination' to minorities. For the benefit of those

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proponents of Ethiopian federalism who wish to distance themselves from the failed multination federalisms of USSR and Yugoslavia, he assures them of the inevitability of federalism to Ethiopia and the increasing acceptance of multination federalism in Western liberal democracies.

Upon the admission of the editor, the book is an outcome of a seminar 'Ethnic Federalism: the Challenges for Ethiopia' held in 2004. The aim of the seminar was to initiate comparisons between Ethiopian federalism with other federations and to see the contributions of Ethiopian federalism towards "federalism as a political concept and as a means of accommodating ethnic diversity". A subsidiary aim of the seminar was also to give attention to the impact of the federal system on the lives of 'ordinary' Ethiopians.

Turton forwards three assumptions made to achieve the aims of the seminar. One assumption is that there is no alternative to federalism to Ethiopia. Obviously one finds it hard to contest this assumption, which is also shared by main stream politics which is the principal forum for public debate on federalism. And two, compared to the past, the restructuring of Ethiopia as an ethnic federation has been an 'undeniable success', preventing 'violent dismemberment', maintaining peace and security, and laying a legal foundation for democracy. The third assumption, which might have inspired the seminar and thereby the contributions in the book, is that, in light of the criteria for genuine federalism, challenges to Ethiopian federalism remain ahead. Although not everybody agrees with these assumptions, they were shared by all the contributors. Common understanding of the assumptions might have helped the debate, by limiting the scope of inquiry. Intentional or not, the assumptions do not rule out other forms of federations such as functional federations to Ethiopia. If that is so, the book could have been enriched had arguments, if any, for functional or other similar forms of federations been made part of the collection.

Multination federalism has become a trend followed by multination states (in contrast to *nation* states) as a mechanism to satisfy interests of minorities. This is what Will Kymlicka tells us in his contribution dealing

with the relevance of the West's experience of multination federalism to Africa in general and Ethiopia in particular (Will Kymlicka, Emerging Western Models of Multination Federalism: Are They Relevant for Africa? pp. 32-64). Having outlined the move towards multination federalism, Kymlicka forwards factors that led to the acceptance of multination federalism in the West. Some of them have to do with the human rights revolution that proclaimed the equality of all nations, the acceptance of democratic values that allowed minorities to mobilize for their rights, and desecuritization of state-minority relations that excluded minorities' claims from the list of security risks for the state. Though he is not entirely optimistic, Kymlicka provides maintenance of peace and individual security, democracy, individual rights, economic prosperity, and inter-group equality as accomplishments of multiethnic federalism in the West. But still, he admits, such kind of federalism has not been a model of constructive inter-cultural exchange. And more, multination federalism has not avoided the recurrence of the question of secession in politics. If these tempt anyone in Ethiopia to suggest a replacement of Ethiopian ethnic federalism, however, Kymlicka's historical account of multination federalism in the West is a bad news: no state, once adopted, has ever moved away from multination federalism.

In his inquiry of the relevance of multination federalism to Africa, Kymlicka finds conflicting positions of minorities and governments. While minorities in Africa seem to require federalism, there is a strong objection in most African states, which he claims, have focused on creating common identity, common future, or pan-ethnic base. Still lack (or non-existent in some cases) of conditions of federalism, namely equality of nations, democracy, and desecuritization of claims of nations in Africa might have also contributed to the resistance by African states. Regarding Ethiopia, Kymlicka admits that the authors of the Ethiopian federation had no choice except ethnic federalism (again those advocating any other form of government to Ethiopia should bear the burden of proving the existence of any other viable option). That is not all. Kymlicka notes of differences of Ethiopian federalism from Western multination federations. These differences, he says, are most evident in practice than constitutional principles. Still on the constitutional front, one typical distinction is the existence of self-

determination to all "nations, nationalities and peoples", which does not exist in the West. According to Kymlicka, self-determination was given in the West only to those nations that presented a clear and strong demand for autonomy. The right of secession, which is not a constitutional principle in the West, is also another distinguishing feature.

The second contributor to the book, Rotimi Suberu, explains the experiences of the Nigerian federation, which aims to manage 'cultural-territorial pluralism and conflict' in the largest state in Africa (Rotimi Suberu, Federalism and the Management of Ethnic Conflict: the Nigerian Experience, pp. 65-92). From the positive side, the Nigerian experience has prevented ethno-secessionist violence. Nonetheless, lower-scale communal conflicts and misallocation of resources persisted despite the country's long experience in federalism. A major achievement of multi-state federalism in Nigeria, Suberu identifies, has been the use of the federal structure to 'fragment, cross-cut and sublimate' the identities of each of the three major ethnic groups preempting the 'secession potential' inherent in the 'conflation of ethnic and administrative boundaries'. Another encouraging sign from the Nigerian federation has also been the empowerment of ethnic minorities that were able to administer states in which they became the majority. On the negative side, centralized distributive process of revenues in the Nigerian federation has been taken as a major challenge that created dependence of all governments in the federation on centrally collected oil revenues. The lesson of Nigerian experience to Ethiopia, according to the author, seems to revolve around the success of the federation in holding together of the country's diverse peoples.

The units of multination federations might be divided based on factors such as religion, ethnicity, and language. The third contributor, Rajeev Bhargava, focuses on the analysis of the language based federalism of India (Rajeev Bhargava, The Evolution and Distinctiveness of India's Linguistic Federalism, pp. 93-118). Given the vast size and diversity of the country, Bhargava states, Indian federalism is a matter of necessity. As a distinct feature of Indian federalism, the author invokes the unitary bias of Indian federalism. Interestingly, he talks of unitary-federal continuum' in the political structure of states and sees each federation to have its own

federalism within the continuum. The three lessons he forwards are: one, every country should have its own form of federal structure. Hence like India or any other federation, Ethiopia has (or should have) its own unique form of federalism. Two, federalism is part of a larger democratic process and hence multination federalism alone is no panacea for problems associated with competing ethno-linguistic claims. Three, different regions may need to be treated differently and hence units of the federation in Ethiopia should expect asymmetric treatment in their relationship with the federal government.

Relying on his role as an active participant in the Ethiopian politics, the fourth contributor, Merera Gudina, reflects on contradictory interpretations of Ethiopian history by competing ethnic elites (Merera Gudina, Contradictory Interpretations of Ethiopian History: the Need for a New Consensus,pp. 119-130). For that purpose, Merera briefly outlines three main ethno-nationalist perspectives on Ethiopian history: 'nation building', 'national oppression' and 'colonization' perspectives. Their differences, Merera explains, lie in interpretations of the 'historical events that gave birth to modern Ethiopia' and in solutions proposed for the 'country's contemporary problems'. He advocates 'national oppression' perspective (which characterizes Ethiopian history as 'domination by one group over a multitude of others' and therefore calls for solutions to Ethiopian political problems to rest upon this assumption), while at the same time dismissing 'nation building' as no more in the mainstream politics and challenging the 'colonization' perspective as more or less indefensible. If what Merera says is true, these perspectives will always remain in Ethiopian politics frustrating the democratization of Ethiopia, unless competing elites, whom Merera alleges to have interests as varied as hegemony and secession, reach a national consensus.

In the fifth contribution, Assefa Fiseha grapples with the question of how the Ethiopian Federation was established. (Assefa Fiseha, Theory versus Practice in the Implementation of Ethiopia's Ethnic Federalism, pp.131-164). Assefa considers it to be an exaggeration to call the Ethiopian federation as the 'coming together' by mere account of the words of the Constitution. Instead, taking the comments of Yash Ghai, Assefa identifies Ethiopian

federalism as 'withholding' federation (in which the center is dominant owing to its centralized beginning and the unease of devolution of political powers). Assefa outlines the principles of allocation of federal - state powers, supremacy of constitution, constitutional interpretation, and linguistic pluralism in light of the FDRE Constitution, with sporadic comparisons with similar principles in other federations, namely of India, Germany, United States and Switzerland.

Assefa credits the Ethiopian federalism for the survival of Ethiopia through 'commitment to national self-determination and the establishment of regional governments based on nationality'. According to him, the threats posed a decade or two ago by national liberation movements would not have been averted except by multination federalism we have today. But this acknowledgement on Assefa's part is no match to his scathing criticisms on the practice of federalism in Ethiopia. He identifies the sometimes mistaken assumption of the existence of territorially defined diversity, the inadequacy of territorial definition of ethno-linguistic groups, the difficulty of allocating 'mother states' to more than 80 ethnic groups, and the potential for local tyranny as limitations of the Ethiopian model of federalism. In his compelling accounts of the anomaly between the theory and practice of Ethiopian federalism, Assefa closely investigates the apparent contradiction between 'generously granted constitutional powers and a centralized federal system'. The policy-making process, the party system, and the existing (or rather lack of) intergovernmental relations are identified as principal culprits for the contradiction between theory and practice in the Ethiopian federalism. Unlike the times when there was semblance of genuine federalism at the beginning, Assefa contends that Ethiopian federalism, for various reasons, is unfavorably leaning towards centralization. The Ethio-Eritrean war and the 'federal intervention' law have been identified as probably instigating and cementing the trend. Hence, not surprisingly, Assefa blames the centralizing trend on political developments rather than constitutional standards.

The sixth contribution is made by Gideon Cohen who articulated the arguments against and in favour of the use of local languages in Ethiopia (Gideon Cohen, the Development of Regional and Local Languages in

Ethiopia's Federal System, pp. 165-180). Admitting the use of local languages as manifestations of Article 39 of the Federal Constitution. Cohen affirms the existence of a range of attitudes towards the adoption of regional and local languages. Arguments against the use of local languages include its divisive nature, its limiting effects towards opportunities at state level, and its costs in terms of time and resources. It is the manifestation of the complex nature of Ethiopian federalism that some of the opposing views have been expressed by the people who were supposedly exercising their self-determination through the use of their languages. Arguments for the use of local languages include expression of identity, self-esteem, increased equality, and the beneficial effects of mother tongue as language of education.

In parts seven and eight of the book, empirical studies are provided to show the challenges the Ethiopian federalism has encountered. In part seven, Sarah Vaughan narrates intriguing stories of challenges to Ethiopian federalism from the South. (Sarah Vaughan, Responses to Ethnic Federalism in Ethiopia's Southern Region, pp. 181-207). According to Vaughan, a political 'shortsightedness' in the implementation of multination federalism has in some cases resulted in violence (the case of Siemien Omo and the Walayta claim for autonomy). The complexity of the experience of mixed populations (in Kaffa-Sheka) has also posed obstacles to federalism, owing mostly to failure to apply constitutional principles. Another case study of the Gambella regional states is written by Dereje Feyissa in part eight of the book (Dereje Feyissa , The Experience of Gambella Regional State, pp. 208-230). The accounts of series of ethnic violence among local people, sometimes with the involvement of 'highlanders', given by Dereje, would leave one wondering if federalism is a 'blessing or a curse', at least for the peoples of Gambella. Dereje attributes the challenges in GPNRS to the 'new relations of dominance' the regional state exhibits between the two competing ethnic groups of Anywaa and Nuer, which supposedly 'own' the regional state. Suggesting the balancing of group and individual rights as a solution to the dilemma in the region, Dereje contends that the federal government on various counts has not been much of a help in mediating the conflicts arising in the region.

In the last part of the book, Chritopher Clapham provides an 'Afterword' (pp. 231- 240), highlighting, commenting, and sometimes reflecting on arguments raised by other contributors in the book. Each of the chapters in the book could be of an independent read. But if one has to read all, the logical arrangement is made in the book, the Western experience first, then individual experiences of Nigeria and India, and finally Ethiopian cases of federalism. The book provides ample theoretical and practical foundations upon which Ethiopian federalism could be debated by all stakeholders: politicians, academics, lawyers, etc. It is appropriate to note that some interesting points raised during the debate in the run-up to the recent Ethiopian election might have been informed by this book.

As almost all of the writers agree, extending, developing, or reinventing federalism is necessary. The Ethiopian federalism unfortunately is too much politicized, preventing its thorough investigation in order to craft viable solutions to emerging problems. Still the Ethiopian federalism has to look forward and develop upon its success. But most of all, it has to rectify its ills outlined in the book and elsewhere for it to sustain. The experiences of the West and of India and Nigeria are helpful. But again peculiar features of the Ethiopian State have to be taken into account. Beyond politicians and academics, the debate on Ethiopian federalism also has to extend to the public at large. After all any major refinement to the Ethiopian federalism has to obtain the consent of all. As Will Kymlicka pointed out, it is early to judge the success or failure of multination federalism in the West, let alone in Ethiopia. After a decade or more of Ethiopian federalism, however, one might pick up some signs of the future to come. As detailed in the chapters dealing with Ethiopian federalism in the book, those signs do not seem to be good. One might inquire what the next step shall be. As David Turton says, "... there can be no going back to a unitary state structure, in which regional autonomy for sub-state groups is ruled out. There is no alternative, in other words, but to make the experiment [of Ethiopian federalism] work."