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ADDIS ABABA UNIVERSITY
FACULTY OF LAW

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2008/09 Academic Year

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Gedion Timothewos	-	LL.B, Graduate Assistant II (on study leave)
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Getachew Assefa	-	LL.B, LL.M, Assistant Professor and Asso. Dean
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[1] Assessed the earlier version of one of the articles.

JOURNAL OF ETHIOPIAN LAW

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The Journal invites the submission of unsolicited articles, essays, case comments, book reviews and comments on law/legislation. The Journal also invites letters in response to articles, essays, case and legislation comments, book reviews and notes appearing in the Journal within the last year. Correspondence should be brief (about 3 pages). Selected letters will be edited with the cooperation of the author and published.

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DEAN'S ANNUAL REPORT (2007/2008 ACADEMIC YEAR)

FIKREMARKOS MERSO (DR.)

Introduction

The Dean's Report (the Report) was reinstated last year when the publication of the Journal of Ethiopian Law (JEL) was restored after seven years of interruption. The Report is an important mechanism through which the Faculty connects itself with its graduates and the legal community at large. Graduates of the Faculty have an interest to know what is going on at the Faculty and the Report may give them the opportunity to understand some of the things the Faculty has been doing. For all this and other reasons, I am convinced that the Report is an important tradition of the Faculty that needs to be preserved.

The Report highlights the main activities at the Faculty- teaching and learning, publication, partnership- and the challenges it has confronted and continues to confront with.

I. The undergraduate programs

In the 2007\2008 A.Y. (2000 E.C.), the Faculty enrolled a total of 123 students in its regular undergraduate program of which over 60 percent were female. An important development at the Faculty has been the dramatic increase in the number of female students joining the Faculty. In the last five years, on overage 50 percent of the students joining the Faculty have been female students. This sharply contrasts with the situation just five years ago where the number of female students at the Faculty had been extremely low. If this trend continues, it will certainly contribute to the reconfiguration of the profile of the legal profession in terms of gender.

It has been over three years since all public law schools in the country have started implementing a new curriculum. While the new curriculum has introduced an important innovation in the way legal education has to be taught and learned, its implementation has not been without challenges. Several new courses have been added to the menu of the course offering. However, the Faculty has been grappling with the challenges of implementing the curriculum. Implementing some of the new courses has been particularly a difficult task. Just to cite one example, in a Faculty where access to computer and the internet has been virtually not available to most of the students, offering the course on "Introduction to Computer and the Internet" has been a particular challenge. Implementing some other courses has also been a challenge simply because the Faculty has been ill prepared to implement the new curriculum.

Problems have also been encountered in finding appropriate professionals to teach the different courses provided for in the new curriculum. While some of these problems are partly the natural outcomes of introducing a new curriculum, the continued

existence of these problems may have a serious negative impact on the quality of legal education and they need to be addressed as soon as possible. The legal reform document has introduced a new approach in legal education with a number of assumptions and without the fulfilment of these assumption, the problems may continue to linger on.

In the 2007/2008 A.Y., the Faculty enrolled about 134 students in its evening program of which more than 80 percent were males. The gender imbalance may have its own explanation into which this report does not seek to venture. The evening program has continued to attract mature and experienced students with background across the professional spectrum. Instructors teaching in the program always say that teaching in the program is more interactive and lively; class discussions have been enriched by real experiences.

Despite this, however, the number of full time staff willing to teach in the evening program has declined dramatically over the last five years. Over 90 percent of the instructors in this program have been lawyers from outside the Faculty teaching on a part-time basis. This has created mixed feelings on the part of the students. On the one hand, the students have benefited from the experienced lawyers who are not available during the day time because of their other engagements. On the other hand, the Faculty has not been able to ensure the quality of education offered in this program and there have been some administrative problems in running the program because the instructors are out of the reach of the Faculty. In particular, getting student grades in time has been quite challenging. Under current circumstance, it is difficult to say that this is really the Faculty's program

The major reason for lack of interest on the part of the full time staff has been the small amount of pay for their services. The issue of pay has been out of the control of the Faculty and it has been difficult to address the problem. Ordinarily, this should not have been a problem for this Faculty which certainly is capable of raising the necessary funds to effectively run the evening program. However, the Faculty has had little role in the admission of the evening students as well as in the administration of the tuition fee collected from the students. Decentralizing the program to the Faculty appears to be the only solution to mitigate the problem.

In addition to the regular and evening programs, the Faculty has continued to run the Summer In-Service Program which was launched in 2006 for the prosecutors drawn from the Oromia National Regional State and currently over 200 students are pursuing their undergraduate study at the Faculty under this program.

II. The Graduate program

In the 2007/2008 A.Y, the Faculty admitted about 64 students in the four streams of the graduate program. Again less than 20 percent of them were female. The number of female students in this program has obviously been unsatisfactory. But hopefully, the number of female students in this program would gradually increase as more and more

female students graduate from the undergraduate programs of the Faculty and other law faculties in the country.

The major problem facing this program has been shortage of qualified staff to teach the specialized courses in the program. The Faculty has attempted to mitigate the problem by looking for qualified professionals from other higher learning institutions such as the Institute of Federalism and Legal Studies of the Ethiopian Civil Service College, intergovernmental and international institutions based in Addis as well as from partner institutions. The problem will not be resolved until such time that the Faculty is able to have its own staff with the necessary specialization.

The staff profile at the Faculty has not been that encouraging. However, recently, there are some developments. One staff has been accepted to pursue a PhD study to be offered by the University of Alabama and another one by the University of Warwick based on the agreement concluded between these universities and the Ministry of Capacity Building with the view to offering PhD and LL.M studies to Ethiopian legal professionals. We are also expecting additional two faculty members to get an opportunity to study in the PhD program of the University of South Africa (UNISA).

III. Research and Publication

The publication of the JEL has continued and Vol. XXII (No.1) was published last June. This issue of the JEL has been historical for different reasons. First, it has reconnected former Faculty members and graduates of the Faculty. Notable here is the very interesting reflection of the first Dean of the Faculty, James C.N. Paul published in this issue. In his reflection, James C. N. Paul has highlighted how the Faculty was established, the objectives they were seeking to achieve and the challenges they were confronted with. James Paul's reflection was indeed inspiring and provides a short but exciting history of our Faculty particularly for the new graduates of our Faculty.

Second, this issue of the JEL has also heralded the continuity of its regular publication and mitigated the frustration on the part of the faculty and the legal community at large. With this came an inspiration to research and publication. The number of manuscripts being submitted has already exceeded the number to be published in each of the issues. The publication of this issue, Vol. XXII No 2 of the JEL, is yet another assurance that there is no backing on this front.

The Faculty has also embarked upon the ambitious project on three additional regular publications: Series on Ethiopian Human Rights Law, Series on Ethiopian Constitutional Law and Series on Ethiopian Private/Business Law. The first volumes of the Series have already been published and the second volumes are expected to come out at the end of this month (December). These publications are intended to address thematic issues of significant importance in their respective areas.

The regular publication of the JEL and the other three publications has been the result of several measures taken by the Faculty to address the declining trend of research and publication at the Faculty. The Faculty has established a Research and Publication Unit and assigned a Coordinator for the Unit. These publications would not have been possible without the commitment and full engagement of the Coordinator of the Unit and the team of editors of the JEL. That said, the continuity of these publications should not depend on the commitment of a few staff members but on the full engagement of all staff members. We all have interest in the continuation of these publications.

The Faculty greatly appreciates the financial support from the French Embassy for the publications.

IV. Moot Court

The Faculty has participated in national, continental and international moot court competitions. In the national moot court competitions, the Faculty has continued to be at the top for the last three years. This is an important achievement and the students representing the Faculty in these competitions have made it possible with very little support from the Faculty. The students did not even have a room where they could practice, and very little access to the internet. The result is simply the outcome of the commitment of the students and the coordinator of the moots.

Apart from the national moot court competitions, the Faculty has also participated in the African Human Rights Moot Court Competition and the Philip C. Jessup International Law Moot Court Competition. Again the teams have tried their best without much support from the Faculty and given that reality their performance has not been bad. However, a lot has to be done in order to improve our performance in the continental and international moot court competitions and bring back our reputation in these competitions.

V. Partnerships

The Faculty has continued its partnership with the Centre for Human Rights, Pretoria University. Last year, four students from the Centre (from South Africa, Malawi, Sierra Leon and the USA) were placed at our Faculty and spent about four months writing their dissertation and doing internship at the African Union. Currently, discussions are underway with the Centre to expand the partnership in other areas such as staff exchange and join research. The Faculty has also established a formal partnership agreement with the New Perimeter, a pro bono wing of the DLA Piper and with the Northwestern School of Law to collaborate in different areas. The partnership in particular is aimed at assisting the Faculty in addressing its problem of shortage of qualified professionals in its graduate programs as well as in research and publications.

Teams of professors drawn from these institutions have been teaching different courses at the graduate program and have tried to fill the gap in the area. The New Perimeter has also sponsored the international conference on Law and Economic Development in Ethiopia which was held on 13 November 2008 (See below).

A discussion is going on to establish a partnership agreement with the University of Martin Luther in Germany targeting different areas of collaboration such as staff exchange and joint research.

The Faculty has also signed a memorandum of understanding with different governmental, non-governmental and inter-governmental organizations to work together in different areas including research and publication, and consultancy. Such agreements have already been made with the Ministry of Justice, the Institution of the Ombudsman, the Alumni Association of the Graduates of the Law Faculty of Addis Ababa University and the UN Office of the High Commission for Human Rights. Some of the agreements have already led to a concrete agreement. A case in point is the research work being undertaken by the Faculty for the Institution of the Ombudsman in three different areas. Discussions are being held to further expand partnership agreements with other governmental and non-governmental institutions with a view to collaborate in important areas of mutual interest.

VI. Conferences

Last November, the Faculty organized an international conference on "Law and Economic Development in Ethiopia." The Conference has taken up some of the key areas of law with significant impact on economic development: dispute resolution, WTO accession, microfinance, foreign investor protection, taxation and the legal infrastructure on capital formation. High government officials, legal experts, economists and other pertinent professionals as well as members of the business community took part in the conference. Although the conference was generally successful, there are always rooms for improvement in organizing similar events and one important feedback we got from the participants is that the time allotted for discussion was short. This has to be taken into account in organizing other conferences. The Faculty is also organizing another conference on the Legal Profession in Ethiopia on December 20, 2008 together with InterAfrica Group. Three papers would be presented at the conference on issues relating to legal education, legal ethics and legal professional associations in Ethiopia which would be followed by discussions.

VII. Challenges

In addition to the specific challenges outlined in each of the section of this Report, there are other challenges the Faculty has continued to grappling with.

The first and foremost challenge facing the Faculty remains to be lack of its own building. Despite its expansion both in terms of programs and number of students it admits, the Faculty is largely confined to its old building. Inadequate classrooms and offices have continued to create significant hurdles to effectively undertake the activities of the Faculty. Lack of options has even forced the Faculty to open classrooms which have been declared not safe for use. The graduate program has been moving from one building to another outside the campus, creating inconvenience in running the program. Apart from classrooms, the Faculty has not been able to establish a computer lab both for its faculty and students as well as to establish different programs such as a legal aid clinic. A related problem is the unfriendliness of the Faculty building to persons with disabilities. The visually impaired students have been taking exams in the corridors with all the noises and disturbances from people moving around. Access to faculty offices and classrooms has also been a problem for the students with physical disability.

These are some of the problems that continue to hinder the teaching learning process and it is high time that the Law Faculty has its own building. Without a building of its own, it has indeed become extremely difficult to deliver what is expected from the Faculty.

Second, there are also problems in relation to the Law Library. The Law Library has been renovated and it has already begun providing services. But it has now become clear that the space for the library does not go with the number of students which continue to rise. It does not also have sufficient facilities for students of the Faculty with disabilities.

There appears to be good news in this regard though. The University has already decided to build a social science and law library complex in the main campus. We hope the construction of the building will soon start and one of the most serious and long outstanding problems confronting the students and faculty would be resolved.

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ሁለቱም ይግባኝ ባዮች ባስከፈቱት የይግባኝ መዝገብ ይግባኝ ብለው ሊቀርቡ የቻሉት የፌዴራል ከፍተኛ ፍ/ቤት በወ/መ/ቁ. 54027 የተከሰሱባቸውን የወንጀል ጉዳዮች በሚመለከት የግራ ቀኙን ክርክሮች እና ማስረጃዎች ሲሰማ ቆይቶ በመጨረሻ ጥር 20 ቀን 2000 ዓ.ም እና ጥር 21 ቀን 2000 ዓ.ም በተከታታይ መርምሮ በእያንዳንዳቸው ላይ የሰጠውን የጥፋተኛነት ፍርድ እና የቅጣት ውሣኔ በመቃወም እንዲሻር ለማድረግ ነው፡፡

ዐቃቤ ሕግ አንደኛ እና ሁለተኛ ተከሣሾች የሆኑትን የአሁኖቹ ይግባኝ ባዮች በሁለት ወንጀሎች የከሰሳቸው ሲሆን አንደኛው ክስ በ1997 ዓ.ም በወጣው የወንጀል ሕግ አንቀጽ 32/1/ሀ፣ 27/1 እና 539/1/ሀ/ ላይ የተመለከተውን በመተላለፍ በግብረአበርነት ሰው ለመግደል አስቀድመው በማሰብ አንደኛ ተከሣሽ የሆነው ደምሰው ዘሪሁን የግል ተበዳይ የሆነችውን ወ/ት ካሚላት መሀዲን ጓደኛዬ ካልሆንሽ ብሎ ሲያስቸግራት ከቆየ በኋላ የማትፈልገው መሆኑን ስትገልጽለት እ/ን ቆርጦ የሚያመጣለት ወይም በስለት ፊቷ ላይ የሚወጋለት ሰው አፈላልጎ በኋላ ሀሣቡን በመቀየር በእርሷ ላይ ለሚደርሰው ጉዳት እርሱ ራሱ ካልተሣተፈ በቀር ምንም ዓይነት እርካታ እንደማይሰጠው ገልጾ እገድላታለሁ ሲል ቆይቶና ድርጊቱም ከመፈፀሙ በፊት እሥር ቤት የምገባው በአንቺ ምክንያት ነው በማለት ስልክ ደውሎላት በመንገር ዝቶባት 2ኛ ተከሣሽ ከሆነው ያዕቆብ ኃይሌ ጋር በመሆን መውጫና መግቢያዋን አጥንተው በመዘጋጀት ሰልፈሪክ አሲድ በእቃ መያዣ 1ኛው

ተከሣሽ ፊቷ ላይ ለመድፋት፣ 2ኛው ተከሣሽ ደግሞ የግል ተበዳይዋ ወደ ቤቷ ስትሄድ እንደሰከረ ሰው መስሎ በማደነጋገርና ሀሣሷን በመስረቅ ድርጊቱ የሚያመጣውን ውጤት በሙሉ ሀሣቡ በመቀበል ታህሣሥ 28 ቀን 1999 ዓ.ም ከምሽቱ 4፡00 ሰዓት ሲሆን በአዲስ አበባ ከተማ በአዲስ ከተማ ክ/ከተማ ቀበሌ 15 ክልል ልዩ ቦታው አውቶቡስ ተራ ሬሣ መውጫ ተብሎ ከሚጠራው ስፍራ የግል ተበዳይዋ እህቶቿ ከሆኑት ዙበይዳ ማህዲና ዘይነባ መህዲ ጋር በመሆን ከሱቃቸው ወደ መኖሪያ ቤታቸው በመሄድ ላይ እያሉ 1ኛው ተከሣሽ የሰሌዳ ቁጥሩ ባልታወቀ መርቸዲስ መኪና መጥቶ ከቦታው ሲደርስ ለ2ኛው ተከሣሽ በማሣየት 1ኛው ተከሣሽ ከግል ተበዳይዋ እና እህቶቿ ፊት ለፊት በመሄድ እንደሰከረ ሰው ሆኖ በትከሻው ሲያደናግራቸው አንደኛው ተከሣሽ ይዞት የነበረውን ሰልፈሪክ አሲድ በተበዳይዋ ፊት ላይ በመድፋት በፊቷ በራስ ቅሏ፣ በግራ ጆሮዋ፣ በአፍንጫዋና በደረቷ ላይ ከባድ የመቦደስና የመቁሰል አደጋ እንዲደርስባት በማድረግና ህይዎቷን አስጊ ሁኔታ ላይ በመጣል በግብረአበርነት ከባድ የመግደል ሙከራ ወንጀል ፈጽመዋል በሚል የቀረበ ነው።

ሁለተኛውም ክስ አንደኛውና ሁለተኛው ተከሣሾች በወንጀል ሕግ አንቀጽ 32/1/ሀ/ እና 555/ሀ/ ላይ የተመለከተውን በመተላለፍ በሰው አካል ላይ ጉዳት ለማድረስ አስበው በ1ኛው ክስ ላይ በተገለፀው ጊዜና ቦታ በተመሣሣይ መንገድ ሁኔታዎችን በማቀነባበር በ1ኛው ክስ ላይ ከተጠቀሰችው የግል ተበዳይ ጋራ አብረዋት ሲሄዱ የነበሩትን ሁለት እህቶቿን 2ኛው ተከሣሽ የሰከረ ሰው መስሎ በትከሻ በማደናገር እንዲበተኑ ሲያደርግ አንደኛው ተከሣሽ ይዞት የነበረውን ሰልፈሪክ አሲድ ደፍቶባቸው ዘይነባ መህዲ በተባለችው 1ኛዋ የግል ተበዳይ በስተግራ በኩል ፊቷ ተቃጥሎ ቆዳዋ እንዲላጥ፤ አናቷ ላይ ጠባሣ እንዲደርስ በስተቀኝ በኩል አይኗ ስር ቆዳዋ ተቃጥሎ እንዲላጥ፣ እንዲሁም 2ኛዋ የግል ተበዳይ ዙበይዳ መህዲ የግራ አይኗ ዙሪያው ጠቁሮ የማቃጠል ስሜት እንዲፈጥር ፊቷና የተለያዩ ቦታዎች የግራ ጆሮዋ እንዲላጥና እንዲቆስል፣ የቀኝ ትከሻዋ እንዲቃጠል በማድረግ በግብረ አበርነት ከባድ የአካል ጉዳት ማድረስ ወንጀል ፈጽመዋል የሚል ነው።

የፌዴራል ከፍተኛ ፍ/ቤት ሁለቱ ተከሣሾች በዐቃቤ ሕግ ክሶች ላይ በተገለፀው አኳኋን ድርጊቶቹን መፈፀማቸው ሊረጋገጥባቸው ችሏል በማለት በከባድ የሰው መግደል ሙከራ ወንጀል እና በከባድ የአካል ጉዳት ማድረስ ወንጀል በክሶቹ ላይ በተጠቀሱት ሁለት የሕግ አንቀጾች መሠረት እያንዳንዳቸውን ጥፋተኛ በማድረግ በአንደኛው ተከሣሽ ደምሰው ዘሪሁን ላይ የሞት ቅጣት፣ ሁለተኛ ተከሣሽ በሆነው ያዕቆብ ኃይሌ ላይ ደግሞ የ20 /ሃያ/ ዓመት ጽኑ እሥራት ቅጣት የወሰነ መሆኑን መዝገቡ ያስረዳል።

ደምሰው ዘሪሁን የካቲት 6 ቀን 2000 ዓ.ም ጽፎ ከመዝገቡ ጋራ ባያያዘው የይግባኝ ማመልከቻ ያዕቆብ ኃይሌም ጥር 28 ቀን 2000 ዓ.ም ተጽፎ ከመዝገቡ ጋር እንዲያያዝ ባደረገው የይግባኝ ማመልከቻ በየበኩላቸው ከፍተኛው ፍርድ ቤት የሰጠውን የጥፋተኝነት ፍርድም ሆነ የቅጣት ውሣኔ የሚቃወሙባቸውን ምክንያቶች እና እንዲታዩላቸው የሚፈልጓቸውን ጥያቄዎች ዘርዝረው አቅርበዋል።

በእነዚህ የወንጀል ይግባኝ ጉዳዮች በወ/መ/ሕ/ሥ/ሥ/ቁ. 192 መሠረት በየመዝገቦቹ ግራ ቀኙ እንዲቀርቡ ተደርጎ ክርክሮቹ ተሰምተዋል። በደምሰው ዘሪሁን በኩል የቀረበውን ይግባኝ በሚመለከት በቃል ያስረዳው ከመዝገቡ ሲታይ፡-

- የተከሰሰባቸውን ወንጀሎች አለመፈፀሙን
- የግል ተበዳይ የተባለችው የካሚላት እህቶች በቴሌቪዥን ቀርበው አሲዱን የረጨብንን ሰው ማንነት አናውቅም የሚል ቃል በመስጠት ለሕዝቡ ከተናገሩ በኋላ ፍርድ ቤት ሲቀርቡ እርሱ ነው አይተነዋል በማለት በሀሰት የመሰከሩበት መሆኑን፡-
- ይኼው ሁለቱ የካሚላት እህቶች በቴሌቪዥን ቀርበው የተናገሩት በመከላከያ ማስረጃነት ቀርቦ እንዲታይለት ጠይቆ ፍርድ ቤቱ ሊያስቀርብለት አለመቻሉን፤
- ካሚላት አሲዱን የረጨብን እርሱ ነው ብላ አለመመስከሯን፣
- ወንጀሉን ፈጽሟል ሊባል የቻለው ከቤተሰቦቿ ጋር ሊስማማ ባለመቻሉ እንደሆነ፤
- ወንጀሉ ተፈፀመ በተባለበት ጊዜ ሌላ ቦታ ማዲንጎ የተባለ ጭፈራ ቤት እንደነበረ አብረውት የነበሩትን ሰዎች በመከላከያ ምስክርነት አቅርቦ በማሰማት ማስመስከሩን፤
- ካሚላት እንዲህ አይነት ነገር ተፈጽሞባታል የሚለውን እንደሰማ የተኛችበት ሆስፒታል ድረስ በመሄድ ሊጠይቃት ሲል ፖሊስ መጥቶ ትፈለጋለህ ብሎ እንደያዘው እና፣
- ባልፈፀመውና በማያውቀው ጉዳይ ያለአግባብ የሞት ቅጣት እንደተወሰነበት የሚገልጽ ሲሆን ፤

በያዕቆብ ኃይሌ በኩል የቀረበውን ይግባኝ በተመለከተም ጠበቃው፤

- 1ኛው ተከሣሽ ለፖሊስ አምኖ ቃሉን ሰጥቷል የተባለው በማስገደድና በተጽዕኖ የተገኘ መሆኑ በመከላከያ ምስክሮቹ ሊረጋገጥ የቻለ ስለሆነ ማስረጃነቱ ተቀባይነት የሚሰጠው አይደለም፣
- የግል ተበዳዮች ከዚያ በፊት አይተውት የማያውቁትን ሰው በዚያ ምሽት የሰከረ ሰው መስሎ መንገድ ላይ ወደ እኛ በመምጣት ያደነባበረን 2ኛው ተከሣሽ ስለመሆኑ አይተናል በማለት የመሰከሩት የሚታመን አይደለም። ተከሶ የቀረበው 2ኛው ተከሣሽ ስለመሆኑ ሊለዩ ስለማይችሉ የሰጡት ምስክርነት ተቀባይነት ሊሰጠው አይገባም፣
- የግል ተበዳዮች ሁለተኛው ተከሣሽ የሰከረ ሰው መስሎ ወደ እኛ በመምጣት አደነባብሮናል ያሉትም ቢሆን በኋላ በሌላ ሰው ተፈፀመ ከተባለው በእነርሱ ላይ አሲድ መደፋት ጋራ ግንኙነት የለውም። አደናባብሮናል የሚሉት ሰው ቦታውን ለቆ ወደ ሌላ አቅጣጫ ከሄደና የግል ተበዳዮችም መንገዳቸውን ይዘው በመንቀሣቀስ የተወሰኑ ደቂቃዎች ከቦታው ርቀው ከሄዱ በኋላ ከጨለማ ቦታ ወጣ በሚሉት ሰው አሲዱ የተደፋባቸው መሆኑ ከመጀመሪያው ድርጊት ጋራ የማይገናኝ መሆኑን የሚያሣይ ነው። 2ኛው ተከሣሽ የድርጊቱ ተካፋይ ነው የተባለው በቂ ባልሆነ ማስረጃ እና ከጉዳዩ

ጋራ በማይገናኝ ምክንያት ስለሆነ በእርሱ ላይ የተሰጠው የጥፋተኛነትም ሆነ የቅጣት ውሣኔ ተገቢነት የሌለው ነው በማለት በቃል አስረድተዋል።

<u>ዐቃቤ ሕግ በበኩሉ፡-</u>

- ዋናው የግል ተበዳይ ካሚላት መህዲን አሲዱን የረጨባቸውን ሰው በእለቱ ላውቀው አልቻልኩም ብትልም አብረዋት የነበሩት በአሲዱ መረጨት ጉዳት የደረሰባቸው እህቶቿ የሆኑት ሁለቱ ምስክሮች አሲዱን የረጨባቸው አንደኛው ተከሣሽ ደምሰው ዘሪሁን ስለመሆኑ በትክክል ያዩት ስለመሆናቸው በማረጋገጥ መስክረውበታል።በሁለቱ የአይን ምስክሮች ተመስክሮበት እያለ ወንጀሉን አልፈፀምኩም በማለት ያቀረበው የይግባኝ ክርክር ተቀባይነት የለውም።
- ደምሰው ዘሪሁን ይህንን ድርጊት በከሚላት ላይ ለመፈፀም የተነሣሣው በጓደኛነት አብራው አሣልፋ በጎላ ግንኙነቱን በማቋረጥ አልፈልግም የሚል ሀሣብ በማቅረቧ ነው። እርሷን አጥፍቼ እኔም እሞታለሁ እያለ ሲዝትባት መቆየቱን ምስክሮች መስክረዋል።
- 2ኛው ተከሣሽ ያዕቆብ ኃይሌም ከ1ኛው ተከሣሽ ጋራ በዕቅዱ በመነጋገርና በድርጊቱ መፈፀም በመስማማት ተካፋይ መሆኑ ተረጋግጧል። የግል ተበዳዮች ወዳሉበት ቦታ በመሄድ ጠብቆ ወደ መኖሪያ ቤታቸው ለመሄድ በሚንቀሣቀሱበት ጊዜ የሰከረ ሰው መስሎ ወደ እነርሱ በመጠጋትና በማስፈራራት ትኩረትና ሀሣባቸውን መስረቁ በታቀደው መሠረት አንደኛው ተከሣሽ በካሚላት መህዲ ላይ አሲዱን እንዲረጭባት ለማድረግ ነው። የ2ኛው ተከሣሽ ድርጊት ከአሲዱ መረጨት ጋራ የተገናኘ ነው። የአሲዱ መረጨት አካል ነው። የድርጊቱ አፈፃፀምም ሆነ በይግባኝ ባዮች በኩል የነበረው የወንጀሉ ሀሣብ ጥፋተኛ በተባለበት የሕግ አንቀጽ ላይ የተመለከተውን የወንጀሉን ሁኔታ የሚያሟላ ነው። በሁለቱ ይግባኝ ባዮች ላይ የተሰጠው የጥፋተኛነትም ሆነ የቅጣት ውሣኔ ተገቢኑ የሚነቀፍበት የሕግ ምክንያት የሌለ ስለሆነ ሊፀና ይገባል የሚል መልስ በመስጠት ተከራክሯል።

በግራ ቀኙ መካከል ያለው የይግባኝ ክርክር ከተሰማ በኋላ መዝገቡ ሲጠና በዐቃቤ ሕግ በኩል ቀርበው ከተሰሙት ምስክሮች መካከል ሁለቱን የአይን ምስክሮች እንደገና አስቀርቦ መስማት አስፈላጊ ሆኖ በመገኘቱ ቀርበው እንዲሰሙ ተደርጓል። እነዚህ ምስክሮች አንደኛው ይግባኝ ባይ በኢትዮጵያ ቴሌቬዥን በሁለተኛው ኢቲቪ2 ኘሮግራም ላይ ቀርበው ድርጊቱን የፈፀመብንን ሰው ማንነት አላወቅንም ቅጥረኛ ተገዝቶብን ሊሆን ይችላል በሚል ተናግረዋል፣ይኸው ከኢትዮጵያ ቴሌቪዥን ድርጅት ተጠይቆ በመከላከያ ማስረጃነት ይታይልን ብዬ ፍ/ቤቱ አልፎብኛል ካለው ጥያቄ ጋራ በተያያዘ ተጠይቀው እኛ በቴሌቪዥን ኘሮግራም ቀርበን ድርጊቱን የፈፀመብንን ሰው አናውቅም ብለን አልተናገርንም፤ ከመነሻው ጀምሮ ድርጊቱን የፈፀመብን ሰው ማን እንደሆነ ለማየትና ለማወቅ መቻላችንን ነው የገለጽነው ለፍርድ ቤትም ቀርበን የመሰከርነው ይህንኑ ነው ብለው በማስረዳታቸው የኢትዮጵያ ቴሌቪዥን ድርጅት

እንዲልክ ታዞ የነበረውን የምስል ማስረጃ አስቀርቦ ማየቱ አስፈላጊ እንዳልሆነ ሊታመንበት ስለቻለ ታልፏል። ለወንጀሉ ክስና ክርክር መነሻ ሊሆን የቻለው ምክንያት እና የግራ ቀኙ ክርክሮች ከሞላ ጎደል ከዚህ በላይ የተገለፁት ሲሆኑ ይግባኝ ሰሚው ፍርድ ቤትም ጉዳዩን ከማስረጃ እና ከሕጉ ጋራ በማገናዘብ መርምሯል።

በዚህ ጉዳይ ሊመረመሩ የሚገባቸው ዋና ዋናዎቹ ነጥቦች፦

1. በአንደኛው ክስ ላይ የግል ተበዳይ በተባለችው ካሚላት መሀዲ ፊት ላይ በሁለተኛው ክስ የግል ተበዳዮች በሆኑት ዙበይዳ መሀዲና ዘይነባ መሀዲ ፊት ላይ የአሲድነት ባህሪይ ያለውን ኬሚካል በመርጨት ጉዳት ያደረሰባቸው አንደኛው ይግባኝ ባይ ደምሰው ዘሪሁን ስለመሆኑ በዐቃቤ ሕግ ማስረጃዎች ሊረጋገጥበት ችሏል አልቻለም?
2. አንደኛው ይግባኝ ባይ ያቀረበው መከላከያ ማስረጃ የዐቃቤ ሕግን ክሶችና ማስረጃዎች የሚያፈርስና የሚያስተባብል ነው አይደለም?
3. በሶስቱ የግል ተበዳዮች ላይ ድርጊቱን የፈፀመው አንደኛው ይግባኝ ባይ ደምሰው ዘሪሁን መሆኑ በማስረጃ የተረጋገጠበት ሆኖ ከተገኘስ በአንደኛው ክስ ላይ የተገለፀው በካሚላት መሀዲ ላይ ፈጽሟል የተባለው ድርጊት ከባድ የግድያ ሙከራ ወንጀል ነው ሊባል ይችላል አይችልም? ጥፋተኛ ሊባል የሚገባው በየትኛው የሕግ አንቀጽ መሠረት ነው?
   - በሁለተኛው ክስ ላይ የተገለፀው በሁለቱ የግል ተበዳዮች ላይ የተፈፀመው ድርጊት ከባድ የአካል ጉዳት ማድረስ ወንጀል ሊባል የሚችል ነው አይደለም? ለዚህ ድርጊት ጥፋተኛ ሊባል የሚገባው በየትኛው የሕግ አንቀጽ መሠረት ነው?
   - ጥፋተኛ ሊባል የሚገባው በሁለት ወንጀሎች ሆኖ ከተገኘ በሕጉ ሊወሰንበት የሚገባው ቅጣት ምንድነው? የቅጣቱ መጠን ምን ያህል መሆን አለበት?
4. በዐቃቤ ሕግ በኩል የቀረቡት ማስረጃዎች 2ኛው ይግባኝ ባይ ያዕቆብ ኃይሌ ግብረ አበር በመሆን ወንጀሎቹን በመፈፀም ተካፋይ ስለመሆኑ የሚያረጋግጡ ናቸው ወይንስ አይደሉም? በግል ተበዳዮች ላይ ለተፈፀመው ድርጊት በወንጀል ጥፋተኛ የሚባልበት የሕግ ምክንያት አለ ወይንስ የለም? ከፍተኛው ፍ/ቤት ጥፋተኛ ብሎ ቅጣት የወሰነበት በአግባቡ ነው አይደለም? የሚሉት የማስረጃ እና የሕግ ጥያቄዎች መሆናቸውን ከመዝገቡ ለመረዳት ተችሏል።ቀጥሎ እነዚህን የማስረጃ እና የሕግ ነጥቦች በየተራው አንድ በአንድ በመመርመር መወሰን ያስፈልጋል።

በዚህም መሠረት፡-

1. *በአንደኛው ክስ የግል ተበዳይ በተባለችው ካሚላት መሀዲን ፊት ላይ እና በሁለተኛው ክስ የግል ተበዳዮች በተባሉት ዙቤይዳ መሀዲ እና ዘይነባ መሀዲ ፊት ላይ አሲድ በመድፋት ጉዳት እንዲ ደርሰባቸው ያደረገው አንደኛው ይግባኝ ባይ ደምሰው ዘሪሁን ሰለመሆኑ በዐቃቤ ሕግ ማስረጃ ሊረጋገጥበት ችሏል ሰልቻለም? የሚለው የመጀመሪያው የማስረጃ ጥያቄ ሲመረመር፡-*

ዐቃቤ ሕግ በግል ተበዳዮች የፊት አካሎች ላይ ስለተደፋው አሲድ ድርጊት አፈፃፀም፣ አሲዱ በግል ተበዳዮች ላይ ስላደረሰው ጉዳት፣ ይህንን ድርጊት በዋናነት ሊፈጽም ችሏል ስለሚለው ተከሣሽ ለማስረዳት በርካታ የሰው እና የሰነድ ማስረጃዎች ማቅረቡን መዝገቡ ያሣያል።

በሰው ማስረጃነት ከቀረቡት በርካታ ምስክሮች መካከል ሦስቱ የወንጀሉ ሰለባ የሆኑት የግል ተበዳዮች ሲሆኑ ከእነዚህ መካከል በወንጀሉ በዋናነት የተነጣጠረባት በአንደኛው ክስ ላይ ስሟ የተጠቀሰው ካሚላት መሀዲ በመደበኛው ክስ ሂደት ከፍተኛው ፍርድ ቤት ቀርባ እንድትመሰክር ያልተደረገ ቢሆንም በዚሁ ጉዳይ በቀዳሚ ምርመራ አድራጊ ፍርድ ቤት ቀርባ የሰጠችው የምስክርነት ቃል ቀርቦ ከመዝገቡ ጋራ እንዲያያዝ ተደርጓል። በሁለተኛው ክስ የግል ተበዳዮች የተባሉት ዙቤይዳ መሀዲና ዘይነባ መሀዲ ደግሞ በመጀመሪያ በቀዳሚ ምርመራ አድራጊ ፍ/ቤት ቀርበው የምስክርነት ቃላቸውን የሰጡ ከመሆኑም በተጨማሪ በመደበኛው ክስ ሂደትም ከፍተኛው ፍ/ቤት በመቅረብ ምስክርነታቸውን ሰጥተዋል።

ስለድርጊቱ አፈፃፀምም ሆነ ድርጊቱን የፈፀመባቸው ሰው አይተዋል፣ ያውቃሉ የተባሉት የግል ተበዳዮች የሆኑት እነዚህ የዐቃቤ ሕግ ምስክሮች ናቸው። እነዚህ ምስክሮች በክሱ ላይ በተጠቀሰው ጊዜና ቦታ የሚሰሩበት ሱቅ አምሸተው አንድ ላይ ሆነው ወደ መኖሪያ ቤታቸው በመሄድ ላይ እያሉ ሁለቱ አይተነዋል የሚሉት ሰው ፊታቸው ላይ አሲድ በመድፋት በእያንዳንዳቸው ላይ ከባድ ጉዳት ሊያደርስባቸው መቻሉን በሰጡት ምስክርነት አረጋግጠዋል።

ከቀረቡት የሰነድ ማስረጃዎች መካከል ደግሞ በግል ተበዳዮች ላይ ጉዳት ሊያደርስ ስለቻለው ነገር እና በእያንዳንዳቸው ላይ ስለደረሰው ጉዳት መጠን ያስረዳሉ ተብለው የቀረቡት የሕክምና ምስክር ወረቀቶች ይገኙበታል። ሦስቱንም የሕክምና ምስክር ወረቀቶች ጽፎ የሰጠው የካቲት 12 ሆስፒታል ነው።

የመጀመሪያው የሕክምና ምስክር ወረቅት በካሚላት መሀዲ በፊቷ ላይ በራስ ቅል ቆዳዋ ሦስተኛው አካል ላይ በግራ ጀሮዋ በአፍንጫዋና በደረቷ ላይ በፈሰሰባት "ጠንካራ የአሲድነት ባህሪ ያለው ኬሚካል" ምክንያት በተጠቀሱት የፊቷ ክፍሎች ላይ ከባድ የመቦዳደስና የመቁሰል ጉዳት መድረሱንና የፊቷ ገጽታ ሙሉ በሙሉ ጠፍቶ እንደሚገኝ የሚገልጽ ከመሆኑም በላይ የሚደረግላት የሕክምና ክትትል መቀጠሉን ያስረዳል።

ሁለተኛው የሕክምና ምስክር ወረቀት ደግሞ በዙቤይዳ መህዲ በግራ ፊቷና ትከሻዋ ላይ በአሲድ ቃጠሎ የተነሣ ጠባሳ ጥሎባት እንደሚገኝ ከዚህ በተጨማሪም ተኸሃንርጉሮ እንደሚታይ የሚገልጽ ሲሆን ሌላው የህክምና ምስክር ወረቀትም ዘይነባ መህዲ ደህራ-አሲድ ቃጠሎ ጠባሳ በግራ ግማሽ ፊቷ እና አናቷ ላይ እንደሚገኝ የሚያስረዳ ነው። በእነዚህ የጽሑፍ ማስረጃዎች የተረጋገጠው እና የግል ተበዳዮች በሰጡት ምስክርነት ተፈጽሞብናል ስላሉት ድርጊትና ደርሶብናል ስላሉት ጉዳት ያስረዱት የሚደጋገፉ ናቸው።

የግል ተበዳዮች ጠንካራ የአሲድነት ባህሪ አለው የተባለ ኬሚካል በፊታቸው ክፍሎች ላይ ተደፍቶ ጉዳት የደረሰባቸው መሆኑ በበቂ ማስረጃ ሊረጋገጥ የቻለ ጉዳይ ነው። አከራካሪም ሆኖ የተገኘው ይህንን ድርጊት በግል ተበዳዮች ላይ ሊፈጽም ቻለው ማን ነው? አንደኛው ይግባኝ ባይ ደምሰው ዘሪሁን ስለመሆኑ እንዴትና በምን ማስረጃ ሊረጋገጥ ቻለ? የሚለው ጥያቄ ሲሆን በማስረጃ በኩል ይህንን ሊያረጋግጡ ችለዋል የተባሉት የግል ተበዳዮች የሆኑት ዙቤይዳ መህዲ እና ዘይነባ መህዲ የተባሉት ሁለቱ የዐቃቤ ሕግ ምስክሮች ናቸው።

ከሁሉም በላይ ከባድ ጉዳት ሊደርስባት የቻለው ካሚላት መህዲ በቀዳሚ ምርመራ አድራጊ ፍርድ ቤት ቀርባ ስትመሰክር በወቅቱ አሲዱን ፊታቸው ላይ የደፋባቸውን ሰው ለማወቅ እንዳልቻለች በመግለጽ ማንነቱን ለመለየት አለመቻሏን ያረጋገጠች ቢሆንም አብረዋት የነበሩትና የድርጊቱም ሰለባ የሆኑት ሁለቱ ምስክሮች ይህንን ፍርድ ቤት ጨምሮ ሦስት ፍርድ ቤቶች ቀርበው በሰጡት የምስክርነት ቃል ከወደ ጨለማ ቦታ ወጥቶ ወደ እነርሱ ቀጥታ በመምጣት በእጁ በያዘው ጆግ ነገር አሲዱን ፊታቸው ላይ የደፋባቸው አንደኛ ተከሣሽ የሆነው ደምሰው ዘሪሁን ስለመሆኑ በአይናችን በትክክል በማየት በደንብ ለይተን ለማረጋገጥ ችለናል ብለው መስክረዋል። እነዚህ ሁለት ምስክሮች በእህታቸው ካሚላት መህዲ ምክንያት ቀደም ሲል ደምሰው ዘሪሁንን እያንዳንዳቸው በግንባር አግኝተው በማነጋገር በመልክም ሆነ በቁመናው ሊያውቁት በመቻላቸው ድርጊቱ በተፈፀመበት ጊዜ ድርጊቱን ፈፃሚው እርሱ ስለመሆኑ በማየት ሊለዩት እንደ ቻሉ በተመሣሣይ ሁኔታ ገልፀዋል። በወቅቱ ለብሶት ነበር ስለሚሉት ልብስ ቀለምና ስለአይነቱ የተናገሩትም ተመሣሣይ ነው። አንዷ ምስክር ደምሰው ዘሪሁን አሲዱን ደፍቶብን በመሮጥ ሲሸሽ በመጮህ ተከታትዬው ያዙልኝ ብያለሁ ብላለች። ሁለቱ ምስክሮች ፍርድ ቤት ቀርበው የሚሰጡት የምስክርነት ቃል እውነት ስለመሆኑ በኃይማኖታቸው መሠረት በመሐላ አረጋግጠው የመሰክሩ ሲሆን ድርጊቱም የተፈፀመው በእነርሱ ላይ ስለሆነ አመሰካከራቸው የሚያጠራጥር አይደለም። በሀሰት መስክረውበታል የሚያሰኝ ምክንያት አይታይበትም።

2. *የግል ተበዳዮች የሆኑት ሁለቱ የዐቃቤ ሕግ ምስክሮች ድጊቱን የፈፀመው ደምሰው ዘሪሁን ነው ብለው የመሰከሩበት ሆኖ ከተገኘ ደምሰው ዘሪሁን በበኩሉ የቀረበው መከላከያ ምስክር ለማስተባበል መቻል አለመቻሉን በተመለከተም፡-* ይህ ይግባኝ ባይ ወንጀሉን ስላለመፈፀሜ ያረገግጥልኝ የሚለው ወንጀሉ ተፈፀመ በተባለበት ታህሣሥ 28 ቀን 1999 ዓ.ም ከምሽቱ 4፡00 ሰዓት ላይ ማዲንጎ የተባለ ጭፈራ ቤት ከሌሎች ሰዎች ጋራ ስዝናና ነበረ፣ ከምሽቱ ሁለት ሰዓት ጀምሮ እስከ ምሽቱ 7 ሰዓት ድረስ እዚህ ጭፈራ ቤት ነው ያመሸሁት በማለት የገለፀው ነው። ወ/ሮ ይሉሻል ዘሪሁን የተባለችው መከላከያ ምስክሩ እህቱ መሆኗን ያረጋገጠች ሲሆን ምስክሯ ደምሰው ዘሪሁን ታህሣሥ 28 ቀን 1999 ዓ.ም ከምሽቱ አንድ ሰዓት ላይ አንድ ዘመድ በሆነ ሰው በኩል ስልክ እንዲደውልልኝ አድርጎ ተቀጣጥረን ከምሽቱ 2 ሰዓት ላይ አብረን በመንቀሣቀስ ማዲንጎ የተባለው ጭፈራ ቤት በመሄድ እስከ ምሽቱ 7 ሰዓት ድረስ ስንዝናና ቆይተን አብረን በመመለስ እኔን ቤት አስገብቶኝ እርሱ ወደሚኖርበት ቤት ሄደ በማለት የመሰከረች ናት። መከላከያ ምስክሯ ሌሎች ከደምሰው ዘሪሁን ጋራ የሚቀራረቡና የሚያውቋቸው ሰዎች አብረዋቸው እንዳመሹ የገለፀችና የሰዎቹንም ስም የጠቀሰች ቢሆንም ይግባኝ ባይ እህቱ የሆነችውን ብቻ በመከላከያ ምስክርነት ቆጥሮ ከማቅረብ በቀር እህቱ ጭፈራ ቤት አብረን አምሽተናል የምትላቸውን ሰዎች መከላከያ ምስክር እንዲሆኑት አልፈለገም። በትክክል አብረው ያመሹ ከሆነ ከእህቱ ይልቅ ጭፈራው ቤት አብረው ነበሩ የተባሉትን ሰዎች በመከላከያ ማስረጃነት ቆጥሮ ቀርበው እንዲመሰክሩለት ባደረገ ነበር።

ይግባኝ ባይ እህቱ ለሆነችው ለመከላከያ ምስክሯ አስቀድሞ በዚህን ቀን ምሽት አብረን ጭፈራ ቤት በመሄድ እንዝናናለን ተዘጋጂ ሌላ ኘሮግራም እንዳትይዥ ብሎ ሣይነግራት ራሱ በቀጥታ ደውሎላት ሊነግራት እየቻለ ሌላ ዘመድ ነው በተባለ ሰው አመካኝነት ከምሽቱ አንድ ሰዓት ላይ ስልክ ተደውሎላት ሲነገራት እሺ ብላ በመቀበል ወዲያው ከምሽቱ ሁለት ሰዓት ላይ ወደ ጭፈራው ቤት ሄድን ማለቷ አጠራጣሪ ሁኔታዎች የሚታዩበት ስለሆነ የሚታመን አይደለም። የግል ተበዳዮች የሆኑት ሁለቱ የዐቃቤ ሕግ ምስክሮች ደምሰው ዘሪሁን በክሱ ላይ በተጠቀሰው ቦታ ታህሣሥ 28 ቀን 1999 ዓ.ም ከምሽቱ 4፡00 ሰዓት በሚሆንበት ጊዜ ወደ መኖሪያ ቤታችን በመሄድ ላይ እያለን በሶስታችን ፊት ላይ አሲድ ሲደፋብን በትክክልና በደንብ በአይናችን በማየት እርሱ ስለመሆኑ አረጋግጠናል በማለት በአንድ አይነት አገላለጽ የሰጡትን ጠንካራ የምስክርነት ቃል እህቱ የሆነችው መከላከያ ምስክር የለም በዚህ ጊዜ አብረን ጭፈራ ቤት ነበርን ካለችው ጋራ ሲወዳደር ሁለቱ የዐቃቤ ሕግ ምስክሮች የመሰከሩት እውነትነቱ የሚያመዝን ነው። ሁለቱ ምስክሮች በትክክል በእነርሱ ላይ ሊፈፀም ስለቻለው ድርጊት ሊያስረዱ የቻሉ ናቸው። ስለድርጊቱ አፈፃፀም ሊያስረዱ ከቻሉ በአይናችን አይተነዋል ስለሚሉት ድርጊቱን ፈፃሚ ሰው በሚመለከት በሀሰት ይመሰክራሉ ለማለት ያስቸግራል። ምስክሮቹ ደምሰው ዘሪሁን ለእነርሱ አዲስ ሰው ሣይሆን በእህታቸው ካሚላት መሀዲ ምክንያት አስቀድመው አንድ ቀን በግንባር አግኝተውት በማነጋገር በመልክ እና በቁመናው የሚያውቁት መሆናቸውን በሰጡት የምስክርነት ቃል ገልፀዋል። ድርጊቱን ፈፀመ በሚሉበት ጊዜም ፊቱን የሚከልል ነገር አድርጓል ወይም ፊቱን የማያሣይ ጭንብል አጥልቋል አላሉም። በግልጽ ፊቱ እየታየ

መጥቶ ድርጊቱን የፈፀመባቸው መሆኑን ገልፀዋል። ሁለቱ የአይን ምስክሮች አመሰካከር የሚታይበት ክፍተትና መዘበራረቅ ስለሌለ ሊያጠራጥር የሚችል አይደለም።

ሦስቱ የግል ተበዳዮች አንድ ላይ ሆነው በመሄድ ላይ እያሉ ድርጊቱ ሲፈፀምባቸው አንደኛዋ ካሚላት መሀዲ ድርጊቱን የፈፀመብንን ሰው በወቅቱ ለማወቅ አልቻልኩም ስትል ሁለቱ የግል ተበዳዮች እንዴት አድርገው ከእርሷ በተለየ መንገድ ወንጀሉን የፈፀመብንን ሰው በማየት ለመለየት ችለናል ሊሉ ይችላሉ? በሚል ለሚነሣው ጥያቄም አንደኛዋ የግል ተበዳይ አስቀድሜ የእርሱን እንቅስቃሴና አመጣጥ ካልተመለከተች በድንገትና ባልጠበቀችው መንገድ ድርጊቱ ሲፈፀምባቸው ሰውዬው ማን ነው የሚለውን ላታየው ትችላለች። በፊቷም ላይ የተደፋው የአሲድ መጠን ከፍተኛ መሆኑን የደረሰባት ጉዳት ስለሚያሣይ በፊቷ ላይ በሚደፋበት ጊዜ ሌላውን ነገር የማየት እድል አይኖራትም። በዚህም ምክንያት ድርጊቱን ፈጽሞ እየሮጠ በሚሸሸበት ጊዜም ልታየው አትችልም። ሁለቱ ምስክሮች ግን አስቀደሙው ደምሰው ዘሪሁን ጨለም ካለ ቦታ ወጥቶ ወደ እነርሱ ለመምጣት መንቀሣቀስ ከጀመረበት ጊዜ አንስቶ እስከ መጨረሻው ሊያዩትና እርሱ ስለመሆኑ በመለየት ሊያረጋግጡ መቻላቸውን ያስረዱ ስለሆነ የሦስቱ አመሰካከር የሚጋጭበት መንገድ የለም። ሊጋጭ ይችል የነበረው ከሚላት መሀዲ አሲዱን የደፋብን ደምሰው ዘሪሁን ሣይሆን ሌላ ሰው ነው ስትል ሁለቱ የግል ተበዳዮች ደግሞ አሲዱን የደፋብን ሌላ ሰው ሣይሆን ደምሰው ዘሪሁን ነው ብለው በተቃራኒው የተናገሩ ሆኖ ቢገኝ ነው። ስለዚህ ሦስቱ የግል ተበዳዮች አመሰካከር እርስ በርሱ የሚጋጭ አይደለም።

ደምሰው ዘሪሁን ካሚላት መሀዲ እንዲህ አይነት አደጋ ደርሰባታል ሲባል የተኛችበት ሆስፒታል የትኛው እንደሆነ አጠያይቄ ሃያት ሆስፒታል ነው ተብሎ ሲነገረኝ በማግሥቱ ልጠይቃት ወደ ሆስፒታሉ መሄዴ ወንጀሉን ስላለመፈፀሜ የሚያሣይ ነው በሚል ያነሣውን የመከራከሪያ ነጥብ በሚመለከትም በእርግጥም ከቀረቡት የዐቃቤ ሕግ ምስክሮች መካከል የሆስፒታሉ ነርስ የሆነችው ምስክር ደምሰው ዘሪሁን በማግሥቱ ሃያት ሆስፒታል በመምጣት ካሚላት መሀዲን ልጠይቃት ነው የመጣሁት ብሎ ሲጠብቅ መቆየቱንና በመካከላቸው ስለነበረው ግንኙነት አንዳንድ ነገሮችን ሊነግራት እንደቻለ በሰጠችው የምስክርነት ቃል ገልፃለች።ይህም ደምሰው ዘሪሁን ወንጀሉን የፈፀመ ከሆነ ለምን ሆስፒታል ሄዶ ይጠይቃታል? እንዴት ይህንን ሊፈጽም ይችላል? የሚል ጥያቄ የሚያስነሣ ቢሆንም ሁለቱ የአይን ምስክሮች ወንጀሉን የፈፀመው እርሱ ነው፣ አይተነዋል በሚል የሰጡትን የምስክርነት ቃል ሊያፈርስ የሚችል አይደለም። የግል ተበዳይዋ የተኛችበት ሆስፒታል ድረስ ለመጠየቅ መሄዱ ብቻውን ንጽህናውን ለማረጋገጥ የሚየስችል አይደለም። አንዷ የዐቃቤ ሕግ ምስክር ይህንን የመጠየቁን ሁኔታ መግለጿ ሌሎቹ ምስክሮች የሰጡትን የምስክርነት ቃል ውድቅ የሚያደረግ አይደለም። በመሆኑም ደምሰው ዘሪሁን በዚህ ረገድ ያነሣው ክርክር ተቀባይነት ያለው ሆኖ አልተገኘም።

ከፍ ሲል እንደተገለፀው ደምሰው ዘሪሁን ወንጀሉን ስላለመፈፀሜ ታስረዳልኛለች በማለት በመከላከያ ምስክርነት አቅርቦ ያሰማት ወ/ሮ ይሉሻል ዘሪሁን ወንጀሉ

ተፈፀመ በተባለበት ሰዓት አብረን ጭፈራ ቤት ስንዝናና ነበር በሚል የሰጠችው ምስክረነት ከተለያዩ አቅጣጫዎች ሲጤንና ሲመዘን ሁለቱ የዐቃቤ ሕግ የአይን ምስክሮች አይተነዋል፤ ወንጀሉን የፈፀመብን ደምሰው ዘሪሁን ነው በሚል የሰጡትን ጠንካራ ምስክርነት የማፍረስ ብቃትም ሆነ ጥንካሬ የሌለው ሆኖ ስለተገኘ ወንጀሉን ስላለመፈፀሜ በመከላከያ ምስክር አስረድቻለሁ በሚል ያቀረበው የይግባኝ ክርክር ተቀባይነት የሚሰጠው አይደለም።

3. በሶስቱ የግል ተበዳዮች ፊት ላይ አሲድ በመድፋት ጉዳት ያደረሰባቸው ደምሰው ዘሪሁን መሆኑ በማስረጃ የተረጋገጠ ሆኖ ክተገኘ ቀጠሎ ሊመረመር የሚገባው :- ከሶስቱ የግል ተበዳዮች መካከል በተለይ በካሚላት መህዲ ፊት ለይ አሲድ በመድፋት የፈፀመው ድርጊትና የደረሰባት ጉዳት የግድያ ሙከራ ወንጀል ሊባል ይችላል አይችልም? በዚህ ጉዳይ በሕጉ የግድያ ሙከራ ወንጀል የሚያስኙ ምክንያቶች አሉ ወይንስ የሉም? ጥፋተኛ ሊባል የሚገባው በየትኛው የሕግ አንቀጽ መሠረት ነው? የሚለው የሕግ ጥያቄ ነው።

ከፍ ብሎ እንደተገለፀው ደምሰው ዘሪሁን ጠንካራ የአሲድነት ባህሪ ያለው ኬሚካል በግል ተበዳይዋ ከሚላት መህዲ ፊት ላይ በመድፋት በፊቷ ክፍሎች ላይ ከባድ ጉዳት ያደረሰባት መሆኑ በማስረጃ ሊረጋገጥ ችሏል።

በማስረጃ የተረጋገጠው በግል ተበዳይዋ ፊት ክፍሎች ላይ ከባድ ጉዳት መድረሱ ሆኖ ቢገኝም ዐቃቤ ሕግ ከባድ የግድያ ሙከራ ወንጀል ነው የሚል ክስ ሊያቀርብበት የቻለው አስቀድሞ የግል ተበዳይዋን እገላታለሁ እያለ ሲዝትባት ቆይቷል፤ የመግደል ሀሣብ ነበረው በሚል ምክንያት መሆኑን የክሱ ቻርጅ ያሣያል። በሌላም በኩል የፌዴራል ከፍተኛ ፍ/ቤት የሰጠው የጥፋተኝነት ፍርድም ሲታይ ፍርድ ቤቱ ደምሰው ዘሪሁን በግል ተበዳይዋ ላይ የፈፀመው ከባድ የግድያ ሙከራ ወንጀል ነው ሊል የቻለው በሁለት ምክንያቶች ሲሆን አንደኛው አስቀድሞ የግል ተበዳይዋን እንደሚገድላትና እንደሚያጠፋት በመግለጽ ሲዝትባት ቆይቷል የሚለው ነው። ሁለተኛው ደግሞ በግል ተበዳይዋ ፊት ላይ የረጨው አሲድ ሰው የመግደል አቅም ያለው መሆኑ በባለሙያ በተሰጠ አስተየየት ሊረጋጥ ችሏል የሚል ነው። አስቀድሞ የመግደል ሀሣብ ነበረው ለሚለው እንደ ማረጋገጫ ተደርጎ የተወሰደው እገድላታለሁ፤ አጠፋታለሁ እያለ ሲናገር ቆይቷል የተባለው ነው። ከፍተኛው ፍርድ ቤት አሲድ የተባለውን ፈሣሽ ኬሚካል ነገር እንደመግደያ መሣሪያ ወይም ሰው ለመግደል አንደሚያገለግል አድርጎ ማየቱን ጥፋተኛነቱን በማስመልከት የሰጠው ፍርድ ይጠቁማል። ስለዚህ በመቀጠል እነዚህ ነገሮች በትክክል የተረጋገጡ መሆን አለመሆናቸውን መመርመር አስፈላጊ ይሆናል።

በቅድሚያ በግል ተበዳይዋ ፊት ላይ የተረጨው /የተደፋው/ አሲድ የተባለው ፈሣሽ ነገር ሰው የመግደል አቅም አለው መባሉ በትክክል ሊረጋጥ መቻል አለመቻሉን በተመለከተ፡-

ዐቃቤ ሕግ በቀረበው የጽሑፍ ማስረጃ የኢትዮጵያ መድኃኒት አስተዳደርና ቁጥጥር ባለሥልጣን ተመርምሮ ሰልፈሪክ አሲድ መሆኑ ተረጋግጧል የተባለው በግል ተበዳይዋ ካሚላት መሀዲ ፊት ላይ ተረጭቶ ጉዳት ያደረሰው ፈሣሽ ኬሚካል ከፊቷ ላይ ናሙናው ተገኝቶ የተወሰደ ሣይሆን ያሲን ኪያር የተባለው የዐቃቤ ሕግ ምስክር ወንጀሉ ማታ ተፈጽሞ በነጋታው ወንጀሉ ተፈፀመ በተባለበት ቦታ ሲያልፍ መሬት ላይ ተጥሎ በማግኘት ወስዶ ለፖሊስ ካስረከበው ሰማያዊ ጀሪካን ውስጥ ተገኘ ከተባለው አሲድ የተወሰደ ናሙና መሆኑን ከማስረጃው ለማረጋገጥ ተችሏል፡ የመግደል አቅም አለው የተባለውም ይኼው ምስክሩ በነጋታው መሬት ተጥሎ አገኘሁት ከሚለው ጀሪካን ተወስዶ የተመረመረ ነው፡፡ ከዚህ ጀሪካን ውስጥ የተገኘው ፈሣሽ ነገር ተመርምሮ ሰልፈሪክ አሲድ በመባል የሚታወቀው ኬሚካል መሆኑ ተረጋግጧል፡፡

አጠያያቂ የሚሆነው ይግባኝ ባዩ ደምሰው ዘሪሁን በግል ተበዳይዋ ፊት ላይ የደፋው ወይም የረጨው ፈሣሽ ኬሚካል የዐቃቤ ሕግ ምስክር መሬት ተጥሎ አገኘሁት ከሚለው ሰማያዊ ጀሪካን ቀድቶ የወሰደው ስለመሆኑ እንዴት ይታወቃል፤ ይህንን ሰልፈሪክ አሲድ በውስጡ ተገኘ የተባለውን ጀሪካን ወንጀሉ በተፈፀመበት አካባቢ ይግባኝ ባይ ጥሎት ስለመሄዱ በምን ማስረጃ ተረጋገጠ? የሚለው ነው፡፡ በውስጡ ሰልፈሪክ አሲድ ተገኘ የተባለውን ጀሪካን ይግባኝ ባይ ወንጀሉ በተፈፀመበት ሰዓት በአካባቢው መሬት ላይ አስቀምጦትና ጥሎት ሲሄድ ወይም በእጁ ይዘት አይቻለሁ ብሎ የመሰከረ አንድም የዐቃቤ ሕግ ምስክር የለም፡፡ ጀሪካኑን በማግሥቱ ከመሬት አገኘሁ የሚለው ምስክርም ጀሪካኑ የማን እንደሆነና ማን ጥሎት እንደሄደ አያውቅም፡፡ ሁለቱ የዐቃቤ ሕግ የአይን ምስክሮች ደግሞ ይግባኝ ባይ አሲዱን ይዞ መጥቶ ደፋብን የሚሉት በጆክ እንጅ በጀሪካን አይደለም፡፡ ጆክና ጀሪካን በቅርጽና በመጠናቸው የሚለያዩ ስለሆኑ አንድ አይነት ናቸው ለማለት አይቻለም፡፡በጆክ ፊታችን ላይ ደፉ የሚሉትን አሲድ ነገር ሰልፈሪክ አሲድ እንደያዘ መሬት ተጥሎ ተገኘ ከተባለው ጀሪካን በጆክ ቀድቶ የወሰደ ስለመሆኑ በአይን ምስክር ወይም በሌላ ማስረጃ መረጋገጥ ይኖርበታል፡፡ ሰልፈሪክ አሲድ የያዘ ጀሪካን ወንጀሉ በተፈፀመበት አካባቢ ተጥሎ መገኘቱ ብቻውን በግል ተበዳይ ፊት ላይ የተደፋው አሲድ ነገር ከዚህ ጀሪካን የተወሰደ ስለመሆኑ ቢያረጋግጥ አይችልም፡፡ ከፍ ሲል እንደተገለፀው ድርጊቱን የፈፀመው ይግባኝ ባይ ስለመሆኑ አይተናል ብለው የመሰከሩት ሁለቱ የአይን ምስክሮች በፊታችን ላይ የደፋብንን አሲድ በእጁ ይዞ የመጣበት እቃ ጆክ ነው በማለት የገለፁ ሲሆን ሰልፈሪክ አሲድ ያለበት በአካባቢው ተጥሎ ተገኘ የተባለው ደግሞ ጃሪካን እንጅ ጆክ አለመሆኑ ሲታይ የበለጠ አጠራጣሪ ያደርገዋል፡፡

ይግባኝ ባዩ ደምሰው ዘሪሁን በእጁ በጆክ ይዞ በመምጣት በግል ተበዳይ ፊት ላይ የደፋባት ፈሣሽ የሆነ አሲድ ነገር ወንጀሉ በተፈፀመበት አካባቢ በውስጡ ሰልፈሪክ አሲድ አንደያዘ ተጥሎ ተገኘ ከተባለው ጀሪካን የተቀዳ ወይም የተወሰደ ስለመሆኑ የሚያረጋግጥ ምንም አይነት ማስረጃ ስለሌለ የኢትዮጵያ መድኃኒት አስተዳደርና ቁጥጥር ባለሥልጣን ተጥሎ ከተገኘው ጃሪካን ውስጥ ሲገኝ የቻለውን ብጫ መልክ ያለው ዘይታማ ፈሣሽ በመመርመር "ሰልፈሪክ አሲድ ነው በሚል የሰጠው ማስረጃም ሆነ ይኼው ሰልፈሪክ አሲድ ስለሚያደርሰው ጉዳት የሰጠው አስተያየት በዚህ ጉዳይ

በማስረጃነት ሊያገለግል የሚገባ ሆኖ አልተገኘም። በሌላም በኩል በግል ተበዳይዋ ፊት ላይ ተደፍቶ ጉዳት ሊያደርስባት ስለቻለው ፈሣሽ ነገር ምንነት የሚጠቁም ሆኖ የተገኘው የካቲት 12 ሆስፒታል በ1/6/99 ጽፍ የሰጠው የሕክምና ምስክር ወረቀት ነው። ይህ የሕክመና ምስክር ወረቀት በካሚላት መሀዲ ፊት ክፍሎች ላይ ፈሶ ከፍተኛ ጉዳት ሊያደርስባት የቻለው" ጠንካራ የአሲድነት ባህሪ ያለው ኬሚካል" እንደሆነ የሚያስረዳ ነው።

በዚህ ማስረጃ መሠረት ይግባኝ ባይ በግል ተበዳይ ፊት ላይ በመድፋት ጉዳት ያደረሰባት ጠንካራ የአሲድነት ባህሪ ባለው ኬሚካል በመጠቀም ነው ለማለት ይቻላል። ጠንካራ የአሲድነት ባህሪ አለው የተባለው ኬሚካል በውጫዊ የሰውነት አካል በፊት ላይ መደፋቱ በተጎጂዋ ላይ የሞት አደጋ የሚያስከትል ነው አልተባለም። የቀረበው ማስረጃም ስለኬሚካሉ የመግደል አቅም መኖር የሚያረጋግጥ አይደለም።

የተረጋገጠው ይግባኝ ባይ የተጠቀመበት ጠንካራ የአሲድ ባህሪ ያለው ኬሚካል በግል ተበዳይዋ ፊት ክፍሎች ላይ ከባድ ጉዳት ያደረሰባት መሆኑ ነው። በሕክምና ማስረጃው የተገለፀው ጠንካራ የአሲድነት ባህሪ ያለው ኬሚካል በትክክል ሰልፈሪክ አሲድ "ስለመሆኑ በሌላ ማስረጃ ስላልተረጋገጠ ከፍተኛው ፍርድ ቤት ይግባኝ ባይ ጉዳት ለማድረስ የተጠቀመበት ነገር በፊት ላይ ቢደፋም የመግደል አቅም አለው ያለው ትክክል አይደለም። እንዲህ አይነት ኬሚካል በውጫዊ ሰውነት ላይ በመድፋት ወይም በመርጨት የሰው ግድያ የሚፈፀምበት ነው ለማለት አልተቻለም። ይግባኝ ባይ ቀድሞ የግል ተበዳይን የመግደል ሀሣብ ነበረው የተባለውን በተመለከተ፡- የመግደል ሀሣብ ነበረው የተባለው እገላታለሁ፣ አጠፋታለሁ እያለ ሲዝትበት ቆይቷል በሚል ምክንያት ነው።

የአንደኛዋ የግል ተበዳይ የካሚላት መሀዲ እህቶች የሆኑት ሁለቱ የዐቃቤ ሕግ ምስክሮች ሲመሰክሩ ደምሰው ዘሪሁን ካሚላትን ጓደኛዬ ካልሆንሽ እያለ ሲያስቸግራት ነበር፤ ጓደኛ ካልሆንሽኝ እገድልሻለሁ፤ አጠፋሻለሁ አያለ ሲናገር ነፀር ያሉ ሆኖ ቢገኝም አስቀድሞ በደምሰው ዘሪሁንና በካሚላት መሀዲ መካከል የነበረው ግንኙነት እውነታው ሁለቱ ምስክሮች ከተናገሩት የተለየ መሆኑ በሌሎች ምስክሮች ሊረጋገጥ ችሏል። የግል ተበዳይዋ ካሚላት መሀዲ ራሷ በቀዳሚ ምርመራ አድራጊ ፍ/ቤት ቀርባ በሰጠችው የምስክርነት ቃል ከደምሰው ዘሪሁን ጋራ በጓደኛነት ለአምስት ዓመታት ያህል አብረው መቆየታቸውን ባለመሸሸግ ያረጋገጠች መሆኑን ተገልብጦ ከመዝገቡ ጋራ ተያይዞ ከሚገኘው የምስክርነት ጽሑፍ ለማረጋገጥ ተችሏል። በመካከላችሁ የነበረው ግንኙነት የተቋረጠው መቼ ነው ተብላ ስትጠየቅም ከአንድ ዓመት በፊት ይሆናል ብላለች።

በደምሰው ዘሪሁን በኩል ከቀረቡት መከላከያ ምስክሮች መካከል ደግሞ የኔመብራት ዘሪሁን የተባለችው ምስክር ደምሰው ዘሪሁንና ከሚላት ከራሷ ከምስክሯ ቤት ተከራይተው ከየካቲት 27 ቀን 1996 ዓ.ም ጀምሮ እስከ 1998 ዓ.ም ድረስ በባልና ሚስትነት መልክ አብረው ስለመቆየታቸው ካሚላት ሁል ጊዜ ወደ ተከራዩት ቤት እየመጣች በቤቱ ውስጥ ቀን እየዋለች ወደማታ ተመልሳ እንደምትሄድ፤ አልፎ

አልፎም አብረው እንደሚያድሩ በዚህ አብረው በነበሩበት ጊዜ ደምሰውና ከሚላት ተነጋግረው ከጅዳ እህቷ መኪና ስለምታስገባ ብር 40,000 ለከሚላት እህቶችና እናትዋ ቤት ድረስ ወስደሽ ስጪ ብሎ ደምሰው ሰጥቷት ከሚላት ቤታቸውን እንድታሣያት ተደርጎ መኖሪያ ቤታቸው ድረስ በመሄድ የካሚላት ሁለቱ እህቶቿና እናቷ ባሉበት እንዲህ በይ ተብላ በተነገራት መሠረት የከሚላት ጓደኛ እናት ነኝ ብላ በመናገር ብር 40,000 ለከሚላት እናት ሰጥታ መመለሷን ደምሰውና ካሚላት አብረው የነበሩት በፍቅርና በመዋደድ እንደነበረ፤ በታህሣሥ ወር መጀመሪያ 1999 ዓ.ም ደምሰው ዘሪሁን የካሚላት ወንድም ስለካሚላት ስለጠየቀኝ ከአንቺ ቤት እንደተከራየን ትነግሪዋለሽ ብሏት እስማኤል የተባለው የካሚላት ወንድም ቤት ድረስ መጥቶ ተነጋግረው የእኔ ሽማግሌዎች አልተሟሉም ብሎ ተመልሶ በዚያው ጉዳዩ መቅረቱን ያስረዳች ሲሆን አመሰካከሯም ጠንካራ ሆኖ የሚታይ ነው።

ተዘራሽ ውቤ የተባለችው መከላከያ ምስክርም የደምሰው ዘሪሁንና ካሚላት በፍቅር ጓደኛነት አብረው እንደነበሩ አውቃለሁ፣ደምስው ታሞ ሆስፒታል በነበረበት ጊዜ ካሚላት ስታስታምመው ነበር ብላ መስክራለች።

ከምስክሮቹ ሌላ ደምሰው ዘሪሁን በአስረጂነት ያቀረባቸው የፎቶግራፍ ማስረጃዎችም ከካሚላት ጋራ በቤት ውስጥ እና በአንዳንድ ቦታዎች የተነሣቸው ፎቶ ግራፎች እንደሆኑ የሚያሣዩ ሲሆኑ እነዚህ የፎቶግራፍ ማስረጃዎች ለአቃቤ ሕግ እንዲደርሱት የተደረገ ስለመሆኑ ለመረዳት ቢቻልም ከመዝገቡ እንደሚታየው አቃቤ ሕግ ፎቶግራፎቹ የግል ተበዳይዋ አይደሉም የሚል ክርክር አላነሣም። ከፍተኛው ፍርድ ቤትም ፎቶግራፎቹ የግል ተበዳይዋ ስለመሆናቸው ያመነበት መሆኑን በፍርዱ ላይ አስፍሮት የሚገኘው ስለማስረጃው የሰጠው አስተያየት ያስረዳል። የቀረቡት የፎቶግራፍ ማስረጃዎች የመከላከያ ምስክሮቹን አባባል የሚደግፉ ናቸው።

በደምሰው ዘሪሁንና በካሚላት መሀዲ መካከል የነበረው የግንኙነት እውነታው ይህንን የሚመስል ሆኖ እያለ ሁለቱ የአቃቤ ሕግ ምስክሮች እውነተኛውን ነገር በመሸፋፈንና በመደበቅ ደምሰው ካሚላትን ሲያስቸግራት የነበረው ጓደኛ ሁኚኝ በማለት ነው እገድላታለሁ አጠፋታለሁ ሲል የነበረው ጓደኛ ካልሆንሽኝ በሚል ነው የሚለውን ትክክለኛ ያልሆነ ምስክርነት ሰጥተዋል።

እነዚህ የአቃቤ ሕግ ምስክሮች ደምሰው ዘሪሁን ካሚላትን እገድላታለሁ፣ አጠፋታለሁ እያለ ስለመናገሩ እንዴት አወቃችሁ፣በምን ስማችሁ ተብለው በምስክርነቱ ወቅት ሲጠየቁ አንደኛዋ በአብዛኛው ደምሰው ለካሚላት ስልክ እየደወለ ሲነጋገሩ እንድሰማው እያደረገች ሲናገር ለመስማት በመቻሌ ነው የሚል መልስ ስትሰጥ ሁለተኛዋ ደግሞ ብዙውን ጊዜ ካሚላት ስለምትነግራት እንደሆነ ገልፃለች። አንዷ ምስክር ካሚላት ስልክ ሲደወልላት በማይክራፎን ወይም በላውድ እስፒከር ጠልፋ ታስማኛለች ያለችው በትክክል ደዋዩና ተናጋሪው ደምስው ዘሪሁን ስለመሆኑ ሣታረጋግጥ በስልክ እገድልሻለሁ አጠፋሻለሁ እያለ ሲናገር እሰማለሁ በሚል የመሰከረችው በብዙ መልኩ የሚያጠራጥር ስለሆነ ተቀባይነት የሚሰጠው አይደለም።

ሁለተኛዋ ምስክር ከደምሰው አንደበት በቀጥታ የሰማችው ነገር ሣይኖር ብዙውን ጊዜ ካሚላት እየተደበደበች ፊቷ አብጦ ወደ ቤት ስትመጣ ደምሰው እገልሻለሁ አጠፋሻለሁ እያለ እንደሚያስፈራራት ትነግረኝ ነበር በሚል የመሰከረችውም የስሚ ስሚ በመሆኑ ማስረጃነቱ ዋጋ የሚሰጠው አይደለም። የሁለቱ ምስክሮች አመሰካከር ደምሰው ዘሪሁን አስቀድሞ ከሚላት መህዲን የመግደል ሐሣብ የነበረው ስለመሆኑ ለማረጋገጥ የሚያስችል ሆኖ አልተገኘም።

ሌላዋ ቤዛዊት ዋሲሁን የተባለችው የአቃቤ ሕግ ምስክር የካሚላት መህዲ ጓደኛ እንደሆነችና የካሚላት ጓደኛ ሆና በቆየችበት ጊዜ ደምሰው ዘሪሁንና ካሚላት በፍቅር ጓደኛነት አብረው ስለመቆየታቸው እንደማታውቅ አስቀድማም ደምሰው ዘሪሁን የተባለውን ሰው አለማወቋን ገልፃ በ1998 ዓ.ም መጀመሪያ አካባቢ ደምሰው ዘሪሁን በእኔ ስልክ ደውሎ የስልክ ቁጥርሽን በገንዘብ ገዝቼ ነው ያገኘሁት ብሎ ስለካሚላት ጉዳይ በማንሣት እንደበደለችው አድርጉ ከነገራት በኋላ ካሚላትን እገድላታለሁ፣ አጠፋታለሁ ብሎ ገለፀለኝ ያለችውን በተመለከተም ድምጹን በስልክ መለየት ቀርቶ አስቀድማ ደምሰው ዘሪሁንን በመልክም ሆነ በአካል የማታውቀውና ትውውቅ የሌላቸው ስለመሆኑ ስላረጋገጠች በስልክ ደውሎ እንዲህ አለኝ የምትለው ሰው በትክክል የአሁኑ ደምሰው ዘሪሁን የመሆኑ ጉዳይ የሚያጠራጥር ነው። እንደገና በሌላ ጊዜ ስልክ ደወሎልኝ ሂልተን ሆቴል ቀጥሮኝ ሂጀ በአካል አግኝቼው ያንኑ ተመሣሣይ ነገር ደግሞ ነግሮኛል ያለች ቢሆንም አስቀድሞ አላውቀውም፣ ከካሚላት ጋራም ስላለው ግንኙነት የማውቀው ነገር የለም እያለችና በመጀመሪያ ደውሎልኛል በምትለው ስልክ በካሚላት ላይ ዝቷል ብላ እየገለፀች በእንዲህ አይነት ሁኔታ ደፍራ ወደማታውቀው ሰው ጋር ሂዳ ትነጋገራለች ብሎ ለመቀበልም ሆነ ለማመን አስቸጋሪ ይሆናል። ምስክሯ ደምሰው በስልክና በግንባር አግኝቶኝ እንዲህ ብሎ ነገሮኛል የምትለውን ጓደኛዋ ለሆነችው የጉዳዩ ባለቤት ለካሚላት መህዲ ዝቶባታል ያለችውን መንገር ብትፈራ እንኳን እገሌ የተባለው ሰው ደውሎ ስለአንቺ እነጋግሮኛልና በአካልም እንድንገናኝ ጠይቆኝ ተገናኝተን ተነጋግረናል የሚለውን ለካሚላት አልነገረኳትም ስለዚህ ጉዳይ ለካሚላት አንስቼላት አላውቀም ማለቷም ሲታይ የመሰከረችው እውነተኛ ነገር ስለመሆኑ አጠራጣሪ ያደርገዋል። ይህም ብቻ ሣይሆን በደምሰው ዘሪሁን በኩል ከቀረቡት መከላከያ ምስክሮች መካከል ደምሰው ዘሪሁንና ከሚላትን በፍቅር ጓደኛነት አብረው በቆዩበትና በኖሩበት ጊዜ በቅርበት በደንብ እናውቃቸዋለን ያሉት በተለይ ሁለቱ ምስክሮች ደምሰው እና ካሚላት በፍቅር ተዋደው በሰላም አብረው ነበሩ ባሉበት ጊዜ ጭምር ቤዛዊት ዋሲሁን የተባለችው ምስክር ደምሰው ስልክ ደውሎልኝ ካሚላትን በሚመለከት ዝቶ ነግሮኛል ያለችው ትክክለኛ እንዳልሆነ ያመለክታል። በፍቅር አብረው በነበሩበትና በቆዩባቸው ጊዜያቶች የፍቅር ጓደኛውን እንዲህ አደርጋታለሁ እያለ ለሌላ ሰው የሚናገርበት ምክንያት አይኖርም። ምስክሯ የሰጠችው የምስክርነት ቃል በደምሰው ዘሪሁን መከላከያ ምስክሮች አመሰካከር ጋር ሲወዳደርና ከሌሎች አቅጣጫዎች አንፃር ሲጤን በርካታ የሚያጠራጥሩ ሁኔታዎች የሚታዩበት ስለሆነ የሚታመን አይደለም። ምስክሯ ደመስው ዘሪሁን አስቀድሞ ከሚላትን የመግደል ሐሣብ እንደነበረው አረጋግጣለች ለማለት አይቻልም።

በ1997 ዓ.ም በሐምሌ ወር ውስጥ ደምሰው ካሚላትንና እኔን ዋቢ ሸበሌ ሆቴል አካባቢ ቀጥሮን ካሚላት ስትመጣ በበክስ መታት በዚህ ጊዜ እኔ የካሚላት ጓደኛ ነበርኩ፣ደምሰው ካሚላትን ሲመታት ፊርቼ ጥያቸው ሄድኩኝ ያለው ሳህሌ መሐመድ የተባለው የአቃቤ ሕግ ምስክር ደምሰው ዘሪሁን ካሚላትን የመግደል ሐሣብ ነበረው ስለተባለው ያስረዳው ነገር ስለሌለ ከእሱ ጋር በተያያዘ መስክሮበታል የሚያሰኝ ነገር የለም።

የግል ተበዳይዋ ካሚላት መሀዲ በቀዳሚ ምርመራ አድራጊ ፍ/ቤት እኔ ከደምሰው ዘሪሁን ጋር በጓደኛነት አብሬው የቆየሁት ስላስገደደኝ እንጅ ፈልጌው አይደለም፣በቤተሰቦቼ ህይወት ላይ አደጋ እንደሚያደርስባቸው ስለሚገልጽልኝ ነው፣ ይህ ድርጊት ከመፈጸሙ አንድ ሣምንት በፊት ስልክ ደውሎልኝ በአንቺ ምክንያት ነው የመጨረሻ ደረጃ እሥር ቤት የምገባው ብሎኛል በሚል የሰጠችው የምስክረነት ቃል የመግደል ሐሣብ እንደነበረው ለማረጋገጥ የሚያስችል መሆን አለመሆኑን በተመለከተም ከመዝገቡ ጋራ ተያይዞ ከሚገኘው የምስክርነቱ ጽሑፍ እንደሚታየው በግልጽ እገልሻለሁ፣ህይወትሽን አጠፋለሁ ብሎኛል አትልም። አሲዱን ከመርጨቱ አንድ ሣምንት በፊት ስልክ ደውሎልኝ በአንቺ ምክንያት ነው የመጨረሻ ደረጃ እሥር ቤት የምገባው ብሎ ዝቶብኛል ያለችውም ሲታይ በእርሷ ላይ አንድ አይነት ወንጀል ፈጽሞ እሥር ቤት ለመግባት መፈለጉን ከሚጠቁም በቀር የእርሷን ሕይወት ለማጥፋት በቁርጠኝነት መወሰኑን ለማረጋገጥ የሚያስችል አይደለም። ይህ ድርጊት ከመፈፀሙ ጥቂት ቀናት በፊት በአንቺ ምክንያት ነው እሥር ቤት የምገባው ብሎ በስልክ ለእርሷ መናገሩ በተግባር ፈጽሞ ከተገኘው ጠንካራ የአሲድነት ባህሪ ያለው ኬሚካል በፊቷ ላይ በመርጨት በአካሏ ላይ ካደረሰው ጉዳት የተለየ ህይወቷን በማጥፋት ላይ ያነጣጠረ ግድያ የመፈፀም ሐሣብና ፍላጐት ነበረው ለማለት አይቻልም።

የድርጊቱም አፈፃፀም የሚያሣየው በውጫዊ የሰውነት አካል በፊቷ ክፍሎች ላይ ጉዳት በማድረስ ላይ ያነጣጠረ መሆኑን ነው። ደምሰው ዘሪሁን በትክክል የግል ተበዳይዋን የመግደል ሐሣብና ፍላጐት ቢኖረው ኖሮ በውጫዊ አካል ላይ ቢደፋ በሰው ህይወት ላይ የሞት አደጋ ሊያደርስ ይችላል ባልተባለ ጠንካራ የአሲድነት ባህሪ ያለው ኬሚካል በመጠቀም ፊቷ ላይ ከመድፋት ይልቅ ሌላ የመግደያ ዘዴ በማዘጋጀት ወይም በሌላ የመግደያ መሣሪያ በመጠቀም ድርጊቱን ሊፈጽም በቻለ ነበር። ደምሰው ዘሪሁን በውጫዊ የሰውነት ክፍል ላይ እንዲህ አይነት ከባድ ጉዳት ሊያደረስ የሚችለውን ጠንካራ የአሲድነት ባህሪ ያለውን ኬሚካል በግል ተበዳይዋ ፊት ላይ ከመርጨት ይልቅ ከሚጠጣ ነገር ጋር ጨምሮ እንድትጠጣው ወይም ከሚበላ ነገር ጋራ ጨምሮ እንድትመገበው ሊያደርግ ቢሞክር የመግደል ሐሣብና ፍላጐት ነበረው ሊባል ይችላል። በዚህ መልኩ ቢፈፀም ኖሮ በገዳይ መርዝ ከመጠቀም የተለየ ስለማይሆን በግልጽ የመግደል ሐሣብ ነበረው የሚል ድምዳሜ ላይ ለመድረስ ይቻል ነበር።

ደምሰው ዘሪሁን የፍቅር ጓደኛ አድርጓት ከአምስት አመት በላይ አብሯት የቆየው ካሚላት መሀዲን በራሷ ምክንያት በፍቅር ጓደኛነት ለመቀጠል ባለመፈለግ ከእርሱ

ጋራ የነበራትን ግንኙነት በማቋረጥ ስትለየው የእኔ ካልሆነች ፊቷንና የመልኳን ውበት በማበላሸት ሌላ እድል እንዳይኖራት አድርጋለሁ ብሎ በፊቷ ክፍሎች ላይ ያነጣጠረ ድርጊት ሊፈጽምባት መቻሉን መረዳት ይቻላል። አስቀድሞ የመግደል ሐሣብ ቢኖረውና የእርሷን ህይወት ለማጥፋት ቁርጠኛ ውሣኔ ላይ የደርሰ ቢሆን ኖሮ የመግደያ መሣሪያ አዘጋጅቶ ወይም ሌላ የመግደያ ዘዴ ፈልጐ አመቺ ጊዜና ቦታ ጠብቆ የግድያ እርምጃ የሚወስድባት እንጅ የምትሰራበት ቦታ ውላ ከሁለት እህቶቿ ጋር ሆና ወደ መኖሪያ ቤቷ ለመሄድ ብዙ ሕዝብ በሚንቀሳቀስበት መንገድ ላይ ስትሄድ ጠብቆ በውጫዊ የሰውነት አካል ላይ ቢረጭ ወይም ቢጨመር በትክክል የሞት አደጋ ያስከትላል ሊባል ባልቻለ ጠንካራ የአሲድነት ባህሪ ያለው ፈሳሽ ኬሚካል በመጠቀም በፊቷ ላይ ጉዳት በማድረስ የተወሰነ ድርጊት በመፈጸም የሚያበቃ አይሆንም።

ይህ ጠንካራ የአሲድነት ባህሪ አለው የተባለው ኬሚካል በፊቷ ላይ ተደፍቶ ያደረሰባት ጉዳት ከባድ ሆኖ መገኘቱ ብቻውን የተፈፀመው የግድያ ሙከራ ወንጀል ነው ለማለት የሚያስችል አይደለም።

የቀረበው የሕክምና ምስክር ወረቀትም በፊቷ ላይ የደረሰው ጉዳት ከባድ እንደሆነ የሚያሳይ እንጅ ለሕሞቷ አስጊ ስለመሆኑ ወይም ለህልፈተ ህይወት የሚያበቃ ስለመሆኑ የሚያስረዳ አይደለም። በአጠቃላይ በዚህ ጉዳይ የታየው የወንጀሉ ሐሣብ ክፍልም ሆነ የድርጊቱ አፈፃፀም በአንደኛው ክስ ላይ በተጠቀሰው የወንጀል ሕግ አንቀጽ 539/1/ሀ/ ላይ የተመለከተው ከባድ የሰው ግድያ ወንጀል ባህሪ የሌለውና ሕጉ የሚጠይቃቸውን የወንጀሉን ሁኔታዎች የሚያቋቁም ባለመሆኑ የተፈፀመው ከባድ የግድያ ሙከራ ወንጀል ነው ሊባል አይችልም። ከዚህ ሌላ በወንጀል ሕግ አንቀጽ 540 ላይ የተመለከተው ተራ የሰው ግድያ ወንጀል ተሞክሯል የሚያሰኝ የፍሬ ነገርም ሆነ የሕግ ምክንያትም የለም።

ይህ ፍርድ ቤት ጉዳዩን ከቀረቡት ማስረጃዎች እና ከሕጉ ጋራ በማገናዘብ በጥልቀት ሲመረምረው የተፈፀመው የግድያ ሙከራ ወንጀል ነው በተባለው የሚያምንበት ሆኖ አልተገኘም። ይልቁንም አንደኛው ይግባኝ ባይ ደምሰው ዘሪሁን ሆነ ብሎ በግል ተበዳይዋ ካሚላት መሀዲ አካል ላይ ጉዳት ለማድረስ አስቦ ጠንካራ የአሲድነት ባህሪ ያለው ኬሚካል በፊቷ ላይ በመድፋት(በመርጨት) በሰውነቷ ላይ ለዘወትር ጠንቅ በሚያተርፍ ሁኔታ ጉዳት ማድረሱ እና በሚያስቅቅና ጉልህ ሆኖ በሚታይ ሁኔታ መልኳን ማበላሸቱ ታስቦ ስለሚፈፀም ከባድ የአካል ጉዳት ወንጀል በሚመለከት በሚደነግገው የወንጀል ሕግ አንቀጽ 555(ሀ) ና (ለ) ሥር የሚሸፈን ሆኖ ስለተገኘ በአንደኛው ክስ ላይ የተጠቀሰው የሕግ አንቀጽ በወ/መ/ሕ/ሥ/ሥ/ቁ. 113/2/ መሰረት ተቀይሮ በከባድ የአካል ጉዳት ማድረስ ወንጀል በወንጀል ሕግ አንቀጽ 555/ሀናለ/ መሰረት ጥፋተኛ ሊባል የሚገባው ነው።

አንደኛው ይግባኝ ባይ ደምሰው ዘሪሁን በሁለተኛው ክስ ላይ በተገለፀው በዙበይዳ መሀዲ እና ዘይነባ መሀዲ ላይ በተመሣሣይ መንገድ አድርሷል የተባለውን ከባድ የአካል ጉዳት በተመለከተም ክፍ ሲል ለመመልከት እንደተቻለው በማስረጃ

የተረጋገጠበት ሆኖ ስለተገኘ በዚህ ረገድ የተሰጠው የጥፋተኛነት ውሣኔ የሚለወጥበት ምክንያት የለም በእነዚህ ሁለት የግል ተበዳዩች ፊት ላይ ያደረሰው ጉዳት ቀላል የሚባል ባለመሆኑ በወንጀል ሕግ አንቀጽ 555/ሀ/ መሰረት ጥፋተኛ መባሉ ተቀባይነት የሚሰጠው ነው።

ደምሰው ዘሪሁን ፈጽሞ ለተገኘው ተደራራቢ ከባድ የአካል ጉዳት ማድረስ ወንጀል በሕጉ ሊወሰንበት የሚገባው ቅጣት መጠን ምን ያህል መሆን አለበት የሚለውን የቅጣት ጥያቄ በተመለከተም፦ ጥፋተኛ የተባለበት የወንጀል ሕግ አንቀጽ 555 "እንደነገሩ ሁኔታ እንደ ጉዳቱ ከባድነት ከአሥራ አምስት አመት የማይበልጥ ጽኑ እሥራት ወይም ከአንድ አመት የማያንስ ቀላል እሥራት ቅጣት ይደነግጋል።

በአንድ ወንጀል ፈፃሚ ጥፋተኛ ላይ ቅጣት ሊወሰን የሚገባው የወንጀል አድራጊውን ግላዊ የአደገኛነት መጠን ያለፈ የሕይወት ታሪኩን ወንጀል ለማድረግ ያነሳሱትን ምክንያቶችና የአሳቡን አላማ የግል ኑሮውን ሁኔታ የትምህርቱን ደረጃ እንዲሁም የወንጀሉን ከባድነትና የአፈፃፀሙን ሁኔታዎች በማመዛዘን" እንደሆነ የወንጀል ሕግ አንቀጽ 88/2/ ያስረዳል።

ከዚህ የቅጣት አወሳሰን መሪ ሐሣብ ጐን ለጐን ቅጣት በሚወሰንበት ጊዜ በሕጉ ጠቅላላ ክፍል የቅጣት ማቅለያ እና የቅጣት ማክበጃ ምክንያቶች ተብለው የተዘረዘሩት መታየት ይኖርባቸዋል።

በዚህ ጉዳይ ደምሰው ዘሪሁን ተደራራቢ ከባድ የአካል ጉዳት ማድረስ ወንጀል ፈጽሞ መገኘቱ በወንጀል ሕግ አንቀጽ 64 እና 184 መሰረት ቅጣቱን ያከብድበታል።

ደምሰው ዘሪሁን በፍቅር ጓደኛነት አብሯት የቆየው ካሚላት መሀዲ ከእርሱ ጋራ የነበራትን ግንኙነት በማቋረጥ አልፈልግህም ስትለየው በማስገደድ የፍቅር ጓደኛው አድርጐ ሊያቆያት እንደማይችል አውቆና አልፈልግህም የማለት መብት እንዳላት ተረድቶ በሰላም ከእርሷ ጋራ የነበረውን ግንኙነት በማቋረጥ የራሱን የግል ህይወት መኖር መቀጠል ሲገባው ከእኔ ጋራ ካልሆነች ጉዳት ሊደርስባት ይገባል በማለት ጉዳቱን ለማድረስ የሚያገለግል ጠንካራ የአሲድነት ባህሪ ያለው ኬሚካል ፊልጐ በማዘጋጀት ፊቷንና መልኳን በማበላሸት ላይ በማነጣጠር ጆክ በተባለ እቃ በእጁ ይዞ መጥቶ በቀጥታ ፊቷ ላይ ሙሉ በሙሉ በመድፋትና በመርጨት በፊቷ አካባቢ ላይ ለዘወትር ጠንቅ የሚያተርፍ ጉዳት ማድረሱና በሚያሰቅቅና ጉልህ ሆኖ በሚታይ ሁኔታ መልኳን ማበላሸቱ፣ ከእርሷም አልፎ አብረዋት የነበሩት ሁለት እህቶቿ የበደሉት ነገር ሣይኖር በእነርሱም ላይ በተመሣሣይ መንገድ ጥቃት በመሰንዘር በፊታቸው ላይ ጉዳት በማድረሱና የሰው አካል ሊያበላሽ የሚችል እንዲህ አይነት አደገኛ የሆነ ጠንካራ የአሲድነት ባህሪ ያለው ኬሚካል መርጦ ለመጠቀም መቻሉ እጅግ አደገኛ የወንጀለኛነት ባህሪ እንዳለው የሚያሣይ ነው። ጓደኛው በነበረች ሴት ልጅ ላይ አደገኛ የሆነ ኬሚካል በመጠቀም በፊቷ ላይ በመድፋት በፊቷ ክፍሎች ላይ ሙሉ በሙሉ ጉዳት ማድረሱና በሚያሰቅቅ ሁኔታ መልኳን ሊያበላሽ መቻሉ ጨካኝነቱን የሚያረጋግጥ ከመሆኑም በላይ ለእኔ ካልሆነች የወደፊት እድሏ ሊበላሽ

ይገባል ብሎ በክፋት በመነሣሣት ወንጀሉን ሊፈጽምባት መቻሉን የሚያመለክት ነው። እነዚህ ሁኔታዎች በወንጀል ሕግ አንቀጽ 84/1/ሀ/ መሰረት ቅጣቱን የሚያከብዱበት ናቸው። የቅጣት ማቅለያን በተመለከተም መዝገቡ ሲመረመር በሕጉ መሰረት በቅጣት ማቅለያነት የሚያገለግል ምክንያት አልተገኘም። ሲረጋገጥ የቻለው የቅጣት ማክበጃ ምክንያቶች መኖራቸው ብቻ ነው።

በአንደኛው ክስ ፊጽሞ ለተገኘው ከባድ የአካል ጉዳት ማድረስ ወንጀል በወንጀል ሕግ አንቀጽ 184/1/ለ/ መሰረት ቅጣቱ ተለይቶ ተወስኖ በሁለተኛው ክስ በተደራቢነት ጥፋተኛ ለተባለበት ከባድ የአካል ጉዳት ማድረስ ወንጀል ሊወሰንበት ከሚገባው ቅጣት ጋራ መደመር ይኖርበታል። በሁለቱ ተደራራቢ ወንጀሎች የሚወሰንበት ቅጣት ጥፋተኛ በተባለበት በሕጉ ልዩ ክፍል ጣሪያ ተብሎ በተደነገገው ቅጣት የሚገደብ አይደለም። በሕጉ ጠቅላላ ክፍል ተደንግጐ የሚገኘው ከፍተኛው ቅጣት ሃያ አምስት አመት ሊደርስ ይችላል።

በዚህም መሰረት በአንደኛው ክስ በካሚላት መሀዲ ላይ ፊድሞ ለተገኘው ከባድ የአካል ጉዳት ማድረስ ወንጀል ለብቻው ሊወሰንበት የሚገባው ቅጣት መጠን ሲታይ ከላይ እንደተገለፀው ቅጣቱን ከፍ የሚያደርጉበት ምክንያቶች በመኖራቸውና በግል ተበዳይዋ የፊት አካል ላይ የዘወትር ጠንቅ የሚያተርፍ ጉዳት ማድረሱና በሚያሰቅቅ ሁኔታ መልካኗን ማበላሸቱ የጥፋቱን ከባድነት የሚያጐላው በመሆኑ ለዚህ ወንጀል ሊወሰንበት የሚገባው ቅጣት በሕጉ ልዩ ክፍል የተደነገገው ጣሪያው የ15(አስራ አምስት) አመጽ ጽኑ እሥራት እንደሆነ ታምኖበታል።

በተመሣሣይ መንገድ በሁለተኛው ክስ በሁለቱ የግል ተበዳዮች ላይ ፊጽሞ ለተገኘው ከባድ የአካል ጉዳት ማድረስ ወንጀል በተናጥል ሊወሰንበት የሚገባው ቅጣት ሲታይ የጉዳቱ አስከፊነት በአንደኛው ክስ ከተረጋገጠው ጋራ ሲነፃፀር በመጠኑም ሆነ በጥልቀቱ ያነሰ በመሆኑና በከባድነቱ ከአንደኛው ጋራ የሚወዳደር ስላልሆነ ለዚህ ወንጀል የሚመጥን ሆኖ የተገኘው የአምስት አመት ጽኑ እሥራት ቅጣት ነው።

በወንጀል ሕግ አንቀጽ 184/1/ለ/ መሰረት የሁለቱ ተደራራቢ ወንጀሎች ቅጣት ሲደመር የ20/ሃያ/ አመት ጽኑ እሥራት ይሆናል። አንደኛ ይግባኝ ባይ የሆነው ደምሰው ዘሪሁን ለፈፀማቸው ለእነዚህ ሁለት ወንጀሎች ሊወሰንበት የሚገባው ቅጣት ይኼው የሃያ አመት ጽኑ እሥራት ነው።

ከፍተኛው ፍ/ቤት ደምሰው ዘሪሁን በአንደኛው ክስ የፈፀመው ከባድ የግድያ ሙከራ ወንጀል ነው በሚል ምክንያት የሞት ቅጣት የወሰነበት ተቀባይነት የሚሰጠው አይደለም።

በመሆኑም ከዚህ በላይ በተዘረዘሩት የፍሬ ነገር፣የማስረጃ እና የሕግ ምክንያቶች የፌደራል ከፍተኛ ፍ/ቤት በወ/መ/ቁ. 54027 ጥር 20 ቀን 2000 ዓ.ም እና ጥር 21 ቀን 2000 ዓ.ም የአሁኑን ይግባኝ ደምሰው ዘሪሁንን በሚመለከት ከአንደኛው ክስ ጋራ በተያየዘ የሰጠው የጥፋተኝነት ፍርድም ሆነ የቅጣት ውሣኔ እንዲሁም

ሁለተኛውን ክስ በተመለከተ ቅጣቱን የሚመለከተው ውሣኔ ክፍል በወ/መ/ሕ/ሥ/ሥ/ቁ.195/2/ለ/2/ መሰረት ተሻሽሎ በአንደኛው ክስ የተጠቀሰበት የሕግ አንቀጽ በወ/መ/ሕ/ሥ/ሥ/ቁ. 113/2/ መሰረት ተቀይሮ ሊረጋገጥ በቻለው ከባድ የአካል ጉዳት ማድረስ ወንጀል በወንጀል ሕግ አንቀጽ 555/ሀ/እና/ለ/ መሰረት እና በሁለተኛውም ክስ በተመሣሣይ ሁኔታ ጥፋተኛ መሆኑ ተረጋግጦ በዚህ ጉዳይ እጁ ከተያዘበት ጊዜ ጀምሮ የሚታሰብለት ሆኖ ለሁለቱም ተደራራቢ ወንጀሎች በጠቅላላው በ20 (ሃያ) አመት ጽኑ እሥራት እንዲቀጣ ተወስኗል።

4. 2ኛው ይግባኝ ባይ ያእቆብ ኃይሌን በተመለከተ፡- በአቃቤ ሕግ በኩል የቀረቡት ማስረጃዎች ያእቆብ ኃይሌ ወንጀሉን በመፈፀም ተካፋይ ስለመሆኑ የሚያረጋግጡ መሆን አለመሆናቸውን በሚመለከት፡-

በቀረበው የሕክምና ማስረጃ ጠንካራ የአሲድነት ባህሪ እንዳለው የተገለፀውን ኬሚካል በቀጥታ በግል ተበዳዮች ፊት ላይ የደፋው ወይም የረጨው 2ኛው ይግባኝ ባይ ያእቆብ ኃይሌ ሣይሆን አንደኛው ይግባኝ ባይ መሆኑ ተረጋግጧል።

አቃቤ ሕግ በእነዚህ ወንጀሎች ያእቆብ ኃይሌ ተካፋይ በመሆን ፈጽሟል በማለት ከአንደኛው ይግባኝ ባይ ጋራ በማጣመር ሊከሰው የቻለው በቀጥታ አሲዱን በግል ተበዳዮች ፊት ላይ በመድፋቱ ተግባር ተሣትፏል በሚል ምክንያት ሣይሆን አስቀድሞ ከአንደኛው ይግባኝ ባይ ጋራ ወንጀሉ እንዴት እንደሚፈፀም በመነጋገር ሲያጠናና ሲያቅድ ቆይቶ ወንጀሉ ወደሚፈፀምበት ቦታ አብሮት በመሄድ በወንጀሉ አፈፃፀም ላይ በተሰጠው የስራ ድርሻ መሰረት ወንጀሉ በሚፈጸምበት ጊዜ የግል ተበዳይዋ ካሚላት መህዲ ከሁለት እህቶቿ ጋራ ሆና ወደ መኖሪያ ቤታቸው በመሄድ ላይ እያሉ በመጀመሪያ የሰከረ ሰው መስሎ ወደ ካሚላት በመጠጋት እንድትደነጋገር አድርጐ ሐሳቧን በመስረቅ በአጠቃላይ ድርጊቱ የሚያመጣውን ውጤት በሙሉ ሐሣቡ ተቀብሏል በሚሉ ምክንያቶች መሆኑን የክሱ ቻርጅ ያስረዳል።

አቃቤ ሕግ ያእቆብ ኃይሌ በዚህ መንገድ የወንጀሎቹ ተካፋይ ስለመሆኑ ያረጋግጣሉ በማለት ያቀረባቸው ሁለት አይነት ማስረጃዎች ናቸው። አንደኛው በወ/መ/ሕ/ሥ/ሥ/ቁ. 27/2/ መሰረት አምኖ ለፖሊስ ቃል ሰጥቷል ተብሎ በጽሑፍ ማስረጃነት የቀረበው ሲሆን ሁለተኛው የሰው ማስረጃ ሆኖ በክሱ ላይ የተነገረበትን ነገር ሲፈጽም አይተዋል የተባሉ 3 የአይን ምስክሮች ናቸው።

የመጀመሪያውን በወ/መ/ሕ/ሥ/ሥ/ቁ. 27/2/ መሰረት አምኖ ለፖሊስ የሰጠው ቃል ነው ተብሎ በጽሑፍ ማስረጃነት የቀረበውን በተመለከተ ከመዝገቡ ጋራ ተያይዞ የሚገኘው ሲታይ ጽሑፉ ሁለት ቦታ የተከፈለ ነው። አንደኛው በ06/06/99 ዓ.ም ከምሽቱ 9 ሰአት ላይ አዲስ ከተማ ክፍለ ከተማ ፖሊስ መምሪያ ቀርቦ በወ/መ/ሕ/ሥ/ሥ/ቁ. 27/2/ መሰረት ሰጥቷል የተባለ ሦስት ገጽ ነው። ይህ ጽሑፍ ሲመረመር በካሚላት ላይ ወደፊት ይፈፀማል ስለተባለ ድርጊት ተነጋግረው ገንዘብ ተሰጥቷቸው ከተከፋፈሉ በኋላ ያእቆብ ኃይሌ በሌለበት ደምሰው ሌሎች ልጆች ይዞ በመሄድ በካሚላት ፊት ላይ አሲድ እንዳስደፋባት ከሌላ ሰው መስማቱን፣ ድርጊቱ

እርሱን እንደማይመለከተው ተናግሯል ተብሎ ከመባሉ በቀር በክሱ ላይ የተነገረበትን ስለመፈፀሙ አምኗል ተብሎ የተፃፈ ነገር የለም። በዚህ ጽሑፍ ላይ ወንጀሉን ፈጽሜአለሁ ብሎ አላመነም።

ሁለተኛው ደግሞ የተከሣሽ ተጨማሪ ቃል በሚል የተፃፈ 2 ገጽ ጽሑፍ ነው። በጽሑፍ ላይ ተጨማሪ ቃል የሚለውን የሰጠበት ቀን ባዶ ቦታ ተትቶ ወሩና አመተምህረቱ ብቻ --/6/99 በሚል ተጽፎ የሚገኝ ሲሆን ቃሉን የሰጠበት ሰአትም ከሌሉቱ 8 ሰአት በሚል የተመዘገበ ነው።

ከዚህ የተከሣሽ ተጨማሪ ቃል ከሚለው ከመጀመሪያው በጽሑፍ ከሰጠው ቃል የቀጠለ መሆኑን መረዳት ቢቻልም በተጨማሪ ሰጠ የተባለው ቃል በመጀመሪያ ሰጥቷል ከተባለው ቃል ጋራ ሙሉ በሙሉ የሚቃረን ነው። በመጀመሪያ ሰጠ በተባለው ቃል ላይ ድርጊቱ እኔን አይመለከተኝም። ወንጀሉ ወደ ተፈፀመበት ቦታ አልሄድኩም ወንጀሉ ስለመፈፀሙ ከሌላ ሰው ሰማሁ ብሏል ተብሎ ተጽፎ እያለ ተጨማሪ ቃል በተባለው ላይ በአቃቤ ሕግ የክስ ቻርጅ ላይ በተገለፀው መልኩ ድርጊቱን ፈጽሜአለሁ ብሎ ተናግሯል በሚል በተቃራኒው ተጽፏል። እነዚህ ሁለት ጽሑፎች የሚጣጣሙ አይደሉም። ሁለተኛው ተጨማሪ ቃል የተባለው የመጀመሪያውን የሚያፈርስ ነው። ይህ ደግሞ በትክክልና በሕጉ አግባብ የተሰጠ ቃል ስለመሆኑ የሚያጠራጥር ነው። ያእቆብ ኃይሌ በመጀመሪያ ተጠይቆ በሰጠው ቃል ላይ ወንጀሉን እንዳልፈፀመ ከገለፀ በኋላ ተጨማሪ ቃል በተባለው ላይ ወንጀሉን ፈጽሜለአሁ የሚልበት ምክንያት የለም። ፖሊስ በሕጉ አግባብ አንዴ የተከሣሽነት ቃሉን ከተቀበለው በኋላ በዚሁ ጉዳይ እንደገና ሌላ ቃል እንዲሰጥ ሊጠይቀው አይገባም። ይህንን የአቃቤ ሕግ የጽሑፍ ማስረጃ በሕጉ አግባብ የተሰጠ የእምነት ቃል ነው ብሎ መቀበል አይቻልም።

ከፍተኛው ፍርድ ቤትም በፍርዱ ላይ ያእቆብ ኃይሌ ባቀረባቸው መከላከያ ምስክሮች በፖሊስ ጣቢያ ታስሮ በነበረበት ጊዜ መደብደቡን ከወንበር ጋራ መታሰሩን ሰውነቱ በድብደባ መቁሰሉንና ማበጡን በማስመስከር ለፖሊስ አምኖ ቃሉን ሰጥቷል ተብሎ በጽሑፍ ማስረጃነት የቀረበበትን በነፃ ፈቃዱና ፍላጐቱ ያልሰጠ ስለመሆኑ ሊያስረዳ መቻሉን በመግለጽ ማስረጃነቱን ተቀባይነት እንዳልሰጠው መረዳት ተችሏል። በወንጀሉ ተካፋይ ስለመሆኑ ተረጋግጧል ያለውም በምስክሮች እንጅ በጽሑፍ ማስረጃ አይደለም። የጽሑፍ ማስረጃው ውድቅ መሆኑ ከተረጋገጠ የሚቀረው ምስክሮቹ ሰጥተዋል የተባው የምስክርነት ቃል ነው።

ወንጀሎቹ በተፈፀሙበት ጊዜና ቦታ ያእቆብ ኃይሌ የድርጊቱ ተካፋይ ስለመሆኑ በአይናቸው አይተዋል የተባሉት ሦስቱ የግል ተበዳዮች የሆኑት የአቃቤ ሕግ ምስክሮች ናቸው።

እነዚህ ምስክሮች ያእቆብ ኃይሌን ከወንጀሉ በፊት በመልክም ሆነ በቁመናው አይተውት እንደማያውቁ ያረጋገጡ ቢሆንም ወንጀሉ በተፈፀመበት ጊዜና ቦታ በእነርሱ ፊት ላይ ጠንካራ የአሲድነት ባህሪ ያለው ኬሚካል ከመረጨቱ ጥቂት

ደቂቃዎች በፊት በሚሄዱበት መንገድ ላይ የሰከረ ሰው መስሎ ወደ እነርሱ በመጠጋት የድንጋጤና የመደነባበር ሁኔታ ፈጥሮባቸው የሄደው ተከሶ የቀረበው ያእቆብ ኃይሌ ስለመሆኑ በትክክልና በደንብ በመልክና በአካል ቁመና በአይናችን በማየት ለመለየት ችለናል በማለት መስክረዋል። እርሱ ስለመሆኑ እርግጠኛ ነን የሚሉት ያእቆብ ኃይሌ የሰከረ ሰው መስሎ አስደንግጧቸው የነበረበትን ቦታ ለቆ ወደ ሌላ አቅጣጫ ከሄደ በኋላ ወዲያውኑ አንድ ነጭ መኪና በፍጥነት እየበረረ በእነርሱ አጠገብ ማለፉንና በዚህም መደናገጣቸውን ገልፀዋል። ከእነዚህ ምስክሮች መካከል ሁለቱ አንደኛው ይግባኝ ባይ በአካባቢው ከተደበቁበት ጨለማ ቦታ ወጥቶ ወደ እኛ በመምጣት አሲድ በፊታችን ላይ ደፉብን የሚሉትም በሶስተኛ ደረጃ ከመኪናው ማለፍ በኋላ የተፈፀመ ነው። ምስክሮቹ በመጨረሻ በተፈፀመው የአሲድ መደፋት ጊዜ ያእቆብ ኃይሌ በቦታው ነበረ አይሉም።

የመጀመሪያው የያእቆብ ኃይሌ እንቅስቃሴ በመጨረሻ ከተፈፀመው የአሲድ መደፋት ጉዳይ ጋራ ግንኙነት ያለው መሆን አለመሆኑን በተመለከተም ምስክሮቹ ግንኙነት አለው ብለው አላስረዱም። እንዲያውም አንዷ ምስክር እዚህ ፍርድ ቤት ቀርባ ይህንኑ በሚመለከት ስትጠየቅ ግንኙነት ያላቸው ስለመሆኑ አላውቅም የሚል መልስ ሰጥታለች። ይህንም ብቻ ሣይሆን ምስክሮቿ በያእቆብ ኃይሌ እና አሲዱን በደፋባቸው ሰው መካከል እንዲህ አይነት ግንኙነት አለ ማለት ቀርቶ ሁለቱ ይተዋወቃሉ እንኳን አይሉም።

አቃቤ ሕግ በክሱ ላይ የአሁኑ ሁለቱ ይግባኝ ባዮች አስቀድመው የወንጀሉን አፈፃፀም በሚመለከት ሲያጠኑና ሲያቅዱ እንደቆዩ አድርጎ ቢገልጽም ምስክሮች እናውቃለን የሚሉት ነገር የለም። ይህንን ያስረዳ አንድም የአቃቤ ሕግ ምስክር የለም።

ያእቆብ ኃይሌ ወንጀሉ ከመፈፀሙ በፊት በአካባቢው ከደምሰው ዘሪሁን ጋራ ታይቷል ተብሎ ያልተመሰከረ ከመሆኑም በላይ ወንጀሉ ከተፈፀመ በኋላም ቢሆን እዚያው አካባቢ ተገናኝተው አብረው ሲሄዱ አይቻለሁ ብሎ ያስረዳ ምስክር የለም።

ያእቆብ ኃይሌ ወንጀሉ በተፈፀመበት ቦታ ሲያደርግ የነበረው እንቅስቃሴ በኋላ ከተፈፀመው የአሲድ መድፋት ድርጊት ጋራ ግንኙነት አለው ሊባል ይችል የነበረው አስቀድሞ አሲዱን ከደፋው ሰው ጋራ ሆኖ ሲመካከር ቢታይ፣አደረገ ከተባለው እንቅስቃሴ በኋላ አሲዱን የደፋው ሰው ወደነበረበት ቦታ ሂዶ ቢቀላቀለው ወንጀሉን ከፈፀመ በኋላም አብሮት በመሮጥ ተያይዘው የሸሹ ቢሆን ነበር። የአቃቤ ሕግ ምስክሮች ይህንን ያስረዱ ሆኖ አልተገኘም።

ያእቆብ ኃይሌ ወንጀሉ ከመፈፀሙ በፊት የሰከረ ሰው መስሎ ወደ ግል ተበዳዮች አቅጣጫ በመሄድ አስደንግጧቸዋል ተብሎ የተመሰከረው ብቻውን ወንጀሉን ስለመፈፀሙ የሚያረጋግጥ ሆኖ አልተገኘም። በኋላ ከተፈፀመው ወንጀል ጋራ ግንኙነት አለው ወንጀሉን ለፈፀመው ሰው ሁኔታዎችን ለማመቻቸት ነው፣ የእንደኛዋን የግል ተበዳይ ሐሣብ በመስረቅ ወንጀሉ እንዲፈፀምባት ለማድረግ ነው የሚያሰኝ በቂና አሣማኝ ምክንያት የለም።

ከፍተኛው ፍርድ ቤት የግል ተበዳዮች የሆኑት የአቃቤ ሕግ ምስክሮች የሰጡት የምስክርነት ቃል ያእቆብ ኃይሌ የወንጀሉ ተካፋይ ስለመሆኑ ያረጋግጣል ብሎ በሁለት ወንጀሎች ጥፋተኛ በማድረግ ቅጣት የወሰነበት ያለአግባብ ነው። በምስክሮቹ ተሰጠ የተባለው የምስክርነት ቃል ወንጀሉን ፈጽሟል ለማለት በቂ ማስረጃ ስላልሆነ ጥፋተኛ የሚባልበት ምክንያት የለም።

ሲጠቃለል ሦስቱ የአቃቤ ሕግ ምስክሮች 2ኛ ይግባኝ ባይ የሆነው ያእቆብ ኃይሌን በተመለከተ የሰጡት የምስክርነት ቃል የተከሰሰባቸውን ወንጀሎች ስለመፈፀሙ የሚያረጋግጥ ሆኖ ስላልተገኘ የፌደራል ከፍተኛ ፍ/ቤት በወ/መ/ቁ. 54027 ጥር 20 ቀን 2000 ዓ.ም እና ጥር 21 ቀን 2000 ዓ.ም ያእቆብ ኃይሌን በሚመለከት የሰጠው የጥፋተኝነት ፍርድም ሆነ የቅጣት ውሣኔ በወ/መ/ሕ/ሥ/ሥ/ቁ. 195/2/ለ/1/ መሰረት ተሰርዞ ከሁለቱም ክሶች ሙሉ በሙሉ በነፃ እንዲሰናበት ተወስኗል።

የአዲስ አበባ ማረሚያ ቤት 2ኛው ይግባኝ ባይ ያእቆብ ኃይሌ ኪዳኔ በነፃ የተሰናበተ መሆኑን አውቆ በዛሬው እለት ከእሥር በመፍታት እንዲለቀው ታዟል። ይፃፍ።

ከዚህ ሌላ የአዲስ አበባ ማረሚያ ቤት 1ኛው ይግባኝ ባይ ደምሰው ዘሪሁንን በተመለከተም በዚህ መዘገብ በተሰጠው ፍርድ መሰረት የተወሰነበትን የ20/ሃያ/ አመት ጽኑ እሥራት ቅጣት ተቆጣጥሮ እንዲያስፈጽም ታዟል። ይፃፍ።

የፌደራል ከፍተኛ ፍ/ቤት አንደኛውን ይግባኝ ባይ በሚመለከት የሰጠው የጥፋተኝነት ፍርድም ሆነ የሞት ቅጣት ውሣኔ ተሻሽሎ መወሰኑን፣ 2ኛው ይግባኝ ባይም በነፃ መሰናበቱን እንዲያውቀው የዚህ ፍርድ ትክክለኛ ግልባጭ ይተላለፍለት። መዝገቡ ተዘግቷል ወደ መዝገብ ቤት ይመለስ።

<u>ተ ጨ ማ ሪ ት እ ዛ ዝ</u>

1ኛ. በዚህ መዝገብ የተሰጠው ፍርድ ግልባጭ ከወ/ይ/መ/ቁ፡ 35658 ጋራ ይያያዝ።

2ኛ. የወ/መ/ቁ. 54027 ለፌደራል ከፍተኛ ፍ/ቤት ይመለስ።

Federal Supreme Court of Ethiopia
Judges: Dagne Melaku
Amare Amogne
Kedir Ali

Appealants: 1. Demissew Zerihun
2. Yakob Haile Kidane
Respondent: The Federal Public Prosecutor
Criminal Appeal File No. 35768
November 7, 2008

Criminal law- participation in the commission of crime, grave willful injury, an attempt to commit aggravated homicide, and sentencing: - Arts. 27, 32(1), 64, 88(2), 184, 539, and 555 Criminal Code. Law of evidence- relevancy and weight of evidence. Criminal Procedure- conviction of an appellant for an offence not charged: Art.113 (2) Criminal Procedure Code.

Held: Judgment of the Federal High Court as relating to the first appellant modified; judgment of the Federal High Court relating to the second appellant reversed.

Summary of the Judgment

The Public Prosecutor charged both appellants jointly for two offences, namely an attempt to commit aggravated homicide (arts. 32(1) (a), 27(1), and 539(1) (a) of the Cr. Code) and grave willful bodily injury (arts.32 (1) (a) and 555(a) of the Cr. Code). Particulars of the first charge indicate that Demissew Zerihun, who had been threatening and intimidating W/t Kamilat Mehedi, for not being willing to continue to be his lover, conspired with Yakob Haile to murder her. According to their agreement, the latter was to approach the victim, at the agreed time, by pretending to have been intoxicated with a view to divert her attention at which time the former was to attack her with sulfuric acid. They executed their plan at 10 p.m. on the 28th of December 1998 E.C. when the victim was going home with Zubeyda Mehedi and Zeyneba Mehedi (her sisters). As stated on the charge, Yakob approached them and acted as agreed when Demissew came from some where threw the sulfuric acid at the victim's face causing serious injury on her head, left ear, her nose, and chest endangering her life. Particulars of the second charge indicate that the appellants, in violation of Arts. 32(1) (a) and 555(a) of the Criminal Code, caused serious bodily injuries on Zubeda Mehedi and Zeyneba Mehedi by the acts referred and at the time and place indicated in the first charge.

The trial court convicted the accused persons under both charges and sentenced the first appellant with death penalty and the second with 20 years rigorous imprisonment. Both appealed to the Federal Supreme Court (here after to be referred as the court) seeking for reversal of conviction and sentence passed by the trial court. The court

ordered their applications, which were filed separately, to be joined for the issues raised in both appeals are related and are from the same judgment.

During the appeal hearing Demissew stated that the lower court wrongly convicted and sentenced him with death penalty for an offence he has not committed. He was suspected for having committed the offence merely because of the misunderstanding he has had with the victim's family. Also, he brought to the attention of the court that his defense of alibi was not considered by the lower court. Furthermore, he stated that Kamilat did not testify against him and that Zubeda and Zeyneba, after stating that they do not know who did the criminal act, changed their mind and testified against him before court of law; that the trial court did not allow the statement they made about the matter on a Tele Vision to be introduced as his evidence; and that he was arrested when he went to Hayat Hospital where Kamilat was admitted.

The second appellant raised the following points to show how erroneous the judgment of the lower court is. The confession he gave to the police not being given voluntarily could not be used in evidence; the testimony made by Kamilat's sisters that he was the one who acted as being intoxicated and approached them to divert their attention is not trustworthy as they have never seen him before; even if he were the one who acted as such, the prosecution did not show the link between his act and the acid attack, which is allegedly done by the first appellant some time after he went away from them and they continued their way to their home. Yakob concluded his argument stating that the trial court convicted him in the absence of adequate evidence showing his involvement in the commission of the alleged offences.

The prosecution on his part raised the following points. Though Kamilat could not identify who committed the act, her sisters, who were at the scene of the crime and who are themselves victims of the crime testified that they recognize Demissew and Yakob being the doers of the crime; witnesses testified that Demissew had been threatening and intimidating Kamilat; Yakob's act is linked to Demissew's for the former acted as he did to make sure that the act of the latter did not miss its target. The prosecutor concluded his argument stating that both the findings and sentences as regards both appellants are correct and no reason for interference on the judgment of the lower court.

The court identified the following issues as calling its attention:

1. Whether the prosecution's evidence established the fact that Demissew did the acid attack on the victims in both charges?
2. Whether the evidence produced by Demissew was capable of casting a doubt on the prosecutor's case?
3. Were Demissew the one who did the wrongful act on the victims,
   3.1. Whether his act on Kamilat would be an attempt for aggravated homicide? If not so, under which law does his act fall?
   3.2. Whether his act on Zubeda and Zeyneba would be an act of grave willful bodily injury?

3.3. If found guilty under both charges, what should be the appropriate punishment?

4. Whether the prosecution's evidence show that Yakob Haile was involved in the commission of the crimes and whether there is a law under which he is to be convicted for the wrongful act committed against the victims?

The court entertained the first issue as follows. The prosecutor produced both documentary and oral evidence to prove that Demisew committed the alleged act. Whereas several witnesses were produced by the prosecutor, only the victims are eye witnesses, whose testimony the court considered. As can be understood from Kamilat's testimony made during the preliminary inquiry, she could not identify who committed the act and hence did not testify against Demissew. The other two victims, Zubeyda and Zeyneba, after taking oaths, testified that Demissew, whom they knew before, splashed the chemical over their face. One of them testified that she followed him raising a cry for help. Both testified uniformly as to what he wore at the time of the commission of the crime. The medical certificates issued by Yekatit 12 Hospital indicate that the three victims were seriously damaged at different parts of their body and Kamilat's face is totally disfigured by a chemical having strong acidic nature. Based on these items of evidence of the prosecutor the court is convinced that the eye witnesses and the medical evidence uncontrovertibly established that it is Demissew who did the acid attack.

Next, the court considered the second issue: whether Demissew had rebutted the case of the prosecutor established as above. In support of his defense of alibi, Demissew called his sister, Yelushal Zerihun who testified that he and she, with other persons, were at Madingo's Night Club at the time when the crime was allegedly committed. She testified that she got Demissew's message that he would like to spend the night with her and others at the aforementioned Club at 7 p.m. on the day of the commission of the crime, met him an hour after she got the message went to the Night Club and stayed there till 1 a.m. in the night. That the appellant called his sister as his witness but not others who are said to be at the Night Club; and his sister's statement that she received the message via another person, where he could directly communicate her and that they met within an hour after she got his message made the court to doubt the credibility of her testimony. This is more so for the court, where seen in light of the consistent testimony given by the two eye witnesses of the prosecutor stating that they recognized the doer of the criminal act being Demissew.

The court considered two facts that seemingly militate against the prosecutor's case if they could cast doubt on the prosecutor's case. The first one is where the three victims were walking together at the time of the commission of the crime how two of them can saw the doer of the act but not the other one. For the court, in the light of the fact that the injury on Kamilat was more severe than the injuries on the two, it is possible for the former not to be able to see and recognize the doer while the other two who suffered from a lighter injury be able to focus on and identify the doer. There would have been a contradiction had Kamilat testified that some one else did the act where her sisters

testify against Demissew. Hence, the court could not found this fact to be helpful to the appellant. The second fact that appears to support the appellant but rejected by the court is that he went to the Hospital where Kamilat was admitted to visit her. As alleged by the appellant, he went there when he heard about the accident that occurred to her for he was not involved in the commission of the crime. Though it is logical to think that he would not have gone there had he been involved in the commission of the crime, the court does not accept this fact, in and by itself, to be adequate to cast a doubt on the prosecution's case proved by strong eye witness testimony.

The court treated the third issue, which is whether Demissew's wrongful act can be treated as an attempt to kill Kamilat, as follows. As can be understood from its judgment, the lower court convicted the appellant for attempted homicide for he had been threatening her life at different times before the commission of the crime, which was considered by the lower court to indicate the intention of the doer; and that experts testified the chemical thrown at her face has the ability to kill a human person, which made the court to consider the same as a means being used by the actor to kill the victim.

Though the prosecutor produced a written document prepared by the Ethiopian Drug Administration and Control Authority which indicates that the chemical splashed over the face of Kamilat is capable of causing death, the chemical about the property of which the Authority wrote is not a sample taken directly from what was thrown at Kamilat's face. Rather it was taken from a chemical in a container which was found, as testified by one of the prosecutor's witnesses, near the place where the crime was committed on the morrow of the commission of the crime. That the chemical found in the said container is a sulfuric acid has been proved. What is questionable is whether the chemical examined by the Authority and found to be sulfuric acid is the same as what Demissew used to attack Kamilat; how can one know whether the container and the chemical in it from which the sample was taken was left behind by Demissew? Prosecutor's evidence shows neither Demissew was in possession of the container nor he left the container there. The Prosecutor's witness who is said to have got the container with the chemical in it does not know whose container it is. Nor does he know who left the container there. Further more,. the two eye witnesses of the prosecutor testified that Demissew carried the chemical that he splashed over them by a container different from that said to have been found near the place of the commission of the crime. In the light of these facts, to say that the chemical examined by the Authority is the same as that Demissew used to commit the crime, the prosecutor should establish the fact that the chemical used to attack the victim was taken from the container said to have been found by the prosecutor's witness. That a container which contained a sulfuric acid was found near the place where the crime was committed in and by itself does not conclusively indicate that the chemical Demissew threw at Kamilat's face was taken from that container. In so far as the fact that the chemical examined by the Ethiopian Drug Administration and Control Authority is the same as that Demissew used to attack the victim is not proved, the document issued by the Authority attesting that the chemical examined is sulfuric acid

and that it has the ability to cause death could not be used as evidence against Demissew. The relevant evidence is the certificate issued from Yekatit 12 Hospital which indicates that the damage on Kamilat's face is caused by a chemical having strong acidic property. The document, however, does not indicate that the said chemical is capable of causing death where poured on the outside part of the body. Hence, the appellate court found the lower court's finding that the chemical used to attack Kamilat has the ability to cause death, for not being supported by relevant evidence, as erroneous.

The court considered the issue of intention as follows. The lower court concluded that Demissew had an intention to kill Kamilat from the fact that he had been threatening her life repeatedly as testified by some four witnesses of the prosecutor. The first two witnesses, Kamilat's sisters testified before the trial court that Demissew had been threatening Kamilat repeatedly for refusing to continue to be his lover. The court observed that the reality as regards the relation between Kamilat and Demissew is quite different from what is testified by Kamilat's sisters. Kamilat herself testified during the preliminary inquiry that they had been lovers for some five years which, she stated, was terminated one year before. Yenemebrat Zerihun, Demissew's witness, testified that Demissew and Kamilat rented her house and were living as husband and wife from February 2004 to 2006; that she, upon their request, handed over Birr forty thousand (40,000) to Kamilat's family introducing herself as Demissew's mother; that the two were living peacefully; and that Kamilat's brother knew their relation. Tezerash Wube, Demissew's witness, testified that she knew the two as lovers and that Kamilat had been providing care to Demissew when he was admitted to a hospital. Further more several pictures produced by Demissew clearly establish that the two had been living as lovers peacefully. In the face of this ample of evidence showing the peaceful relation between Demissew and Kamilat, the court could not find the testimony made by Kamilat's sisters being trustworthy.

Another reason for the court not to consider their testimony convincing is the way they acquired the knowledge about the fact they testified. One of the two stated that she heard Demissew stating intimidatory and threatening words to Kamilat during their telephone conversation. She heard these words for Kamilat used to put her telephone into a loud speaker mode so that she could listen what was being said to Kamilat. The court did not accept this testimony for the witness, apart from having heard the words, could not certainly know that Demissew was speaking and stating these words to Kamilat. The second one did not testify that she directly heard Demissew while threatening Kamilat's life. Rather she stated Kamilat informed her that Demissew was threatening her which the court rejected being a hearsay.

Bezawit Wasihun, a friend of Kamilat and witness of the prosecutor, after stating that she does not know Demissew nor does she know that Demissew and Kamilat had been lovers, told to the lower court that she received a call from some one sometime in 1998 E.C., who identified himself by the name Demissew and told her that he would kill Kamilat. The court did not accept her testimony noting that as she had never seen him

physically or heard his voice before he called her, she could not tell that the one who called and spoke to her was Demissew Zerihun. Also, she testified before the trial court that she met Demissew at Hilton hotel upon his request at which time he told her that he would kill Kamilat. The court found it difficult to believe her testimony for it doubts the fact that she met him at Hilton hotel in the face of the facts that he is a stranger to her; that it is not likely for her to be willing to meet one who called and told her that he would kill Kamilat; and she does not know his relation with Kamilat. She stated before the trial court that she did not communicate to Kamilat what he, through a telephone and in person, told her, which makes the court's doubt on her testimony stronger. Moreover, it is at the time when Kamilat and Demissew were living peacefully as lovers that the witness said to have received the call from Demissew which shows the inaccuracy of her testimony. For these reasons, the court concluded that Bezawit's testimony did not show that Demissew had the intention to kill Kamilat.

The court analyzed the testimony given by Kamilat at the preliminary inquiry stage of the case. Her testimony shows that she had been with him not voluntarily. Rather, it was because he forced her and threatened her to take measures on her family if she refused. She stated that he called a week before the incident and told her that he would go to prison because of her. To the court, Her testimony does not clearly show that he threatened her life. It shows only that he was thinking of committing a crime, which need not necessarily be homicide. Had he intended to kill her, he would have added the chemical in a drink or food with a view to cause her consume it instead of throwing the chemical on the outside part of her body (as there is no evidence that shows doing so has the ability to result in her death) or he would have used another means of killing. His threatening words and what he actually did--throwing acidic chemical at her face -- would only lead one to conclude that what he had in mind while threatening Kamilat was to cause a bodily injury with a view to disfigure and damage her beauty. That the chemical caused a grave injury on her face alone does not suffice to say that Demissew did the act with an intention to kill. The medical evidence apart from indicating that the injury on her face is serious does not show that there is a risk of death.

Finally, the court concluded for neither the state of mind nor the circumstances of the commission of the act does satisfy the requirements under Article 539(1) (a) of the Criminal Code what Demissew did cannot be treated as an attempt to commit aggravated homicide. Nor is there a factual or legal element to conclude that ordinary homicide envisaged under Article 540 of the Criminal Code is attempted. The court found that Demissew's act falls under Article 555(a) and (b) of the Criminal Code, the provision that punishes causing a grave bodily injury, and convicted him under the same by virtue of Article 113 (2) of the Criminal Procedure Code.

As regards the second charge -- causing grave willful injury on Kamilat's sisters--, the court confirmed the finding by the lower court as it is persuaded by the prosecution's evidence.

The court assessed the sentence against the appellant as follows. Article 555 of the Criminal Code, the legal provision under which the appellant is found guilty, provides for punishment ranging from one year simple imprisonment to fifteen years rigorous imprisonment based on the circumstances of the case and gravity of the injury. To determine the appropriate sentence among the several options available, the court began from the principle under Article 88(2) of the Criminal Code which states the penalty to be assessed according to the degree of individual guilt taking into account the dangerous disposition of the criminal, his antecedents, motive and purpose, his personal circumstances and standard of education, as well as the gravity of the crime and the circumstances of its commission. The court noted that aggravating and mitigating circumstances should be taken into consideration as well.

The concurrent nature of the crime for which the appellant is found guilty is an aggravating factor as provided under articles 64 and 184 of the Criminal Code. The court derived the dangerous disposition of the criminal from his selection of such a dangerous chemical having strong acidic property which resulted in a permanent disfigurement on Kamilat's face. His attack on her innocent sisters without having any reason to do so is another aggravating factor. His calculated act to disfigure Kamilat, who had been his lover, and spoil her attractiveness is considered by the court to show his cruelty. The court found the aforementioned being aggravating circumstances under article 84(1) (a) of the Criminal Code. The court could not see any mitigating circumstance.

Because the appellant is found guilty for two crimes under two charges the court, based on Article 184(1) (b) of the Criminal Code, decided to first determine the sentences appropriate to each crimes and then sum up. The court indicated that the ceiling of the punishment to be imposed for the two crimes is 25 years – the general maximum provided in the general part of the Criminal Code not confined by the maximum punishment under article 555 of the Code. Accordingly, the court by considering the above mentioned aggravating factors sentenced the appellant with 15 years -- the maximum punishment under article 555 of the Criminal Code -- for the crime he committed against Kamilat. As regards the punishment for the crime under the second charge, the court observed that the injury caused on the victims is not as severe as that on Kamilat and decided five years rigorous imprisonment as appropriate for the crime committed. Thereafter, the court added up the two sentences and decided Demissew to be punished with twenty years of rigorous imprisonment. By doing so, the court reversed, as per article 195(2) (b) (ii) of the Criminal Procedure Code, the finding of the lower court as relates to the first charge and reduced the sentence passed on Demissew.

The fourth issue relates to the second appellant: whether the prosecutor's evidence proved the involvement of Yakob Haile, the second appellant, in the commission of the crime? As can be seen from the charge, the prosecutor did not allege that Yakob directly threw the chemical at the victims' face. The allegation is that Yakob, associating himself with the commission of the crime and the intended result,

pretended he was intoxicated, approached the victims and diverted their attention so that they would not protect themselves where Demissew did the acid attack. The prosecutor introduced two items of evidence: the confession given under article 27 of the Criminal Procedure Code and oral evidence (three eye witnesses). The lower court did not consider the confession as evidence for it, based on the testimony given by defense witnesses, was convinced that the confession was not given voluntarily. Despite the fact that this piece of evidence was not admitted by the lower court, the appellate court opted for examining the relevance of this evidence. The record of the confession shows that it was given in two different days. On the first day, the record shows, Yakob denied his involvement in the commission of the crime. On the second day, the record shows, he admitted his involvement in the crime stating exactly what the prosecutor alleges on the charge. The two confessions are totally contradictory. The court indicated that once the police officer interrogated a suspect there is no reason to interrogate him for the second time which leads it to disregard the confession document for not being obtained in accordance to the law.

The court then examined the testimony given by the three witnesses of the prosecutor based on which Yakob is convicted by the lower court. Though none of the three has ever seen Yakob before the time when the crime was committed, they testified that it was the person who stands before the court -- Yakob Haile -- who approached them appearing intoxicated and created a state of confusion among them few minutes before Demissew arrived and attacked them with acid on their faces. They stated that after the person, who they said is Yakob, went away from them, a white vehicle/car with a high speed passed close to them by which they were frightened. It was then, as testified by two of the three witnesses, that Demissew came out of a dark place and threw the chemical on their face. They did not testify that Yakob was at the scene of the crime when it was committed. They did not testify that there was a cause and effect relation between Yakob's act and that of Demissew. They did not even testify that Yakob and Demissew know each other. Though the prosecutor's charge alleges that Demissew and Yakob had a pre-arranged agreement to commit the crime, none of the witnesses testified in support of this allegation. What Yakob did before the commission of the crime would have been considered as related with Demissew's act, had the fact that the two were discussing about how to commit the crime or/and the two were seen together after the commission of the crime was established. However, the prosecutor did not produce any evidence to show that the two were together before or after the commission of the crime. As what is testified by the witnesses to have been done by Yakob before the commission of the crime in and by itself is not adequate to prove that he did the act to facilitate for the commission of the crime by Demissew, the finding of the lower court that Yakob Haile is involved in the commission of the two crimes in the two charges is found to be wrong. Accordingly, the appellate court reversed the lower court's finding and sentence and acquitted the appellant under article 195 (2) (b) (1) of the Criminal Procedure Code.

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አቶ ፍስሐ ወርቅነህ
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አቶ አሰግድ ጋሻው
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አመልካች፡-ወ/ሮ ሸዋዬ ተሰማ
ተጠሪ፡- ወ/ሮ ሣራ ልንጋነ

ጋብቻ - የጋብቻን መፍረስ ስለማስረዳት

የፌዴራል ከፍተኛ ፍርድ ቤት የፌዴራሉ የመጀመሪያ ደረጃ ፍርድ ቤት ተጠሪ የሚች የአቶ ይልማ ወ/ሃና ሚስት ናቸው ሲል የሰጠውን ውሳኔ በማፅናቱ በተቃውሞ የቀረበ አቤቱታ ነው።

<u>ውሳኔ</u>፡- የፌዴራል ከፍተኛ ፍርድ ቤት የሰጠው ውሣኔ ተሻሽሏል።

1. ጋብቻ የሚፈርስው ህጉ ባስቀመጣቸው ውሱን ምክንያትቶች ነው።
2. ጋብቻ የሚፈርስበት ምክንያት መፍረሱን ከማስረዳት መለየት ያስፈልጋል።
3. ተጋቢዎች ምንም እንኳን ቀደም ብሎ የተፈፀመ ጋብቻ የነበራቸው ቢሆንም በመካከላቸው በተፈጠረ አለመግባባት ምክንያት መቀጠል አለመቻላቸውና ሁለቱ በየፊናቸው የየራሳቸውን ሕይወት መጀመራቸው እያለ ፍቺ መፈፀሙን አንደኛው ተጋቢ አላስረዳም የሚል ውሳኔ ትክክለኛ የህግ አተረጓጎም አይደለም።

<u>ፍ ር ድ</u>

አመልካች ለሰበር ችሎት ያቀረቡት ማመለከቻ የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት መልስ ሰጭ የሚች የአቶ ይልማ ወ/ሃና ሚስት ነበሩ በማለት የሰጠው ውሣኔ እንዲሻርላቸው የሚጠይቅ ነው። አመልካች መ/ሰጭ የሚቹ የአቶ ይልማ ወ/ሃና ሚስት አይደሉም በማለት ተቃውሞ ያቀረቡት ለፌዴራል የመጀመሪያ ፍ/ቤት ነው። ተቃውሞውን ለዚህ ፍ/ቤት ያቀረቡት ፍ/ቤቱ ቀደም ሲል ግንቦት 15/95 በዋለው ችሎት መልስ ሰጭ ወ/ሮ ሣራ ልንጋነ የሚች የአቶ ይልማ ወ/ሃና ሚስት ነች በማለት ውሳኔ በመስጠቱ ነው። ተቃውሞው የቀረበለት ፍ/ቤትም አመልካች ሚስት መሆናቸውን የሚያረጋግጥ ማስረጃ አቅርበዋል በሌላ በኩል መልስ ሰጭ ከሚች ጋር ጋብቻ የነበራቸው መሆኑ ስለተረጋገጠና በአመልካቹ በኩል ጋብቻቸው መፍረሱን የሚያሳይ ማስረጃ ባለመቅረቡ ቀደም ሲል መልስ ሰጭ የሚች ሚስት ናት በማለት የተሰጠው ውሣኔ የሚለወጥበት ምክንያት የለም በማለት ውሣኔውን አጽንቶታል።

አመልካች ይግባኝ ለከፍተኛው ፍ/ቤት ቢያቀርቡም የፌዴራል ከፍተኛ ፍ/ቤት ማመልከቻውን አይቶ ይግባኙን በፍ/ሥ/ሥ/ሕ/ቁ 337 መሠረት አያስቀርብም በማለት ዘግቶታል። የሰበር አቤቱታ የቀረበውም ይህን ውሣኔ ለማስለወጥ ነው።

የሰበር አቤቱታ መሠረታዊ ቅሬታ መልስ ሰጭ ከሚች ጋር የነበራትን ጋብቻ በገዛ ፈቃዷ አፍርሳ ከሌላ ሰው ጋር ከ1977 በፊት ጀምሮ ትዳር በመመስረቷ የሚቹ ሚስት ፈት ልባል አይገባም፣ ሚች ከአመልካች ጋብቻ የፈፀመው ሌላ ጋብቻ ስላልፈፀመ ነው፣ የመልስ መሰጭን ጋብቻ መፍረስ ያውቁ የነበሩ ምስክር ቀርበው እንዳይመሰክሩ መደረጉ እውነቱ እንዳይወጣ መደረጉን ያሳያል። አቶ ይልማ የሞቱት በ1989 ሆኖ ሣለ መልስ ሰጭ ግን በ1981 ነው የሞቱት ብላ ለፍ/ቤት ማመልከቷ ጉዳዩን የተቀነባበረና የሚስትነት ጥያቄው ከ14 ዓመት በኋላ መቅረቡን ያስረዳል የሚል ነው።

በመልስ ሰጭ የቀረበው መልስ ደግሞ መልስ ሰጭና ሚች መጋባታቸው በማስረጃ ስለተረጋገጠና ጋብቻ የሚፈርስባቸው በሕግ ከሚታወቅባቸው ምክንያቶች አንዱ መኖሩ ስላልተረጋገጠ የሚችና የመልስ ሰጭ ጋብቻ ፈርሷል ሊባል አይችልም፣ የሚችና የአመልካች ጋብቻ መጀመሪያ የተፈፀመውን ጋብቻ አያስቀርም፣ መልስ ሰጭ ከሌላ ሰው ሁለት ልጆች መውለዳቸውም ሆነ የሞቱበትን ቀን 1981 ብለው መጥቀሳቸውም እንደዚሁ ሚስትነታቸውን አያስቀርም፣ የሚስትነት ማረጋገጫው የተሰጠው ሚች በ1989 ዓ.ም ሞተዋል በማለት በመሆኑ የአመልካች ቅሬታ መሠረት የለውም፣ በመሆኑም የሥር ፍ/ቤቶች ውሣኔ የሕግ ስህተት ስለሌለበት ሊፀና ይገባል የሚል ነው።

ይህ ችሎት የግራ ቀኙን ክርክር አግባብ ካላቸው ሕጎች ጋር በማያያዝ ተመልክቷል። ከመዝገቡ እንደተረዳነው አመልካችም ሆነ መልስ ሰጭ ከሚች አቶ ይልማ ወ/ሃና ጋር ጋብቻ መፈፀማቸው ተረጋግጧል። መ/ሰጭ ሚስት መሆናቸውን ለማረጋገጥ በ1966 የተጋቡበት የጋብቻ ውል፣ በ6/6/72 የተሞላ የሕይወት ታሪክ ሚች ይሰሩበት ከነበረው የቡና ገበያ ድርጅት ማጎደር የተገኘ/ እንዲሁም ጥር 19/1974 በጡረታ ቅጽ ላይ ሚስት ተብለው የተሞላበት ሰነድ ቀርቧል። አመልካቹ በበኩላቸው በ1987 ዓ.ም ከሚች ጋር መጋባታቸው ማስረጃ ቀርቦ ሚስትነታቸው በሌላ ተረጋግጧል።

በሌላ በኩል አመልካች ባቀረቡት መቃወሚያ መነሻነት የፌዴራል መጀመሪያ ደረጃ ፍ/ቤት ባደረገው ማጣራት መልስ ሰጭ ሰፍርድ ቤቱ በሰጡት ቃል ሚችና መ/ሰጭ እስከ 1985 አብረው ከኖሩ በኋላ በ1985 ዓ.ም ተጣልተው መ/ሰጭ ወደ አዲስ አበባ መምጣታቸውን፣ በኋላ ደግሞ ሚቹ አቶ ይልማ አመልካቿን ወ/ሮ ሸዋዬን አግብተው አጋሮ መሄዳቸውን እንደሰሙ ፍርድ ቤቱ አስረድተዋል። ከዚህ በተጨማሪ ከሚች ጋር የነበረው ጋብቻ በፍቺ አለመፍረሱንም ገልፀዋል። በቃል በተደረገው ማብራሪያ የአሁኑ አመልካች ስለፍቺው ያውቁ እንደሆነ ተጠይቀው ሚቹ ከመልስ ሰጭ ጋር ጋብቻ የነበረው መሆኑን ሰለማላውቅ ስለፍቺው አላውቅም ብለዋል።

ከዚህም መገንዘብ የቻልነው የአሁንዋ መልስ ሰጭ ምንም እንኳ ከሚቹ ጋር ቀደም ብሎ የተፈፀመ ጋብቻ የነበራቸው ቢሆንም በመካከላቸው በተፈጠረው አለመግባባት ምክንያት በነበረው ጋብቻ መቀጠል አለመቻላቸውንና ሁለቱ በየፊናቸው የየራሳቸውን ሕይወት መጀመራቸውን ነው። የአሁኑ መልስ ሰጭ ጋብቻው በፍቺ ምክንያት አልፈረሰም ይበሉ እንጂ ሰፍርድ ቤቱ የሰጡት ማረጋገጫ ጋብቻው መፍረሱን የሚያረጋግጥ ነው። ጋብቻ የሚፈርሰው ሕጉ ባስቀመጣቸው ውሱን ምክንየት መሆኑ ይህም ፍ/ቤት ይቀበለዋል። በሌላ በኩል ለጋብቻ መፍረስ ምክንያት የሆኑ ነገሮች መኖር አለመኖራቸውን የሚረጋገጠው እንዴት ነው የሚለው ጥያቄና ነጥብ በሁለቱም ተጋቢዎች ከነበረው ሁኔታ ጭምር መረዳት የሚቻል ነው። ጋብቻ የሚፈርስበትን ምክንያት መፍረሱን ከማስረዳት መለየትም ያስፈልጋል። አሁን በቀረበልን ጉዳይ የመልስ ሰጭ መከራከሪያ ፍቺ መፈፀሙን አመልካች አላስረዳችም የሚል ነው። ነገር ግን የመልስ ሰጭና የሟች ግንኙነት ማንም ሌላ ማስረጃ ሊያስረዳ ከሚችለው እና ከሚገልፀው በላይ በመካከላቸው የነበረው የጋብቻ ግንኙነት መፍረሱ፣ ሁለቱም ሌላ ሕይወት ጀምረው ሟቹ የአሁንዋን አመልካች ማግባታቸውን፣ ይህንንም ጋብቻ የአሁኗም መልስ ሰጭ ያውቁ እንደነበር ያስረዳል። ይህ መሆኑ በተረጋገጠበት ሁኔታ የአሁንዋን መልስ ሰጪ ቀደም ሲል የፈፀመችውን ጋብቻ መሠረት በማድረግ ብቻ ሚስት ናት ብሎ መወሰን ትክክለኛ የሕግ አተረጓጎም አይደለም።

ው ሣ ኔ

የፌዳራል መጀመሪያ ደረጃ ፍ/ቤት በመ/ቁ 4796 ሚያዝያ 18 ቀን 1997 ዓ.ም የሰጠው ውሣኔ ተሻሽሏል።

ወ/ሮ ሣራ ልንጋነ የሟች የአቶ ይልማ ወ/ሃና ሚስት አይደለችም በማለት ወስነናል፣ ወጪና ኪሳራ ግን ቀኙ የየራሣቸውን ይቻሉ።

Federal Cassation Bench: File No.20938
April 19, 2006

Justices:

1. Menberetsehai Tadese
2. Fiseha Workineh
3. Abdulqadir Mohammed
4. Asegid Gashaw
5. Hirut Melese

Petitioner: Shewaye Tessema

Respondent: Sara Lengane

Judgment

The petitioner asked the Cassation Bench to reverse the decision of the Federal First Instance Court which, on May 23, 2003, held that the present respondent was the wife [and widow] of the late Yilma W/Hanna. The Petitioner [first] filed an opposition with the Federal First Instance Court [pursuant to Article 358 of the Civil Procedure Code] challenging the Court's decision. The Court, however, rejected her opposition on the ground that that the respondent had a marital relationship with the deceased Yilma W/Hanna had been established; although the petitioner had adduced evidence, which proves that she was the wife of the deceased she, nevertheless, failed to produce evidence, which shows that the marital relationship between the respondent and the deceased Yilma W/Hanna was dissolved. The Court thus confirmed its prior decision.

The Federal High Court dismissed the petitioner's appeal pursuant to Article 337 of the Civil Procedure Code as unfounded. This petition, therefore, was lodged to have that decision reversed.

The major grounds of objection invoked by the petitioner are that the respondent who, by her own free will, abandoned her earlier marriage with the deceased and remarried another person long before 1985 should not be considered the widow of the deceased; that the deceased concluded marriage with the petitioner as he then was not engaged to anyone; the fact that the refusal on the part of the lower court to hear the testimony of witnesses who know the dissolution of the marriage between the respondent and the deceased shows a deliberate act to conceal truth; Ato Yilma died in 1997, but the respondent, in her pleading, told the court that he died in 1989 was a calculated misrepresentation and shows that her application to obtain a declaration that she is the widow of the deceased was lodged fourteen years after he died.

The respondent in her reply contended that that the respondent and the deceased were wedded to one another is proved; but as the existence of any one of the legally

recognized grounds for the dissolution of marriage is not established, it cannot be said that the marriage between the respondent and the deceased had been dissolved; the [later] marriage between the petitioner and the deceased would not have the effect of invalidating the former marriage [already existing between the respondent and the deceased]. Respondent's bearing of two children with another person [from a second marriage] and her mentioning, in her pleading, of the date of Ato Yilma's death as 1989 would not also bar her status as the wife of the deceased; even, since the court in its judgment confirmed the year 1997 as the appropriate time of death of the deceased petitioner's contention in this regard is groundless. Thus, the decision of lower courts is free from any basic error of law and should be confirmed.

This Bench has analyzed the arguments of the respective parties in light of the relevant legal provisions. As we have gathered from the records the fact that both the petitioner and the respondent concluded marriage with the deceased Yilma W/Hannah is established. To prove that the respondent was the wife of the deceased a contract of marriage signed in 1974, deceased's personnel record filled out on 13/2/80 and kept with Coffee Marketing Enterprise, former employer of the deceased, and a pension form filled out on January 27, 1982 in which the present respondent's name was entered as the spouse of the deceased were adduced. The petitioner on her part has introduced items of evidences that show that she and the deceased were wedded in 1995.

On the other hand, on the basis of the opposition filed by the petitioner the Federal First Instance Court examined the respondent in which she told the Court that the deceased and the respondent lived together [as couple] until 1993; that in 1993 they broke up and she came to Addis Ababa; then she also heard that the deceased Ato Yilma W/Hanna married the present petitioner W/ro Shewaye Tessema, and left for Agaro. In addition to this, she told the court that her marriage with the deceased was not dissolved by divorce. Asked whether she knew of a divorce [between the respondent and the deceased], the petitioner on her part orally explained to the Court that she knew nothing about the divorce as she did not know that the deceased had marital relationship with the respondent.

What we have discerned [from these facts] is that even though the present respondent had a preexisting marriage relationship with the deceased, owing to a disagreement ensued between them they were unable to continue living as married couple and both went their own way and started to live own life. Although the present respondent contends that the marriage was not dissolved by divorce, what she actually confirmed to the court, however, establishes that the marriage was dissolved. The argument that marriage dissolves on limited grounds prescribed by the law is [equally] acceptable to this court. On the other hand, the issue of how to ascertain whether or not there exist the grounds for the dissolution of a marriage can also be inferred from the conduct or behavior of the respective couple [towards one another]. It is also necessary to distinguish between the ground for the dissolution of marriage and the means of proving the dissolution itself.

In the case at hand, the respondent's contention is that the petitioner has failed to prove the existence of the fact of divorce. However, it is sufficiently proved and, proved to the extent it can be said that no other evidence would have proved it better, that the marital relationship between the respondent and the deceased was dissolved; that both started their own independent life and, the deceased got married to the present petitioner and the respondent herself was well aware of this development. Where these facts are clearly established, to hold that the present respondent is the widow of the deceased merely based on the marriage she formerly concluded with deceased is not the appropriate way of interpreting the law.

Decree

The decision of the Federal First Instance Court delivered in File No. 4796 on April 26, 2005 is hereby reversed.

We hold that W/ro Sara Lingane was not the wife of the late Yilma W/Hannah. Let both parties bear their own respective costs.

CASE COMMENT

DISSOLUTION OF MARRIAGE BY DISUSE: A LEGAL MYTH

MEHARI REDAE*

The Case[1]

The deceased, a certain Yilma W/Hanna[2], had marital relationship which remained intact from 1973-1992 with W/ro Sara.[3] They separated for good, in 1992, though they did not comply with the requirements of the divorce procedures. Following their separation, the ex-spouses led their own ways of life independently of each other. Accordingly, each of them concluded other marriages with other partners.

The deceased, concluded marriage with W/ro Shewaye[4] in 1993 and remained engaged until his death in 1997. Following his death, his former spouse, the respondent, petitioned the Federal First Instance Court with a view to obtaining a declaratory judgment that she was the wife of the deceased. In fact, she obtained a judgment which conferred her status of a widow.

As soon as the applicant knew the respondent had obtained a judgment in her favor, she filed an opposition[5] in view of reversing the judgment rendered in the respondent's favor contending that the latter's marriage with the deceased was dissolved long before his death. Nevertheless, the Federal First Instance Court rejected the opposition by stating that "since the respondent has shown, to the satisfaction of the court, that she had marital relation with the deceased and since the applicant failed to show respondent was divorced, there is no convincing reason why the previous judgment could be reversed".

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[1] Federal Supreme Court Cassation Bench; File No.20938. An extensive and well researched article, (written in Amharic) by Philipos Aynalem, in support of the Bench's position, appeared in *Mizan Law Review*, Vol.2 No.1(Jan,2008)(pp.110-136)

[2] Hereinafter referred in this document as "the deceased"

[3] Hereinafter referred in this document as "the respondent"

[4] Hereinafter referred in this document as 'the applicant"

[5] Art.358 of The Ethiopian Civil Procedure Code provides for such an opportunity.

Although the applicant lodged an appeal against this decision, the appellate court confirmed the decision of the lower court. As a final resort, the applicant brought her case to the Cassation Bench of the Federal Supreme Court contending that the lower courts committed fundamental error of law in disposing the case before them[6].

The Cassation Bench examined the application. Being convinced that the case warrants revision at the level of cassation, it summoned the respondent to submit a written reply as to why the decision of the lower courts' should be sustained.

The respondent in her statement of reply stressed that "it was shown a marriage was concluded between herself and the deceased; there was no evidence that this marriage was lawfully dissolved; a subsequent marriage entered into between the present applicant and the deceased could not have the effect of dissolving the previous marriage. She further argued that, though she concluded another marriage and gave birth to two children from the new marriage, such an act would not have the result of dissolving the former marriage." Thus, she contended, the lower courts' decision should stand.

It should be noted that once she is granted the status of a widow, her next move will be to claim the pecuniary effects of the marriage. Hence, her first step is only a tactical move; the strategic move being to benefit from the pecuniary effect of the marriage.

I. The Holding of the Cassation Bench

"The Respondent presented a contract of marriage[7] issued in 1973 while the applicant produced a certificate of marriage prepared in 1994. Both documents stated that each of them had concluded marriage with the deceased. Consequently, the Bench realized that both the applicant and the respondent had valid marriage with him". However, the Bench further learnt that the marital relation of the respondent and the deceased lasted until 1992 after which they had disagreement and as a result of which they separated for good. The lower court's record spelt out that respondent affirmed before the court that she had knowledge as to the conclusion of marriage between the deceased and the applicant and their cohabitation in Agaro; but she did not raise any objection against this fact.

The Bench, thus, held that:

> *Although the deceased and the respondent had marital relationship, they separated and moved towards leading their respective independent mode*

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[6] When a decision of a lower court is confirmed by an appellate court, the decision shall be held final. Nevertheless, Ethiopian legal system has framed out a procedure for hearing before a Cassation Bench where the aggrieved party manages to show the commission of fundamental error of law in arriving at the final decision which is the subject of the attack. (See, Arts. 10(1) & 22(1) of Proc. No.25/1996.)

[7] The author understood it to mean Certificate of Marriage

of livelihood. Although respondent contended that her marriage was not dissolved in accordance with the law, her testimony before the court unequivocally showed the breakdown of her marriage."(emphasis added).

The Bench further stated that, "undeniably there are specifically spelt out grounds on the basis of which marriage could be dissolved and this bench accepts these. Nevertheless, *there is a need to make distinction between grounds of dissolution and manner of proving them* (emphasis added). The grounds of dissolution may be inferred from the externally expressed acts of the ex-spouses. The main contention of the respondent remained to be that the applicant did not prove the dissolution of the marriage between the respondent and the deceased. *However, the facts of the present case clearly show that the marital relation of the respondent and the deceased has been irreparably broken down beyond any shadow of doubt and the ex-spouses established their own marital life elsewhere* (emphasis added). Thus, the Bench concluded that, holding the marriage of the deceased and the respondent as still valid for non-compliance with divorce proceedings would be inappropriate interpretation of the law". Hence, it reversed the decision of the lower courts and held that the respondent is not a widow.

II. Comment

It must be clear from the outset that under our family law, conclusion of marriage has three modalities: civil, religious and customary.[8] Hence, the entry corridor for marriage has three gates. When it comes to the exit corridor, however, there is only a single gate. This single exit gate is pronouncement of court judgment to this effect.[9] The approach of the law tends to reflect the governmental policy towards marriage in the sense that it encourages marital relations by establishing multi-door entry and discourages dissolution by drawing up a single exit door.

Actually, under the Civil Code of 1960, there exited express provisions which read as follows: "Any unilateral repudiation of the wife by the husband or the husband by the wife shall be of no effect."[10] "Divorce by mutual consent is not permitted by law".[11] Examination of the provisions of the Revised Family Code also reveals, even though divorce by mutual consent is allowed, it, nevertheless, requires court approval for its

[8] Revised Family Code(Ethiopia), Art.1

[9] ibid, Art.75. Admittedly, death of either of the spouses is one ground for dissolution of marriage. It must be noted that the single exit gate of judicial pronouncement does not include this. In deed, absence requires judicial determination. The writer of this piece is fully aware that some people tend to argue that the exit gate from marital relation should also be multi-door. To entertain such liberal position, it requires policy reconsideration and amendment of the law. As the law stands now, however, the exit gate is singular and narrow.

[10] Civil Code of 1960, Art.664.

[11] Ibid, Art.665(1)

validity.[12] The reason for such rigorous exit procedures in the two instruments seems to arise from the need to protect and preserve, to the extent possible, the institution of marriage. In addition to this, such streamlined divorce procedure might be helpful in avoiding any doubt as to the dissolution of the marriage if and when dissolution occurs.

Protection and preservation of marriage seem to have been motivated by firstly, marriage is the basis of society and hence society and its continuity may be preserved as well. Secondly, marital relation and its dissolution affect innocent third parties such as, children of the marriage and relatives of the spouses and hence in the interests of these parties, conclusion and dissolution of marriage should be clearly identifiable and regulated. Thirdly, more often than not, marriage creates community of property between the spouses and protection of property rights and protection of creditors of the marital household demand strict rules and procedures.

Against this background, however, the Cassation Bench held "since the deceased and the respondent were separated with no intention for reunion, this tantamounts to divorce". Through this approach, the Bench introduced the concept of "*de facto divorce*" (i.e. divorce in fact) into the Ethiopian legal fabric. Nevertheless, such introduction seems logically unsound because as Ethiopian legal system does not recognize *de facto marriage*;[13] it would be legally and logically inconsistent to introduce *de facto divorce*.

Undeniably, partners in an irregular union are entitled to put an end to their relationship unilaterally or bilaterally whenever they wish to.[14] Theirs was a factual union and it naturally flows that they may terminate it factually. This has been held to be one of the basic differences between marriage and irregular union.

That being said, it must be borne in mind that marriage is the creation of the law while irregular union is a union *merely recognized* by law. However, the holding of the Bench, if maintained, would have the effect of making the line of demarcation between marriage and irregular union very blurred. We submit, this is a dangerous move militated against sanctity of marriage.[15]

Furthermore, winding up marital relation through separation, if allowed, would be deriving benefit from taking the law into one's hand (i.e. self-help measure). Most

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[12] Supra at note 7 Art.77(1)

[13] The above mentioned three modes of conclusion of marriage are the only recognized ones. No matter how long standing and permanent an irregular union has been, it cannot be upgraded or transformed into marriage under the existing legal framework in Ethiopia.

[14] Supra at note 7, Art.105(1)

[15] In File No.23021 the Bench held that "re-union of ex-spouses with out any formality amounts to marriage". The author has submitted his comment (in Amharic) on that case to *Mizan Law Review* to be published soon.

legal systems, more often than not, prohibit self-help measures on the policy consideration that such measures could result in social anarchy and thereby create risks to social order. If and when legal systems grant self-help, it is only exceptionally and expressly[16]. Consequently, self-help, as a remedy, cannot be implied.

Unfortunately, in the present case, the Bench is validating a self-help measure through interpretation as there is no express provision anywhere in our law that states separation, no matter long and final it may be, amounts to divorce. Thus, it seems to us that, this is a major deviation from the well established approach of not only our legal system but also most legal systems as well.

In arriving at its decision, the Bench has taken into account the acts of the deceased and the respondent subsequent to their separation. The most important ones in this respect were the following:

- the deceased concluded marriage with another woman (the applicant);
- the respondent had knowledge about the marriage with the applicant but she did not object it in whatever way;
- the respondent, on her part, concluded marriage with another man and gave birth to two children from her new engagement; and
- the deceased did not object to the same.

From these externally manifested acts of the ex-spouses, the Bench inferred that the intention of the spouses was permanent separation. We admit this is a valid inference. The problem, however, is, though the intention of the parties to terminate commitment may be relevant to contractual relations, it is less relevant; and at times irrelevant, when it comes to marital relation.

It must be underlined that marriage is not a mere contract. It is rather a legally established institution.[17] Institution making and unmaking is not a purely private act and hence it should not be left to the mercy of private actions. Since the state, through its law making power, was involved in the making of the institution of marriage, it is logical to assume that it remains involved at its unmaking, presumably through its adjudicative power.

The Bench is of the opinion that there is a need to distinguish between grounds for dissolution of marriage and the manner of proving the same. Actually, since this was

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[16] Some of them are the following: Art.78 of the criminal Code on legitimate defence; Art.78 (1) of the Criminal Procedure Code; Art. 2076of the Civil Code on victim's guarantee; Art. 157 of the Labour Proclamation on strike and lock out.

[17] Although there are unsettled controversies as to whether marriage is a contract or something different from that, it suffices for the present purpose to highlight the fact that there are some peculiar features of marriage. These are: its permanency; its personal effect other than pecuniary effect on the spouses; its effect on third parties (i.e. relatives of the spouses); no dissolution at will; etc. In fact, the present author belongs to the camp which holds that marriage is an institution far beyond a mere contract.

spelt out, by the Bench, in the form of a passing remark, it failed to enlighten us as to what it means and how this distinction is relevant to the case before it. Nevertheless, even if the grounds of dissolution of marriage and the manner of proving them are to be treated independently of each other, it does not bring any change to the case at hand. The reason for this is, permanent physical separation of the spouses was no where mentioned in the Revised Family Code as a ground of dissolution of marriage and hence the ground in the present case does not appear among the grounds for dissolution. Furthermore, from the angle of proof, as the court is the sole organ to pronounce divorce,[18] production of the court decision is necessary and sufficient proof thereof. This proof was not available either in the present case. Thus, the separate treatment of grounds of dissolution of marriage and proof of dissolution of the same, if at all the separation is necessary and meaningful, is unhelpful as neither the ground of dissolution nor the proof thereof does exist in the present case.

It seems to us that the reason why the Bench held the abovementioned position is holding otherwise, it assumed, would entitle the ex-spouse to community of property as marriage brings with it community of property of the spouses. The Bench felt that it would be unfair and unjust to grant the respondent a right of community of property with the deceased in his household to which she contributed nothing. This appears to be a valid concern.

In fact, it is safe to conclude that the reason why the respondent wanted the declaratory judgment, as indicated above, is purely property interest because once Ato Yilma is dead; there is no room to revitalizing the marriage.

However, it is our strong belief that the Bench could have maintained the validity of the marriage and at the same time denies community of property to the respondent. In our view, marriage *per se* is not a license for community of property. The reason why the legislature presumed community of property, in the absence of valid contract of marriage with otherwise effect, is the presumption of contribution of the spouses to the household in the form of goods and/ or services.

It seems to us that there is a need to make distinction between the existence of marriage and the existence of the effects thereof. Whether marriage exists or not is a legal issue; while whether the effects of marriage, particularly pecuniary effects of marriage exist is an issue of fact.

It is an established fact that marriage brings with it, among other things, the following:[19]

- Cohabitation of the spouses;
- Mutual respect, support and assistance between spouses;

[18] Art.117 of the Revised Family Code.

[19] Ibid, Arts. 49, 53, 54 &72

- Co-decision on common residence and common property administration; and
- Cost sharing and contribution to the household expenses in proportion to the their means

The legal bases for presumption in favor of community of property are mostly the above mentioned realities of marital relationship. However, it must also be noted that the presumption is not an irrebuttable one. Admittedly it may be contended that the legislature no where mentioned whether this presumption is rebuttable or not and hence it cannot be confidently said that it is a rebuttable one.

However, the way the Ethiopian legal system operates in this regard deserves due consideration. Our legal system has spelt out different kinds of presumptions in the different branches of the law. At times, it includes phrases such as "No proof shall be admitted against this presumption"[20], or "not withstanding any proof to the contrary"[21] or other phrases of equivalent effect. In such situations, it is fair to regard such presumptions as irrebuttable as the legislature, through its words, conveyed its clear position in this regard.

At other times, the legislature lays down the presumption and keeps silent as to whether it is rebuttable and the manner of rebutting it. In such cases, the proper assumption should be that it is rebuttal because had the legislature intended to make it irrebuttable it would have expressly stated as such. Thus the proper holding should be silence amounts to allowing rebuttal.

At this juncture, it is worth noting that the community of marital property provision in the Code is silent as to its rebuttability or otherwise.[22] Consequently, the said principle which is enshrined under the Revised Family Code is rebuttable in the sense that when and if contribution to common property has been shown not to exist, community of property shall be held non-existent. The presumption will only have the effect of shifting the burden of proof. The beneficiary of the presumption (i.e. the respondent in the present case) will be relieved from proving her contribution to the household. It will be the applicant who will be required to show that the respondent had contributed nothing to the household. Moreover, the fact that this principle can be legally derogated (it can be contracted out) through contract of marriage is an indication of its rebuttability.[23]

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[20] Art.3 (2) of Civil Code; Art.128 (2) of the Revised Family Code.

[21] Art.672(2) of the Civil Code of 1960

[22] See, Art.63(1) of Revised Family Code

[23] Ibid, Art.48

Even from logic point of view, rebutting evidence brought against one's position is an expression of a right to defend one's position. The right to defend oneself, on its part, is an aspect of the right to be heard which is recognized as a basic feature of due process of law in modern world. Therefore, any working procedure which restricts this right, being an exception, should be expressly spelt out. This means irrebuttability of presumption must be expressly stated. It can never be implied. Hence, when and where the legislature is silent as to whether a certain presumption is rebuttable or irrebuttable, the logical interference would be treating it as rebuttable. As indicated above, the relevant provision on the presumption of community of property is silent as to its rebutability. To sum up, therefore, the presumption of community of property which is enshrined under our family code is susceptible to rebuttal. Thus, the Bench would have lawfully rejected the respondent's claim for community of property, at her subsequent claim for that, as, from the facts of the case, she contributed nothing to the household of her first marriage.

It is also important to note, at this point, that our legal system denies recognition to "unlawful enrichment".[24] Besides, the Federal Constitution defines private property "*as any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of the person concerned*" (emphasis added).[25] Based on this definition, one has to contribute something[26] in either of the forms mentioned above to the realization of the property at issue, in order to possess a lawful claim to private or community property right. This, we think, squarely fits to the case of the respondent and all of these basic facts would have assisted the Bench in its effort to attain just and legal outcome to the case before it.

III. Conclusion

It seems to us that the Cassation Bench's holding which states "long non usage of personal effects of marriage by the spouses amounts to divorce" is logically unsound and legally invalid.

It is logically unsound because what has been legally constituted should be legally dissolved. Marriage, as indicated earlier, is something which is legally constituted. It, thus, logically begs for legal (not factual) dissolution. Moreover, given the non existence of de facto marriage, one cannot logically think of de facto divorce in Ethiopia.

It is legally invalid because the law has expressly and exhaustively laid down grounds of dissolution of marriage; and separation, how deliberate and permanent it may be,

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[24] Arts. 2162-2178 of the Civil Code.

[25] FDRE Constitution, Art.40(2)

[26] Actually, when there is a legal presumption, as in the case at hand, in one's favour, she will not be required to prove that.

does not exist among the listed grounds. Thus an addition of a judge made ground to the list of the legislature will be unlawful. An utmost good faith and a sense of justice from the Bench would not in any way justify such an act.

It would have been more plausible and legal to hold both marriages lawful and grant the community of property entitlement to the later marriage. As it is well known, though bigamy is prohibited, Ethiopian family law recognizes bigamous marriages until and unless they are challenged by the stakeholders who are entitled to.[27] Thus holding these two marriages lawful is not something illegal. Such an approach would have dissuasive effect on those who would like to unduly benefit from the existence of marriage, for its sake, without complying with its personal effects because they will realize that though they may succeed in obtaining confirmation as to the existence of the marriage, they will not, anyways, be successful in obtaining common marital property which is their strategic goal.

In situations where appreciable number of the Ethiopian legal community is not sufficiently clear with the distinction between marriage and irregular union, the Bench's holding in the case at hand will have the effect of aggravating the confusion in this regard. It is well recognized that there are lots of factual similarities between marriage and irregular union, given such similarities, if separation were to have an effect of putting an end to both marriage and irregular union, there will be little or no difference left in them. Nevertheless, the law wanted them to be separate institutions with distinct legal status and effect. This is the reason why they are treated separately under the Code.

Furthermore, it is not the end result of a legal controversy that matters. The way the result was achieved is also equally material. Both the result and the manner of arriving at the end result should be lawful. We believe, the Bench, in the present case failed, to deliver the latter.

Finally, the principle of separation of state powers reminds us that courts, no matter how high they are situated in the judicial hierarchy, cannot amend laws. They are there to apply and interpret the laws with a view to resolving disputes before them. Law amendment is within the competence of the legislature. But the act of the Bench in the present case, in our view, is something beyond interpretation and an action which transcends into the territory of lawmaking and hence *ultra vires.*

[27]The right to challenge bigamous marriage has been accorded only to either of the spouses of the bigamous spouse or the public prosecutor.(See, Art.33(1) of the Revised Family Code)

CASE COMMENT

THE LAW OF ATTEMPT

TSEHAI WADA*

Salient Facts [1]

Case No. One[2]

Respondents were charged for an attempt to hijack an airplane in domestic flight at the Dire Dawa Airport. Both respondents [as members or sympathizers of an armed opposition group] travelled from Addis Ababa to Dire Dawa with the intention to hijack a plane in domestic flight and demand the release of other comrades in arms who were in detention. Though it is not known where they acquired the arms, Respondent No. One had a bomb, a fuse, and a knife concealed in his shoe/s' sole while being apprehended at the security check point, which is quite a few meters away from where the plane was parking to take its next flight. Respondent No. Two, who is charged for unauthorized possession of arms, was sitting in the airplane while his friend was apprehended and the reason for his arrest was that his photograph was found in one of the bags belonging to Respondent No. One and it was presumed that they had conspired to commit the crime together.

The First Instance Court acquitted both respondents on the ground that the acts done by Respondent No. One do not amount to attempt [put differently, they amount to preparatory acts which are not in principle punishable] and that Respondent No. Two did not carry any weapon at the relevant time.

The Prosecutor lodged this appeal contending that all acts done by the respondents amount to attempt, while the defence counsel argued in defence that in order that the acts be considered as attempt, there needs to be a direct movement in the air plane. Thus, whatever is done before this, amount to preparation but not attempt.

The Supreme Court reversed the lower court's decision on the following grounds:

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[1] Note – an abridged form of part of this comment relating to Case No. Two was published in Duke House Newsletter No 1 , 1st Year and this was a one time in-house students' journal. This comment is, however much different from the previous one.

[2] Criminal Appeal File No.18/87, decided by The Federal Supreme Court, Criminal Bench. In the case, the Appellant was the Central Prosecutor and Respondents were: Ato Lemma Hunde and Lieutenant Benti Dinegde. Justices of the Supreme Court were: Abate Yimer, Menbere Tsehai Tadesse and Mekuria Endeshaw.

- Though unlawful possession of arms is a crime by itself, an attempt to pass such items through the checkpoint and then into the plane is not an easy task. From the reasonable person's point of view, a person who attempts to pass these items through such a narrow and dangerous pass has a firm intention which cannot be reversed.
- Respondents were apprehended after having meticulously done all these acts so as to enter into the airplane and these certainly confirm their firm decision to realize their plan which they had admitted to do against the plane. This certainty is manifested when seen in light of the proximity of the acts in terms of time and place.
- As far as space proximity is concerned, Respondent No. Two had managed to enter into the plane that was intended to be hijacked and Respondent No. One was near the plane. The time was when the plane was readying to take off and the pilot and passengers who could have been taken as hostages were on board.
- These indicate that had the respondents not been apprehended at the checkpoint, a condition had been created whereby they were very close to realize their plan.
- Concluding that the acts done against a civil air craft amount to preparation, defeats the purpose of the law which is to prevent the commission of crimes beforehand, i.e. nipping such designs in the bud. There is a possibility that if respondents get the plane with its pilot, they could have done what they want in a short span of time.
- Regarding the case of Respondent No. Two, as he had admitted that he had conspired with the other appellant to hijack the plane, it cannot be concluded that he had not assisted in the collection of the items – to be used in the crime.

Thus the lower court's decision is reversed.

Case No Two[3]

The appellant was charged for attempted homicide -in the first degree – in that he, with other three accomplices: had organized a killer squad, transported arms such as pistols with silencers, flammable bomb materials from Ethiopia to East Germany and then to West Germany, with a view to kill a number of opposition parties' members residing there. The appellant appears to be a facilitator of the crime for his involvement was that of communicating with the Minister of the then Ministry of Security rather than doing any other overt act to accomplish the criminal design. The other participants though not parties in this case, took all the necessary materials to their hotel and started to check whether they are functioning well but found that one of the timers was malfunctioning.

[3] Criminal Appeal File No.1324, decided by the Federal Supreme Court. In the case, the Appellant was, Captain Melaku Rufael and the Respondent was the Special Prosecutor. The Justices were, Tegene Getaneh, Desta Gebru and Asegid Gashaw.

They attempted to buy a replacement but this cannot be achieved, for shops were closed. In their attempt to repair the timer, the explosive went off without killing anyone except for property damage sustained by the hotel in which they were lodging at the time.

The intention of the group was to plant these explosives wrapped in books, at a library and an office wherein the intended victims were supposed to be at the time. Some other explosives intended to be planted under the vehicles belonging to some of the victims were not made use of for the failure in the first attempt.

The lower court convicted and then sentenced the appellant with life sentence and this appeal was lodged to reverse this decision.

Major contents of the appeal are that: the appellant and his accomplices did not start their journey to the library in which the intended victims were supposed to be present, it is not proved that the victims were in the library at the relevant time, the explosive went off at the hotel while the accomplices were adjusting a malfunctioning timer, thus, since they had not adjusted the timer and started their journey to the library, all what they did amount to preparation but not attempt.

The Prosecution responded that the appellant and his accomplices had designed a perfect criminal design, identified the victims as well as their whereabouts, transported the necessary arms and adjusted them for action and all these show that they had done all what they can under the circumstances and all these amount to attempt but not preparation.

The appellate court, in reversing the decision reasoned out that: the explosives went off at the hotel wherein the accused were staying while adjusting the timer but not at the library as alleged by the prosecution. Moreover it was not proved that the victims were in the library at the relevant time. Though it is proved that arms and members of the squad had been transported from Ethiopia to Germany and that the location where the explosives should be placed was chosen and the book to put the explosive was readied, all these are acts done before doing the last decisive act. Per Art.27 of the Penal Code, an act passes the stage of preparation or put differently, execution begins, when the last preparatory act is done. This means, that all things necessary for the commission of the crime should be ready and that the actor should be in a position to say that I have done everything on my part to commit the crime.

In the case at bar, it is proved that the accused had the intention to commit a crime. This mental element alone, however, is not sufficient to convict him of a crime as provided under Art.23 of the code. Moreover, preparation alone is not punishable unless provided expressly. Accordingly, the explosive went off at the hotel where they were lodging before they started their journey to the library. It is not proved that the malfunctioning explosive was repaired or replaced by another. What is known is that the timer was not functioning and that the attempt to replace it could not succeed for shops were closed. Thus since it is not proved that the timer was repaired or replaced, it

is not possible to conclude that acts done before the explosion, have passed beyond the preparatory stage.

Per Art.27/1 of the code, the offence is deemed to be begun when the act performed clearly aims, by way of direct consequence, at its commission. Though it may be said that acts done before the explosion, are acts done to commit the crime, the act that would have brought about criminal liability would have been that act which clearly aims at the homicide that was intended to be done at the library and at the office of one of the intended victims. This thus shows that there were other major acts to be done [before the realization of the design]. What is more, [in order to conclude that the acts amount to attempt], the works to be done on the explosive should have been completed, the malfunctioning timer should have been repaired or replaced, and the arms should have been transported to the library. In order to commit the crime, it should also have been checked that the timer and the explosive function properly and that the explosive was put ready to explode. Thus, we cannot conclude that all acts done before these decisive acts clearly aim by way of direct consequence at the commission of the homicide.

In order to convict the appellant for attempted homicide, the act should have been materially proximate and unequivocal. The acts done till the explosion, when seen in contrast with other decisive acts that remain to be done, however, do not reveal material proximity nor certainty and they did not pass the stage of preparation. This does not, however, mean that in order to conclude that a crime is attempted, one should wait till the last act is done but that it should have been proved with certainty that the crime was to be committed and that [the acts have reached] at a decisive stage.

Accordingly, the appellant is not found liable for the crime charged but found liable for unauthorized possession of arms under Art. 41/1 of Proclamation 214/1974 [E.C.] and thus sentenced to twelve years of rigorous imprisonment.

Major standards[4]

To begin with, it may be said that under Ethiopian law[5], in the strict sense, the legal standards for preparation are: procuring the means and creating conditions for the

[4] The standards are generously taken from Graven, Philippe, *An Introduction to Ethiopian Penal Law*, Haile Selassie University,. 67-80 and Wayne R.LaFave *Substantive Criminal Law*, Current through the 2007 Update, Section 11.4. The 2007 edition is written by David C. Baum Professor of Law Emeritus and Professor Emeritus in the Center for Advanced Study, The University of Illinois.

[5] Relevant articles of the then Penal Code are:

Art. 26. Preparatory acts

commission of an offence [Art.26]. As far as attempt is concerned, the legal requirement is doing an intentional act which clearly aims by way of direct consequences at its commission [Art.27]. This single standard is also known as the standard of "unequivocality or certainty."

With regard to preparation, the act of "procuring means" of commission of a crime is clear enough so as not to demand any explanation. On the other hand, the standard of "creating conditions" though vague, may simply be understood as facilitating the commission of the crime but not necessarily going any further.

In addition to t he above standards, authoritative texts on the subject, i.e., law of criminal attempt, acknowledge the presence of other standards. All these standards are discussed here bellow albeit, briefly.

1. **Equivocality/certainty -**

It is often said that preparatory acts are equivocal while acts of attempt are certain. The major point in this regard is determining the intention behind doing an act. This again calls for other standards known as "the *res ipsa* loquitur [facts speak for themselves] and the only reasonable inference". Accordingly, under the first test the act done should show by itself the intent behind and under the latter, reasonable minds should agree unanimously that the actor did the act with a simple purpose of achieving the criminal design but nothing else.

Acts which are merely designed to prepare or make possible an offence, by procuring the means or creating the conditions for its commission are not punishable unless:

(a) in themselves they constitute an offence defined by law; or
(b) they are expressly constituted a special offence by law by reason of their gravity or the general danger they entail. And

Article27. Attempt

1. Whoever intentionally begins to commit an offence and does not pursue or is unable to pursue his criminal activity to its end, or who pursues his criminal activity to its end without achieving the result necessary for the completion of the offence shall be guilty of an attempt.

The offence is deemed to be begun when the act performed clearly aims, by way of direct consequence, at its commission.

[Subs 2 and 3 are omitted]

2. Proximity

The common understanding in the law of attempt is that, acts of attempt are proximate, while acts of preparation are remote. It may, however, be easily understood that this standard is subjective for no law sets the exact limit of proximity. As one of the controversial standards, so many other tests are employed to narrow down the disparity that may arise in employing it. These are discussed hereunder:

2.1 - The last proximate act - this test demands that the actor should do everything that he believes necessary to bring about the intended result[6].

2.2 - Obtaining the indispensable element – this test demands the acquisition of means of commission such as ballot in the case of illegal voting or deadly weapon in the case of assault.

2.3- Physical proximity – under this test, the emphasis is not so much upon what is done as upon what remains to be done and the time and place at which the intended crime is supposed to occur take on a considerable importance. In this regard, it is suggested that account must be taken of "the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension, coupled with the great harm likely to result.

3. The probability of desistance

Under this test, the act must be one in which in the ordinary course of events would result in the commission of the targeted crime except for the intervention of some extraneous factor and that the defendant's conduct must pass that point where most men, holding the same intention would think better of their conduct and desist[7].

4. Substantial Step

This standard is also known as the Model Penal Code's[8] standard and its main contents are that: conduct cannot constitute a substantial step unless it is strongly corroborative of the actor's criminal purpose; the emphasis is upon what the actor has already done rather than what remains to be done; liability will be imposed only if some firmness of criminal purpose is shown; and the conduct may be assessed in light of the defendant's statements.

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[6] This test is abandoned at least in the Common Law jurisdiction. See LaFave.

[7] This test is criticized as a highly artificial device and that it lacks an empirical basis. See LaFave.

[8] This is an American model code and it has served as an authority for judicial interpretations and basis for re codification.

Though not discussed in the above style, other standards of attempt are also provided in the seminal work of Philippe Graven and the major standards are the following[9]:

1- **Objective and subjective standards** -

The attempter's liability to punishment is based on objective reasons (creation of abstract, and not concrete, danger) as well as subjective ones (intent to do wrong).The manner of estimating the beginning of execution and, consequently, the field of attempts, vary considerably depending on whether the danger is said to lie in what the attempter does or in what he is..... [pronounce judgment on the act... [objective conception] or on the person who did it [subjective conception].

2. **Irrevocable intent** -

There is a punishable attempt when the acts done show that the doer has an irrevocable criminal intent, when the moral distance between what he did and what he desired to do is so small that, had he been left to himself, he would almost certainly have crossed it.

3. **The point of no return** -

The doer should ...be beyond what might be called the point of no return; he should have taken a decisive step towards the commission of the offence, i.e., a step such that only circumstances beyond his control, and not a change of purpose, would subsequently prevent or have prevented the desired result from being achieved."

4. **Probability of abandonment** -

[Execution begins]...with any act which, in the doer's estimation amounts to a decisive step towards the attainment of his goal....admittedly, even at this stage, the doer may still of his own motion abandon the execution of his design...but, this abandonment is not in the ordinary course of things.

5. **Mental and material proximity**

Given the fact that the criminal law in general and the law of attempt are highly influenced by the concept of subjectivity, the mental rather than the material proximity is the decisive factor in judging whether or not an act amounts to attempt or preparation and that if a person has formed an irrevocable intent to commit a crime, how close he would be to causing harm if everything went according to his plan, is

[9] Note that some of the following standards are very similar to the above. They are discussed here for the sake of comprehensiveness only.

immaterial. He may be found guilty of an attempt even though many movements remain to be made, by himself or another person.

On the ....other hand if one were to require in addition that this act should tend directly or immediately towards the commission of an offence or should speak for itself..., one would undermine the very foundation of the subjective conception. Based on this subjective conception, what matters is the dangerous disposition of the person, but not necessarily material proximity. Accordingly, if objective proximity were a condition for the existence of an attempt, it should logically follow that the execution of an offence is begun only when an act is done which creates a concrete danger.

Testing the cases against the different legal standards

1. **Under the standard of Equivocality** – equivocal acts do not speak for themselves. Thus, such acts may or may not indicate a criminal design. Such is the case when one buys a box of matches or a knife which may be used for innocent as well as criminal ends. Moreover, this standard compels one to infer into the purpose behind doing the act and if the only reasonable inference is that the act was done to commit a criminal act, then this should amount to attempt.

Under normal circumstances a civil passenger does not carry the types of items mentioned in Case No. One. The items mentioned in Case No. Two are also deadly and there is no reason why anyone should transport and store them at such places like hotels, except to commit a crime. No reasonable mind will conclude that the possession of these items can be for an innocent purpose. Thus, in the absence of any other [innocent] motive to possess such dangerous items at these places, the lower court in Case No. One and the appellate court in Case No. Two, should have decided that acts done by the defendants [in the first instance court][10] amount to attempt and convict them accordingly[11].

2. Under the standard of proximity – This standard as shown above makes use of three tests namely, the last proximate act, acquiring the indispensable instrument and physical proximity. It appears that in Case No. Two the appellate court has based its

[10] Note – respondents in case No. One and appellant in case No. Two are mentioned as defendants hereunder.

[11] It is interesting to note here that, in a similar case to Case No. One, in the US, in the case, United States V Brown, 305 (W.D.Tex.1969), a person with a gun in his pocket, who checked in at the airline ticket counter and took a seat in the departure lounge, had been found guilty of an attempted offence of boarding an aircraft while carrying a concealed weapon. See LaFave at Foot Note 16.

decision mainly based on the standard of the last proximate act, though it seems to contradict this by stating that "This does not, however, mean that in order to conclude that a crime is attempted, one should wait till the last act is done but that it should have been proved with certainty that the crime was to be committed and that [the acts have reached] at a decisive stage." However, as indicated above this is an outdated test. It is also very dangerous to argue that a criminal should be allowed to do the last act before the law takes its own course.

In both cases, defendants had acquired the indispensable instruments, which were the items they intended to use and they did not need other instruments under the circumstances. Thus, their acts till they were apprehended meet this criterion and they should have been convicted under this test alone.

Though physical proximity is a subjective standard, it may be argued that acts done by defendants are by far significant compared with what remains to be done by them. Travelling all the way from Addis Ababa to Dire Dawa – more than 500 Kms. then to the airport and the checkpoint is not comparable with the distance between the checkpoint and run way where the plane was taxing – probably 300 or so meters. In Case No. Two too, the distance covered – AA to W. Germany - is quite substantial compared to the distance between the hotel and the library. It should also be noted that taking the seriousness of the crimes intended and the seriousness of apprehension, this standard should be applied restrictively. Thus since both the intended crimes were serious crimes the defendants should have been found guilty of attempt. Mention should also be made here regarding the difference between mental and material proximity. Accordingly, when intention is known, material proximity is immaterial. In both cases it was admitted that appellants had the intention to commit the intended crimes. Thus, let alone the last acts done by them till arrest, any other move beyond acquisition of the items should have made them criminally liable.

3. Under the probability of desistance standard – This standard focuses on the internal determination of each actor. In both cases the defendants were not ordinary criminals but political activists and hardened security personnel. Moreover, they could not achieve their intended results due to external factors beyond their control [i.e. arrest at the check point and explosion at the hotel] but not change of mind and it was unlikely that they would have abandoned their design out of any other cause. Thus, they should have been found liable for attempt. The objective and subjective standard can also supplement this argument, for given their personal backgrounds [i.e., political activists and security personnel], the defendants were more likely to persist in their criminal path unlike in the case of other individuals who commit crimes for other personal purposes.

4. Under the standards of irrevocable intent and point of no return – under both standards, what is important is the high degree of determination beyond which a criminal could not desist from going further except from external circumstances but not change of purpose. The physical as well as mental proximity and the personal profiles

of the defendants discussed above amply prove that they have all reached the point of no return and had irrevocable intents to achieve what they were set for. The facts that the hijacking failed due to arrest and the homicide due to the explosion amply prove that the causes for failure were extraneous to defendants but not change of purpose which is not expected of such actors. Thus, they should have been convicted for attempted crimes on these standards too.

5. Under the substantial step standard – this standard, as mentioned above focuses on the quality of the conduct to corroborate the actor's criminal purpose and that the emphasis should be upon what is done than what remains to be done. It is shown above that the only reasonable inference that can be made out of the possession of such deadly weapons at such places is that they are intended to be used for criminal ends but not any imaginable innocent purpose/s. The conducts of the defendants were undoubtedly corroborative of such purposes. Moreover, if more attention is given to what is done than what remains to be done, all acts done before failure were so alarming so as not to give defendants any benefit of doubt. It should be noted here that the whole reasoning of the court in Case No. Two focused on what remains to be done than on what is done. Based on this line of argument, defendants should have been convicted for their attempt to commit those crimes for which they were charged.

6. The articles under which appellants were charged and convicted – Apart from the issues of attempt and preparation, these cases also call for a brief discussion on the relevance of the articles under which the defendants were charged and convicted.

6.1- In Case No. One respondents were charged and convicted for attempted plane hijacking. A closer look at the statements of the decision also shows that they were charged and convicted for robbery. It should, however, be noted that Ethiopian had no any anti - hijacking law at the time when this crime was committed, i.e. in 1986 [E.C] 1994 [G.C.]. The first anti - hijacking law was enacted on February 22, 1996[12]. Under the Penal Code, robbery is a crime against property and has no relevance to the acts done by the respondents. Thus, though it is not clear why this was not raised as an issue, the case should have been rejected for being against the principle of legality provided under Art.2 of the code.

6.2 - In Case No. Two, the appellant was set free on the charge of homicide but found liable for unauthorized possession. Art. 41/1 of the Revised Penal Code No.1981 [under which the appellant was charged] had provided the following:

[12] Offences against the Safety of Aviation Proclamation No.31/96. Note also that the former criminal code did not have any provision that covers this situation and that the current criminal code makes this act punishable under Art. 507. It may further be argued that had it been possible to charge and convict such persons under the robbery provision there was no any need to enact an anti-hijacking law soon after this case.

4. Prohibited traffic in Arms.

Whosoever

(1) apart from offences against the security of the state (Art.4), makes, imports, exports or transports, acquires, receives, stores or hides, offers for sale, puts into circulation or distributes, without special authorization or contrary to law, weapons or ammunitions of any kind is punishable with rigorous imprisonment from five years to twenty five years[13].

It is noted from the facts of the case that the defendant and his accomplices were personnel of the then Ministry of Security and sent abroad for this specific purpose that was ordered and directed by the minister himself. Thus, their acquisition of those weapons employed in the attempt cannot be said to be *unauthorized.* Moreover, the intention behind was not trafficking but, to commit homicide. Thus, if not found liable for the attempt, they should have been set free on this count.

By way of conclusion and in retrospect, given what happened on 9/11, 2001 in the US, one can easily appreciate the seriousness of the danger created and the damage suffered by the acts of passengers armed with non-deadly weapons. Thus for stronger reasons, those deadly items recovered from respondents in Case No One should have given sufficient ground to convict them as charged. The appellant and his accomplices in Case No. Two, had shown their exceptional dangerousness by daring to commit series of crimes in another country and had they had their own way, they would have killed a number of individuals. Given the seriousness of the crimes intended to be committed and the apprehension felt in this regard, defendants should have been convicted of the crimes for which they were charged.

For all the above reasons, the decision of the lower court and the Supreme Court in cases No. one and Two, respectively do not pass muster.

[13] Note that Art. 481 of the Revised Criminal Code defines this act in an almost identical manner though with different ranges of punishment.

ETHIOPIAN BANKRUPTCY LAW: A COMMENTARY (PART I)

TADDESE LENCHO*

The bankruptcies came to us from Italy, _bancorotto, bancarotta, gambarotta e la giustizia non impicar_. Every merchant had his bench (_banco_) in the place of exchange; and when he had conducted his business badly, declared himself _fallito_, and abandoned his property to his creditors with the proviso that he retain a good part of it for himself, be free and reputed a very upright man. There was nothing to be said to him, his bench was broken, _banco rotto, banca rotta_; he could even, in certain towns, keep all his property and baulk his creditors, provided he seated himself bare-bottomed on a stone in the presence of all the merchants. This was a mild derivation of the old Roman proverb--_solvere aut in aere aut in cute_, to pay either with one's money or one's skin. But this custom no longer exists; creditors have preferred their money to a bankrupt's hinder parts.

Voltaire, Philosophical Dictionary, 'Bankruptcy'

Introduction

It is no exaggeration to state that Ethiopian Bankruptcy Law (tucked away in the last Book of the Commercial Code) is the least known and hence the least practiced in Ethiopia. Since the coming into force of the Commercial Code in 1960, cases having to do with bankruptcy have been few and far in between.[1] Why might this be? Is the defect in the law or in the economic environment? Is Ethiopian business environment immune from the natural laws of bankruptcy or has it always gone bankrupt without ever being noticed by the public or mediated by the law?[2] The Economist magazine recently quipped that imagining capitalism (business enterprises) without bankruptcy

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E-mail:tadboda@yahoo.com. I am grateful to all the assessors who kindly went through the draft version of this article and pointed to errors of one sort or another. Responsibility for all the errors that remain is all mine.

[1] The incidence of bankruptcy cases is reportedly picking up in recent times. For example, a regional high court recently declared a flour factory bankrupt in accordance with the bankruptcy provisions of the Commercial Code; in re. Shafi Kemal and Family Private Limited Company, Eastern Shoa Zonal High Court (Oromia), File No. 08477/98 E.C.

[2] Bankruptcy is a natural law of business. It is not that businesses in Ethiopia do not go bankrupt. But when they go bankrupt, the old law of the superior creditor seems to rule supreme in practice. Banks, for example, have developed a practice of private receiverships through private loan contracts. In this arrangement, borrower-businesses agree to submit their business to an employee or a consultant installed by the bank. The employee or consultant of the creditor bank manages the financial operations of the debtor and attempts to restore the latter to solvency. This practice is seen by some as a snub to the formal bankruptcy proceedings; see USAID: Ethiopia Commercial Law & Institutional Reform and Trade Diagnostic, January 2007, p. 53;

is like imagining Christianity without hell. [3] Perhaps, that is what happened in Ethiopia.

The questions of why bankruptcy laws have become dormant are troubling questions. However, as troubling they are, they cannot be answered in categorical terms. An answer to these questions would require an extensive empirical study of the business environment and the historical factors that might have kept the bankruptcy laws of Ethiopia from having to see the light of the courts.

There is no shortage of theories as to why bankruptcy cases are not as common as the failure of businesses would suggest. One theory puts the blame on the freezing of commerce in the aftermath of the 1974 Ethiopian Revolution, tying the (mis)fortunes of the bankruptcy provisions to the Commercial Code in general.[4] The problem with this theory is that it only explains why bankruptcy fell into disuse between 1974 and 1991. It does not explain the situation after 1991 when the economy of Ethiopia was more or less liberalized (seventeen years and counting!).

Another theory is lack of familiarity (of the legal community) with the provisions of bankruptcy in the Commercial Code. Lawyers are a critical piece in the application of the law. If lawyers do not know or understand the law, it is unlikely that the law will ever come to courts even if it were included in the Code. It is what Emperor Haile Sellassie I was emphasizing in his speech on the inauguration of the Journal of Ethiopian Law:

> *... We have observed that Ethiopia's rapid progress demands the services of a large number of legal experts... capable of insuring the effective application of the law.*[5]

In a recent report commissioned by the USAID, this matter has been aptly emphasized:

> *There is little demand for change from the debtor side because so little is known about bankruptcy protection. The possibility of reorganization or*

[3] See, The Economist, Business Bankruptcies, Waiting for Armageddon, March 27, 2008.

[4] Ato Tamiru Wondimagegnehu, who was a judge during the Imperial times, believes that the history of the Commercial Code in general and that of the bankruptcy law would have been completely different had the Revolution not taken the country along a completely different ideology of socialism. He remembers some cases of bankruptcy that started coming before courts; although the judges were not familiar with the bankruptcy provisions, they referred to the bankruptcy provisions to adjudge businesses bankrupt; conversation with Ato Tamiru Wondimagegnehu, November 28, 2008.

[5] Journal of Ethiopian Law, Vol. 1, No. 1, Summer 1964, p. V

protection arises not only from law, but from knowledge of the law, and that is quite limited.[6]

The third theory points to the foreclosure laws and practices of Ethiopia as probable reasons for the eclipse of bankruptcy. According to the USAID Commissioned report:

> *...lenders are using foreclosure law and practice instead of bankruptcy. Secured lenders can institute accelerated proceedings to repossess and liquidate security and do not need to start a bankruptcy action. Frequently, borrowers are captive to a single lender, with few other commercial obligations than their bank loan, so that foreclosure effectively deals with most of the debtor's liabilities, although it does not permit rehabilitation or reorganization and often results in liquidation.*[7]

Foreclosure powers were granted to banks and selected other creditors only in the last decade and could not entirely explain why bankruptcy practices are not so common.[8] It is perhaps nearer to the truth to conclude that multiple factors were conspiring to keep bankruptcy out of the limelight of the practice.

Although cases of bankruptcy have rarely been taken to courts, there are several reasons why one should write about Ethiopian bankruptcy law. First, it is barely known even among the otherwise savvy and seasoned lawyers of Ethiopia. Second, it has now been offered as an independent course for the last five or so years without any reference material. And lack of reference material is always a legitimate inspiration for writing (even if it were just an article). Third, since 1991, Ethiopia has taken on an economic policy whose driving engine is the participation of the private sector, and the private sector needs laws not just for its formation but also for its orderly winding up and possibly for its rehabilitation after bankruptcy.[9] It is not that Ethiopia lacks these laws but they are unknown even among those who earn a living from their knowledge of the law.

This commentary is divided into two parts. In the first part, I intend to treat subjects like the background of Ethiopian bankruptcy law, its organization and structure, scope and meaning, and the tests for commencement of bankruptcy under Ethiopian bankruptcy law. In the second part, I intend to throw light on some of the other basic

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[6] See United States Agency for International Development (USAID), Ethiopia Commercial Law and Institutional Reform and Trade Diagnostic, January 2007, p. 56

[7] Ibid, P. 53

[8] See Property Mortgaged or Pledged with Banks Proclamation No. 97/1998 and a Proclamation to Provide for Business Mortgage Proclamation No. 98/1998

[9] It is difficult to see how an economy can thrive without an effective bankruptcy law; for objectives and goals of bankruptcy law, See United Nations Commission on International Trade Law (UNCITRAL), Legislative Guide on Insolvency Law (2005), p. 14 ; See also Elizabeth Warren, the Untenable Case for Repeal of Chapter 11, Yale L. J., Vol. 102, No. 2, pp 467, 478

features of Ethiopian bankruptcy law and related subjects of composition and schemes of arrangement.

At the end of each part, I will provide some concluding remarks on what I think would be striking features of Ethiopian bankruptcy law. For these commentaries, I have relied upon as wide a range of literature on the subject of bankruptcy as I could get my hands on. But as repeated quotes and references in the footnotes show, I am indebted primarily to the 2005 UNCITRAL Legislative Guide on Insolvency Law of 2005 (hereinafter simply 'UNCITRAL' Guide').[10] As far as I am concerned, 'UNCITRAL Guide' offers the latest and most comprehensive reference on the subject of bankruptcy. The 'UNCITRAL Guide' also provides alternative approaches on controversial points of bankruptcy, something one can rarely find in many other sources. .

I. Background

The history of bankruptcy law in Ethiopia (at least in its modern sense) dates back to 1933. That was the year when Emperor Haile Sellassie I passed a bankruptcy law containing 96 articles.[11] It is not clear as to how much of a resource material this law was for the drafter of Book V of the Commercial Code, but there was no doubt the drafter was aware of its existence, as the background documents show.[12] Along with the Business Organization Law of 1933 and Registration Decree of 1928, the Bankruptcy Law of 1933 represents the Emperor's first attempt to modernize Ethiopian law relating to business or commerce.[13]

Under the 1933 law, 'every person registered in the commercial register' and who suspends payment might be declared bankrupt.[14] Suspension of payment triggers a proceeding of bankruptcy only when the obligation of payment arises out of what the

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[10] United Nations Commission on International Trade Law (UNCITRAL), Legislative Guide on Insolvency Law (2005).

[11] The Commercial Code of 1960 had three 'domestic' legislative predecessors: Registration Decree of 1928, Law of Business Organizations of 1933 and Law of Bankruptcy of 1933; see Peter Winship (ed. and trans.), Background Documents to the Commercial Code of Ethiopia of 1960, Faculty of Law, HSIU, 1974 Appendix III (Manuscript), Pp. 185-220

[12] In the Background Documents compiled and translated by Peter Winship, the drafter acknowledges borrowing from the French, Italian and other bankruptcy laws. He also referred to the 1928 Registration Decree and the 1933 Business Organization Law; See Peter Winship (ed. And trans.), Background Documents to the Commercial Code of Ethiopia of 1960, Faculty of Law, HSIU (1974); pp. 45 and 54

[13] It is striking to note that this first attempt, what one might call the first phase of legislative modernization, was rather piecemeal and uncommitted. It was on the second phase that the Emperor took more drastic and systematic approaches to modernizing Ethiopian law and Ethiopian legal system, with the promulgation of Penal Code in 1957, the Civil Code, the Commercial Code and the Maritime Code in 1960, the Criminal Procedure Code in 1961 and the Civil Procedure Code in 1965.

[14] Art. 1 of the 1933 Bankruptcy Code

law calls an 'executory document' ('titre executoire').[15] An executory document is narrowly defined in the 1933 law. It refers to three documents only:

a) a judgment against the debtor in a court of last appeal;
b) a minute of a conciliation proceeding in which the debt is recognized without reservation;
c) a commercial instrument signed or accepted by the debtor accompanied by a protest for non-payment regularly drawn up.

The 1933 Bankruptcy law allowed initiation of bankruptcy only against debtors who suspended a payment which was a sum certain, liquid and in all respects evidenced by a written document. Incidentally, with the exception of a court judgment, these documents would have permitted creditors to seek order through the special route of summary proceedings, and the notion of 'titre executoire' is more often used today in connection with summary or accelerated proceedings.[16]

Apart from the commencement standard (which was very stringent), two other features distinguish the 1933 bankruptcy law from the Commercial Code of 1960. One is that the 1933 law did not have provisions for 'schemes of arrangement'.[17] The other is that the 1933 law contained penal provisions.[18]

It is not certain if the 1933 Bankruptcy law was ever applied in practice. Even the otherwise reliable account of the period, Mahteme Sellassie's *Zikra Neger*, says nothing about the 1933 Bankruptcy Law. This is rather surprising because it mentions other similar laws passed at the time, such as the Law of Business Organizations of 12 July 1933, and the Registration Decree of 25 August 1928.[19]

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[15] Ibid; Compare with OHADA Uniform Act on Simplified Recovery Procedures and Enforcement Measures (1998): Article 33. According to the Uniform Act, only the following are defined as enforceable rights (titre executoire): a court decision which has been declared enforceable, a foreign deed or court decision or an arbitral award that cannot be suspended by any type of appeal and that has been declared enforceable by a court decision in the State where the enforcement is sought; official minutes of conciliation, signed by a judge and the parties; a notarized deed that has been declared enforceable; or a decision which, under the national law of the Member State concerned, has the same effect as a court decision; See Boris Martor et al, Business Law in Africa, OHADA and the Harmonization process, 2002, P. 232.

[16] Compare with Article 284 of the Ethiopian Civil Procedure Code; summary procedure is designed to prevent full trial when there is no material issue of fact to be tried; See Notes, Factors Affecting the Grant or Denial of Summary Judgment, Columbia Law Review, Vol. 48 (1948), p. 780.

[17] The 1933 law has provisions regarding 'composition', see Chapter 12, Articles 68-84

[18] See Chapter 13, Articles 85-93 of the 1933 Bankruptcy law; the Commercial Code has no provisions regarding offenses related to bankruptcy, leaving these matters to the Penal Code of 1957, Articles 625-633

[19] Incidentally, the Law of Business Organizations and the Bankruptcy Law were passed on the same date; See Mahteme Sellassie W/Meskel, Zikre Neger (1962 E.C, in Amharic). About the 1928 Decree, the first drafter of the Commercial Code writes: "The Decree was not applied effectively outside Addis Ababa and several towns." See Escarra, Book I Expose des Motifs (2 September 1954), in Winship, Supra Note 12, P. 45; See also the preamble of the Commercial Code of 1960.

The first drafter of Book V of the Commercial Code, Professor Escarra, used the French Bankruptcy Legislation (as revised in 1955) as the primary source for drafting Book V of the Commercial Code, with one important difference.[20] The French law of the time provided for two procedures, namely bankruptcy and judicial administration[21], but Professor Escarra removed judicial administration[22] from his Ethiopian draft and supplanted it with the 'scheme of arrangement systems' accepted in many jurisdictions, such as in Italy.[23] The schemes of arrangement sections (Book V, Title V, Articles 1119-1166) were primarily borrowed from the Italian law of 1942, which the drafter at the time considered the most technically complete.[24] The composition sections (Articles 1081-1100) were also inspired in part by the Italian law of 1942.[25]

Professor Escarra was not able to complete the drafting of the Commercial Code due to his untimely death in 1954. The task of completing the drafting of the Code fell upon Professor Jauffret. At the time of his death, Professor Escarra had completed the drafting of Book V of the Commercial Code, and Professor Jauffret accepted this draft, in his words, 'with minor revisions and innovations of his own.' [26] These 'revisions and innovations' of Professor Jauffret included:

i) *clarifications (redrafting) of provisions on the scope of bankruptcy, conditions of bankruptcy, bankruptcy in fact, court jurisdiction and harmonization of the rules of bankruptcy with those on commercial register;*

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[20] Winship, Supra Note 12, P. 109; Professor Escarra drafted the texts of Book II (Business Organizations), IV (Negotiable Instruments and Banking Transactions) and V (Bankruptcy and Schemes of Arrangement). Professor Jauffret took over the drafting of the Commercial Code (upon Professor's Escarra's death) and produced Books I and IV, See Winship, Supra Note 12, p. 33

[21] Judicial administration or judicial arrangement under the French system is in many ways similar to the schemes of arrangement under Ethiopian law. In a French system, a debtor and creditors may enter into agreement and submit the same to court. If the agreement is confirmed by the court, it enables the debtor to continue the operation of its enterprise; see Jacques M. Raffin, Commercial Laws of France, in the Digest of the Commercial Laws of the World, 1972.

[22] One interesting note about this is that Professor Escarra himself was a member of the French Commission on the revision of the French Commercial Code and recommended the adoption of the scheme of arrangement for France, but his proposal was rejected. Well he was not disappointed for ever, as he put that in the Ethiopian Commercial Code, with little opposition; See Winship, Supra Note 12, p. 109.

[23] Winship, Supra Note 12, P. 109

[24] Ibid.

[25] The drafter thought he took a huge risk in this regard, because at the time the Italian war and occupation was fresh on the minds of the Imperial Government; He writes "The valid resentment which the Italian occupation has left in Ethiopia should not blind one tot he technical value of some of the Italian laws, which should be studied correctly." See Winship, Supra Note 12, p.105. There was no evidence that the Government officials of the time held anything against him for borrowing from the laws of Italy. No body took action against the roads constructed by Fascist Italy, and if any thing, people were grateful. The drafter, through his statements, sought to preempt any possible backlashes against his recourse to Italian law. After all, what had Italian fascism to do with 'composition' and 'schemes of arrangement'? Nothing!

[26] Winship, Supra Note 12, PP. 109-110

ii) *incorporation of the principle of 'suspension of individual suits' upon declaration of bankruptcy (Article 1026);*

iii) *provision of a definition for the phrase 'universality of creditors' (Article 1025);*

iv) *addition of rules relating to business, in particular the rule regarding the right of universality of creditors to have a mortgage upon business in Article 1007 cum 1089 (legal mortgage), and rules regarding the rights of creditors secured by mortgage on the business in the distribution of the residue (Articles 1069-1072) and a rule that extinguishes the right of business mortgagees to seize the business after the opening of compulsory winding-up (Article 1105),*[27]

v) *incorporation of rules regarding the rights of sellers with ownership reserved (Articles 1063 cum 1076)*

Apart from these, Professor Jauffret considered the draft prepared by Professor Escarra 'satisfactory' and submitted the final draft with his report on 1 March 1958, four years after Professor Escarra passed away. Two years later, i.e. in 1960, the Commercial Code was promulgated as a law, containing, among others, Law of Bankruptcy, as one of the five books of the Code. The final version of Book V, as officially promulgated, contains 202 articles arranged in five titles:

Title I: General Provisions
Title II: Bankruptcy
Title III: Schemes of Arrangement
Title IV: Special Provisions Concerning Bankruptcy and Schemes of Arrangement with Respect to Business Organizations
Title V: Summary Procedure

II. The Structure (Organization) of Ethiopian Bankruptcy Law

On the structure of Ethiopian bankruptcy law, three general statements can be made.[28] First is its distinct preference for bankruptcy, in the sense of its preference for liquidation to rehabilitation of the debtor's business. This is an inference from the arrangement of the provisions, rather than an explicit statement of policy expressed in any of the provisions of Book V of the Commercial Code. The provisions regarding bankruptcy precede the provisions on composition and schemes of arrangement. In addition, the largest number of provisions is devoted to the liquidation of the business of the debtor for the collective interest of creditors. Only on occasions is the law interested in saving the business of the debtor from dismemberment by creditors.

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[27] Professor Jauffret claims to have invented these rules, as he found no parallel elsewhere, but justified in Ethiopian law; See Winship, Supra Note 12, P. 110

[28] Having been drafted by two drafters at different times, Book V of the Commercial Code strikes one as lacking in unity. This lack of unity makes it difficult to make categorical statements about the Code.

Once a bankruptcy proceeding is set in motion, the law presumes that the debtor is culpable, not just unlucky, to have been declared bankrupt.[29] In all cases, the law strips the debtor of his power and right to manage his business.[30] The law requires the appointment of third parties, like trustees and commissioners, for the purposes of temporarily managing the debtor's business, collecting debts and distributing the proceeds among creditors.[31] All these point strongly towards the Code's preference and partiality for bankruptcy. The USAID Diagnostic made a similar observation in the following words: 'The [Ethiopian] bankruptcy law provides for liquidation and reorganization (sic), but in tone and practice clearly favours liquidation.'[32]

Secondly, the Commercial Code appears to chart two separate (at points related) procedures for debtors in financial difficulties.[33] A debtor and other parties may either pursue the route of bankruptcy or schemes of arrangement, and although there are possibilities for conversion in the course of proceedings, each route has its own separate rules and proceedings.[34] Each proceeding sets forth its own access and commencement requirements, with different possibilities for conversion between the proceedings at some stage.[35]

This approach of the Commercial Code contrasts with what the 'UNCITRAL Guide' calls the 'unitary' approach. In a unitary approach, a single commencement requirement leads the business through reorganization and liquidation.[36] Ordinarily, the business in financial difficulties goes through reorganization attempts, and only when that fails will one proceed to liquidation.

Recent bankruptcy reforms in some countries have moved in the direction of the unitary approach.[37] And more and more countries are opting for a wait and see period, known as the 'observation period', to determine the direction of the proceeding for a business in financial difficulties.[38] During the 'observation period' no presumption is made as to whether the business will be eventually reorganized or liquidated.[39] This

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[29] See, for example, Articles 1019 – 1023 of the Commercial Code
[30] See Article 1023 of the Commercial Code
[31] See Articles 991-993 and 994-1001 of the Commercial Code
[32] USAID, Supra Note 6, p. 53
[33] I use 'financial difficulties' deliberately because the debtor's current inability to pay debts may lead to bankruptcy and imminent inability to pay debts may trigger a scheme of arrangement; see Articles 968 and 1119 of the Commercial Code.
[34] For example, a debtor as well as creditors, court or the public prosecutor may apply for bankruptcy while it is only the debtor that can apply for a scheme of arrangement; compare Article 975 with 1119 of the Commercial Code.
[35] UNCITAL, Supra Note 4, p. 17
[36] Ibid; See also the French Commercial Code where a single proceeding takes a business in financial difficulties through safeguard proceedings, reorganization, and liquidation; Vogel, Louis, and Perochon, Francoise, trans. French Commercial Code.
[37] UNCITRAL, Supra Note 10, pp 17-19
[38] Ibid, p. 19
[39] Ibid

approach is quite reasonable, because, in practice, it is often impossible to provide an accurate diagnostic as to the viability of the business.[40] A separate proceeding may lead more often than not to a misdiagnosis of the financial situation of the business, leading courts to misconstrue temporary financial shortfalls for a permanent problem and vice versa. Misdiagnosis can become costly, as it would mean the court might have to go back on its initial judgments. And this error in judgment can be irreversible. In its adoption of separate proceedings, the Commercial Code seems to open a way for this kind of error.

A third prominent feature of the Commercial Code is that, by the explicit preference of the drafters, the Code follows a 'dual' system of bankruptcy and schemes of arrangement, setting down separate rules in a separate title for business organizations.[41] This does not, however, mean that the general rules of bankruptcy, such as those in Articles 974 to 1118 do not apply to business organizations. Many of these rules apply to business organizations, but in addition to these rules and at times as exceptions to these rules, there are special rules that apply to business organizations only. It is for these 'special rules' that a separate title has been included in the Commercial Code. It will be seen that this approach is more about where these rules should be put than anything else. If these rules were inserted in the general provisions, we would not be talking about dual approach in this instance.

There are other distinct features which strike us when we read Book V, but these, to my mind, are minor. These features include, for example, the heavy accent on the punitive element in the bankruptcy regime and the rules on discharge. These features of the Commercial Code will be emphasized in their appropriate places.

As alluded to before, Book V of the Commercial Code is arranged into five titles. Title I, with the smallest number of articles (just six Articles), is appropriately entitled "General Provisions." This title lays down general rules for the whole Book. It defines the scope of Book V and sets down the conditions for bankruptcy and schemes of arrangement. Title II, with the largest number of articles (154 Articles in all), is devoted to 'bankruptcy' and 'composition.' This is the most important title in the whole *corpus* of Book V. Title III deals with schemes of arrangement, and its aim is, in contradistinction to Title II, the saving of the business of the debtor. Title IV contains special rules of bankruptcy and schemes of arrangement for business organizations. The last title in Book V (Title V) deals with small and simplified (as well as accelerated) bankruptcy proceedings.

III. On the Meaning of Bankruptcy

As Voltaire's quote at the beginning of this article notes, the word bankruptcy is etymologically derived from an old Italian word "banca rotta" which signified the

[40] Ibid, p. 18
[41] See Title IV of Book V of the Commercial Code, Articles 1154-1165

medieval practice of breaking tables/benches on a trader who absconded with the money or goods of creditors. The etymological meaning of the term today survives as a relic of a brutal past, and nothing more.

There is some confusion and inconsistency in bankruptcy literature in the use of the term 'bankruptcy' and cognate concepts like 'insolvency' and 'reorganization.' Part of the confusion is that the term bankruptcy is sometimes used interchangeably with insolvency, and sometimes the two terms are technically distinguished. Some use insolvency to refer to the fact of inability to pay debts and restrict bankruptcy to the judicially recognized proceeding following one's inability to pay debts. Black's Law Dictionary, for instance, defines insolvency as "the condition of being unable to pay debts as they fall due or in the usual course of business" and limits bankruptcy to 'the statutory procedure, usually triggered by insolvency, by which a person is relieved of most debts and undergoes judicially supervised reorganization or liquidation for the benefit of that person's creditors.'[42] Similarly, Encyclopedia Britannica defines insolvency as 'the inability to meet debts' and bankruptcy as 'the status of the person who has been declared by judicial process to be unable to pay his debts.'[43]

Some writers use insolvency for a similar proceeding for debtors other than traders, in the sense of civil bankruptcy. For these, bankruptcy refers to a proceeding respecting traders and commercial business organizations. In P Ramanatha Aiyar's Concise Law Dictionary, for example, we have this:

> *The leading distinction between a bankruptcy law and an insolvency law, in the proper technical sense of the words, consists in the character of the persons upon whom it is designed to operate, the former contemplating as its objects traders of a certain description, the latter insolvents in general, or persons unable to pay their debts.*[44]

For some, the distinction between bankruptcy and insolvency does not even seem relevant. The 'UNCITRAL Guide', for example, uses the term 'insolvency' to mean both the fact of inability to pay debts and more importantly the formal proceedings for either liquidation of the debtor's assets or rehabilitation of the debtor's business.[45]

There is also some confusion over the scope of bankruptcy. Sometimes, bankruptcy is used broadly as to include both proceedings of liquidation and reorganization of

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[42] See Black Law Dictionary, Bryan A. Garner (ed. 1993), s.v. "Bankruptcy"

[43] See Encyclopedia Britannica, 2005 Edition, s.v., "Bankruptcy"; Arthur Leff defined bankruptcy as 'a legal proceeding...in which an insolvent debtor by surrendering his non-exempt assets for distribution to his creditors may be granted a discharge from substantially all his obligations'; See Arthur Leff, the Leff Dictionary of Law: A Fragment, Yale Law Journal, Vol. 94, No. 8, p 2132

44 P. Ramanatha Aiyar, Concise Law Dictionary, With Legal Maxims, Latin Terms and words and Phrases, 2006

[45] See UNCITRAL, Supra Note 10, p 5

a business.[46] When bankruptcy is used in this sense, the various proceedings available for bankrupt business are distinguished by the use of terms like 'liquidation', 'composition', 'reorganization,' all as constituent elements of bankruptcy as an overarching procedure. If the aim of a proceeding in a particular instance is to liquidate the bankrupt business (and distribute the proceeds among creditors), terms like 'liquidation' or 'straight bankruptcy' are used.[47]

Sometimes bankruptcy is used in a narrow sense of only referring to liquidation proceedings. In this sense, bankruptcy is synonymous and interchangeable with liquidation, and reorganization proceedings are treated as if they were a separate proceeding from bankruptcy.[48] This association of the term bankruptcy with liquidation of the debtor's business is now less common.

The Ethiopian Commercial Code (of 1960) uses the term 'bankruptcy' almost exclusively. There is only one article in the entire Commercial Code where insolvency is mentioned alongside bankruptcy, not as an interchangeable word but possibly as the fact of inability to pay debts.[49] That article is Article 542(3) where insolvency is stated as not a ground for dissolution of a company 'unless otherwise expressly provided in the articles of association.'[50]

The Commercial Code uses 'bankruptcy' in a narrow sense of 'straight bankruptcy' referring to proceedings that involve the liquidation and winding-up of the business of the bankrupt debtor. Book V itself is entitled 'Bankruptcy and Schemes of

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[46] Black's Law Dictionary, for example, defines bankruptcy as having two forms: liquidation and reorganization. The Dictionary also concedes that the terms 'straight bankruptcy' and 'bankruptcy' often are used to describe liquidation because the vast majority of bankruptcy cases are liquidation cases; See Black's Law Dictionary, ... Edition, s.v. "Bankruptcy" ....; similarly the late Professor Arthur Leff seems to subscribe to this broad construction of bankruptcy. He writes "the [US] Bankruptcy Act also provides for reorganization of debtors, i.e., a procedure for the rehabilitation rather than liquidation of the debtor's estate or business'; Arthur Leff, the Leff Dictionary of Law: A Fragment, Yale L. J., Vol. 94, No. 8, p 2132.

[47] The UNCITRAL Legislative Guide defines liquidation as 'proceedings to sell and dispose of assets for distribution to creditors in accordance with the insolvency law.' See, UNCITRAL, Supra Note 10, p 5

[48] See Black's Law Dictionary, Supra Note 46

[49] The Commercial Code avoids 'insolvency' even for a fact of inability to pay debts. Instead, the Code uses 'suspension of payment' or 'bankruptcy in fact' to refer to the fact of inability to pay debts; See Articles 969, 970 and 971 of the Code.

[50] The Civil Code of Ethiopia, on the other hand, uses the term 'insolvency' in some provisions (see, for example, Articles 1019 and 1757) and 'bankruptcy' in others (see Articles 1932 and 1947 of the Civil Code); the Civil Code is not helpful in distinguishing bankruptcy from related concepts. But, Article 1019 (2) of the Civil Code unearths the intention of some of the drafters of Ethiopian Codes to develop parallel procedures (of insolvency) for civil debtors in the Ethiopian Civil Procedure Code. For some unknown reasons, the 1965 Ethiopian Civil Procedure Code failed to incorporate detailed rules for insolvency of civil debtors. If this intention (of the drafters) were realized, we would have provisions for insolvency of civil debtors (non-traders, consumers) in the Code of Civil Procedure and bankruptcy proceedings for traders in the Commercial Code. Now we only have the latter.

Arrangement" to separate the 'scheme of arrangement' part from the 'bankruptcy' part. Title II of Book V, entitled 'bankruptcy', includes provisions that eventually lead to the liquidation and winding-up of the bankrupt's business, tempered only by the provisions of 'composition.'[51] 'Tempered', because once bankruptcy is set in motion, composition and payment in full are the only ways out from the liquidation of the debtor's business.[52] With the exception of the possibility for opting out of bankruptcy through composition, all the rules of Title II regarding bankruptcy are aimed at liquidating and winding-up of the business of the bankrupt debtor. The following definition of bankruptcy offered by the first drafter by and large confirms this narrow sense of bankruptcy:

> *Bankruptcy can be defined as both a collective and universal mode of execution: collective in the sense that it puts secured and unsecured creditors more or less on an equal footing, universal in the sense that it applies to the total estate of the bankrupt person. The goal of this procedure is either to save the enterprise by a composition with creditors or to liquidate it, which may bring into play different losses of rights or penalties for the debtor in bad faith in particular.*[53] *(Emphasis mine)*

It is not difficult to see that the first drafter did not see 'schemes of arrangement' as part of a bankruptcy proceeding. As to why the drafter preferred the term 'bankruptcy' to be used in this narrow sense, instead of a more common expression such as 'liquidation' or 'straight bankruptcy,' it is for anyone to speculate.[54] It is not as if the term 'liquidation' was not on offer at the time. Other Books of the Commercial Code use the term 'liquidation' to refer to procedures aimed at dissolving and winding-up a business.[55]

Although bankruptcy may be more appropriately used in the broader sense, as shown above, we ought to conform to the narrow construction of the drafter in this article, and unless the context otherwise shows, bankruptcy is used in this article to denote straight bankruptcy or liquidation, distinguished from cognate procedures of 'composition' and 'schemes of arrangement.'

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[51] See Articles 1081-1100 of the Commercial Code

[52] See Article 988 of the Commercial Code; for composition, later

[53] Winship, Supra Note 12, p. 105

[54] It may have something to do with the fact that the drafters of the Commercial Code were two. The first drafter, Professor Escarra, completed the drafting of Books II, IV and V before his untimely death in 1954 and the second drafter, Professor Jauffret, completed the other Books (I and III), See Winship, Supra Note 12, P. 33

[55] See, for example, Articles 496, 499-509 of the Commercial Code

IV. Scope of Ethiopian Bankruptcy Law

4.1 In General

Modern bankruptcy law grew out of the practices of the mercantile cities of Northern Italy and for a long time bankruptcy was seen as a status that applied only to merchants.[56] Bankruptcy law has come a long way since then. Many countries have now abandoned this restriction of bankruptcy to traders. Their bankruptcy regimes are often extended to all classes of persons, whether these are engaged in trade or not.[57] There are, however, some countries (which inherited their laws from the French tradition) which still restrict bankruptcy to traders.[58] Ethiopia, by the conscious choice of the drafters, belongs to the group of countries which apply bankruptcy only to traders.[59]

Article 968 delimits the scope of Ethiopian Bankruptcy law:

> *The provisions of this Book (i.e. Book V) apply to any trader within the meaning of Article 5 of this Code and to any commercial business organization within the meaning of Article 10 of this Code with the exception of joint ventures.*[60]

A cursory reading of Article 968(1) would show that Book V of the Commercial Code is narrower in scope of application than other provisions of the Code. As far as individual traders are concerned, Book V is co-extensive with the scope of the Commercial Code itself. All traders as defined by Article 5 of the Commercial Code

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[56] In this connection, the first drafter writes "The different laws of bankruptcy have many points in common. ... Moreover, they can trace their history to common historical sources, among which the practices of the mercantile cities of Northern Italy..." See, Escarra, Book V: Expose des Motifs (2 September 1954), in Winship, Supra Note 12, p. 105

[57] These countries include Germany, Austria, Japan, the USA and Canada; see Encyclopedia Britannica, supra note 43; although these countries extend the status of bankruptcy to all persons, it does not mean that the specific rules of bankruptcy are the same across the board for all classes of persons; see also UNCITRAL, Supra Note 10, P. 38

[58] It is interesting to note that France, responsible in the past for trader-only regimes of bankruptcy, now extends its bankruptcy regimes to all persons even if they are not traders; Article L620-1 of the French bankruptcy law states: "The safeguard procedure shall apply to traders, persons registered with the craftsman's register, farmers, other persons running an independent professional activity, including an independent professional person with a statutory or regulated status or whose designation is protected, as well as private-law entities." See also Article L631-2 and Article L640-2 of the French Commercial Code, which provide for similar rules. See also, Encyclopedia Britannica, Supra Note 43

[59] The drafter was fully aware of this distinction on the scope of bankruptcy laws. For instance, he writes "...the Germanic and Anglo-Saxon countries (Germany, England, USA) extend the rules of bankruptcy to all debtors, while the Latin countries (Argentina, Belgium, Brazil, France, Italy, Spain) apply bankruptcy only to traders." Nonetheless, he chose a trader-only regime of bankruptcy for Ethiopia; see Winship, Supra Note 12, P. 100

[60] Article 1155 (1) repeats Article 968 for business organizations. The drafter repeated this probably for emphasis. A separate title is reserved to provide for special provisions applicable to business organizations, and that is how the repetition came about. If a separate title were necessary, a repetition would be necessary; see Title V of Book V, Articles 1154-1165 of the Commercial Code.

are subject to the provisions of bankruptcy, i.e., may be declared bankrupt. When it comes to business organizations, however, there are limitations. Article 968(2) has explicitly excluded 'joint ventures' from its applications. In addition, Article 968(1) uses the phrase 'commercial business organization,' which would obviously mean that non-commercial business organizations[61] are excluded, however viewed they may be. Business organizations assume the mantle of 'commercial' organization for either of two reasons,[62]

i) *if they carry on activities specified in Article 5 of the same Code or if their memorandums of association indicate that as their objective*
ii) *if they are organized as private limited companies or share companies;*

Businesses organized as private limited companies and share companies are always subject to bankruptcy, regardless of the objectives for which they are established. It does not matter that their objectives do not fall under the list under Article 5 of the Code. If a business is organized as one of the three other forms of business organizations (ordinary partnership, general partnership, and limited partnership), the question of whether the business organization in question is subject to the provisions of bankruptcy will turn on whether the business organization is engaged in activities listed under Article 5 of the Commercial Code or its memorandum states this as the objective of the firm. Non-commercial business organizations (sometimes called civil business organizations) may be covered by the other provisions of Commercial Code, but not Book V of the Code.

The Commercial Code is surprisingly (and perhaps unwittingly) vague about the status of civil business organizations. Article 10 of the Code talks about commercial business organizations, suggesting that there are "non-commercial" business organizations. It even prescribes that private limited companies and share companies are always commercial business organizations, whatever their objectives. Article 213 of the Code provides that any of the business organizations recognized by the Code may be a commercial business organization except for an ordinary partnership. For some reason, the upshot of Article 213 is that ordinary partnerships are prohibited from carrying on activities under Article 5 of the Code[63] or they are no longer named ordinary partnerships when they do so. By a process of exclusion, other business organizations (i.e., general partnerships and limited partnerships) may carry on activities other than those listed in Article 5 in which case they acquire the status of 'non-commercial' business organizations. The Commercial Code says very little about how non-commercial business organizations are regulated and which rules of the Commercial Code (if any) apply to them,

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[61] The distinction between civil and commercial business organizations is not unique to the Ethiopian Commercial Code; See Seyed M. Hosni, Commercial and Civil Companies in UAE law, Arab Law Quarterly, Vol. 7, No. 3 (1992), pp 159-174

[62] See Article 10 of the Commercial Code

[63] See Everett Goldberg, J. Eth. L., Vol.8, No.2 (1972), pp 500-501

Incidentally, the 1933 Law of Business Organizations is much clearer in this regard than the Commercial Code. First of all, it is explicit in its reference to civil business organizations.[64] It devotes a separate title to this form of business organizations.[65] Secondly, it regulates the rights and obligations of partners, and fixes their liabilities.[66] In view of this, it is a little surprising that the Commercial Code leaves much to be desired in its distinction of commercial business organizations from non-commercial ones.

4.2 Bankruptcy and Banking Business

Once the general scope of a bankruptcy law is settled, the next issue is whether the rules of bankruptcy should apply uniformly to all traders or whether there is a need for special treatment of certain classes of traders. Neither Article 968 nor Article 1155 of the Commercial Code addresses this issue.[67]

One of the sectors which have often required special treatment in some countries is banking.[68] There is no uniformity in the approach of bankruptcy regimes towards banks. Some countries (e.g. the USA) have developed a special law of bankruptcy for banks, removing banks from general regime of bankruptcy completely.[69]Many countries (notably those in Europe), however, have not gone so far as developing special rules of bankruptcy for banks.[70] Instead, these countries have developed special rules of banks which apply as supplements or exceptions to the general rules of their bankruptcy law. In other words, in these countries, the general rules of bankruptcy apply to banks so long as the general rules are compatible with the special rules of

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[64] See Title II of the 1933 Law of Business Organizations, Articles 20-31.

[65] Ibid

[66] See, for example, Article 20 of the 1933 Law which states "Members of a civil business organization are jointly and severally liable for the debts regularly contracted by the business organization."

[67] There is no evidence that the drafters were concerned about traders requiring special treatment during bankruptcy. In all likelihood, the drafters intended Book V to apply to all classes of traders, without any privileges or dispensations.

[68] A variety of arguments have been put forward in support of special regimes of bankruptcy for the banking sector. Banks deserve special treatment because they 'typically hold highly liquid liabilities in the form of deposits repayable on demand' and 'long term loans' which, unlike the deposits, are not easily and immediately convertible into cash, resulting in a mismatch of maturity. A crisis of confidence, which may be set off by a rumor, can result in massive withdrawal of deposits, causing liquidity shortfalls. In addition, banks 'perform financial services that are fundamental to the functioning of an economy' by extending credit, taking deposits and processing payments. In many countries, banks are the primary source of liquidity for most financial and non-financial institutions. Lastly, banks are the 'transmission belt' for the implementation of monetary policy. For arguments for or against special dispensations for the bankruptcy of banks, see Eva Hupkes, Insolvency – why special regime for banks? in Current Developments in Monetary and Financial Law, Vol. 3, Pp. 2-4; See also UNCITRAL, Supra Note 10, pp 40-41

[69] See Eva Hupkes, Insolvency – why special regime for banks?, in Current Developments in Monetary and Financial Law, Vol. 3, p. 8

[70] See Ibid, p. 7; Under Italian Law, for example, the Italian banking law sets forth several special rules for bank insolvency while the provisions of the Italian bankruptcy law continue to apply 'in so far as they are compatible' with the banking law. The same obtains in Norway, see ibid.

bankruptcy set forth in their banking laws. There are also countries, for example the UK, where no special dispensation is available to the banking sector. The UK treats banks like any other business for bankruptcy purposes.[71]

While this article was being readied for publication, the Banking Business Proclamation which was in force since 1994[72] was repealed and replaced by a new Banking Business Proclamation (No. 592/2008), with far reaching implications for bankruptcy. The Banking Business Proclamation that was just repealed contained few provisions addressing the bankruptcy of banks, leaving several issues of bankruptcy to the general law of bankruptcy in Book V of the Commercial Code.[73] If the comments of this article were to draw upon or stick to the trajectory of the repealed Proclamation, they would (as they should) be relegated to a mere historical relic, such is the extent of the change in the area of bankruptcy of banks as a result of the new Proclamation. The repealed Proclamation's approach would have placed Ethiopia among a group of countries which subject banks to the general rules of bankruptcy save for a few special rules contained in banking business laws.

All that is history now. By virtue of the new Banking Business Proclamation, Ethiopia can now stake a claim to having a special bankruptcy law for banking business, superseding and overriding the general rules of bankruptcy in the Commercial Code. The New Proclamation devotes a whole part to what it calls 'Revocation of License, Receivership and Liquidation.'[74]

The new Banking Business Proclamation breaks with the Commercial Code not just in substance but even in the very terms it uses. Instead of the terms 'bankruptcy', or 'schemes of arrangement', 'liquidation' and 'receivership' are used. In stead of the term 'trustee' for a person who manages a bankrupt business, we have a 'receiver' to manage a bank in bankruptcy.[75] The institution of 'commissioner,' which incidentally is an important office in general bankruptcy proceedings, does not even get a nod in the new Banking Business Proclamation (in all likelihood, it is abrogated). The National Bank of Ethiopia appears to have taken the place of the 'Commissioner.'[76]

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[71] Eva Hupkes, Supra Note 69, p. 7

[72] Licensing and Supervision of Banking Business Proclamation No. 84/1994 (repealed)

[73] The repealed Proclamation required prior notice to be given to the National Bank of Ethiopia before bankruptcy proceedings were initiated against a bank. In addition, the National Bank is authorized to appear before the court hearing the case and petition for bankruptcy to safeguard the interests of creditors. The National Bank also recommends a liquidator (trustee) for the bank in times of bankruptcy; see Article 26 of the now repealed Proclamation No. 84/1994.

[74] Proclamation No. 592/2008 has nine parts, and 61 Articles. Of this, Part Eight (the part dealing in part with bankruptcy of banks), contains sixteen articles (Articles 32-48).

[75] See Article 33 of the Banking Business Proclamation No. 592/2008

[76] See Article 34(1) of Banking Business Proclamation No. 592/2008

The new law appears to have broken a new ground in the details with which it deals with bankruptcy of banks. The Proclamation lays down rules for commencement of 'receivership' proceedings, thus replacing a cartload of Commercial Code provisions pertaining to commencement of bankruptcy, composition and schemes of arrangement (Articles 1071, 1072, 1081, and 1119, among others).[77] The Proclamation provides for rules regarding 'parties responsible for receivership proceedings' involving banks, thus replacing Articles 989-1003 of the Commercial Code.[78] The Proclamation lays down special rules for the 'suspect period' and fixes the fate of transactions concluded during this period, thereby replacing the Commercial Code provisions in this regard (for example, Articles 1029-1034). The Banking Business Proclamation also lays down rules for submission and settlement of claims, priority of claims, and conclusion of receivership proceedings involving a bank, essentially superseding Articles 1041 to 1118 of the Commercial Code.

The new Banking Business Proclamation has even changed the trajectory of bankruptcy proceedings under the Commercial Code. Continuation of banking business, as opposed to its liquidation for distribution of proceeds among creditors, is of utmost importance under the new Banking Business Proclamation. The 'receiver' is directed by the Proclamation to 'continue the operation of the bank' when the 'bank is viable' and 'return [the bank] to the previous owners or to previous owners and other partners'.[79] Liquidation is clearly a measure of last resort, something which appears to reverse the overall tone of the general bankruptcy law under the Commercial Code.
After all the special rules of bankruptcy involving banks, it is a little surprising that there is still an allowance made for the application of the Commercial Code. In Article 48 of the Proclamation, it is stated that the 'Commercial Code and other laws will remain applicable in so far as they are not inconsistent with the provisions of Part Eight of the Proclamation. Frankly, this is a 'just-in-case' provision. It is difficult to conceive what rules of Book V of the Commercial Code remain unscathed after the extensive regulation of bankruptcy involving banks in the new Banking Business Proclamation. It would be fair to conclude now that Ethiopia has a special bankruptcy regime for banks. Recourse to Book V of the Commercial Code is still open (courtesy

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[77] Insolvency is one among the seventeen grounds for commencement of receivership proceedings against a bank. Some of the other grounds include revocation of banking license, substantial dissipation of assets, involvement (of a bank) in a pattern of unsafe and unsound practices, refusal to submit books of accounts to inspection, failure to meet minimum capital requirement of the National Bank, and undercapitalization; see Article 33(1) of Proclamation No. 592/2008.

[78] The parties responsible in cases involving receivership of banks being the 'receiver', the National Bank of Ethiopia, an advisor or expert appointed by the receiver, certain creditors, shareholders and of courts; See Articles 39-46 of the Proclamation No. 592/2008; the parties responsible in ordinary bankruptcy proceedings are the trustee, the commissioner, the court, creditors, and sometimes the debtor; see Articles 989-1003, for example.

[79] See Article 40(1) of Proclamation No. 592/2008

of Article 48 of the new Proclamation), but recourse would in most instances be unnecessary.

4.3 Bankruptcy and Pubic Enterprises

The final question regarding the scope of Book V of the Commercial Code is its applicability to public enterprises.[80] Public enterprises are primarily regulated by a special law[81] and secondarily by the Commercial Code. The special law regulating public enterprises provides that they are subject to the rules of the Commercial Code.[82] But by virtue of the special law, public enterprises exhibit certain special features that their private counterparts do not have. Unlike their private counterparts, for instance, public enterprises are invariably established not by a memorandum of association but by regulations.[83] They are wholly owned by the state and the composition of their board is determined not according to the rules of the Commercial Code but by the special law.[84]

After all these special rules, it may come as a surprise that bankruptcy is one of the subjects in which the special law defers to the Commercial Code. It seems that public enterprises are spared nothing in this regard. The Public Enterprises law says the provisions of Book V of the Commercial Code shall apply, *mutatis mutandis*, to the winding up of public enterprises.[85] In the same law, bankruptcy is stated as one of the grounds for dissolution of public enterprises.[86] The only notable exception made is that the court may pursue 'summary procedure' (sometimes also known as 'simplified bankruptcy procedure' or 'petty bankruptcy') regardless of the value limitation stated in Article 1166 (1) and (2) of the Commercial Code.[87]

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[80] The applicability of bankruptcy proceedings to state enterprises should be restricted to state enterprises which compete in the market as distinct economic or business operations and otherwise have the same commercial and business interests as privately owned enterprises. This would exclude administrative agencies of governments, sub-national governments, and municipalities. See, UNCITRAL, Supra Note 10, P. 40

[81] See Public Enterprises Proclamation No. 25/1992

[82] See Art. 4 of Public Enterprise Proclamation No. 25/1992

[83] See Article 6 of Public Enterprises Proclamation No. 25/1992

[84] See Article 12 of Public Enterprises Proclamation No. 25/1992; The general assembly of workers have the right to elect up to one-third of the directors of the Board. The rest of the Board is appointed by the supervising authority; Article 12(20 of Public Enterprises Proclamation No. 25/1992. This is contrasted with the rule in the Commercial Code which permits only members of the company (shareholders) to be directors of the Board; See Article 347(1) of the Commercial Code.

[85] Article 40 of Proclamation No. 25/1992

[86] See Article 29(6) of Proclamation No. 25/1992

[87] Article 40(2) of Proclamation No. 25/1992; It will be seen that the Commercial Code permits summary bankruptcy proceedings only when the value of assets of the debtor do not exceed one thousand Birr. It is unlikely that any bankruptcy of a public enterprise will ever proceed in a summary proceeding without this exception. This exception is therefore significant although it is not clear when the court will decide a summary proceeding instead of a regular bankruptcy proceeding.

This is as far as the law goes. As any one following the recent history of public enterprises in Ethiopia can observe, the practice has gone a different way. Since 1992, after the country officially adopted an economic policy based on private sector participation, over two hundred public enterprises, big as well as small, have been privatized by the Government.[88] These enterprises have been privatized through the modalities of asset sale, employee and management buy out (MEBO), joint venture with a strategic investor, management contract, comp etitive sale of shares, restricted tender and negotiated sale.[89] Bankruptcy and schemes of arrangement are conspicuously absent in the list of modalities of privatization. Why did the Ethiopian government not choose the path of bankruptcy in spite of this wave of privatizations in the 1990s and 2000s? The answer to this question should obviously await empirical research, but one thing is certain. The Ethiopian Government has not chosen to abandon even the most troubled public enterprises to the rigors of bankruptcy regime.[90] It cannot be because bankruptcy and schemes of arrangement are devoid of merits. The 'UNCITRAL Guide' clearly favours subjecting public enterprises to bankruptcy regime:

> *... insolvency regime has ... the advantages of subjecting them to the discipline of the [Bankruptcy] regime, sending a clear signal that government financial support for such enterprises will not be unlimited and providing a procedure that has a potential to minimize conflicts of interest.*[91]

Whatever may be the merits of the application of bankruptcy regime to public enterprises, we have yet to see Ethiopian Government pursuing bankruptcy options for some of its troubled public enterprises. This is neither for lack of law authorizing such a path, because the public enterprise law explicitly provides for bankruptcy. Nor can it be because the Government tenaciously holds onto public enterprises, for better or for ill, because there is plenty of privatization going on.

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[88] Ethiopia: An Investment Guide to Ethiopia, Opportunities and Conditions, March 2004, P. 10

[89] Ibid.

[90] The privatization drive did not proceed as vigorously as expected, largely because of the (in)capacity of the private sector to absorb large public enterprises offered for sale; for others reasons, see, Ethiopia: an Investment Guide to Ethiopia, Opportunities and Conditions, March 2004, P. 10

[91] UNCITRAL, Supra Note 10, P. 40; It is not all state enterprises that should be subject to bankruptcy proceedings. Exceptions are made for some state enterprises for which the government has 'adopted explicit guarantee in respect of liabilities as part of its shift in the overall macroeconomic policy, such as during large scale privatization' or where the state enterprises are involved in such sensitive sectors of the economy as utilities (electricity and water); ibid.

V. Commencement Standards

5.1 In General

The standard to be met for commencement of bankruptcy proceedings is central to the design of any bankruptcy law.[92] Commencement standard is what sets the process in motion, what charts the path forward for a business in financial difficulties, and what determines, initially at least, the balance of power among the parties involved in bankruptcy proceedings, particularly the creditors vis-à-vis the debtor. The pendulum of bankruptcy may tilt in favor of debtors or creditors depending on the liberality or stringency of a commencement standard.[93]

While it is ultimately upto the law of each country to fix its commencement standards in what ever way it sees fit, commencement standards should be crafted in consideration of the virtues of 'accessibility', 'flexibility' and their capacity to prevent 'improper' use of proceedings.[94] Accessibility is measured by the ease with which all 'stakeholders' can apply for and set bankruptcy proceedings in motion.[95] Flexibility is measured by the types of bankruptcy proceedings available: liquidation of the business, composition, reorganization, and a combination of these.[96] The need to make the proceedings 'accessible' should be balanced against the possibilities of abuse by those bent on using the proceedings for 'improper' motives, for example, to twist the hand of the debtor or quite simply cause the debtor embarrassment. Commencement standards may be used by debtors, who are not really in financial straits, in order to take advantage of 'automatic stay' in a bankruptcy law.[97] They may also be used by creditors to 'disrupt the debtor's business' and 'gain competitive advantage'.[98] The standards should therefore be crafted so as to prevent both debtors and creditors from using the bankruptcy regime for motives other than collection of debts.

The 'UNCITRAL Guide' identifies two types of formulations in establishing conditions for commencement of bankruptcy proceedings against debtors:[99] the 'liquidity, cash flow or cessation of payments' test, and the 'balance sheet' test.

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[92] UNCITRAL, Supra Note 10, p 45

[93] It should, however, be noted that a commencement standard, while important, is not the only factor for characterizing a bankruptcy regime as either 'debtor-friendly' or 'creditor-friendly,' or something in between.

[94] UNCITRAL, Supra Note 10, P. 45

[95] Ibid

[96] Ibid

[97] Ibid

[98] Ibid

[99] Ibid, Pp 45-47

5.2 'The Liquidity, Cash Flow, or Cessation of Payments' Test

The first, and most extensively used commencement standard is variously called 'liquidity' or 'cash flow' or 'cessation of payments' test. This test allows parties to apply for bankruptcy proceedings based on evidence of inability of a debtor to pay debts as they fall due. In other words, bankruptcy proceedings may be set in motion when a debtor 'has generally ceased making payments and will not have sufficient cash flow to service existing obligations as they fall due in the ordinary course of business.[100] The cessation of payments may relate to outstanding 'rents, taxes, salaries, employee benefits, trade accounts payable or other essential business costs.'[101]

The 'cessation of payments' test is obviously a liberal standard, particularly when it is viewed from the vantage point of creditors. Bankruptcy proceedings are triggered upon simple evidence of suspension of payments by the debtor. It is maintained that the liquidity test has two principal advantages:[102]

1. It puts the factors that trigger bankruptcy within the reach of creditors as the facts constituting grounds for initiation of bankruptcy are fairly accessible and within the reach of creditors; and
2. It activates proceedings early thereby minimizing the risks of dissipation of assets by the debtor in collusion with creditors;[103]

The 'liquidity' or 'cash flow' or 'cessation of payments' test has been appropriately called a creditor-friendly test, and included in some laws with the interest of creditors in mind. It is not, however, without criticism. Those who disapprove of the test argue that the test, so easily established, might instigate bankruptcy proceedings against otherwise healthy businesses upon what they call a 'false signal' of mere suspension of payments.[104] Critics of the test point out that the test makes it easier for creditors to initiate bankruptcy proceedings against debtors solely on grounds of 'temporary cash flow or liquidity problem.'[105] As a creditor-friendly test, there is a fear that the test might lend ammunition to creditors bent on using bankruptcy proceedings as 'debt enforcement' scheme[106] or twisting the arm of debtors using the threat of bankruptcy proceedings.

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[100] Ibid, P 45-46
[101] Ibid, P 46
[102] Ibid
[103] There is a natural propensity by the debtor or other creditors to act irresponsibly after suspension of payments; the debtor may engage in risky activities or creditors may want to arrogate special privilege to themselves to the detriment of other creditors, hence dissipation of assets. For a detailed analysis of the objectives of bankruptcy, see UNCITRAL, Supra Note 10, p 46
[104] UNCITRAL, Supra Note 10, p 46
[105] Ibid
[106] Ibid, p 45

5.3 the 'Balance Sheet' Test

The second type of commencement standard, adopted by some countries, requires a more rigorous test for commencement of bankruptcy. It is called the 'balance sheet' test.[107] The 'balance sheet' test requires whoever wishes to commence bankruptcy proceedings to 'show an excess of liabilities over assets.'[108] Mere suspension of payments by the debtor is not enough. The burden is upon the person applying for bankruptcy to show that the debtor has not only ceased payments but also that the debtor's balance sheets show an excess of liabilities over its assets. This often forces an applicant to hire 'an expert who reviews books, records and financial data to reach a determination of the fair market value of the business' of the debtor.[109] The merit of this test, which is debtor-friendly, is that bankruptcy proceedings are not initiated against a debtor solely on grounds of cessation of payments. The test is also an accurate reflection of the debtor's financial status and prevents commencement of bankruptcy proceedings upon false signals of temporary cash shortfalls.[110]

The 'balance sheet' test has however been criticized for putting the commencement standards beyond the reach of most creditors.[111] It 'relies on information under the control of the debtor' and it 'is rarely possible for other parties to ascertain the true state of the debtor's financial affairs until the difficulties have become irreversible.'[112]Ascertainment of an excess of liabilities over assets of the debtor takes time. Delays are inevitable from the involvement of an expert to establish an excess of liabilities over assets.[113] In addition, critics of the 'balance sheet' test charge that the test is unfair to small businesses and other businesses already mired in cash shortfalls. It imposes an onerous burden upon these businesses to hire experts, who may be both hard to find and afford.[114]

To many people, the balance sheet test might seem more accurate than the cessation of payments test, but it too can give a misleading indication of the debtor's financial situation.[115] The valuation method used in a particular case may yield different numbers depending on whether the liquidation value or going concern value of the business is taken into account.[116] The accounting standards and valuation techniques

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[107] Ibid, P 46; German bankruptcy law is often cited as an example of the balance sheet test. In Germany, a debtor is over-indebted when the value of his liabilities exceeds the value of its assets. The value of assets is ascertained by a reference to a prevailing market value; See Julian R. Franks, Kjell G. Nyborg and Walter N. Torous, A Comparison of US, UK and German Insolvency Codes, Financial Management, Vol. 25, No. 3, 1996, p. 92

[108] UNCITRAL, Supra Note 10, P 46

[109] Ibid

[110] Ibid

[111] Ibid

[112] Ibid

[113] Ibid, P 47

[114] Ibid, P 46

[115] Ibid

[116] Ibid

may produce results that do not reflect the fair market value of a debtor's assets. Besides, the market for some assets may not be sufficiently developed or stable to enable the fair market value of a business to be established.[117]

Classification is often a ploy employed for illuminating certain standards. The purity of tests that classifications project is not to be found in the actual laws on the ground. Cognizant of the strengths and weaknesses of the two tests above, some countries have opted to use both tests in different combinations.[118] In those countries which mix both tests to establish conditions for commencement of bankruptcy, a party applying for bankruptcy must show that 'the cessation of payments by a debtor reflect difficult financial situations that are not temporary.'[119] These systems, called 'intermediate' approaches, have not avoided criticisms either. The intermediate approaches have been criticized because they too cause 'delay, uncertainty and expense' in the commencement of bankruptcy proceedings.[120]

As all the tests in existence have been criticized for one defect or another, it seems that there is no perfect test of commencement of bankruptcy out there. Each country should adopt a test that best mirrors its business environment, in particular based on the availability of expertise for establishing some facts and the information that is accessible to a community of creditors.

5.4 Commencement Standard under Ethiopian Law

Where does Ethiopian law fit in all this? Article 969 states the basic rule. It provides: ``Any trader who has suspended payments and has been declared bankrupt shall be deemed to be bankrupt.`` Article 969 lays down two conditions for commencement of bankruptcy. First, a trader should suspend payments. And secondly, the trader should be declared bankrupt. Let's deal with the second condition first. The second condition is inserted to prevent labelling debtors as 'bankrupt' solely on grounds of 'suspension of payments.' Only a court that has jurisdiction to adjudicate bankruptcy[121] has the authority to first establish 'suspension of payments' and then declare the debtor 'bankrupt.' Ethiopian law calls mere suspension of payments without declaration by court of bankruptcy 'bankruptcy in fact.'[122]

The law emphasizes importance of the declaration by court in Article 970(1) which provides: ``Where no judgment in bankruptcy is given, bankruptcy 'shall not result from mere suspension of payments' (Emphasis mine)

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[117] Ibid
[118] See Ibid, Pp 47-48
[119] Ibid, P 47
[120] Ibid, P 47
[121] See Art. 974 of the Commercial Code
[122] See Art. 970 of the Commercial Code

Bankruptcy has far-reaching legal and factual consequences upon the business of the debtor, and the cumulative requirement of suspension of payments and declaration by court of the bankruptcy of the debtor should be seen as a protection of the rights and interests of debtors who have suspended payments.[123] Only a court having jurisdiction can give its imprimatur to the bankruptcy of debtors and all the consequences that ensue from declaration of bankruptcy.[124]

Bankruptcy in fact or factual bankruptcy or mere suspension of payments does not have any legal consequences except in one case.[125] The exception is provided in Article 970(2). A criminal court may pass conviction and impose sentence upon the debtor or others involved in bankruptcy 'in respect of bankruptcy or any offense connected with bankruptcy notwithstanding that the suspension of payments has not been established by a judgment in bankruptcy.'[126] A debtor may, for instance, be convicted and fined or face simple imprisonment, where he/she has 'intentionally concealed the fact that he is insolvent and contracts an obligation knowing that he is unable or unwilling to execute it.'[127] A criminal division court, before which a case is pending, does not have to wait for a bankruptcy court before it passes a criminal conviction and sentence.

5.5 When is there 'Suspension of Payments'?

A court which passes a judgment of bankruptcy should establish that there is a 'suspension of payment' by the debtor. What is, and more precisely, when is there a 'suspension of payments'? Article 971 describes the facts constituting 'suspension of payments' in the widest construction possible. It reads: ``Suspension of payments shall result from 'any fact, act or document showing that the debtor is no longer able to meet the commitments related to his commercial activities'' (Emphasis mine).[128]

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[123] Depending on the gravity of the particular bankruptcy, the dire consequences of bankruptcy may include the loss and liquidation of the debtor's assets, criminal penalties and loss of civil rights.

[124] On court jurisdiction in bankruptcy, later

[125] 'Bankruptcy in fact', 'factual bankruptcy', 'mere suspension of payments' or 'insolvency' are interchangeably used to refer to inability to meet liabilities without or before the declaration by bankruptcy by court.

[126] For offenses connected with bankruptcy or suspension of payments, see Arts 725-731 of the New Criminal Code of 2004

[127] See Article 725 of the New Criminal Code of 2004

[128] It is interesting to contrast the generality of the terms used in Article 971 to describe 'suspension of payment' with the Anglo-American tradition of enumerating what are known as 'acts of bankruptcy.' In the Anglo-American tradition, it has been customary to list acts of debtor which might, as it were, raise presumption of suspension of payment. They are conditions precedent for any party to initiate bankruptcy proceedings against a debtor. These acts include 'a transfer with actual intent to hinder, delay, or defraud, or one which leaves the debtor with an unrealistic small amount of capital,' 'failure to discharge a lien by legal proceedings within a reasonable time,' 'equity receivership,' 'a general assignment for the benefit of creditors,' 'an admission by the debtor of an inability to pay his debts,' 'failure to discharge judgment within a reasonable time.' In continental systems, the standard is to allow creditors to initiate bankruptcy proceedings so long as the debtor is unable to pay his debts as

Standing alone, Article 971 would seem to permit the commencement of bankruptcy proceedings upon submission (to the judgment of the Court) of 'any facts, acts, or documents' that show the debtor is no longer able to meet the commitments related to his commercial activities. Just what might these 'facts, acts, or documents' be? Are the facts in the following hypothetical examples sufficient to have a debtor declared bankrupt? Are they even relevant in an application for bankruptcy?

Example 1:

> ABC S.C., an import/export company, has failed to pay outstanding tax due to the Federal Inland Revenue Authority. It has been in arrears for one year of tax due (including penalties and fines).

Example 2:

> XYZ S.C., a manufacturing company, has been involved in some reckless actively lately. Not only has the company entered into a multimillion supply contract with a foreign company of dubious background, its management has also been suspiciously raising the salary of senior management and the fees of the board members, and generously donating money to so many causes in just one year.

Example 3:

> The general manager and deputy manager of NOP Company, engaged in construction business, have absconded to a foreign country and sought asylum in that country, after questions have been raised about their style of management and their extravagant personal lifestyle. After they have absconded, the Federal Ethics and Anti-corruption Commission filed a criminal charge against the general and deputy manager of NOP Company.

Example 4:

> Mr. X, the sole proprietor and executive manager of a well-known supermarket in Addis, has lately taken steps to disassociate himself from the active management of the supermarket, by allowing his two sons and wife to take over, citing illnesses.

The acts of the debtors in the above hypothetical examples may raise the suspicion of creditors. But are they the 'facts, acts or documents' Article 971 talks about?

Members of the Drafting Commission anticipated that the construction of Article 971 might give rise to problems of interpretation, but the first drafter was not troubled by it, as the following statements of his attest. In the Background Documents of the Commercial Code edited and translated by Peter Winship, we read:

> *Mr. Roberts (then president of the High Court) asked if...the acts of bankruptcy were enumerated as is done in the English Law. Mr. Escarra*

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they mature. For critical analysis of the 'acts of bankruptcy', see Notes, "Acts of Bankruptcy" in Perspective, Harvard Law Review, Vol. 67 (1954), pp. 500-508.

replied that the enumeration of specific acts was not of any practical significance, because the phrase "suspension of payment" ... is broad enough to include all specific acts.[129]

Further down we read:

When asked by Mr. Roberts if a judgment of execution would be considered as a case of suspension of payments, Mr. Escarra (the drafter) stated that the adjudication of bankruptcy is left to the court to decide because each case presents different facts... it is for court to rule whether one act or series of acts is necessary for adjudication of bankruptcy.[130]

In order to put the responses of the drafter in context, one needs to review the two approaches he refused to adopt for the Commercial Code of 1960: the commencement standard under the 1933 bankruptcy law and the Anglo-American approach. As quoted previously, the 1933 law set a rather restrictive commencement standard for initiation of bankruptcy proceeding. Article 2 of that law states: "A suspension of payments exists when the debtor does not pay an obligation which he has by virtue of an executory document (titre executoire)."

Under the 1933 Bankruptcy Law, only obligations evidenced and supported by executory documents entitle the creditor to apply for bankruptcy. And these documents are exhaustively listed under Article 2 of that law. The drafter was probably aware of this law (which he thought constricting) but he was reluctant to adopt a similar approach for the Commercial Code of 1960.

In addition, the drafter was reluctant to adopt the Anglo-American tradition of listing what are known as 'acts of bankruptcy.' An adoption of the Anglo-American tradition of enumerating 'acts of bankruptcy' would have produced a provision similar to the 1966 Bankruptcy Act of Australia where a debtor is said to have committed an 'act of bankruptcy' when he:[131]

1. *makes a conveyance or assignment to trustees for the benefit of his creditors generally;*
2. *makes a fraudulent conveyance, gift, delivery or transfer of his property;*
3. *makes a conveyance which would be void as a fraudulent preference if he became bankrupt;*

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[129] Winship, Supra Note 12, P. 107
[130] Ibid.
[131] See J. Adrian Redmond, the Commercial Laws of the Commonwealth of Australia, in the Digest of Commercial Laws of the World (1967)

4. *departs from or remains from out of Australia or departs from his dwelling place of business with intent to delay or defeat his creditors;*

5. *if execution has been issued against the debtor under process of a court and any of his property has in consequence either been sold by a Sheriff or held by the Sheriff for 21 days or execution has been issued against the debtor under process of a court and has been returned unsatisfied;*

6. *is adjudged bankrupt in any court of the Queens Dominion within the British Commonwealth having Jurisdiction in bankruptcy;*

7. *consents to present a petition at a meeting of creditors and does not do so within 7 days;*

8. *admits at a meeting of creditors that he is insolvent and refuses to surrender his estate or admits at a meeting of creditors that he is insolvent and having been requested by a resolution of a majority of the creditors to bring his affairs under the Act does not within;*

9. *days present a debtor's petition or make an arrangement with his creditors without sequestration;*

10. *files a declaration of his inability to pay his debts;*

11. *fails to comply with a bankruptcy notice served on him by a creditor who has obtained a final judgment;*

12. *gives a notice to any of his creditors that he has suspended or is about to suspend payment of his debts.*

The approaches of the 1933 Ethiopian law of Bankruptcy and the Anglo-American tradition of listing 'acts of bankruptcy' are similar in form, if not in substance. Both enumerated objectively acts or documents which led to initiation of bankruptcy. The first drafter of the 1960 Commercial Code was reluctant to go down this path, no matter how predictable these approaches felt to the rest of us. In what appears to us nonchalant, the first drafter expressed his reluctance in the following words:

> *The circumstances in which bankruptcy can be declared are defined in general terms by the laws of Latin and Germanic countries. In Anglo-Saxon countries, the definition is replaced by a limiting enumeration of acts of bankruptcy. In fact, however, the difference between these two approaches is negligible and refers more to the method than to the substance, because the enumeration in Anglo-Saxon laws covers in*

practice the same area as that covered by the general definition found in the other countries.[132]

The first drafter decided to settle with the general phrases of Article 971 (inclining towards the Latin and Germanic systems of the time) because he was convinced that in practice the two systems led to the same conclusions: in both cases debtors were declared bankrupt for similar set of facts.

This approach of the drafter left the issue of 'suspension of payments' wholly to the discretion of the courts. The drafter's reluctance to adopt a limitative language was understandable, to an extent. But it is legitimate to ask whether he was right in reposing so much faith in our courts. And in ceding too much discretion to courts by the construction of such a wide language as Article 971, didn't he perhaps place an unwarranted trust in the wisdom of our courts to make judgments based on the 'facts of each case?'

At the time of writing, more than half a century after the drafter submitted Book V to the Drafting Commission, there is certainly no basis for relying upon the wisdom of courts to determine, based on the facts of each case, whether there is a suspension of payments, as that expression is 'defined in Article 971. The fear is that courts may adjudge a debtor bankrupt solely on grounds of 'facts, acts, or documents' which may cast suspicion on the ability of the debtor to meet commercial commitments. That may turn out to be too hasty a judgment on the part of the court and too costly for the debtor. Whether founded or not, the association of the debtor with bankruptcy can impinge negatively upon the ability of that debtor to freely draw resources from the market in order to continue as a viable business. Bankruptcy has dire consequences for the debtor, such as liquidation of his assets, possible criminal penalties and possible loss of civil rights.[133]

Who is to say that creditors will not apply for improper motives such as to disrupt debtors' business and gain competitive advantage? Although it is less likely, who is to say that debtors themselves may not apply for bankruptcy for improper motives, like to take advantage of 'stay of execution'?[134] It is in view of these dangers that one hoped the drafter would have thought twice before giving that much discretion to the courts to establish 'facts, acts, or documents' constituting suspension of payments.

In fairness to the drafter, however, it must be said that the adoption of such a general phraseology in Article 971 is not entirely without merits. Such a general language would permit courts to calibrate the commencement of bankruptcy proceedings to as

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[132] Escarra, Book V: Expose des Motifs (September 2, 1954), in Winship, Supra Note 12, p. 101

[133] Encyclopedia Britannica, Supra Note 43

[134] Given the punitive attitude of Ethiopian bankruptcy law, it will be foolhardy for any debtor to apply for anything other than for proper motives of equitable treatment of creditors and possible reliefs through composition and schemes of arrangement.

widely divergent situations as one can expect from the cases that might come before the courts. It would allow parties, especially creditors, to petition for institution of bankruptcy proceedings based on 'facts, acts or documents' that establish that the debtor is 'no longer able to meet his commercial commitments', in the process forestalling possible dissipation of assets. It is a language wide enough to embrace all sorts of factual situations that indicate the inability of the debtor to pay its commercial liabilities.

What is provided for in Article 976 might help to temper the fears expressed in connection with the language of Article 971. Article 976 authorizes (but does not require) the court to conduct what it calls 'preliminary investigation.' The court may appoint a 'judge for the purpose of investigating into the affairs and activities of the debtor.'[135] The judge may also be assisted by a trustee for purposes of establishing whether there is a suspension of payment by the debtor.[136] Although the professional competence of judges, as we know them, in ascertainment of 'suspension of payments' is doubtful, there is no question here that these additional rules in the bankruptcy law are intended to ensure that courts rely on actual facts to adjudge a person bankrupt.[137]

The courts should not be deceived by the generality of Article 971, and should rely on the language of Article 976 in all but too obvious cases of suspension of payments.[138] The judgment of bankruptcy should be the result of careful investigation of the real situation facing the debtor and full appreciation of the implications and consequences of an adjudication of bankruptcy. Any erroneous adjudication of an otherwise viable business should be avoided by the liberal use of the investigative power under Article 976. Courts which use their discretion under 976 in all situations but the few obvious cases would certainly fulfil the trust laid upon them by the drafter.

Based on the generality of the phrase used in Article 971 of the Code, there can be little doubt about where Ethiopian commencement standard should be classified. Article 971 puts Ethiopia among those countries which pin commencement of bankruptcy upon 'shortage of cash' or 'liquidity problem.' This position of Ethiopian law is strengthened by Article 972, which requires debtors to notify court of 'suspension of payments' within fifteen days of the suspension.

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[135] Article 976(1) of the Commercial Code

[136] Article 976(2) of the Commercial Code; the practicality of assistance by trustee is doubtful, for at this stage, the Court has not yet appointed a trustee; unless the drafter had in mind what is elsewhere known as 'interim trustee.'

[137] Ascertainment of suspension of payments may require financial expertise to examine balance sheets of the debtor. Judges are professionally qualified to read and interpret balance sheets and other financial statements.

[138] Ato Tamiru Wondimagegnehu (who served as a judge during Imperial times) told me that the court required the balance sheet of four preceding years before it adjudged a business bankrupt; conversation with Ato Tamiru Wondimagegnehu, November 28, 2008

An easy access to bankruptcy proceeding based on cessation of payments is justified by the reality of Ethiopian business environment. The recent surge of business activities notwithstanding, Ethiopia's business environment is still undeveloped. We do not as yet have general disclosure requirements in our laws. The activities of many businesses (even the big companies) are still shrouded in secrecy. Information regarding the financial situations of most businesses is not available in the public domain. Ethiopia does not have a stock exchange market, which would have allowed the general public to access some financial information about companies that operate in the stock market. Even if these types of information were available, the country has neither the know-how nor the resources to process and analyze financial information. All these realities about the country militate against the adoption of the so-called 'balance-sheet' test, however accurate that test might appear.

The statement that Ethiopian bankruptcy law adopts 'cessation of payments' as a commencement standard needs some qualification. Sub-article (1) of Article 973 requires the debtor giving notice under Article 972 to annex some documents to his notice. These documents, when they are available at the time of notice, include the 'balance sheet,' 'the profit and loss account' and the 'lists of commercial credits and debts with the names of the creditors and debtors.' Why would the law require the submission of these documents by the debtor were it not for helping the court base its judgment not just upon mere suspension of payments but upon what the balance sheet and the profit and loss accounts of the debtor show?[139]

There is no escape from the conclusion that these documents are required as additional commencement standards, although Ethiopian reality would not permit adoption of the balance-sheet test in its rigorous form. And the mild requirement of 'preliminary investigation' by a 'judge' aided by the trustee would strengthen the view that Ethiopian law inclines towards the 'intermediate test' of combining the 'liquidity test' with the 'balance sheet' test. However, Ethiopian law takes no firm position on commencement of bankruptcy. It all depends on the disposition of the court in a particular case. The court may declare a person bankrupt based on simple evidence of suspension of payments. The court is also at liberty to require additional evidence, like the balance sheet of the debtor. It would therefore be safe to conclude that the Commercial Code permits both liquidity test and the intermediate test in equal measure.

5.6 Why Notify Court of 'Suspension of Payments'?

In thinking about commencement standards under Ethiopian bankruptcy law, we should distinguish two situations. One is the requirement of 'notification' under Article 972 of the Commercial Code and the other is the 'institution' of bankruptcy

[139] These documents have a utility beyond establishing the seriousness of suspension of payments; they might help the court fix the date of suspension of payments, which, as shall be seen later, is important for determining the retrospective effect of bankruptcy; see Winship, Supra Note 12, p 108

proceedings under Article 975 of the same code. The notice provision of Article 972 imposes a duty upon the debtor to 'notify' or 'inform' the court of the fact of 'suspension of payments.' Article 975, on the other hand, talks about a serious application, with parties listed therein having a categorical intent to commence proceedings of bankruptcy. The notification under Article 972 may or may not lead to commencement of bankruptcy proceedings. The debtor simply states the fact of 'suspension of payments' and submits the notice to the court.

What the court will do with that notice is something we will have to explore. Unfortunately, the language of Article 972 is not much of a help:

> *Any trader who suspends payment of his commercial debts shall within fifteen days file a notice to this effect with the registrar of the Court... with a view to the institution of bankruptcy proceedings or the approval of a scheme of arrangement.*

Reading the first part of this provision, one may conclude that the provision is intended merely for the purpose of informing the court of suspension of 'commercial debts.' But reading it up to the end, as one should, one is thrown into a dilemma as to why this provision is inserted in the Code.[140]

There are two possible ways of dealing with Article 972. One way to read it is to understand it as a 'commencement' provision, as surely as Article 975 is. The other way to read it is to understand it as a 'notice' provision, merely intended to 'inform' the court and possibly 'commence' bankruptcy proceedings if and when other facts, showing the seriousness of the problem, are established.

There are words and clauses in Article 972 which support both of the above positions. As the debtor is required to notify the court within 'fifteen days' of suspension of payments, which is clearly too early to say whether the suspension is ripe for initiation of bankruptcy proceedings, one would be taken to task if one were to conclude that Article 972 is a commencement provision. The most liberal of approaches to commencements could not have allowed the commencement of bankruptcy proceedings upon the fact of suspension of payments for just 'fifteen days.' It would clearly be too premature to base the commencement of bankruptcy proceedings upon mere showing of suspension of payments for a period of fifteen days. In a business cycle, fifteen days is too short a period to gauge whether the suspension of payments warrants the commencement of bankruptcy proceedings. In addition, assuming debtors

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[140] By the way, this kind of provision is fairly common in bankruptcy laws of other countries; for example, Article L640-4 of the French Code provides "The Commencement of these [liquidation] proceedings must be requested by the debtor at the latest within forty-five days following cessation of payments...", Louis Vogel and Francoise Perochon, trans., French Commercial Code; similarly Article 25 of OHADA law states "The declaration shall be made within a period of thirty days following the cessation of payments..."; See OHADA, UNIFORM ACT ORGANIZING COLLECTIVE PROCEEDINGS FOR WIPING OFF DEBTS, 1998.

are conscientious about their duties under Article 972, the flood of notifications coming from debtors about suspension of payments would be too overwhelming for the registrar of the court to handle.[141] Every time the registrar receives notice of suspension of payments, it will have to refer the matter to the court for commencement of bankruptcy proceedings.

As the law says little on what the registrar will do with the 'notice of suspension of payments,' we are left to struggle with the real meaning and purpose of Article 972 of the Commercial Code. A suggestion that such 'notice' automatically triggers the commencement of bankruptcy proceedings would be too destabilizing to businesses and too overwhelming for our work-ridden courts. For that reason, the suggestion should be resisted.

The language of Article 972, particularly the last phrase that reads 'with a view to the institution of bankruptcy proceedings or the approval of a scheme of arrangement' complicates our task of properly situating the meaning of the Article. After reading this phrase, one would be tempted to conclude that Article 972 is as much a commencement provision as Article 975. The explanations provided by the drafter in connection with the notice requirement under Article 972 are unfortunately vague. He wrote:

> *... the debtor must inform the court as soon as possible about his situation by annexing the documents set out in Article 2 (973) so that the court will be in a position to open proceedings either for bankruptcy or for a scheme of arrangement – latter procedure requiring in addition an express application from the trader in accordance with Article 139(1119).* [142]

The drafter seems to regard the notice requirement as a possible prelude to the institution of bankruptcy or schemes of arrangement. But he says nothing about what the court should do with the notice, and in particular, whether the court should commit the case to either bankruptcy or schemes of arrangement. Nonetheless, there are reasons which urge us not to regard the notice provision as the automatic initiation of bankruptcy. First of all, the Article itself is entitled 'notice of suspension of payments,' which indicates that the purpose of the Article is to serve as a vehicle for 'notification' without attaching the requirement of commencement of bankruptcy proceedings. Secondly, Article 975 lists the debtor as the first party with the vested interest to petition bankruptcy proceedings. If Article 972 were a commencement provision, it would not be necessary to repeat the debtor in Article 975. Thirdly, the short notice period of fifteen days could not have been intended to be a reliable standard for commencement of bankruptcy proceedings. At this stage of the suspension of payments, no one can foresee if the suspension of payments is a temporary shortage of cash or a more serious and permanent problem warranting the commencement of

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[141] The flood of notifications may not materialize as feared, for it depends on the default rate on debts in the market. In times of economic crisis, it may be overwhelming.

[142] See Winship, Supra Note 12, p. 107

bankruptcy proceedings. All these reasons and more force us to relegate Article 972 to just a 'notice' provision, not a commencement standard. Having notified the court of suspension of payments 'within fifteen days,' the debtor or other parties indicated in Article 975, will have to decide whether to petition for institution of bankruptcy proceedings. Until then, the notice under Article 972 will just remain what it is: a notice. That does not mean it is unimportant. The notice can be an important source of information for parties listed in Article 975 in order for them to decide whether to institute bankruptcy proceedings.

Instead of asking what the court will do with the notice of suspension of payments, we should perhaps more appropriately be asking what the consequence would be to the debtor of not giving the notice within fifteen days as required by Article 971. As far as Ethiopian bankruptcy law is concerned, it does not make much of a difference whether a debtor has notified the court within fifteen days or not. The rules on discharge in Book V[143] are equally harsh on debtors who notify the court of suspension of payments. There is nothing in these rules to encourage debtors to be conscientious about their obligations to give notice to court. It makes no difference how the bankruptcy came about: discharge is not available because of good behaviour on the part of the debtor.[144] We should therefore not search for clues in Book V itself, for there we will find nothing.

Not giving notice may have consequences under criminal law, though. Article 725 of the New Criminal Code of Ethiopia provides that a debtor who 'intentionally conceals the fact that he is insolvent and contracts an obligation knowing that he is unable or unwilling to execute it' is guilty of 'fraudulent bankruptcy' and punishable with a fine. Concealment of insolvency alone is not sufficient, but it is a material fact in the conviction and punishment of a debtor in criminal proceedings. A criminal division court may view failure by the debtor to notify the court within 15 days under Article 971 as evidence of concealment of insolvency.

5.7 What are 'Commercial Commitments'?

Finally, one special requirement for commencement of bankruptcy proceedings under Ethiopian law merits some treatment. Article 971 in part provides 'the debtor is no longer able to meet the commitments related to his commercial activities.' One would have dismissed the use of 'commitments related to his commercial activities' as an accidental slip had the expression not been repeated in Article 972. Article 972 in part reads 'any trader who suspends payment of his commercial debts shall…' Reading the two articles, one is in no doubt about the seriousness of the requirement that the inability should relate to 'commercial debts,' or 'commercial commitments'.

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[143] See Articles 1113-1118 of the Commercial Code
[144] On discharge, later

Why is the law particular about this requirement? The additional requirement of the debts having to do with commercial commitments seem to issue from the scope of application of Book V of the Commercial Code, as defined in Article 968. Article 968 uses language that restricts the application of bankruptcy to traders and commercial business organizations (except joint ventures). A consistent application of such 'trader-only' regime of Ethiopian law would logically restrict Book V to cases where the 'suspension of payments' was the result of 'commercial commitments.' The drafters were careful not to allow the intrusion of 'non-commercial' debts into their rigidly defined scope for bankruptcy application. They wanted to design a tightly fenced bankruptcy regime that applied to traders in respect of their trade commitments only. This take on the scope of Book V is consistent with the original intent of the two drafters of the Commercial Code. It is difficult to write about the intent of the drafters with any degree of certainty but there is some evidence that they were serious about circumscribing the Commercial Code to the status of traders and their activities arising from their status as traders. It might even be contended that the trader-only drift is not a sudden detour in Book V. Their preference for the 'subjective' approach, in contradistinction to the 'objective' approach of some other systems, may have led to the requirement that only 'commercial' debts should result in initiation of bankruptcy.

The following passage taken from the Background Documents, written by Professor Jauffret, might be taken as one such evidence. Professor Jauffret writes:

> *Professor Jean Escarra did not hide his preference for the subjective system..... I believe it very desirable to follow the intention of Professor Escarra on this point. Thus, Book I, which I drafted, is devoted to this subjective concept*[145]*: the point of departure is found in the definition of trader in Article 5 and the definition of Commercial Business Organizations in Article 10. Book I, in sum, is devoted for the most part to the status of traders, a status supplemented by the bankruptcy provisions of Book V (Emphasis mine).*[146]

The two drafters saw the Commercial Code as a body of rules regulating the status of traders and opted for the subjective standard with that aim in mind. It is quite possible that the additional requirement of commercial commitments stemmed from their conviction to restrict bankruptcy to the status of traders. The additional requirement would prevent a commencement of bankruptcy against a trader for suspension of debts not having to do with the trader's commercial commitments. If we accept the drafters' circumscription of bankruptcy to traders, it is easy to accept their other limitation, i.e., that the debt should be commercial, whatever that may mean.

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[145] The subjective vs. objective dichotomy is based the applicability of the Commercial Code to traders and only traders (subjective) or certain acts, called acts of commerce (objective), see Winship, Supra Note 12, pp. 35-36

[146] Jauffret, Report on the Completion of the Draft of the Avant-Project of the Commercial Code of the Empire of Ethiopia (1 March, 1958), in Winship, Supra Note 12, p. 36.

The additional requirement may also be rooted in the drafters' conviction to restrict the possible liquidation of a trader's business for commitments directly related to commerce. The schema makes sense if we see bankruptcy through the lens of the drafters. That lens is decidedly a narrow one. It endows bankruptcy as a status (not an enviable one, to boot) for traders only and it is only reasonable that traders should fall by the 'sword of bankruptcy' only for their acts having to do with their status as traders. What happens after the business falls is quite another matter.

The additional commencement requirement of 'commercial commitments' would give rise to two sets of problems. One is the definition of 'commercial commitments.' The second problem is whether the exclusion of 'non-commercial commitments' from Articles 971 and 972 would affect these commitments.

It would be vain to search for a definition or even clues to 'commercial commitments' in the Commercial Code. In the absence of a definition, how would one fix the meaning of 'commercial commitments' or 'commercial debts'? The following hypothetical cases illustrate the problem:

a. XYZ is a general partnership, with X, Y and Z as its general partners. X entered into a private contract with N unrelated with the activities of the general partnership. X was unable to perform his obligations towards N, and N obtained a judgment against X. Can N apply for the bankruptcy of XYZ, of which X is a partner?
b. Mr. D has a boutique in Piazza area. Mr. D, unrelated to his boutique, was fined 500 Birr for violating traffic rules while driving in Addis Ababa. Supposing D failed to pay the fine as ordered, is that sufficient to trigger bankruptcy proceedings against Mr. D?
c. Mr. E was recently divorced from his estranged wife, and the court ordered him to pay maintenance allowance for their children, amounting to 1000 Birr every month. Mr. E has a bookstore in Arat Kilo. If Mr. E fails to pay the allowance, can his former wife (as a guardian of the children) bring suits against Mr. E to have him declared bankrupt?
d. Suppose in C above, his wife brought action against Mr. E for a division of their common property, of which the book store in Arat Kilo formed one. Can she institute bankruptcy proceedings against Mr. E?
e. X, an employee of XYZ Company, caused injury to Mrs. N for whom the Company is vicariously liable under Ethiopian extra-contractual liability law. Should the court declare XYZ bankrupt upon the application of Mrs. N?

When does a commitment or liability acquire the label 'commercial'? How directly should it be connected with the business? Nothing in the language of the Code gives us a hint on how to draw the line between commercial and non-commercial commitments. As the hypothetical cases above illustrate, it is not always easy to classify a debt or a commitment as commercial or non-commercial, and in practice, as

long as the requirement of 'commercial debt or commitment' remains in the Code, courts are bound to struggle to find an appropriate means of distinguishing 'commercial debts' from 'non-commercial' ones. Perhaps, the drafters refrained from a definition of these terms in order to give courts the discretion to decide cases based on the circumstances surrounding each case.

In some cases, a debt, defined broadly, would be so unrelated with the commercial activities of the debtor that the court should reject any attempt to institute bankruptcy proceedings on grounds of 'suspension of payment.' Such is the case in 'b' and 'c' of the hypothetical examples given above. The use of the expression 'commercial commitment' or 'commercial debt' would be rendered meaningless if a person were declared bankrupt because of suspension of payment of fine or maintenance payments. In other cases, as in the hypothetical example 'd' above, the distinction is not so easy. To be sure, marriage and its breakdown 'divorce' are as personal and non-commercial as they can get. Mr. E's marriage to C has no relationship with the commercial activities of Mr. E. But, divorce has the effect of division of property, which may include the commercial establishments of the divorcees. Mr. E's bookstore may have formed part of the common property of the spouses while their marriage lasted. Should that lead to the bankruptcy of the divorcee?

In the hypothetical cases given above, the creditors in each case may seek execution (enforcement) according to the Ethiopian Civil Procedure Code.[147] In that case, the court will simply order execution of judgment in accordance with the Civil Procedure Code, without, it may be added, declaring the judgment debtor bankrupt. The effect of the order may be liquidation of the debtor's business along with other assets, if there are any. If that is the path chosen by the creditor, we won't be having any problem, at least as far as the Commercial Code is concerned.

But what happens when the creditor or groups of creditors, or even the debtor, applies to have the debtor declared bankrupt? What if the debtor applied for bankruptcy protection?[148] It is in situations like these that the courts will have difficulty distinguishing commercial debts from non-commercial ones. The courts will have to continually make judgments about the commercial nature of certain debts or other wise, for they are left to themselves to make judgments based on the facts and circumstances of each case.

The second question in relation to the issue of 'commercial commitments' or 'commercial debts' is whether non-commercial debts are excluded from participation

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[147] See Paragraph 3, Articles 394-461 of Ethiopian Civil Procedure Code

[148] This has happened elsewhere. The American company, Texaco, filed for bankruptcy in order to dispute a large court award. Other companies in the USA opted for bankruptcy protection in order to withdraw from expensive collective agreements; see, Julian R. Franks, Kjell G. Nyborg and Walter N. Torous, A Comparison of US, UK and German Insolvency Codes, Financial Management, Vol. 25, No. 3, 1996, p. 92.

in bankruptcy proceedings even at a later stage of the proceedings. For this, we may need to distinguish two groups of debts. There are those that are responsible for setting bankruptcy in motion (the triggers of bankruptcy). There are, on the other hand, debts (claims) that are submitted upon declaration of the debtor's bankruptcy. We can all agree, based on the preceding discussions, that non-commercial debts are not part of the first group of debts. These debts cannot set bankruptcy proceedings in motion.

Does this also mean that 'non-commercial' debts cannot be submitted for proof in bankruptcy proceedings after the bankruptcy has been declared by court? There are two ways of looking at this problem. One approach is to interpret the above provisions so that 'non-commercial' creditors are excluded from bankruptcy proceedings in all cases and at all times. This approach would be implausible for a number of reasons.

In many instances, bankruptcy has the effect of liquidating and winding up the business of the debtor.[149] At the end of a bankruptcy proceeding, i.e., upon distribution of the proceeds of the debtor's assets among creditors, the debtor may have little left for himself and family let alone for non-commercial creditors. The exclusion of non-commercial creditors from the proceedings of bankruptcy is, therefore, as good as denying them any recourse to recover their debts.

Secondly, exclusion of non-commercial creditors from participation in bankruptcy proceedings is an acknowledgment that bankruptcy law imposes a limitation of liability based on characterizations of debts as commercial and non-commercial debts. If there is such a thing in bankruptcy law, it will indeed be odd, to say the least. Limitation of liability is a privilege accorded by law and the circumstances in which limited liability is accorded are exhaustively listed in the law. A case in point is the limited liability that private limited companies and share companies enjoy.[150] It is not the objective (and it has never been the objective) of bankruptcy law to legislate limited liability rule.

Thirdly, Articles 1041ff of the Commercial Code, which incidentally deal with the submission of claims by all sorts of creditors during bankruptcy, never use terms like commercial or non-commercial debts. These provisions nowhere discriminate between commercial and non-commercial debts. All kinds of debts owed by the debtor are admissible provided they are supported by evidence. The trustee, who takes over the management of the bankrupt estate upon declaration of bankruptcy, has the duty to admit all debts.[151] The Commercial Code of Ethiopia does not even exclude foreign debts from admission in bankruptcy as some foreign jurisdictions do.[152] The drafters would have inserted 'commercial debts' in all provisions following Articles 1041ff if

[149] See Articles 1035-1040, 1041-1080 and 1101-1118 of the Commercial Code
[150] Even these privileges are sometimes taken away in 'piercing the corporate (company) veil' cases; See, for example, Article 309 of the Commercial Code
[151] See Article 1041 of the Commercial Code
[152] See UNCITRAL, Supra Note 10, p 51

they had really intended to keep non-commercial debts out of bankruptcy proceedings. It is therefore reasonable to assume that 'non-commercial' debts, while excluded from debts that trigger bankruptcy, are entitled to participate equally with commercial debts after the declaration of bankruptcy.

VI Conclusion

From the discussion of Ethiopian bankruptcy law so far, we may conclude the following:

1. Ethiopian law uses bankruptcy in a narrow and restrictive sense of liquidation and treats 'schemes of arrangement' as separate from bankruptcy proceedings. This may have stemmed from its treatment of the two proceedings as separate, having their own rules of entry and procedure. In any event, this restrictive definition of bankruptcy is at variance with the accepted meaning of the term elsewhere.

2. Ethiopian law gives a preference for bankruptcy in contradistinction to a scheme of arrangement which would have looked to the saving of the business of the bankrupt as opposed to its dismemberment for the satisfaction of the claims of creditors. This is an inference more from the arrangement of provisions in the Commercial Code than an explicit policy expressed in any of the provisions. Unfortunately, Book V of the Commercial Code has seldom been tested in practice since the promulgation of the Code. The question of whether the Code favours liquidation to reorganization of businesses cannot be, therefore, buttressed by hard evidence of cases litigated in courts. In any case, in its inclination towards bankruptcy in the sense of liquidation of the business of the bankrupt, Ethiopian law is again at variance with developments in bankruptcy in the rest of the world. It does not encourage debtors to view bankruptcy as a scheme of protection against liquidation and winding up of their business. This may have to do with the fact that the Code is comparatively old. At the time of writing, the Code is more than half a century old, if we count the time the draft was first submitted by the first drafter, i.e., 1954. The conclusion that Ethiopian bankruptcy law appears to favour liquidation over continuation of the business needs one qualification. The new Banking Business Proclamation (No. 592/2008), which devotes a whole part to bankruptcy involving banks, seems to overturn the general tendency of Ethiopian bankruptcy regime. The new Banking Business Proclamation directs that banks that are deemed 'viable' should be given the chance to continue business.

3. Although by no means peculiar to Ethiopian law, its distinctive feature nonetheless is that bankruptcy applies only to traders and commercial business organizations. This is to be expected, as bankruptcy is found in the Commercial Code, which is a special law for traders. In terms of scope,

however, the Commercial Code and Book V are not co-extensive. In this respect, Book V may be said to have provided for special rules of application. Book V does not apply to joint ventures. Nor does it apply to non-commercial or civil business organizations, however they may be distinguished. Perhaps more significant and possibly unique to Ethiopian law is the requirement that the suspension of payment that triggers bankruptcy proceedings should be 'commitments related to commercial transactions.' Traders are therefore distinguished, for purposes of bankruptcy application, not only by their status as traders but also by the specific transactions they enter into. If the transaction does not qualify as 'commercial', it does not lead to initiation of bankruptcy even though the debtor is a trader. This additional restriction is clear enough although courts will have a hard time distinguishing commercial from non-commercial transactions. Again in its restriction to traders and commercial business organizations, the Commercial Code appears to be at variance with recent developments in bankruptcy application. Even countries which used to associate bankruptcy with the status of traders or merchants (France is a very good example in this regard) have now abandoned this restrictive approach and have made bankruptcy applicable to non-traders as well. Should Ethiopia follow suit?

BASIC FEATURES OF THE ETHIOPIAN LAW ON COMMISSION AGENCY

ZEKARIAS KENEAA[1]

Introduction

Agency is an area of law that has gained importance in Ethiopia over the last forty years. With the advent of the Registry of Acts and Documents in Ethiopia, conferring of agency on others and receiving of Powers of Attorney from others have, in particular, become very popular in the last fifteen years. Generally, it may be said that the value of agency as a useful institution is being given its due recognition in Ethiopia. It is not only the regular and direct agency, or the complete representation, to put it otherwise, that is becoming popular in Ethiopia. Cases of indirect agency and imperfect kinds of representations are also slowly and gradually becoming known, and in fact, becoming quite popular in the daily business transactions in the country. The hitherto not very well known area of commission agency, for instance, is now very well in use and of late, it has become yet another area to venture into. With globalization and Ethiopia's aspiration to join the WTO, the institution of commission agency will, undoubtedly, be more and more useful.

There is dearth of source materials relating to the topic of the article. Though there are some old materials and books available in the Law Library on agency in general, the writer could not find recent materials in sufficient quantity on commission agency. There are no reported cases on commission agency. The only and one case found by this writer that was reported on commission agency, though a very good case, is not found to be directly relevant to treat basic features of commission agency under Ethiopian law.

Despite the problem of not finding recent and relevant source materials, this modest work attempts to briefly discuss the basic features of the Ethiopian Law of Commission Agency, which is one of the aspects of agency recognized in Ethiopia. The paper does not, as such, deal with all aspects of Commission Agency as expounded in the Civil and Commercial Codes of Ethiopia. As the title of the work indicates, it only attempts to briefly deal with the basic features of the Ethiopian Law of Commission Agency.

I. Brief Historical Perspectives of Agency in the Civil Law System and the Ethiopian System

Agency as an institution in the civil law system is a fairly recent phenomenon compared to its existence in the common law system.[2] In fact, it was said that the institution was

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totally not known in Roman law which is the root of the Civil Law legal system, because, in Roman law, obligations were considered to be personal.[3] In the father system of the existing Civil Law i.e., in Roman law, people, however, acted through messengers which, in a way, foreshadowed agency. Moreover, the so-called contract of *mandatum* pursuant to which the principal called *mandator* conferred mandate on an agent called *mandatrius*, served as a substitute for *agency* in Roman law.[4] It would, however, be important to note that the contract of *mandatum* did not bring about the effect modern *agency* brought about. Surprisingly, the contract of *mandatum* resulted in legal effects only as between the *mandatarius* and the third party and the principal did not have the right to exercise a direct action against the third party.[5]

Agency in the Civil Law system must have been highly influenced by developments in the Common Law system and mercantile reality and pressures. According to Schmitthoff, "...the common law developed already in the 15th century considerably earlier than the civil law, the principle that the principal was in direct contractual relationship with the third party. Thus, the foundation was laid for a theory of agency."[6]

Though Germany was influenced by the developments in the Common Law system, and around 13th century had imported into her legal system the principle of representation,[7] when it comes to the topic of this work, commission agency, it was observed:

> *In the 17th and 18th centuries the influence of mercantile law which was embodied into the common law, led the emergence of two classes of mercantile agents, the factors and the brokers. The expression agent came into use and the "confusion of the principal-agent relationship with that of master and servant" began to disappear.*[8]

In Ethiopia, agency in its modern sense was introduced with the advent of the Fetha Negast Nomocanon. The Fetha Nagast, in its Second Part and under Chapter XXX regulated "mandate."[9] However, like all other aspects of the Law of the Kings, there is no evidence, nor literature, showing the extent to which the mandate rules were put into application. Professor David wrote: Ethiopian tradition:

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[2] See generally Clive M. Schmitthoff, "Agency in International Trade: A Study in Comparative Law" 129 Hague Recueil Des Cours, Academy of International Law, Vol. I, 1970 pp. 115- 202

[3] Ibid; also see W .L. Church Cases and Materials on Agency and Business Organizations, Unpublished, AAU, Law Library Vol. I 1965, p. 3 ; Encyclopedia Britannica Vol. I, 1973-74, p. 291

[4] See Church, supra, note # 3 pp 4-5

[5] Ibid.

[6] Clive M. Schmitthoff, supra, Note # 2

[7] K.W. Ryan, An introduction to the Civil Law, 1962, p.72,

[8] Clive Schmitthoff, supra, Note # 2

[9] Translated from Ge'ez Abba Paulos Tsadua, edited by Peter L. Strauss, The Fetha Nagast, (The Law of Kings), Faculty of Law, Haile Sellassie I University, Addis Ababa, Ethiopia, 1968

"without any doubt, is weak enough if one considers it from practical point of view. Ethiopian juridical science has not existed up to our time, and the rules applied by the tribunals of Ethiopia are apparently inspired little by the principles set out in the Fetha Nagast."[10]

After the Law of Kings, modern law of agency was introduced into the Ethiopian legal system in 1960 with the promulgation of the Civil and Commercial Codes.

Expose de motifs of the Civil Code, the law that extensively dealt with agency, is not available. As a result, it has become difficult to adequately trace the roots wherefrom the provisions of the various books of the Code were borrowed. The same is true about agency in general and commission agency in particular. All that has been obtained showing that the Civil Code was essentially borrowed from the Civil Law/Continental legal system is what was proffered by the Master Drafter of the Code, Professor David. He wrote:

Once admitted that Ethiopia was interested in adopting a civil code, the second question presented was whether the model of this code should be taken from a Romanist system of laws or from the common law system. ...This question was foreseen and resolved only in an indirect way by the Ethiopian authorities. These authorities indirectly took the side favoring the continental system when they called French and Swiss jurists to work out the preparatory plans of codes. One could well expect of these jurists in fact, that they be aware of the concepts of the English reasoning; but it was clear that their composition and the care of perfecting a technical work would lead them inevitably to propose codes established on the continental model.[11]

Finally, though agency is treated both in the Civil Code and Commercial Code, the Commercial Code dealt with commercial intermediaries and commercial agents, it may be worthwhile to quote what the master drafter said after having dealt with having two codes, i.e., Civil and Commercial. He wrote:

The distribution of matters between the Civil Code and the Code of Commerce, not being dominated by commercial criteria, is in large measure arbitrary. All sales, all mandates and all pledges are thus regulated in the Civil Code, while all insurance, all conveyances and all partnerships are regulated in the Commercial Code.[12]

It would be important to note that contrary to the above, all mandates are not dealt with in the Ethiopian Civil Code. As stated earlier, commercial intermediaryship and

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[10] Rene David, "Civil Code for Ethiopia: Considerations of the Codification of the Civil Law in African Countries", 37 Tulane Law Review, p.192

[11] Ibid

[12] Ibid, p. 197

commercial agencies are dealt with in the Commercial Code. It is also doubtful if all conveyances are treated in the Commercial Code.

II. A Brief Description of Agency

Though it is not the concern of this work to deal with agency in general, it is, however, believed that orienting the reader with what agency is before dealing with Commission agency, which may be termed to be an aspect of agency, would be beneficial. In attempt to convey across the meaning of agency the late, and one of the most senior scholars on agency, Mechem, stated the etymology of the word agency as follows: "The word agent or agency, from *ago, agere, agens, agentis,* denotes an actor, a doer, a force, or power that accomplishes things"[13]

The word 'agent' or 'agency' is used in various contexts. It is, therefore, impossible to give the word a comprehensive meaning that denotes it in every situation it is employed. Professor Mechem, in his work cited above, offered the following:

> *Observation will show that the word has a wide range of use. Thus the chemist speaks of chemical agents, and the physician of therapeutic agents, the moralist declares that this or that institution or organization is an agency for good or evil; we say that man is a free moral agent. In a recent editorial the writer referred to party allegiance as the "great agency" for securing majority rule, and to a political party as a "responsible agent" of government. This agent or agency may at times be a physical or material, it may be a person, an animal or a tool.*[14]

It would be outside the scope and concern of this work to tackle the term 'agency' in the wide sense in which it is used in day to day parlance and relationships. Even though the etymology of the word, as noted above, is, certainly, of import to this work, the word 'agency' is employed in this work to denote "a branch of law under which one person, the agent, may directly affect the legal relations of another person, the principal, as regards yet other persons, called third parties by acts which the agent is said to have the principal's authority to perform on his behalf and which when done are in some respects treated as the principal's acts."[15] In other words, the word 'agency' as used in this work is employed in the sense that it is to "...represent another as being employed by him, for the purpose of bringing him into legal relations with a third party. Employment for this purpose is called agency." [16] In describing an agent, Mechem, in his above-cited work wrote: "In the sense in which it is used in the present subject, it denotes usually one human being who is used by another as a means of accomplishing some purpose of the

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[13] Floyd R. Mechem, Outlines of the Law of Agency, 4th ed. Callaghan & Co., 1952, p. 1.
[14] Ibid
[15] F.M.B. Reynolds, Bowstead and Reynolds on Agency, Sixteenth Ed., Sweeet & Maxwell, London, 1996, pp.2-3
[16] A.G. Guest, Anson's Law of Contract, 24th ed., The English Language Book Society and Oxford University Press, 1975, p. 571

latter."[17] According to the American Restatement of the Law of Agency, the institution under discussion is described as: "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."[18] In a similar tune, Seavey offered the following: "Agency is a consensual relationship in which one (the agent) holds in trust for and subject to the control of another (the principal) a power to affect certain legal relations of that other."[19] Based on French law at the time, Marcel Planiol in his Treatise on the Civil Law stated: "According to Art. 1984, the mandate is the contract by which one person, called the principal, gives to another, called the mandatary, the power to accomplish in his name one or several juridical acts."[20] Article 2199 of the Ethiopian Civil Code defines agency as: "a contract whereby a person, the agent, agrees with another person, the principal, to represent him and to perform on his behalf, one or several legally binding acts."[21]

III. Various Nomenclatures and Aspects of Agency[22]

Agency may be categorized into various aspects. It could, for instance, be categorized into "direct" and "indirect." Agency may, as well, be tackled from the point of view of it being "civil" or "commercial." There are also aspects of agency known as "ostensible agency", "agency of necessity", "special agency" and "general agency." There may even be cases of "unauthorized agency." References are occasionally made to "disclosed agency" and "undisclosed agency" which may, interchangeably, be used with "disclosed-principal" and "undisclosed principal." Representations arising from consent may be described as "consensual agency" or "contractual agency" whereas; those ones emanating from the provisions of the law may be referred to as: "agency by operation of law."

One aspect of agency is the so-called "Commission agency," which is the concern of this work. The term "mercantile agent" is often used in its broad sense and, as such, may include the following categories of intermediaries: "broker", "commission agent",

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[17] Mechem, Supra, Note # 2, p.1

[18] Restatement of the Law of Agency, (2nd ed. 1958, Para. 1

[19] Warren Seavey, " The Rationale of Agency" (1919-1920), 29 Yale Law Journal, 868

[20] Marcel Planiol, Treatise on the Civil Law, Vol. 2, No. 2 Translated by Louisiana State law Institute, 1939, p.286

[21] Civil Code of Ethiopia, Article 2199

[22] See, generally: Floyd R. Mechem, Outlines of the Law of Agency, 4th ed. Callaghan & Co., 1952; F.M.B. Reynolds, Bowstead and Reynolds on Agency, Sixteenth Ed., Sweeet & Maxwell, London, 1996; Restatement of the Law of Agency, (2nd ed. 1958); Warren Seavey, " The Rationale of Agency" (1919-1920), 29 Yale Law Journal, 868; B.S. Markesinis, & R.J.C Munday, An Outline of the Law of Agency, 2nd ed., Butterworths, London, 1986, Ronald, A. Anderson, Ivan Fox and David Twomey, Business law: Principles, Cases, Environment, Southwestern Publishing Co., Cincinnati, Ohio,1983, Fritz Staubach, The German Law of Agency and Distribution Agreements, Oyez Publishing, London, 1977

"factor" "auctioneer", and "del-credere agent." [23] Clive Schmitthoff, refers to a commission agent as an agent with special responsibility. He wrote:

> *He is an agent who, acting in a representative capacity, undertakes personal liability to the third party. Prima Facie, that the agent should be personally liable to the third party is nothing extraordinary. This is the typical feature of the commissionaire or other indirect agent who, vis-à- vis the third party, acts as principal but is an agent in his relationship with the principal.*[24]

On the other hand, tracing the historical development of commission agency, Planiol stated that the definition quoted earlier, based on French law, that goes: "the mandate is the contract by which one person, called the principal, gives to another, called the mandatary, the power to accomplish in his name one or several juridical acts" is narrow. He offered the following:

> *The Code makes the essence of mandate consist in the juridical representation of the principal by the mandatary. This representation is nothing more than an improvement made by the Roman law in the method whereby the mandatary was discharged from his mission. The mandate existed before that and was performed without the representation of one person by another, and this primitive form of the contract has not disappeared: it still exists in commercial law under the name of "commission." And, in civil law, under the "contract of prête-nom." It is evident that the commission agent or the person, who lends his name, although they do not make known their principal, are only kinds of agents.*[25]

On the other hand, arguing that it is difficult to see any doctrinal objection in the common law legal system of indirect representation, it was noted:

> *Indeed something like this seems to have been the mode of operation of the nineteenth century factor, who received goods on consignment and sold them without making clear whether he sold his own goods or those of another. A commercial intermediary operating on this basis is sometimes even referred to as a "commission agent" or "commission merchant"* [26]

IV. Varying Definitions of Commission Agency

According to Black's law Dictionary, commission agency is described from the agent's view point. In fact, the dictionary offered definition for 'mercantile agent' and it goes:

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[23] K.R. Bulchandani, Business Law for Management,2nd ed., Himalaya Publishing House, Mumbai, India, 2002, pp.154-155

[24] Clive, M.Schmitthoff, "Agency in International Trade: A Study in Comparative Law" 129 Hague Recuel Des Cours, Academy of International Law, Vol. I 1970, pp.115-202

[25] Marcel Planiol, Supra, Note # 20 p. 286

[26] F.M.B. Reynolds, supra, note # 15, p. 11

"agents employed for the sale of goods or merchandise are called mercantile agents and are of two principal classes, - brokers and factors(q.v.); a factor is sometimes called a 'commission agent' or a 'commission merchant.'[27] The same dictionary, in an endeavor to define 'commission merchant' offers the following:

> *A term which is synonymous with "factor." It means one who receives goods, chattels, or merchandises for sale, exchange, or other disposition, and who is to receive a compensation for his services to be paid by the owner, or derived from the sale, etc., of the goods. One whose business is to receive and sell goods for a commission, being entrusted with the possession of the goods to be sold, and usually selling in his own name.*[28]

Under German law, a commission agent (Kommissionär) is defined as "A person who, with a view to profit, undertakes to buy or sell goods or investment securities in his own name on behalf of another person (the principal)"[29]

As noted above, the terms 'commission agent' 'commission merchant' and 'factor' may be used interchangeably despite the differences that may exist among them. According to Markesinis and Munday, "traditionally, a 'factor' was defined as an agent into whose possession goods were entrusted by a principal and who customarily had power to sell them in his own name."[30] Similarly making reference to the English Factors Act of 1889 the same authors observed: "However, the body of the Act contains no reference to 'factors,' but refers exclusively to 'mercantile agents', 'who are defined in the following manner"[31]: "The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods."[32]

Schmitthoff noted that according to the Uniform Law on Agency and Commission, 'By commission agent this law means anyone who professionally undertakes to effect in his name on behalf of another (the principal) the purchase or sale of goods.'[33]

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[27] Henry Campbell Black, Black's Law Dictionary, 5th ed. West publishing Co. St. Paul Minnesota, 1979, p. 59
[28] Ibid, p. 247
[29] Fritz Staubach, The German Law of Agency and Distribution Agreements, Oyez Publishing, London, 1977, p. 118

[30] B.S. Markesinis, & R.J.C Munday, An Outline of the Law of Agency, 2nd ed., Butterworths, London, 1986, p. 146
[31] Ibid
[32] Ibid
[33] Clive, M.Schmitthoff, supra note # 24

V. Definition of Commission Agency under Ethiopian Law

Before dealing with the definition of commission agency under Ethiopian law, it might be of help to note that commission agency is defined both in the Civil and Commercial Codes of Ethiopia. However, detailed provisions on commission agency are in the Civil Code and not in the Commercial Code. The Commercial Code, in fact, contains only three articles dealing with commission agency one of which is a provision declaring that the provisions of Articles 2234-2252 of the Civil Code shall apply to contracts of commission under the Commercial Code. It would be interesting to note that Article 60(2) of the Commercial Code clearly provides that a commission agent is a trader regardless of the parties and of the nature and object of the contract. On the other hand, in the English version of Article 5 of the Commercial Code, commission agency is nowhere mentioned as a trade activity. This writer believes that this must have been done by oversight. The activity mentioned under Article 5(19) of the Code is 'stock broker' which also figures in Article 62 of the Commercial Code in the provision stating that 'stock brokers' are commission agents and have to be treated as such, unless the law provides otherwise. However, though 'stock brokers' are commission agents on the basis of Article 62 of the Commercial Code, all commission agents are not stock brokers. It would, therefore, be wrong to argue that if stock brokers are mentioned in sub-article 19 of Article 5 of the Commercial Code, it shall be deemed as if commission agency is included therein. Yet, it is another point of interest to note that 'commission agency' is mentioned in the official Amharic version of Article 5(19) of the Commercial Code.

When it comes to definitions of 'commission agency' under Ethiopian law, as stated above, both the Civil and Commercial Codes have offered their respective definitions. The Civil Code provides:[34]

> *(1) The commission to buy or to sell is a contract of agency whereby the agent, called the commission agent, undertakes to buy or to sell in his own name but on behalf of another person, called the principal, goods, securities or other fungible things.*
> *(2) The rules governing agency shall apply to this contract subject to such special provisions and exceptions as are laid down in this section.*

Further to the buying and selling commission defined under Article 2234, the Civil Code offers a definition for another type of commission agency. It provides:[35]

> *(1) The forwarding agency is a contract of agency whereby the agent, called the commission agent, shipper or forwarding agent, undertakes to enter in his own name but on behalf of another person, called the principal, into a contract for the forwarding of goods.*

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[34] Civil Code, Article 2234
[35] Ibid Article 2251

(2) The rules governing the contract of commission to buy or to sell shall apply to this contract.

The Commercial Code, on its part, has come up with the definition of 'commission agency.' It provides: [36]

(1) A commission agent is a person or business organization who, independently, professionally and for gain, undertakes to buy or to sell in his name, but on behalf of the principal, goods, movables or any other thing of a similar nature, or to enter in his name but on behalf of the principal into a contract of carriage of goods.
(2) A commission agent is a trader, regardless of the parties and of the nature and object of the contract.

VI. Contrast with Direct Representation

Agency may be direct where the agent acts in the name and on behalf of the principal. However, there are other versions of agency which may not qualify to be called direct representation or direct agency. Sometimes agency may be indirect. Bowstead & Reynolds offer the following:

> *There is another situation which can be said to amount to "incomplete agency": that of what may be called indirect representation. In commercial spheres a method of representation can be adopted whereby a principal appoints a person, who may be called an agent, to deal (especially to buy) on his behalf, on the understanding that when dealing with any third party, the agent will deal in his own name as principal. As between principal and agent, however, the relationship is one of agency (emphasis added).*[37]

Ethiopian law recognizes both direct/complete and indirect/incomplete agency. Direct representation under Ethiopian Law, it could be said, is governed by the provision of Article 2189 of the Civil Code wherein it is provided:

(1) Contracts made by an agent in the name of another within the scope of his power shall be deemed to have been made directly by the principal.
(2) The principal may avail himself of any defect in the consent of the a gent at the time of the making of the contract.
(3) Any fraud committed by the agent may be set up against the principal by the third party who entered into the contract with the agent.

According to Article 2189, therefore, if an agent acts in the name of the principal and within the bounds and limits of the powers conferred upon him by the principal, it is considered as though the principal himself acted personally and directly without an

[36] Commercial Code Article 60
[37] F.M.B. Reynolds, supra, note # 15 p. 10

intermediary. As a result, he (the principal) shall be responsible for the obligations arising from the agent's acts and shall be entitled to enjoy the fruits flowing from the contract. In other words, though the contract is concluded through an intermediary, persons becoming parties to the contract are the principal on the one hand and the third party on the other and the agent is not considered to be a party to the contract. Privity of contract would be between the principal and the third party despite the fact that the negotiation and the actual conclusion of the contract were carried out by the agent. In a similar tune, Markesinis and Munday wrote the following:

> *Where an agent, acting within the scope of his authority, contracts with a third party on behalf a disclosed principal, direct contractual relations are established between the principal and the third party. The principal can therefore sue and be sued by the third party on the contract which the agent has made on his behalf. This principle is fundamental to the law of agency and, indeed, the basic purpose of agency always was to bring the principal and the third party into direct contractual relations with one another.*[38]

In Planiol's words:

> *if the principal is bound to perform all that has been done or promised, in his name, it is because of the effect of a juridical representation: he is really bound towards third parties because he is reputed to have contracted personally and not because of any obligation resulting from his relationship with his mandatary.*[39]

Planiol also wrote: "The execution of the mandate obligates him (the principal) directly towards third persons, just as if he had contracted himself without employing an intermediary. It is the effect of representation in juridical acts."[40]

However, it would be important to note where the emphasis is in the quotation taken from Markesinis and Munday and where it is in Article 2189 of the Ethiopian Civil Code. In what is offered by those authors, the emphasis is on whether or not the agent acted within the scope of his power, whereas in Article 2189 of the Ethiopian Civil Code both acting in the name of another, (the principal) and acting within the scope of the power of the agent are mentioned as requisites leading to the contract concluded by the agent being deemed to have directly been made by the principal.

Coming back to the cornerstone provisions of Article 2189 (1) of the Ethiopian Civil Code, the elements thereunder are that:

(1) the contract is concluded by an agent;
(2) in the name of another, (that other being the principal);

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[38] B.S. Markesinis, & R.J.C Munday, supra, note # 30 p. 116
[39] Marcel Planiol, supra, note # 20, p. 296
[40] Ibid, p. 297

(3) within the scope of his power (the agent's power);
(4) shall be deemed to have been made directly by the principal.

From the four elements, however, the second element is by far the most important in that it firstly signifies that there is agency and secondly because the presumption in element (4) would not have resulted unless the agent acted in the name of another, i.e., in the name of the principal.

It is, of course, important that the agent acts within the scope of his power for the resultant element that "the contract be deemed to have been made directly by the principal" to come about. Hence, let it not be taken as if the requirement of the agent's transacting within his powers is played down. One cannot, however, equate elements (2) and (3) above-mentioned in terms of importance because if the name requirement, i.e., the second element is fulfilled, and yet the agent acted outside the scope of his power, the resultant element under (4) above may still be brought about by the optional but remedial act of ratification by the principal.[41] Or, even if the principal might not be willing to ratify, the law may impose upon him the duty to ratify and the agent's acting outside the scope of his powers may thus be remedied by obligatory subsequent adoption.[42]

Optional, or as the case may be, compulsory ratification may also serve to remedy situations where an agent acted in an authority that has lapsed or even without agency of any kind between himself and the person on whose behalf he acted. One thing should be made clear once again. Whether a principal optionally ratifies the *ultra vires* act of his agent in situations where there is an agent-principal relationship between them; or where a purported principal ratifies the act of the person who, without authorization of any sort, manages his, i.e., the principal's affairs; or the law imposes a duty to ratify both in circumstances where there is agency relationship between the acting person and the purported principal, or in the circumstances of unauthorized agency; the agent must have, necessarily acted *in the name of* the person whose ratification he would be seeking. (emphasis added) There cannot, putting it otherwise, be a ratification having an external effect, without the agent having acted in his agent capacity, which is expressed through his acting *not in his own name but in the name of the principal.*(emphasis added)

Since under Ethiopian law, from the two tests included in Article 2189(1) of the Civil Code, i.e., the 'name' test and 'within the scope of his power' test, the more important one is the 'name' test, ratification, therefore, cannot make the principal of an agent who transacts with third parties *in his own name* a party to the contract and the principal cannot be deemed to have personally concluded such a contract through ratification.(emphasis added) As a result, third parties may not have the right to take direct action against the principal. Privity of contract shall be deemed to exist as

[41] Civil Code, Article 2190
[42] Ibid, Articles 2207 & 2264

between the agent and third parties with whom the agent contracted. Such is the case with respect to the situations where the agent acts in his own name but for the benefit of his principal dealt with under Articles 2197, 2198 and 2234-2252 of the Civil Code.

Planiol has the following to offer:

> *It is possible that the mandatary authorized to enter into a contract with a third person, instead of representing himself as empowered, by another, deals in his personal name as if the contract were his own. In this case he is personally bound towards the third person who has placed his confidence on him, and who desired to have him as his debtor.*[43]

In the circumstances covered by Articles 2197 and 2198 of the Civil Code, it is, in fact, provided, *albeit* not very clearly, and in contradistinction to the cornerstone provision of Article 2189, that an agent who acts on his own behalf shall personally enjoy the rights or incur the liabilities deriving from the contracts he makes with third parties; notwithstanding that such third parties know that he is an agent. It is further stated that in cases where an agent acts "on his own behalf", third parties shall not have direct action, i.e., an action that would have resulted from cases where an agent acts in the name of the principal and within the scope of his power against the principal; and may only bring against him an indirect action on behalf of the agent with respect to the rights pertaining to the agent.

Note should be taken of the fact that under Article 2197(1), the language used seems to be different from the intended language that ought to have been employed to contrast the effect of an agent's acting in the name of another. It may, of course, be argued that the phrase "agent who acts on his own behalf" is proper because if no mention of the name of another i.e. the principal, is made by an agent, then he would not be acting on behalf of another except on his own behalf. Nevertheless, no sooner would the fallacy of the use of the phrase 'on his own behalf' in Article 2197 be exposed than when one reads the first two sub-articles of the next Article i.e., Article 2198 let alone other provisions which will soon be treated.

Sub-article (1) of Article 2198 provides that a principal who is behind an agent and on whose behalf the agent acts may recover any movable, which the agent acquired "on his own behalf while acting in his name". Though there is the possibility of arguing that both phrases "on his own behalf "and "in his name" appearing in sub-article (1) of Article 2198 refer to the agent and not to the principal; I am of a different opinion. I think the phrase "on his own behalf" in the sub-article under consideration refers to the principal and not to the agent and only the phrase "in his own name" refers to the agent. This argument owes its basis to the cornerstone, direct and complete representation provision of Article 2189(1) of the Civil Code in that to contrast consequences of the direct, disclosed agency, the indirect, undisclosed agency falling under Articles 2197-8

[43] Marcel Planiol , Supra, note # 20, p. 297

of the Civil Code, should be construed in such a way that the phrase "on behalf of" means "for the benefit of" or "for the account of" thereby indicating an indirect agency which is maintained by the agent's acting not in the name of another but in his own name but yet hinting that there is an indirect agency.

A close look at sub-article (2) of Article 2198 should also, in my opinion, give the sort of construction that the principal may substitute himself for the agent to enforce the rights acquired by the agent while he acted in his own name but for the benefit of the principal i.e., "on behalf" of the principal. In other words, unless the principal shows that the agent acted for his (the principal's) benefit but in his own name (in the name of the agent) thereby being able to prove to third parties who did not know that there was an indirect agency, he may not successfully enforce against them the rights that have accrued to him through the agent's acting in his own name. This is so, for the simple reason that there is privity of contracts between the agent and third parties and not between the principal and third parties as it is under the complete and direct agency governed by Article 2189 of the Civil Code. Procedurally, there are no clear provisions as to how the principal exercises his rights under Article 2198(2). It is not, in other words, provided under Art. 2198 as to whether the principal, by virtue of there being an agent-principal relationship, sues the agent first and then the agent pulls the contracting third party into the suit as a third party, but a real party defendant and then the agent pulls out or whether the agent should give a power of attorney to the principal so that he may exercise his rights on his behalf or whether the principal may be allowed to exercise the rights given to him simply on the strength of the legal provision, which seems unlikely.

As the agent's acting in the name of another is glaringly the most important requirement in Article 2189(1) for the resultant effect that the act done by the agent be deemed to have been made directly by the principal, I opine that the phrase "an agent who acts on his own behalf" appearing in Art. 2197 of the Civil Code should have been replaced by the phrase "in his own name" so that it clearly stands in contrast to the direct and complete agency and its effect under Article 2189(1). The title of Article 2197 ought, accordingly, to have been "Agent acting in his own name on behalf of another" or "agent acting on behalf of another in his own name".

The main concern of this work is 'commission agency' which is another example of an indirect agency. A glance at Article 2234(1) of the Civil Code reveals that a commission agent is somebody '*...who undertakes to buy or to sell in his own name but on behalf of another person called the principal, goods, securities or other fungible things*' (emphasis added).

The provision of sub-article (1) of Article 2234 also clarifies that in indirect agency cases, the agent acts in his own name but for the benefit of another, and that there is distinction between acting in one's own name and acting on behalf of another. The provisions of Article 2234(1) support my argument above-stated in that in "undisclosed agency" or "undisclosed principal" circumstances figuring under Articles 2197/98 of the

Civil Code, although the agent enters into contracts with third parties in his own name, yet he transacts to benefit another person-his principal. It could, therefore, be said that both as it appears in the title and the actual contents of the provisions of Article 2197, the phrase "on his behalf" could be misleading unless it is construed to be referring to "on the principal's behalf" and the phrase "in his name" definitely referring to the agent and not to the principal.

It would be worthwhile to mention, at this point, that the indirect agency situation that falls under Articles 2197/98 of the Civil Code on the one hand and commission agency on the other, are, in essence, the same. Bowstead & Reynolds wrote:

> *There is another situation which can be said to amount to 'incomplete agency': that of what may be called indirect representation.*(emphasis added) *In commercial spheres a method of representation can be adopted whereby a principal appoints a person, who may be called an agent, to deal (especially to buy) on his behalf, on the understanding that when dealing with any third party, the agent will deal in his own name as principal. As between principal and agent, however, the relationship is one of agency.*[44]

Making the German Commercial Code a point of reference, Staubach also observed: "The Commercial Code contains special rules governing indirect agency for commercial purposes. In particular, there are rules relating to commission agents, forwarding agents and agents who enter into insurance arrangements on behalf of others."[45] Staubach further argued:

> *A commission agent is bound by his contract with his principal to procure and enter into contract in his own name with a third person in order to carry out the commission. The relationship which arises between the commission agent and the third person under this executory contract is the external relationship in the commission transaction. The commercial Code does not have a special set of rules governing the external relationship, and the same rules apply to it as to indirect agency under the Civil Code. (emphasis added) Thus, the gent alone obtains rights and enters into commitments under the executory contract, and so if he sells goods under it he alone is entitled to payment of the price, and if he buys goods he alone acquires initial ownership of them.*[46]

When it comes to Ethiopian law, it may be said that 'commission agency' is, among others, governed by the principles laid down in Articles 2197/98. This, it is submitted, must be what the legislator had in mind when it came up with the provisions of Article 2234(2) of the Civil Code reading: "The rules governing agency shall apply to this

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[44]F.M.B. Reynolds, supra, note # 15 p. 10

[45] Fritz Staubach, supra, note # 29, p.118

[46] Ibid, p. 141, (emphasis supplied)

contract (the contract of commission agency as stated in sub-article (1)) subject to such special provisions and exceptions as are laid down in this section." However, the agency situations falling under Articles 2197/98 may be distinguishable from commission agency cases in that agency cases falling under Articles 2197/98 are not, as such, commercial agency cases whereas commission agency cases are, by virtue of Article 5(19), (especially the Amharic version,) *cum* Articles 60-62 of the Commercial Code. It is paradoxical to note that commission agency is not adequately treated in the Commercial Code and is extensively dealt with in the Civil Code. From the way Article 5 of the Commercial Code is formulated, those activities formulated in sub-articles (1) through (21) seem to have been designated as commercial activities and that somebody acquires the status of being a trader when he/she or it is engaged in any of the activities professionally and for gain.

VII. The Recognized Types of Commission Agency

There are many kinds of commission agencies e.g. the insurance broker[47] the stock-broker[48] the ship-broker[49] the advertising-agent[50] the French customs commission agency[51] or the German commission contracts in respect of subscription or exchange or conversion rights[52] "under which a bank is entrusted with the exercise of a right to subscribe for new shares or other securities to which its customer is entitled."[53] However, the Ethiopian Civil and Commercial Codes only recognize the following aspects of commission agency- 1) commission to buy or sell goods; 2) commission to buy or sell securities; 3) commission to buy or sell fungible things; 4) stock brokerage commission and 5) forwarding commission.[54] An attempt will be made here below to briefly consider each of the aspects recognized by the Ethiopian Law.

7. 1. Commission to Buy or Sell Goods

7.1.1 Commission to Buy Goods

A commission agent entrusted with the buying of goods would normally be an agent who enters into contracts for the purchase of goods in his own name but for the benefit

[47] J. Guyenot, The French Law of Agency and Distribution Agreements, London, 1977, p.156; see also Schmitthoff, supra, note # 24

[48] Ibid, see also Schmitthoff, supra, note # 24

[49] Ibid, see also Schmitthoff, supra, note # 24

[50] Ibid, see also Schmitthoff, supra, note # 24

[51] Ibid, see also Schmitthoff, supra, note # 24

[52] Fritz Staubach, supra, note # 29, p. 156; see also Schmitthoff, supra, note # 24

[53] Fritz Staubach, supra, note # 29, p. 156

[54] Civil Codes Articles 2234(1) *cum* Article 2251; Commercial Code Articles 60 & 62

of the principal. A goods-buying commission agent, would, in other words, be entering into sale agreements in his own name as a buyer for the period during which his contract of agency remains effective. It, therefore, follows that Articles 2266-2367, and, as the case may be, Articles 2368-2426 of the Civil Code and without prejudice to the prior application of these provisions, the provisions of Title XII of the Civil Code, i.e., Articles 1675-2026 of the same Code, would be applicable to a buying commission agent's external relationships i.e., his/her relations with seller third parties.

Among the mentionable duties of a purchasing commission agent are, 1) the duty to pay the price and take delivery of the goods he buys;[55] 2) duty to examine the goods he takes delivery of at the time when the risks are transferred to him or as soon as he gets the opportunity to examine them; 3) duty to notify the seller of the defects and/or non-conformity he discovered in the process of examination and his intention to avail himself of the defects and non-conformity; 4) duty to describe the nature, and extent of the defects and/or non-conformity detected on the goods he took delivery of; 5) duty to inform the seller that he rejects the goods delivered to him or alternatively that he requests the replacement of the goods so that he avoids transfer of risks over to him; and 6) duty to call the seller or his agent at the time he conducts examination on the goods. In general, a purchasing commission agent may avail himself of the warranty provisions of sales law in the Civil Code in order to demand specific performance or have the seller rectify the defects or non-conformity, unilaterally declare the contract cancelled either partially or totally as the case may be.[56]

Although nothing is provided to that effect in the Civil Code, if the principal has instructed the commission agent that the goods he buys be sent to him by the seller thereby avoiding the intermediary stage of the agent's taking delivery from the seller, and then redeliver the goods to the principal; there may not be the necessity of the commission agent's receiving the goods. In France, "more usually the goods are dispatched by the seller acting on the principal's instructions."[57] If the goods bought by a commission agent are directly dispatched by the seller to the principal, then the principal has to see to it that things that ought to have been taken care of by the agent have to be taken care of by him. Among others, the principal has to examine the goods at the time when the risks are transferred to him or at the earliest possible opportunity. If examination discloses defects or non-conformity for which the seller may be held on warranty, then the principal shall have to notify the agent so that he seeks the appropriate remedy in the circumstances by taking the appropriate measure. The agent becomes the most appropriate person to take measures legally appropriate simply because privity of contract is only there between the agent and the seller third party.[58] Although the arrangement that the principal's directly receiving the goods from the third party seller could in certain respects be advantageous to the principal, particularly from

[55] See generally, Articles 2203-2313 of the Civil Code
[56] Ibid, Articles 2290-2300
[57] Guyenot, supra, note # 47, p.167
[58] Fritz Staubach, supra, note # 29, p.141

the point of the consideration that he gets the goods fast, this consideration alone might not benefit the principal unless he also would be able to examine the goods as swiftly as possible and inform the agent so that he, (the agent) may be able to exercise his legal rights within the code prescribed time set for the purpose of holding the seller on warranty for defect and non-conformity.[59] The principal's getting the goods directly from the seller third party might as well adversely affect the interest of the agent in that he, (the agent) won't be able to exercise his lien rights on the goods he buys which serves him as a security for him to get his remuneration or even reimbursement of outlays and expenses.[60]

A commission agent meant to purchase goods in his own name but for his principal's account 'shall act at his own risk where, without the principal's consent, he pays the seller before delivery has taken place.'[61] The provisions of Article 2237 of the Civil Code presuppose that a commission agent, generally, is not permitted, and is not expected, to pay the prices of the goods he buys unless payment of price is simultaneous with delivery or even better, until after he, or as the case may be, his principal, has taken delivery of the goods purchased[62]. The provisions of Article 2237 are not, strictly speaking, prohibitions but the provisions sort of put the responsibility on the agent which otherwise would not have been his. In other words, the agent, who, unless he is a *del credere* agent, may not be held responsible for the performance of the contract he entered into with third parties would be held responsible towards the principal at least upto the amount he paid by way of price just because his performance preceded that of the third party and unfortunately the third party failed to discharge his obligation to deliver the good/s purchased. The application of Article 2237 should not, it seems, affect situations where the nature of the transaction made with the seller is such that payment of price is effected before the seller even makes, or, manufactures the goods to be delivered or even where delivery, as a matter of trade usage, follows payment of price. The Article focuses on the agent's securing the consent of the principal before paying the price anyway.

A purchasing commission agent should be careful enough in examining the goods he takes delivery of. Although he may avail himself of defects which could not be detected by the normal process of examination and which are subsequently discovered to which the law refers to as "latent" "hidden" "or rehidibitory" defects; provided however, that he notifies the seller as soon as the latent defect is discovered.[63] There may be also the possibility that the buying commission agent overlooks obvious defects as a result of his gross negligence in which case the seller would be exonerated from liability or warranty

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[59] Civil code Articles 2290-2300
[60] Ibid, Articles 2234(2), *cum* Articles 2247 and 2224
[61] Ibid, Article 2237.
[62] See also Article 2278 of the Civil Code providing for simultaneity of performance in the absence of agreement otherwise, and the provisions of Articles 2310 & 2311
[63] Ibid, Article 2293(2)

against defects.[64] The warranty shall, however, be due if the case falls under the provisions of Civil Code Art. 2296 (2).

A purchasing commission agent should also bear in mind that he owes his principal a duty to check as to whether the goods sent or delivered to him by seller third parties conform to the ones described in the contracts of sale. A buying commission agent would be required to do that with the view to hold selling third parties on warranty in the event that examinations and/or inspections disclose warrantable non-conformity.[65]

Civil Code Article 2235(1) seems only to provide for measures of preservation to be taken by a selling commission agent. Whether or not the provisions of the Article apply to a buying commission agent in the absence of an express provision to that effect may be worth considering. The very way Article 2235(1) is formulated, in fact, invites two different ways of construction. The first possible construction would be the one that limits the application of the provision to situations where the agent is a selling commission agent and that the sub-article refers to goods sent to the agent by the principal. This construction, therefore, limits the scope of application of the sub-article to the internal relationship between the principal and the agent, and hence it perfectly makes sense if a duty of preservation is imposed upon the agent. In other words, Article 2235(1) may be taken as a provision indicative of one of the fiduciary duties a commission agent owes his principal. The other alternative construction would be to take the provisions of Article 2235(1) as also referring to situations where a buying commission agent receives goods whilst contracting in his own name but on behalf of the principal. Particularly if the phrase: "[T] he goods sent to him on behalf of the principal" is taken in isolation it could be argued that the latter construction is the more appropriate one because such an expression may be taken as referring to cases where third parties would be sending goods to a commission agent whom they know as such. On the other hand, the word "sent," it may be argued, does not seem to refer to cases where a purchasing commission agent receives goods from third parties with whom he contracts. In such circumstances, it is submitted that the most appropriate legal and technical phrase would be "...goods delivered to him" thereby fitting into the consequential situations flowing from the nature of the indirect representation of commission agency.

If Article 2235(1) is limited to the narrow construction that it only applies to cases of selling commission agent who receives goods from the principal or directly from a manufacturer on behalf of the principal, and the other aspect, i.e.; the cases of buying commission are considered as not covered by the provision; it could be detrimental to the principal in that even agents who unreasonably fail to preserve goods delivered to them would be relieved from liability. After all, the requirements laid down under

[64] Ibid, Article 2296(1)
[65] Ibid, Articles, 2287, 2288, 2290-2300, 2308 & 2343

Articles 2208(1) and 2211(1) shall apply to commission agency and there is a fiduciary duty imposed upon commission agents as well.[66]

The strict provision of Article 2235(3) which imposes the duty of preservation upon any person who has not yet accepted the commission but who is by profession one may also be taken as an indication that duty to preserve applies to a buying commission agent as well.

It, therefore, follows that a commission agent is duty bound to preserve the goods he receives while transacting in his own name but on behalf of the principal. The duty to preserve includes all necessary steps that need to be taken by a purchasing commission agent so that the goods that come into his possession do not lose their quality, or deteriorate in value or even be stolen or perish.[67] Unless otherwise instructed by the principal, the preservation duty imposed upon a commission agent does not go to the extent of insuring the goods.[68] However, all appropriate measures, short of insurance, in the absence of instruction for insurance, would fall; it is submitted, within the broad duty of preservation.

7.1.2 Commission to Sell Goods

The other aspect of commission recognized by the Ethiopian law is the commission to sell goods in one's own name but for the benefit of the principal. Goods selling commission agency is an agency whereby one party called the agent agrees with another party called the principal, to sell in his own name but not for his own benefit, goods belonging to the latter. A selling commission, in other words, is a transaction whereby the agent sells goods that have been sent to him by the principal or even by the manufacturer for the benefit of the principal. As the name itself indicates, a selling commission agent would be engaged in selling transactions with third parties in his own name but for the benefit of the principal. Like the buying commission agent, a selling commission agent's sale transactions necessarily call for the application of Civil Code Articles 2266-2367[69] since the agent assumes the responsibility of a seller like in any ordinary sale transaction. Depending on the type of sale agreement the agent concludes, the provisions of Articles 2368-2426 of the Civil Code may also govern the transactions a selling commission agent enters into.

Although he sells goods not belonging to him,[70] a selling commission agent assumes the duty to deliver the goods he sells to the purchasing third party and to transfer the ownership of the goods over to the purchaser. A selling commission agent bears the responsibility to transfer to the third party buyer unassailable rights over the goods he

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[66] See Civil Code Article 2234(2)
[67] See, for instance, Civil Code Article 2323
[68] Civil Code Article 2242
[69] Ibid, Article 2267
[70] Ibid, Article 2270(3)

sells.[71] A selling commission agent, unless the warranty is validly excluded or restricted, or the exception laid down by the law comes into application, also warrants the buying third party against any total or partial dispossession which he might suffer as a consequence of another 3rd party exercising a right he enjoyed at the time of the contract.[72]

The selling commission agent assumes the responsibility to transfer ownership and to warrant against any total or partial dispossession primarily because he transacts in his own name and because of the nature of goods sent to him by virtue of the agency agreement. The goods sent to a selling commission agent must necessarily be ordinary goods, i.e. ordinary corporeal chattels the transfer of possession of which entails transfer of ownership.[73] In other words, goods to be entrusted to selling commission agents cannot be special chattels whose ownership may not be transferred by virtue of mere delivery of the goods or transfer of possession and other formalities required by the special law applicable to the goods must be complied with in addition to transfer of possession.[74]

In selling commissions, because he contracts in his own name, it would be the selling agent that would be held liable on warranty for defects and non-conformity. If the things (goods) sold by him happen to be suffering of warrantable defects or warrantable non-conformity, it is the selling agent that should be held liable on a warranty towards purchasing third parties and not the principal that owns the goods. Third parties cannot claim to have a direct right of action against the principal and may only have an indirect right of action by putting themselves in the shoes of the agent pursuant to the rules of the Civil Code governing indirect agency.[75]

Without prejudice to the possibility of the sub-article being intended to govern acquisition in good faith, it seems Article 2270(3) of the Civil Code is meant to govern cases of commission agency. Hence, the provisions of Article 2270(3), make a sale contract concluded by a seller in respect of things that do not actually belong to him valid. It is believed that the legislator had the case of selling commission agents in mind by formulating sub-article (3) of Article 2270 of the Civil Code, the way it now reads. As said earlier, the case of acquisition in good faith may also have been in the mind of the legislator by formulating Article 2270(3) as it now reads.

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[71] Ibid, Articles 2273(2), 2281-2286, 2341& 2342

[72] Ibid, Articles 2282 & 2342

[73] Note the provisions of Article 1193(1) of the Civil Code, by virtue of which the law lays down the presumption that that whosoever possesses a corporeal chattel is presumed to be its owner. Also take note of Articles 1143 & 1186(1) of the Civil Code providing that delivery transfers possession and that for ordinary chattels, transfer of possession entails transfer of ownership.

[74] Article 1186(2) of the Civil Code; See also Article 2267(2) of the same Code.

[75] Article 2234(1) *cum* 2197(2) of the Civil Code

A selling commission agent, as discussed earlier, owes the duty to preserve the goods falling into his custody. Accordingly, in a selling commission context, the seller agent shall bear risks of the things in his custody until he succeeds to transfer the risks to the purchasing 3rd party by delivering the things over to the buyers. Although he bears the risks, however, it is important that his duty to preserve the goods in his custody does not go to the extent of insuring the goods, unless the principal instructs the agent to take out insurance for the goods in his possession.

7. 2. Commission to Buy or Sell Fungible Things

7.2.1 Commission to Buy Fungible Things

Commission to buy fungible things is, in fact, not very different from commission to buy goods except that the former commission agency only pertains to the purchase of fungible things as distinguished from the commission conferred on somebody to buy specific goods. Fungible things are things of generic species. The name given to such things is generic in that there would normally be internal classifications for things having generic designations. Primarily because of the characteristics of fungible things, the law has come up with some special provisions regulating such things. Article 1747 of the Civil Code, for instance, is such a provision in that it reads: (1) "Unless otherwise agreed, the debtor may choose the thing to be delivered where fungible things are due." (2)" The debtor may however not offer a thing below average quality." Where somebody is authorized to act as a commission agent to purchase things of generic species, therefore, the selling third party is the one authorized to choose what is to be delivered to the buying agent. The selling third party, however, may not offer generic or fungible things that are below average quality.

Article 1748 of the Civil Code, also regulates transactions relating to fungible things. A fungible things purchasing commission agent, who may be taken as "the creditor" for the purposes of the Article under consideration, therefore, may not refuse fungible things on the ground that the quantity or quality offered to him does not exactly conform to the contract, unless this is essential to him or has been expressly agreed. Where the thing does not exactly conform to the contract; the purchasing commission agent, (the creditor) may proportionately reduce his own performance. Alternatively, where he has already performed, the creditor may claim damages.[76]

The commission agent given authorization to purchase fungible things may also avail himself of the provisions of Article 1778 of the Civil Code in that he/she may apply to the court to be authorized to buy at the defaulting third party's expenses, the things which the debtor assumed to deliver.

In cases of commission to buy fungible things, the agent may as well avail himself of all other appropriate remedial provisions in Title XII of the Civil Code without prejudice to

[76] See also Articles 2299(2) & 2345(2) of the Civil Code

the prime application of the relevant provisions of Sales Law whether general, or special, as the case may be.

7.2.2 Commission to Sell Fungible Things

A person may be conferred with commission to sell generic things. Though the position of a person authorized to act as a commission agent to sell fungible things is not, as such, very different from the one given the authority to sell goods; similar to the one authorized to buy generic goods, his position may merit to be given the special consideration it deserves mainly because of the simple fact that s/he is authorized to sell generic things. Civil Code provisions of Articles 1747, 1748 and 1778 would therefore; *mutatis mutandis*, apply to cases of commission to sell fungible things. By the same token, appropriate remedial provisions in the Law of Sales would also govern cases and relationships of a commission agent given authorization to vend fungible things belonging to his principal as though they are his own.[77]

7.3 Commission to Buy or Sell Securities

7.3.1 Commission to Buy Securities

Although securities, unless otherwise provided by law, are, for the purposes of property designation, assimilated into movables, and are treated as goods,[78] they do have their own characteristics and idiosyncrasies, which distinguish them from other kinds of goods. According to Article 1127 of the Civil Code, corporeal chattels are defined as "things which have a material existence and can move themselves or be moved by man without losing their individual character." There is no definition, as such, given to securities in the Civil or Commercial Codes. However, the provisions of Article 1128 of the Civil Code could be taken as giving hint that securities seem to be incorporeal rights embodied in transferable instruments of some sort. This is further supplemented by Article 715(2) of the Commercial Code which makes it clear that transferable securities are one among those negotiable instruments recognized by our Commercial Code; and that "negotiable instrument is any document incorporating a right to an entitlement in such manner that it be not possible to enforce or transfer the right separately from the instrument."[79] Dictionary definition, albeit a common law one, is that securities are "evidences of debts or of property evidences of obligations to pay money or of rights to participate in earnings and distribution of corporate trust ...and other property." Among the frequently mentioned securities, stocks, bonds, notes, convertible debentures, warrants or other documents that represent a share in a company are but few.

The Ethiopian Commercial Code recognizes three categories of negotiable instruments viz. "commercial instruments", which are enumerated under Article 732(2) of the Code,

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[77] Read Article 2300(1) of the Civil Code, for instance
[78] Article 1128 of the Civil Code
[79] Commercial Code Article 715(1)

"transferable securities" and "documents of title to goods."[80] Unfortunately, the Code does not separately deal with transferable securities and documents of title to goods as it elaborately deals with commercial instruments. Nevertheless, as commercial instruments are said to be those negotiable instruments setting out an entitlement consisting in the payment of a sum of money,[81] by exclusion, therefore, it could be said that negotiable instruments which do not set out the payment of a sum of money and which are not documents of title to goods, are transferable securities. The Ethiopian law, it may be stated, at least recognizes share certificates (stocks), debentures, negotiable life assurance policies and bonds as transferable securities.[82]

A commission agency may be given to buy transferable securities and an agent entrusted with such agency is not an ordinary commission agent. He is the so-called *del credere*[83] agent unless there is an agreement otherwise which dispels the rebutable presumption under Article 2240(2) of the Civil Code that a commission agent entrusted with the task of buying securities shall be deemed to be a *del credere* agent. If a commission agent is a *del credere* agent, the law imposes on him the obligation to be liable to the principal for the payment or the performance of other obligations by the persons with whom he contracted.[84]

A securities purchasing commission agent may be required to be even more conscientious than a goods purchasing one. He has to be able to profess the technical know-how of dealing with the instruments he purchases in his own name but on behalf of the principal. *Inter alia*, he may be expected to deposit the securities he purchases with a bank in accordance with Article 912ff of the Commercial Code for their safety and their proper handling, which includes but not limited to, the collection of yields of the securities. It, in fact, seems that it is banks that undertake to become commission agents for purchasing of securities more than any other person, in which case it becomes a lot easier to handle the securities.[85]

It is gatherable from some provisions of the Commercial Code that transferable securities, by and large, may be in the form of either in the name of a specified person or to bearer.[86] Considering Articles 660 and 696 and the few ones following, it may also be said that at least negotiable life insurance policies may be issued in the form of "to order" instruments. In the event that the transferable securities purchased by a commission agent are in the names of specified persons i.e. that of the seller third parties; then the commission agent is expected to follow the procedure provided for by Articles 722 and 723 of the Commercial Code to have the instruments registered in his

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[80] Ibid, Article 715(2)
[81] Ibid, Article 732; see also Black's Law Dictionary, supra, note # 27, p. 245
[82] See Commercial Code Articles 325, 340, 429-444, 474, 660, 696-697, 912-918, and 947-958
[83] Article 2240(2) of the Civil Code; see also pages 24 & 25 infra, for the definition of *del credere* commission agent
[84] Ibid, Article 2241; see also the discussion on pages 24 & 25 infra
[85] Fritz Staubach, supra, note # 29 p. 150
[86] See Commercial Code Articles mentioned at note # 82 supra

own name in the issuing company's or person's register and then repeat the same procedure again to have the securities transferred over to the principal's name. Purchasing of securities in the names of seller third parties, though possible, may, nonetheless, be expensive and tedious in the face of the provisions of Articles 722-723 and 341 of the Commercial Code.

It would be a lot easier if a securities purchasing commission agent is to buy bearer securities as opposed to those ones in the names of specified persons. In the case of bearer securities their transfer does not involve any process other than simply handing over of the documents. An agent who buys bearer securities "in his own name but on behalf of the principal" needs only to take delivery of the instruments from selling third parties and merely deliver them over to his principal to effect transfer of title over the securities. Pursuant to Articles 340 and 721 of the Commercial Code, such securities are assigned, or transferred by delivery without any other requirement. Per Article 340(2) of the Commercial Code, "Unless the contrary is proved, such shares shall be deemed to be the property of the holder for the purposes of payment of dividend, redemption and right of participation in general meetings". Article 721(1), on its part, provides that "the holder of an instrument to bearer establishes his right to the entitlement as expressed in the instrument by the sole fact of the presentment of the said instrument."

A securities purchasing commission agent who has become an endorsee possessor of endorsable transferable securities, for example, a life insurance policy to order, should re-endorse the policy in the name of the principal and hand the instrument (policy) over to him (the principal).[87]

7.3.2 Commission to Sell Securities

Commission agency may be conferred upon someone for the purposes of selling of securities as well. As mention has already been made for the cases of commission to buy securities, it is usually banks that serve as depositories of securities.[88] It would be worthwhile to note that in cases of commissions for sale of transferable securities, a practical problem will arise in the face of the provisions of Article 722 &723 of the Commercial Code. The selling commission agent will not be able to sell the securities unless and until the principal transfers the ownership of the transferable securities registered in his name to the name of the agent. Primarily, therefore, the principal who is desirous of having a commission agent to sell his registered securities should first have the securities registered in the name of his commission agent. This becomes a prerequisite because the agent will be selling the securities in his own name. On the other hand, it would be easy and straightforward to have bearer securities sold through the intermediary of a commission agent.

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[87] Commercial Code Articles 696 and 724

[88] See note # 85 supra

7. 4 Forwarding Commission

As defined under Article 2251, forwarding commission agency is a contract of agency whereby the agent, called, the commission agent, shipper, or forwarding agent, undertakes to enter in his own name but on behalf of another person, called the principal, into a contract, for forwarding of goods. Basing himself on the then in operation German Commercial Code, Staubach wrote:

> *A forwarding agent is a person who carries on the business in his own name of consigning goods for carriage by carriers or by owners or charterers of sea-going vessels for the account of other persons. The forwarding contract between the consignor of goods and a forwarding agent is closely related to the commission contract. Like a commission agent, a forwarding agent carries on a business independently, and enters into contracts of carriage in his own name but on behalf of other persons as his principals.*[89]

Although the sub-topic of this section of the work appears to be limited to forwarding commission agency, Article 2251(1) has a broader coverage and it embraces three categories of forwarding agents called commission agent, shipper or forwarding agent. The latter two, seemingly different kinds of agency, might look misplaced in there. However, they all are bound together by the provision of Article 2251(1) which makes it clear that all the three could be called forwarding agents and hence the title of the Article. The other binding factor is that whether the person undertaking to execute the agency is called shipper, forwarding agent or commission agent, the objective of such an undertaking by the agent would be the same in that he would be entering into an obligation to become a party to contracts to forward goods in his own name but on behalf of the principal.

Since the rules governing the contract of commission to buy or to sell apply to forwarding commission agency,[90] a forwarding agent would be duty bound to preserve the goods he undertakes to forward short of taking out insurance for the goods unless, of course, there is an agreement otherwise. [91]

Where the commission agent or the shipper has been instructed to insure the goods, then he would be obliged to take out appropriate insurance policies for the goods. With respect to insurance, Articles 2242 and 2251(2) are in effect warning provisions to the principal/owner or to any other party who might have insurable interest in the goods that he/she should ensure that appropriate arrangement is made for insuring the goods on his part or alternatively he must see to it that taking out insurance cover for the goods is

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[89] Fritz Staubach, supra, note # 29 p. 160
[90] Civil Code Article 2234(2)
[91] Ibid, Articles 2251(2); 2234(2) *cum* 2235 & 2252

unequivocally made the duty of the agent in the agency contract in whichever capacity he undertakes to act, i.e. be it as a selling, buying or forwarding agent.

A forwarding agent can agree with himself to carry out the transportation of the goods.[92] On the other hand, because of the resultant conflicting interest of the principal with that of the agent,[93] the principal is given the right to cancel the contract made by the agent in his name where he contracts with himself. As it is expressly stated in Article 2188(3), Articles 2248 and 2252 are exceptions to the rules laid down in Article 2187 and 2188 (1) of the Civil Code.

The right of an agent to enter into agreements in his own name but on behalf of the principal on the one hand and with himself in strictly his personal capacity on the other; will be considered below.

Where a forwarding agent avails himself of his right to contract with himself to carry out the forwarding of goods, he shall have the same rights and duties as a carrier, in which case, the Commercial Code provisions of Articles 561 and the following shall govern the aspect of the carriage of goods by the agent. Save the mandatory provisions of Titles I and II of Book III of the Commercial Code, which parties cannot set aside by their own agreement, there are various circumstances in those two titles of the same Book of the Commercial Code which are left to be regulated by the parties concerned. If those circumstances are to be regulated by the parties, there is bound to arise an issue of how they are to be regulated if the forwarding agent decides to act as a carrier himself through the mechanism of contracting with himself. An easy way out to the problem may be that unless terms and conditions upon which the forwarding agent may act as a carrier may have been supplied by the principal, the purported agreement expected to have been concluded between the carrier in his personal capacity and in his indirect representative capacity would be left to be fixed solely by the agent himself. If the forwarding agent enters into an agreement with himself fixing terms that are manifestly disadvantageous to his principal, there is nothing provided for in the Civil Code which might be put into application to rescue the principal since contracting with oneself is taken as permitted in cases of commission agency for sale and purchase of goods quoted on the Stock Exchange or having a market value, or in cases of forwarding agency. Alternatively, the principal should, at the time of conferring of the agency, make it clear to the agent that he may not enter into agreements with himself as a third party. By virtue of the provisions of Article 2188 (3), it seems that the principal, cannot demand the cancellation of the contract the agent makes with himself if it pertains to commission agency for sale and purchase of goods quoted on the Stock Exchange [94] or having a market value [95] or forwarding commission agency. [96]

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[92] Ibid, Article 2252 (2)
[93] Ibid, Articles 2187 & 2188
[94] Civil Code Article 2248(1)
[95] Ibid
[96] Ibid, Article 2252(2)

Nevertheless, it is submitted that a forwarding agent, who enters into contracts with himself, in the process of which the principal is manifestly disadvantaged, should be responsible towards the principal by virtue of Articles 2208 and following of the Civil Code. According to German law:

> *The stock exchange or market price to be taken is the highest price ruling at the relevant time if the agent buys from the principal, and the lowest such price if the agent sells to the principal. The agent must conclude the contract with the principal at an even more favorable price to the principal if the agent is able by exercising proper care to execute the commission at a better price than the ruling exchange or market price.*[97]

As the carrier and sender of the goods would be the same person where a forwarding agent undertakes to effect the transportation of the goods, the likelihood, it seems, is that he will not issue a consignment note that may be issued in accordance with Article 571 of the Commercial Code.

The issuance of a consignment note, it is provided, may be replaced by any other document such as a receipt delivered by the carrier on the sender having made all appropriate statements provided the sender and the carrier agree.[98] But again, in cases where a forwarding agent undertakes to transport the goods, both the sender and the carrier would be one and the same person. At any rate, Articles 577-582 and Articles 583-586 of the Commercial Code shall, *mutatis mutandis* come into application to regulate the relationship of the parties whenever a forwarding commission agent himself undertakes to transport the goods.

In general, there might be a host of problems that may arise out of a forwarding agent's transacting as a third party on his own account and concluding the contract with himself into details of which, I think it is unnecessary for me to indulge.

7. 5 The *Del Credere* Agent

7.5.1 Definition

Neither the Civil Code, nor the Commercial Code of Ethiopia give the definition of what a *del credere* agent is. Consequently, it is a little difficult to know what the term means exactly. All the Civil Code provides, under Article 2241, is:

> *(1) The del credere commission agent is a guarantor jointly liable with the person with whom he contracted.*

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[97] Fritz Staubach, supra, note # 29 p. 147
[98] Commercial Code Article 575

(2) He shall in all cases be liable to the principal for the performance of the contract he entered into unless non-performance was due to the principal's default.

Drawing on some foreign definitions may give some clues thereby helping the reader to get some idea as to what the term *del credere* stands for. According to, Fridman *Del Credere Agents* are mercantile agents. 'Such agents, in return for extra-commission, called a *del credere* commission, promise that they will indemnify the principal, if the third party with whom they contract in respect of goods fails to pay what is due under the contract.'[99] Quoting Lord Ellenborough in the Morris v. Cleasby case, the same author wrote: 'A commission *del credere* is the premium or price given by the principal to the factor for a guarantee, it presupposes a guarantee.'[100]

According to yet another source, a *del credere agent* is "an agent who sells goods for the principal and who guarantees to the principal that the buyer will pay for the goods."[101]

According to Markesinis and Munday,

> *the fundamental characteristics of del credere agency agreements is that the principal will be under no obligation to reimburse the agent if third parties fail to pay under the contract.* [102]

According to Reynolds, a *del credere* agent:

> *is an agent who for a special commission undertakes in effect the liability of a surety to his principal for the due performance by the persons with whom he deals, of contracts made by him with them on his principal's behalf.*[103]

Referring to Article 2 of the Restatement of American Law, the same source offered the following:

> *A del credere agent is an agent who, in consideration of extra remuneration, called a del credere commission, guarantees to his principal that third parties with whom he enters into contracts on behalf of the principal will duly pay any sum becoming due under those contracts.* [104]

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[99] G.H.L. Fridman, The Law of Agency, 2nd ed., Butterworths, 1966, p.28
[100] Ibid
[101] Ronald, A. Anderson, Ivan Fox and David Twomey, Business law: Principles, Cases, Environment, Southwestern Publishing Co., Cincinnati, Ohio,1983, Glossary, p.5
[102] B.S. Markesinis, & R.J.C Munday, supra, note # 30 p. 105
[103] F.M.B. Reynolds, supra, note #15, p.32
[104] Ibid, p. 30

Article 2241 of the Ethiopian Civil Code, though it has embodied in it that a *del credere agent* is a guarantor for the obligations of contracting third parties, it does not, however, mention that what makes a commission agent a *del credere* agent is also the extra-remuneration in consideration of which he assumes the guarantor responsibility.

It is nowhere provided in the chapter dealing with commission in the Ethiopian Civil Code that a commission agent does not guarantee the performance of the contract he enters into in his own name but on behalf of the principal. It is in fact awkward for the Code not to have such a provision because any reasonable person, would, without taking note of the provisions of Article 2212(1) of the Civil Code, think that where an agent enters into contracts with third parties, in his own name, but on behalf of another person, he would be, to use the expression in Article 2197 "enjoying the rights and incurring the liabilities deriving from the contracts he makes with third parties..." In which case, he would, according to their internal relations, be answerable to the principal for the performance of the contract. Quite to the contrary, however,

> *unless otherwise agreed, the agent, notwithstanding that he acted in his own name, shall not be liable to the principal for the performance of the obligation of the person with whom he contracted.*[105]

This, I think, is a provision intended primarily to clear the doubts that would have occurred in cases where an agent who acts in the name of another, in situations of direct agency would have been expected to be responsible for the performance of the contracts he makes with third parties. On its way to clear this doubt, however, the provision also deals with even more controversial situations that would have resulted from cases of incomplete or indirect agency in which a principal would have held his indirect representative responsible for the performance of the contracts he concludes with third parties: The provision, is therefore, put in such a way that it in effect says: Unless otherwise agreed, an agent, who acts in the name of the principal, within the scope of his power, shall not be responsible to his principal for the performance of the obligation of the person with whom he contracted. The same applies to an agent who acts in his own name but on behalf of another, (the principal) despite the fact that he is a party to the contract and it is he who incurs liability and enjoys the rights flowing from his transactions with third parties.

Article 2212(1) is, therefore, a warning provision to principals in general and especially to principals who either are undisclosed or who employ commission agents that if they wish to hold their agents liable to them for the performance of the contracts they make with third parties, they should see to it that in the agency conferring agreement, a clause is included which makes the agent responsible to them for the performance of the contracts their agents enter into with third parties.

Article 2212(1) is applicable to commission agencies or in general to indirect agency cases by virtue of Article 2234(2). A commission agent, generally, is not responsible for

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[105] Civil Code, Article 2212(1)

the payment or the performance of other obligations by the persons with whom he contracted unless he acted as a *del credere* agent.

7.5.2 Distinguishing Features of a d*el credere* Agent

It is clear from the provisions of the Civil Code that a *del credere* agent, whether he gets that status by contract or through the imposition of the law, is a commission agent responsible for the payment or the performance of other obligations by the persons with whom he contracted. In other words, cases of *del credere* agents automatically become exceptions to the sweeping provisions under Article 2212(1) of the Civil Code and hence, internally, a principal can always hold his *del credere* commission agent responsible for the default of third parties with whom the agent had entered into contractual relationships in his own name but on behalf of the principal.[106] The only ground given by the Code on which a *del credere* agent may be relieved from liability towards the principal for the performance of the obligations of third party contractants is where he proves that the non-performance, or, the default, of the third party was caused by the fault of the principal.[107] In all other cases, the *del credere* agent shall be responsible towards the principal.

The nature of the liability of the *del credere* agent is stated as: "a guarantor jointly liable with the person with whom he contracted."[108] Although Article 2240(1) of the Civil Code, the sub-article that was supposed to deal with the guarantor position of the agent, at least taking the title of the Article, does not spell out what Article 2241(1) spells out; the guarantee given by the *del credere* would be such that the creditor, (in our case the principal) may sue the *del credere* agent without previously demanding payment or performance from the debtor (in our case the third party). Article 2240(1) mandatorily makes the *del credere* responsible whereas according to the first sub-article of the next Article, there would, at least, be the discretion given to the principal to first sue the third party debtor thereby demanding payment or performance from him.[109] Procedurally, or even practically, it could be disadvantageous or even impossible for the principal to proceed against the third party first and then against the *del credere* agent.

The Civil Code deals with two types of commission in which there may be the possibility of an agent assuming the position of a *del credere* which will be treated separately, but briefly herein below.

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[106] Ibid, Article 2242(1)
[107] Ibid, Article 2241(2)
[108] Ibid, sub-article (1)
[109] Ibid; see also Article 1933(1)

7.5.2.1 Commission Entrusted with Sale and Purchase of Securities

The Civil Code, in Article 2240(2), lays a rebutable presumption that a commission agent entrusted with the purchase or sale of securities is a *del credere* agent.[110] The presumption is rebutable because the same provision gives discretion to the parties to agree otherwise. It, therefore, follows that if the parties agree to opt out the presumption they should see to it that a clause is included in their internal agreement, which exonerates the agent from guaranteeing performance pursuant to the provisions of Article 2240(2).[111]

A person who accepts the offer of a principal to act as a commission agent for sale and purchase of securities, or whose offer to act as a commission agent for sale and purchase of securities has been accepted by the purported principal should, therefore, bear in mind that he is not an agent covered by the provisions of Article 2212(1), but one subjected to that of Article 2240(2).

7.5.2.2 Commission Entrusted with the Purchase or Sale of Goods

A commission agent entrusted with the purchase and sale of goods is not, automatically and as the one entrusted with the sale or purchase of securities, presumed to be a *del credere*. He is presumed to be one when either one of the following two conditions is fulfilled or where both of them are fulfilled. The two conditions are: 1) where it is the custom of trade in the place where the agent resides and 2) where the commission agent has agreed. It may be worthwhile to look at the two separately.

7.5.2.2.1 Where it is the Custom of Trade in the Place where the Commission Agent Resides

This is one of the few instances where the Civil Code makes reference to custom, although this is of trade, thereby curbing the effect of the sweeping provisions of Article 3347 of the Civil Code that repeals and replaces all customary rules pertaining to matters provided for in the Civil Code, including commission agency. It is, in other words, recognition by the Code of the already existing trade custom. The expert draftsman of the Code and the then Codification Commission took the stand not to disturb the existing trade usage with respect to the topic under consideration.

As the application of the Code is only viewed in the context of domestic commission agency relationships, the expression "the custom of trade in the place he resides" refers

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[110] See the discussion offered on pages 22-24, supra, on sell and purchase of transferable securities

[111] The argument offered might sound that the writer is propagating for an express agreement otherwise to avoid the presumptuous effect of article 2240(2) of the Civil Code. Let it, however, be noted that it is, at least arguable that an implied agreement may, as well, be possible to contract out Article 2240(2) of the Civil Code

to the custom or usage in a given trade locality[112] in Ethiopia. It specifically refers to the established trade pattern in the place where the commission agent entrusted with the sale and purchase of goods resides. The residence of a person is the place where he normally resides.[113] Casting some doubts as to the propriety of the formulation of Article 174 of the Civil Code, it seems that the residence of a person is the place where he normally lives. It may, however, be noted that a commission agent entrusted with sale and purchase of goods may have more than one residence[114] in which case one of the several residences may have the character of principal residence.[115]

I am also of the opinion that the phrase that runs: "the custom of trade in the place where he resides" in Article 2240(3) of the Civil Code, should have instead been the custom of trade of the place of his domicile. This, I believe, should have been so, because residence and domicile, for all practical purposes, could be different and the more important one for the point being discussed seems to be the domicile and not the residence. Nevertheless, this little problem could be deemed to have been solved because Article 180 of the Civil Code provides that the place where a person carries on trade shall be deemed to be a residence of such person and a commission agent being a trader by virtue of Article 60 cum 5(19) of the Commercial Code, the place of the seat of his business should be his residence. On the other hand, what if the commission agent has an established place of residence? Does the presumption laid down in Article 180 apply irrespective of the fact that he has such a place? Or does it only apply in cases where there is no place of residence of the trader or there is no doubt as to which one of the two places is the principal residence? Or is it simply a sweeping provision that produces the effect that for a trader there is no need to attempt to identify his residence provided he has a place where he carries on his trade?

The above discussion need not be necessary except in cases where difficulties might arise in determining the residence of a commission agent entrusted with the sale and purchase of goods, because if there is an answer to the question where is the residence of the commission agent? Then the problem may at least be half solved.

The other aspect of the condition under consideration i.e.; that it is the custom of trade in the place where a commission agent resides, to act as a *del credere*, is that a problem that might sometimes arise in determining whether or not acting as a d*el credere* for a commission agent entrusted with the sale and purchase of goods is a custom of trade in the locality where the agent "resides" or does his business as a commission agent. If acting as a commission agent for the sale and purchase of goods is inseparably linked

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[112] Although Jacques Vanderlinden, in his book on the Law of Persons on page 57 wrote: "The concept of 'locality' is, in the usual sense of the word, larger than that of 'place', which I think, is right, I nevertheless would prefer 'locality' to 'place' because, I believe, 'locality' better indicates circumstances of there being 'custom' than the word, 'place does.'

[113] Civil Code, Article 174

[114] Ibid, Article 177(1)

[115] Ibid, sub-article (2)

with acting, as a *del credere* then there might not arise the problems of determination of whether acting, as a *del credere* is the custom of trade.

There would, however, definitely be debatable cases where it might not be easy to determine that it is the custom of trade in the area where the agent entrusted with sale and purchase of goods is considered to be *del credere*. This could, in certain respects, involve the determination of what constitutes "trade custom" or in other words when does a certain commercial behavior become a custom? Is there a time factor involved for a given commercial pattern to become a trade custom? What percentage of persons in commerce should acquiesce to and use a given way of doing business for it to be known as a trade custom?

7.5.2.2.2Where the Commission Agent Guaranteed the Solvency of the Person with whom he Contracted

Article 2240 also provides that a commission agent entrusted with the purchase or sale of goods shall be deemed to be a *del credere* where he guaranteed the solvency of the persons with whom he contracted. This is, of course, different from the cases where a commission agent directly guarantees the payment or the performance of other obligations by the persons with whom he contracted. The former i.e., the situations where an agent guarantees the solvency of the third parties with whom he concludes contracts seems to be narrower than the latter which could embody all reasons for non-performance including the insolvency of the other party. That there is difference between payment of money debts and the performance of other obligations can be inferred from Article 2240(1) of the Civil Code itself.

Where a commission agent entrusted with the purchase or sale of goods guarantees the payment of monetary obligation, or to put it otherwise, money debts of his contracting partner, and hence, it is doubtful if it includes "the performance of other obligations" by the person with whom he contracted other than the payment of money debts. On the other hand, it is doubtful if this argument of mine is correct in the face of Article 2212 of the Civil Code. To once again bring it to the attention of the reader Article 2212 provides:

> (1) *Unless otherwise agreed, the agent, notwithstanding that he acted in his own name, shall not be liable to the principal for the performance of the obligation of the person with whom he contracted.*
>
> *(2) The provisions of sub-article (1) shall not apply where he contracted with a person whose insolvency he knew or ought to have known at the time of the making of the contract.*

Pursuant to sub-article (1) of Article 2212, an agent including a commission agent,[116] does not guarantee the performance of the obligations of the other contracting party unless otherwise agreed. In the regular, direct or complete agency, the agent cannot be held liable for the performance of third parties' obligations unless he has willfully covenanted to guarantee performance. In the indirect agency cases, the same applies except that for commission agencies, the law intervenes in certain additional ways to put the responsibility for performance on the agents' shoulders and that an agent has to be a *del credere* to be subjected to such responsibility.

Pursuant to sub-article (2) of Article 2212 on the other hand, the agent's being aware of the other contracting party's insolvency or even where he ought to have been aware of such insolvency, the sweeping mandatory provisions of sub-article (1) does not apply and hence the agent shall be responsible for the performance of the obligations of the persons with whom he contracted. To go back to my above-stated argument, therefore, Article 2212 purportedly holds an agent who was, or who ought to have been, aware of the insolvency of the third party at the time of the making of the contract responsible for the general all-embracing performance of the obligations of the third party and not only for the payment of money debts. In other words, if sub-article (2) of Art. 2212 is meant to except sub-article (1), which appears to be the case, then whether awareness by the agent of the actual or expected insolvency of the other party or guaranteeing insolvency by agreement under Article 2240 (3); this applies to the failure of the other party to perform his obligations other than the payment of money.

A look at the Commercial Code,[117] makes it clear, for instance, that a trader who has suspended payments and has been declared bankrupt shall be deemed to be bankrupt;[118] and that suspension of payment shall result from ``any fact, act or document showing that the debtor is no longer able to meet the commitments related to his commercial activities.''[119] Insolvency, on the other hand, is, "the inability to pay debts as they mature or the inability to pay debts in the usual and ordinary course of business."[120] Bankruptcy is also the same thing and it is the "state or condition of one who is unable to pay his debts as they are or become due."[121] The difference is that insolvency could be the factual suspension of payments or the factual inability to pay debts as they mature or in the usual and ordinary course of business, whereas for the state of bankruptcy there to be, it has to be preceded by the declaration of a court of jurisdiction to that effect.[122] In other words, insolvency is the state of the factual inability of a trader to meet commitments related to his commercial activities, whereas, bankruptcy

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[116] This, however, does not rule out cases where the law lays down presumptions that a commission agent shall be deemed to be a *del credere* which means he shall guarantee the performance of the obligations of third parties with whom he enters into contracts
[117] See Book V of the Commercial Code in general
[118] Commercial Code, Article 969
[119] Ibid, Article 971
[120] Black's Law Dictionary, supra, note # 27, p.716
[121] Ibid, p. 134
[122] Commercial Code, Article 970(1)

technically is the legal declaration which subjects a trader to the application of Bankruptcy law which, in our case, is Book V Title II of the Commercial Code.

The "obligation of a contract" is meant to be "that which the law enforces when a contract is made obliges parties to do or not to do and the remedy and legal means to carry it into effect. ... It is also the duty of performance. The term includes everything within the obligatory scope of the contract and it includes the means of enforcement."[123]

A further look at the Civil Code provisions dealing with contracts in general, reveals that the terms `debtor` and `creditor` apply to all types of primissor/promisee relationships.[124] "A debt is a fixed and certain obligation to pay money or some other valuable thing or things either in the present or in the future... it is that which is due from one person to another, whether money, goods or services;"[125] and a debtor is one who owes a debt, he who may be compelled to pay a claim or demand anyone liable on a claim, whether due or to become due.... he is "the person who owes payment or other performances of the obligation secured, whether or not he owns or has rights in the collateral and includes the seller of accounts or chattel paper."[126]

It could, therefore, be argued that if a commission agent entrusted with the sale or purchase of goods guarantees the solvency of the other parties with whom he enters into contract, it does not, although it might look like, mean that he would only be guaranteeing the payment of money debts owed by the other contracting parties to the principal but also the performance of other obligations. In other words, a commission agent entrusted with the purchase of goods, who guarantees the solvency of the persons with whom he contracts guarantees, without prejudice to the payment of damages, that the other contracting party, at least delivers the goods as agreed and free of warrantable defects and warrantable non-conformity. This, in effect, may mean that if the other contracting party fails to perform his obligations, the agent himself effects performance[127] of the contract and personally proceeds later on against the defaulting third party contractant.[128] It may also be taken as meaning that the principal may directly sue the agent for the performance of the obligations assumed by the contracting third party. The commission agent who is entrusted with the sale of goods, on the other hand, where he guaranteed the solvency of the persons with whom he contracted, ensures that the purchasers pay the prices of the goods they take delivery of as agreed and in accordance with the law.

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[123] Black's Law Dictionary, supra, note # 27

[124] See, generally, Title XII of the Civil Code and especially, Articles 1740-1762

[125] Black's Law Dictionary, supra, note # 27

[126] Ibid

[127] It is so, in Germany, See Staubach, supra, note # 29

[128] This is, all the more true from the point of view of the fact that a *del credere* agent is a "guarantor jointly liable ..." and, hence, Articles 1933-1951 of the Civil Code become applicable to it

For a commission agent entrusted with the sale or purchase of goods to be a *del credere*, he has to guarantee, which, I think, should be through an undertaking of some sort given by the agent to the principal. In the absence of the first that it is the custom of trade in the place where the agent resides, for a principal to avail himself of *a del credere* guarantee of his commission agent entrusted with the sale or purchase of goods; he has to see to it that the agent has covenanted to guarantee the solvency of the persons with whom he contracts. I am of the opinion that the agent enters into a joint guarantee obligation towards the principal presumably when he accepts the offer for a commission agency for sale or purchase of goods. The way sub-article (3) of Article 2240 is formulated, however, casts some doubt as to the correctness of the above-stated opinion of mine. The last part of Article 2240(3) reads:"Where he guaranteed the solvency of the persons with whom he contracted" which, I suppose, could as well be taken to mean the agent promising to contracting third parties that he guarantees their solvency for the purposes of the performance of their obligations towards himself but for the benefit of the principal. It may be said that this argument flows from the fact that the word "contracted" is used in its past tense in both sub-articles (1) and (3) of Article 2240 and in sub-article (1) of Article 2241.

One point worth noting, at this juncture, is that Article 2240(3) on the one hand, and Article 2212(2) on the other, might end up creating confusion, or to put it in other words, the relationship of the two, in actual application of the provisions, might call for some interpretation. The second limb of Article 2240(3) imposes the duty of *a del credere* on a commission agent entrusted with the sale or purchase of goods, only where he guaranteed the solvency of the persons with whom he contracted, his guaranteeing being either when he accepted the offer to act as a commission agent, or at the time he entered into a contract with a third party. On the other hand, Article 2212(2) imposes on the agent, the duty of guaranteeing performance "where he contracted with a person whose insolvency he knew or ought to have known at the time of the making of the contract". The latter one counts on the actual knowledge, or objectively the expected knowledge or awareness of the agent of the insolvency of the other party. Where a commission agent entrusted with the sale or purchase of goods guarantees the solvency of the persons with whom he contracts, there will arise no problem of interpretation or confusion because Article 2240(3) cum 2240(1) cum 2241(1) make it clear that he is responsible to the principal.

The confusion, I think, arises when a commission agent entrusted with the sale or purchase of goods doesn't guarantee the solvency of the persons with whom he agrees. In this latter case, definitely, Article 2240(3) does not apply. If sub-article (3) of Art. 2240 does not apply, then could one argue that Art. 2234(2) cum 2212(2) apply? Whether or not a commission agent who, by covenant, does not guarantee the solvency of the persons with whom he contracts may be taken as a guarantor otherwise may be dismissed as an academic issue because of the easy way out consisting in the rule of interpretation: "the special derogates over the general." However, there would still be

the possibility of the principal or even a third party insisting that the commission agent knew or ought to have known the solvency of the person with whom he contracted and hence should not be relieved from liability merely on the strength of the application of Article 2240(3). A principal or a third party may further substantiate his arguments by saying that Article 2212(2), *a fortiori*, applies in commission agency cases, which, by definition, presupposes that the activity of such an agency is commercial in nature and that the agent is a person who professionally and for gain is engaged in such an activity in the capacity of a trader. For stronger reasons again, such an agent should know or ought to have known the insolvency of the persons with whom he contracts, and hence, omission to guarantee insolvency does not relieve him from being held liable. To put it again, but otherwise, would the canon of interpretation, "the special derogates over the general", that is actually provided for in Article 2234(2), come automatically into application and the principal's or a third party's insistence that a commission agent who knew or ought to have known the insolvency of the persons with whom he contracted should be held liable be dismissed? How far is Article 2240(3) "a special" provision and an exception to the rules governing agency which also apply to commission agency? This, I leave to the courts.

Before finalizing the sub-topic on "*del credere* agency", I would like to say that there is no ready answer in the Civil Code as to whether there may be undertakings (there are at least no legal presumptions) to proceed as a *del credere* in commission agency relationships consisting in the sale or purchase of fungible things or in forwarding agency situations. It would also be good to note that the Civil Code does not expressly say that there may not be guaranteeing of the payment or performance of other obligations by the persons with whom a commission agent entrusted with the sale or purchase of fungible things or a forwarding commission agent contracts. In the absence of an express legal provision prohibiting, I would take the liberty to argue that it is possible for a commission agent entrusted with the sale or purchase of fungible things or the one who undertakes to enter into contracts in his own name but on behalf of the principal to forward goods to proceed as a *del credere*.

Incidental to the above, I feel it is worthwhile to say something on cases of *del credere* and contracting with oneself. As mention has already been made, it is provided that a commission agent entrusted with the sale or purchase of goods quoted on the Stock Exchange or having a market value may, in the absence of contrary instructions by the principal, effect the transaction as a third party on his own account and conclude the contract with himself.[129] The same applies as provided in Article 2252(2) of the Civil Code, to a commission agent, shipper or forwarding agent, who undertakes to enter into contracts for the forwarding of goods in his own name but on behalf of the principal. The Code, this time quite justifiably, is silent on this matter also. However, it goes without saying that any party who enters into a legally valid and binding contract shall have to be bound by the consequences flowing therefrom. *Pacta Sunt Servanda*. A commission agent entering into agreement with third parties, in his representative

[129] Civil Code, Article 2248(1)

capacity, on the one hand, and in his own personal capacity, on the other, becomes a party to the contract and he cannot avoid his personal obligations flowing from such contracts which he negotiates and makes all with himself and all by himself. It, therefore, follows that there need not be a legal presumption nor a trade custom in the place where the agent resides or an undertaking to guarantee his own solvency, for a commission agent is permitted by law to enter into contract with himself to be held responsible for the performance of his own personal obligations towards a principal. A commission agent who contracts with himself, in the circumstances recognized by the law, therefore, acts as a *del credere* towards the principal. As it is to be remembered, Article 2212(1) is meant to clear out doubts harbored by third parties or principals that an agent is not, unless otherwise agreed, even where he acts in his own name, liable for the performance of the obligations he enters into. And the latter article, taken at its face, is limited to situations where an agent transacts with another person either in the name and on behalf of the principal or in his own name but on behalf of his principal.

However, what if as a commission agent entrusted with the sale or purchase of goods quoted on the Stock Exchange, or having a market value, in the absence of contrary instructions by the principal, or a forwarding commission agent, who concludes contracts with himself wearing his two or even three caps at the same time, argues: "In the absence of an undertaking that I entered into to guarantee performance or where no legal presumption appears in the Code to the effect that an agent permitted to contract with himself and who does so, is a *del credere*, the mere fact of contracting with myself does not make me responsible for the performance of the contract I entered into?" What if he continues and further argues that "even Article 2212(1) clarifies that it is only in cases of agreement by the agent otherwise that he would be responsible for performance or failing that where he contracted with a person whose insolvency he is aware of or ought to have been aware of and goes on to say that he was neither actually nor expectedly aware, as far as he knows, that he was insolvent at the time of the making of the contract? Would the argument be considered and be dismissed as a fantasy? If an agent, who contracts with himself is not responsible for the performance of the obligations flowing there from, who shall be responsible? Would the law allow contracting with oneself and at the same time let the agent who contracts with himself get away without being responsible for the performance of the obligation he shoulders in his personal capacity? I personally do not think so. If the law does so, it would be a disservice to commercial interests the law intends to protect. If agents contracting with themselves are not to be held responsible, then, "contracting with oneself" remains to be impracticable and undesirable. Hence, a commission agent who concludes a contract with himself acts as a *del credere* without there being an undertaking given by him or a legal presumption to that effect. Cases of contracting with oneself, therefore, are exceptions to Articles 2212(1), 2248(1) and 2252(2).

A cautious principal, who is properly advised, would instruct his agent not to conclude contracts with himself. In the absence of contrary instructions, by the principal, a commission agent may avail himself of Articles 2248(1) and or 2252 (2) of the Civil Code, but the principal would, at least, be taking the risk of the agent's being insolvent

unless he secures himself otherwise. As mention has already been made earlier, in commission agency cases, the principal cannot make use of the cancellation provision of Article 2188(1) and (2) although he can apply for cancellation in other cases.

VIII. Conclusion

Commission agency, which is a kind of agency according to which an agent acts and/or transacts with third parties in his own name but for the benefit of the principal; is normally governed by the principles applying to direct complete representation situations. Commission agencies, however, have their own idiosyncrasies among which are the issues that pertain to acting in the name of the agent, preservation of goods, which happen to be in the hands of the agent, and most of all the issues pertaining to liability of agents towards the principal.

A commission agent may be *del credere* depending on the duty with which he is entrusted or sometimes his conduct in the course of discharging his duties by entering into agreements with third parties. By way of exception, a commission agent is permitted by law to contract with himself though the law discourages contracting with one self and that such contracts are subject to invalidation.

THE CONSTITUTIONAL PROTECTION OF ECONOMIC AND SOCIAL RIGHTS IN THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

SISAY ALEMAHU*

Introduction

Economic and social rights, also called socio-economic rights, are generally those rights that contain claims to an adequate standard of living and include the right to work under just and favorable conditions, the right to social security, the right to health, the right to housing, the right to food, and the right to education.[1] The grouping of rights as socio-economic rights is usually seen in contradistinction with civil and political rights. Theories that use categorization of rights with connotations that make economic and social rights of secondary importance and unenforceable are strongly objected.[2] In this article the rights are named as a group for ease of reference considering their relevance to economic and social aspects of societal life and in recognition of the way they are usually referred to, less the negative connotations. Socio-economic rights have been afforded legal protection in various instruments at different levels. This contribution is about the protection of the rights in the Ethiopian legal system.

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[1] F Coomans, "Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Constitutional Context" in F Coomans (ed.) *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, (Intersentia, 2006), 4. Coomans further identifies the right to property as an economic right. But this right is also associated with civil liberties for its importance as a basis of freedom. See C. Krause, 'The Right to Property' in A. Eide *et al* (eds.) *Economic, Social and Cultural Rights: A Textbook*, 2nd edition (Dordrecht: Martinus Nijhoff 2001), 197. But considering its relevance to the physical aspects of such rights as the right to housing and the right to food, we treat the right to property as a socio-economic right as well.

[2] Professor Karel Vasak's 1979 hypothesis of three generation of rights by which civil and political rights were first generation rights while socio-economic rights were second generation rights is objectionable in so far as it gives the impression that the latter are secondary in status and emerged latter in the development of human rights. For a discussion of the hypothesis, see Carl Wellman, "Solidarity, the Individual and Human Rights", 23 *Human Rights Quarterly* 639 (2000), and J Oloka-Onyango and S Tamale, "'The Personal is Political', or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism" (1995) 17 *Human Rights Quarterly* 691, 711 (expressing misgivings about the idea of generation of rights). See also A Eide and A Rosas, "Economic, Social and Cultural Rights: A Universal Challenge" in Eide *et al* (n 1 above) (providing that the history of the evolution of human rights at the national level does not make it possible to place the emergence of different human rights into clear-cut stages); and A Eide, "Economic, Social and Cultural Rights as Human Rights" in Eide *et al* (n 1 above), 9, 12-16 (explaining the thesis that economic and social rights found acceptance at the international level before civil and political rights did).

Domestic systems are the primary fora for the effective protection and implementation of all human rights.[3] In the positive law of a particular state, economic and social rights may be protected through inclusion in the Bill of Rights of the Constitution, as Directive Principles of State Policy (DPSP), through constitutional reference to relevant international human rights treaties, and/or through domestic legislation.[4] The enforceability or justiciability of these rights by judicial and quasi-judicial organs is an effective strategy to monitoring their implementation. It should, however, be noted that making rights justiciable (by providing for rights and obligations in legal instruments and subjecting them to judicial enforcement) is only one of the ways of protecting them.[5] Policy and related measures should also be taken to realize economic and social rights. That is why the usage of the term "protection" rather than "justiciability" of rights should be given eminence in relation to steps to realize human rights in general and socio-economic rights in particular.

In laying down framework for the domestic protection of economic and social rights, much attention is given to their constitutional entrenchment, their protection in ordinary legislations and their justiciability before judicial and quasi-judicial organs.[6] These are indeed among the major vehicles of giving effect to social and economic rights. However, the place of relevant international human rights instruments in the domestic legal system, the existence of policy framework which identifies responsible organs and sets time-frame for the implementation of each form of economic and social right, and the availability of a procedure that allows any person or civil society organizations to institute cases on behalf of victims of socio-economic rights violations (*action popularis*) are also determinant factors. Among these factors, the incorporation or otherwise of socio-economic rights in a state's constitution either as part of the Bill of Rights or in DPSP and the place or status of relevant international treaties to a certain extent determine the degree to which the rights may be protected through specific legislation or policies.

This article deals with the constitutional protection of economic and social rights in Ethiopia by reviewing the relevant provisions of the Constitution of the Federal

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[3] This is mainly because of their relative accessibility to the disadvantaged group in a society and that they have more effective enforcement mechanism. See General Comment No. 9 of the Committee on Economic, Social and Cultural Rights on the domestic application of the International Covenant on Economic, Social and Cultural Rights (ICESCR): 03/12/98, E/C. 12/1998/24, para, 4.

[4] F Viljoen, "National Legislation as a Source of Justiciable Socio-economic Rights" (2005), *ESR Review*, Vol. 6 No. 3, 7.

[5] M Scheinin, "Economic and Social Rights as Legal Rights" in A Eide *et al* (eds.) *Economic, Social and Cultural Rights: A Textbook*, (Dordrecht: Martinus Nijhoff publ., 1995), 41, 62. See also J Cottrell & Y Ghai "The Role of the Courts in the Protection of Economic, Social and Cultural Rights" in Y Ghai & G Cottrell (eds), *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights*, (INTERIGHTS, 2004) 88 (contending that the classical role of justiciabiltiy is that of last resort – one goes to court when all else fails – and that when used as a last resort in connection with socio-economic rights, adjudication would become less opposed and necessary).

[6] See for instance, S Liebenberg "The Protection of Economic and Social Rights in Domestic Legal Systems" in Eide *et al* (n 1 above), 55-84.

Democratic Republic of Ethiopia (hereinafter FDRE Constitution)[7] and discussing the status of pertinent human rights treaties in the domestic legal system. The justiciability of socio-economic rights in the FDRE Constitution and relevant treaties is also studied. As what is on the papers does not tell the whole story, the practice is also visited. While we recognize the paramount importance of specialized legislation providing for specific rights and procedures, and policy instruments, it is the limitation of this paper that it does not address them. The article does not also have the pretense of exhaustively dealing with all the issues it raises.

I. Economic and Social Rights in the FDRE Constitution

The entrenchment of economic and social rights as fundamental norms of constitutional legal order through their incorporation in the bill of rights with stern amendment requirements and their judicial enforceability[8] provide a very strong basis for the protection of the rights. There have, however, been principled objections to the inclusion of socio-economic rights in the bill of rights of constitutions and their justiciability. The objections relate to the legal nature of the rights (that they entail imprecise obligations that are not amenable for enforcement by courts of law) and the legitimacy and competence of courts and other quasi-judicial organs to monitor their implementation.[9] At the center of the objections is the basic argument that socio-economic rights entail positive and resource dependent obligations for the decision on which courts are not well placed.[10]

The objections nevertheless are based on a 'rigid and formalistic conception of the doctrine of separation of powers'– charging that the judiciary (with its

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[7] Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995 (hereinafter cited as FDRE Constitution). Ethiopia is a federal state and the regional states do also have constitutions which are generally modeled after the FDRE Constitution. As the title may suggest, this article deals with the protection of socio-economic rights in the system established by the Federal Constitution.

[8] The term "enforceability" is often used interchangeably with "justiciability" when they relate to rights. By "judicial enforceability" of rights, we mean their applicability by courts or other organs with judicial power in concrete cases.

[9] See the debate on the inclusion of socio-economic rights in the South African Constitution in the *South African Journal on Human Rights* Vol. 8 (1992), and especially see: E Mureinik "Beyond a Charter of Luxuries: Economic Rights in the Constitution", and D Davis "The Case against the Inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles". See also: S Muralidhar "Judicial Enforcement of Economic and Social Rights: The Indian Scenario" in Coomans (n 1 above), 237 257; and D Brand, 'Socio-economic rights and courts in South Africa: Justiciability on a Sliding Scale' in Coomans (n 1 above), 207 225.

[10] It is argued that there may be a range of appropriate policy solutions to realize a particular socio-economic right, and judges are not equipped to decide which is most suited, and that courts cannot always anticipate the 'knock-on' effects of their orders on other areas of budgetary and social policy. See the observations of the South African Constitutional Court in *Minister of Health and Others v Treatment Action Campaign and Others* (no. 2) 2002 (5) SA 721 (CC), (also called the *TAC* Case) para. 37. Also see, M Pieterse "Coming to terms with judicial enforcement of socio-economic rights" 20 *South African Journal on Human Rights* (2004) 383, 389-399.

unelected judges) exceeds its role in enforcing socio-economic rights with often significant budgetary impact and that such decisions should be left to the elected legislature.[11] They are based on the wrong assumption that there is bright line separating the mandates of the legislative, executive and judicial branches of government from one another, and fail to heed to the modern conception of separation of powers that allows 'checks and balances' - the functions of one branch serving to monitor the activities of the other and to place limits on the power exerted by the other branches. They also fail to see that many civil and political rights such as the rights to vote, equality, freedom of speech and a fair trial also involve questions of social policy and have budgetary implications and yet their incorporation in constitutional bill of rights is never objected.[12] While economic and social rights have been incorporated in justiciable bill of rights of some constitutions[13], the objections have in some systems, such as Ireland and India, had the effect of putting them in what are called "Directive Principles of State/Social Policy" (DPSP) – policy objectives that are meant to guide implementation of a constitution and the governance of a state - which are rendered expressly non-justiciable.[14] The FDRE Constitution sets a unique example in enshrining socio-economic rights both in the Bill of Rights and in what it calls "National Policy Principles and Objectives" which are akin to DPSP. The practical application of the constitutional provisions through both legal and non-legal mechanisms ensures the realization of socio-economic rights in the country. The following sub-sections discuss the extent to which the rights are protected by the Constitution.

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[11] See Pieterse (as above), 389. See also J Waldron, "The Core of the Case against Judicial Review" 115 *Yale Law Journal* (2006), 1346.

[12] Liebenberg (n 6 above) 58. The South African Constitutional Court made the same observation in certifying the 1996 Constitution in the case: *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa*, 1996, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), paras. 76-78 (the Constitutional court has also observed that at the very minimum, socio-economic rights can be negatively protected from improper invasion). The objections are also premised on the wrong belief that judicial intervention in socio-economic rights cases is directed at budgetary rearrangement. The role of the judiciary in such cases should be seen as one of checking legislative and executive actions against standards derivable from constitutional provisions rather than direct involvement in budgetary decision-making processes.

[13] For example see the Constitution of the Republic of South Africa (1996), sections 26 – 29.

[14] See the *Constitution of Ireland* (1937), article 45 (providing that the principles 'shall not be cognizable by any court under any of the provisions of this constitution'), and the *Constitution of India* (1949/1950), articles 36 – 51 (article 37 provides that the DPSP 'shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply the principles in making laws'). See also the *Constitution of Lesotho* (1993), Chapter III; and the *Constitution of the Republic of Ghana* (1993), Chapter 6.

1.1 Rights Protected

The FDRE Constitution is the supreme law of the land and any law, customary practice or a decision of an organ of state or a public official which contravenes it shall be of no effect.[15] Chapter three of the Constitution provides for a long list of fundamental rights and freedoms in which an impressive array of classical human rights are included.[16] Article 105 of the Constitution finally closes with an extremely stringent requirement for the amendment of the Chapter on fundamental rights and freedoms.[17] Among the rights and freedoms, Aarticle 41 of the Constitution, which is entitled "economic, social and cultural rights", provides:

> *(1) Every Ethiopian has the right to engage freely in economic activity and to pursue a livelihood of his choice anywhere within the national territory. (2) Every Ethiopian has the right to choose his or her means of livelihood, occupation and profession. (3) Every Ethiopian national has the right to equal access to publicly funded social services. (4) The State has the obligation to allocate ever increasing resources to provide to the public health, education and other social services. (5) The State shall, within available means, allocate resources to provide rehabilitation and assistance to the physically and mentally disabled, the aged, and to children who are left without parents or guardian.*

Article 41 does not provide for all the rights falling within the réalm of economic and social rights in black letters as one would hope by looking at its title. Its provisions are so crude that it is difficult to identify the rights guaranteed and the extent of protection afforded to them. Sub-articles 1, 2 and 3, which guarantee freedom to engage in economic activities, the right to choose such engagement and non-discriminatory access to publicly funded services are basic to all sorts of economic and social rights. Sub-article 4 stipulates the state's obligation to progressively realize the rights through the allocation of ever-increasing resources. It does also provide indicative listing of the socio-economic rights, which the state should realize progressively within the limits of its available resources. The usage of phrases like "publicly funded social services" allows us to read many of the conventional economic and social

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[15] Article 9 of the FDRE Constitution.

[16] Articles 14 – 44 of the FDRE Constitution.

[17] As different from the requirement for the amendment of other provisions, article 105 of the FDRE Constitution requires the approval of the majority in all State Councils, and two-third majority of the House of Peoples' Representatives as well as that of the House of Federation for the amendment of the provisions of the Constitution on fundamental rights and freedoms.

rights into Article 41. The same can be said in relation to the provision of rehabilitation and assistance to some vulnerable groups under sub-article 5.

Based on the indicative listing under Article 41/4, we may say that the right to health[18] and the right to education are guaranteed. One may also add the rights to housing, to social security, to safe and potable water, to food etc. from the open-ended phrase "...and other social services". Article 43/1 of the Constitution further provides that "The Peoples of Ethiopia as a whole, and each Nation, Nationality and People in Ethiopia in particular have the right to improved living standards and to sustainable development". Despite the collective fashion in which it defines the right, this article may be interpreted as including such socio-economic rights as the rights to adequate food, closing and housing that are listed to define "adequate standard of living" under Article 11/1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). But still, however liberal one may be in interpreting the above provisions of the Constitution, there still remains the problem of delimiting the scope of the rights that might be said to have been guaranteed. Talking about the right to health for example, can we say that the right to emergency medical services is guaranteed? Similarly , can we say that the right to free and compulsory primary education for all is guaranteed? What about the right against forced eviction? The letters of Articles 41 and 42 do not provide clear answers to these questions.

The right to work (of labour) is the one socio-economic right that the Constitution defined in some detail. It states under Article 42 that certain category of workers (factory and service workers, farmers, farm labourers, other rural workers and government employees) "have the right to form associations to improve their conditions of employment and economic well-being." The rights specifically guaranteed include: the right to form trade unions, the right to strike, the right of women to equal pay for equal work, and the right to reasonable limitation of working hours, to rest, to leisure, to periodic leaves with pay, to remuneration for public holidays as well as healthy and safe work environment. The relatively detailed and robust constitutional provisions do have some worrying internal limitations though. Firstly, Article 42 provides for the right of those who already have a job and does not actually provide for the right to get one. Secondly, the exercise of trade union rights is limited to specific category of workers "whose work compatibility allows for it and who are below a certain level of responsibility". This is an open qualifier that may be used to make the rights of no practical significance. The rights are also

[18] The official Amharic version of the sub-article shows that the English phrase "public health" is used in lieu of the "right to health".

subjected to laws that determine government employees who enjoy them and establish procedures for the formation of trade unions and for the regulation of the collective bargaining process.

As shall be discussed below, the ratification of the ICESCR and other pertinent treaties and the status given to these instruments by the FDRE Constitution solves many of the problems that arise from the crudity and resulting non-clarity of the constitutional articles discussed above. Progressive interpretation of other provisions of the constitution does also help strengthen the protection of socio-economic rights, i.e., the rights may be read into provisions of the Constitution on such rights as the right to life.[19] It can, therefore, be said in general that the Constitution guarantees economic and social rights.

Chapter ten of the FDRE Constitution is devoted to "National Policy Principles and Objectives" with which any organ of government at both Federal and State levels shall be guided in the implementation of the Constitution, other laws and public policies.[20] Articles 89 and 90 of the Constitution provide for the economic and social objectives, respectively. Under the economic objectives, the Government has the duty to, among others, formulate policies that ensure equal benefit from the country's legacy of intellectual and material resources, and equal opportunity for all to improve their economic conditions. The social objectives require that policies shall aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security to the extent the country's resources permit.

The national policy objectives and principles are the DPSP of the FDRE Constitution. While Article 41 and other relevant provisions of the Constitution protect economic and social rights as entitlements of individuals and groups, Articles 89 and 90 extend this protection by requiring the government to develop policies that ensure the enjoyment of the rights by citizens. As opposed to the former, the policy objectives are not directly enforceable by courts, i.e.,

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[19] Articles 14 and 15 of the FDRE Constitution guarantee an inviolable and inalienable right to life which would be devoid of much breath without protection of the rights to food, shelter, health care and other necessities of life (see *Francis Coralie Mullin Vs. The Administrator, Union Territory of Delhi* [(1981) 2 SCR 516]). Article 35 of the Constitution guarantees the right to equality of women in general, which extends to the right to enjoyment of economic and social rights, and the rights of this group of people in relation to work, health, education etc. According to article 35/9, for instance, in order to safeguard their health, women have the right of access to family planning education, information and capacity. Article 36 of the Constitution provides for the rights of children relating to work, education, health and well-being. For example, article 36/1/d provides that every child has the right not to be subjected to work that is hazardous or harmful to his or her health or well-being. Article 40 of the Constitution protects the economic right to property which as indicated hereinabove is pertinent to the physical aspects of such rights as the right to housing.

[20] Article 85 of the FDRE Constitution.

they are not directly justiciable.[21] The latter are, however, to be used as tools that guide the interpretation and construction of fundamental rights and freedoms of the FDRE Constitution that include Article 41 and the other provisions with relevance to socio-economic rights. They could be used to give content to the sparse provisions of Article 41 on socio-economic rights. Policies should also be developed and implemented with due respect to fundamental rights. Detailed policies that identify responsible organs and set time frame for implementation are the major vehicles of giving effect to the policy objectives and principles. By virtue of Articles 89 and 90 of the FDRE Constitution, the Ethiopian government is duty bound to adopt and implement such policies in all areas of economic and social rights.

1.2 The Judicial Enforceability of Constitutionally Protected Rights

Article 13 (1) of the FDRE Constitution puts strong responsibility and duty on all Federal and State legislative, executive and judicial organs at all levels to respect and enforce fundamental rights and freedoms. By imposing the responsibility of respecting and enforcing the fundamental rights and freedoms (including the guaranteed economic and social rights) on the judiciary, this article has given a justiciable dimension to the rights. The duty of the judiciary to enforce the rights is an expression of the subjection of the fundamental rights and freedoms provided by the Constitution to judicial application. Article 37 (1) further provides 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 judicial power.[22]

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[21] Note that the FDRE Constitution, as opposed to those of Ireland and India, has not incorporated a clear provision that the policy principles and objectives are non-justiciable. We argue that they are not 'directly' justiciable because Chapter ten of the Constitution does not provide to that effect and also because article 85 of the Constitution says that the principles and objectives guide in the implementation of laws and policies than they themselves be applied by courts. It is submitted, nevertheless, that the inclusion of socio-economic rights in DPSP does not put them out of the total reach of courts. At a minimum, the implementation of the directive principles by the executive should not violate fundamental rights and the latter may be interpreted in the light of the DPSP. If, for instance, a policy adopted to realize the right to health (as a DPSP) happens to be discriminatory (the right to equality and non-discrimination being part of the bill of rights), Courts may intervene. In India the Constitution, as noted hereinbefore, requires all organs of the state to treat the DPSP as fundamental in the governance of the country and the Supreme Court turned the principles to justiciable guarantees by reading them with the fundamental rights. In two cases (*Mohini Jain v State of Karnataka*, (1992) 3 SCC 666, AIR (1992) SC 1858 and *Unni Kkrishnan J P v State of Andhra Paradesh*, (1993) 1 SCR 594, AIR 1993 SC 2178) which concerned the right to education, the Indian Supreme Court held that fundamental rights and DPSP are complementary because what is fundamental in the governance of the country could be no less significant than that which was fundamental in the life of an individual.

[22] The Provisions of article 37 of the Constitution show that justiciability of rights may be ensured through institutions with judicial power other than proper courts of law. In one case, the Federal Supreme Court interpreted the article as including organs such as the National Electoral Board of Ethiopia in respect of its

On the other hand, Article 83 (1) of the Constitution, entitled "Interpretation of the Constitution", provides that all constitutional disputes shall be decided by the House of Federation. According to Article 84, the House of Federation exercises this power upon the recommendations of the Council of Constitutional Inquiry that it is necessary to interpret the Constitution.[23] These provisions have served as ground for the insistence of some courts and lawyers of the country against directly applying constitutional provisions – considering cases in which constitutional provisions are invoked as "constitutional disputes".[24] Ethiopian Courts generally tend to decide cases based on ordinary legislations even where parties to a dispute invoke constitutional provisions. While legislations take primacy in their application to specific cases, they

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jurisdiction to decide on electoral complaints. See *National Electoral Board v. Oromo Federalist Democratic Movement*, Appeal, File No. 21387, judgment of 27 September 2005. Such other institutions also include the Human Rights Commission and the Institution of the Ombudsman which were established by Proclamation 210 /2000 (a Proclamation to Provide for the Establishment of the Human Rights Commission, Proclamation No. 210 /2000, Addis Ababa, 4 July, 2000) and Proclamation 211 /2000 (a Proclamation to Provide for the Establishment of the Institution of the Ombudsman, Proclamation No. 211 /2000, Addis Ababa, 4 July, 2000), respectively. Article 6 of the proclamation that established the former states that it has the powers and duties to ensure that the human rights and freedoms recognized by the Constitution are respected by all citizens, organs of state, political organizations and other associations as well as by their representative officials; and ensure that laws, regulations and directives as well as government decisions and orders do not contravene the human rights of citizens guaranteed by the Constitution. It is interesting to see also that article 1(5) of the Proclamation defines "Human Right" as including fundamental rights and freedoms recognized under the Constitution and those enshrined in the international agreements ratified by Ethiopia. According to article 6(1) of the Proclamation that established the Institution of the Ombudsman, it shall have powers and duties to ensure that directives and decisions given by executive organs do not contravene the constitutional rights of citizens. The establishment of these institutions with the mandates given to them would definitely contribute to the justiciability of the constitutionally recognized socio-economic rights. While it had to wait until 2005 for the two institutions to start actually functioning, they recently have adopted strategic plans and have begun operating through field offices as well. These quasi-judicial institutions and their mechanisms reinforce the justiciability of human rights, including economic and social rights, in Ethiopia.

[23] The provisions of articles 83 and 84 of the FDRE Constitution basically define the mandate and procedure for "constitutional review" - power to control the constitutionality of laws and decisions. This article is not interested in dealing with constitutional review in Ethiopia in any detail. For discussions on the Ethiopian approach to constitutional review, see Y T Fessha "Judicial Review and Democracy: a Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review" (2006) 14 *African Journal of International and Comparative Law*, No. 1, 53-82; and A Fiseha "Federalism and the Adjudication of Constitutional Issues: the Ethiopian Experience" (2005) 52 *Netherlands International Law Review*, No. 1, 1-30.

[24] See Fessha (n 23 above), 79-80 (observing that there is a practice of shying away from considering the provisions of the Constitution including those in the bill of rights even when parties invoke them). See also T Regassa, "State Constitutions in Federal Ethiopia: A Preliminary Observation, A Summary of the Bellagio Conference", March 22-27, 2004, page 3, available at <http://www.camlaw.rutgers.edu/statecon/subpapers/regassa.pdf> (accessed on 27.04.2007). In one workshop (Training of Judges, organized by the Federal Supreme Court in Cooperation with USAID, summer 2001, Adama, Ethiopia) in which this author took part, most judges of the Oromiya Regional State took the position that articles 83 and 84 of the Constitution in effect debar them from directly applying constitutional provisions, especially when the constitutionality of a law or decision is in issue.

should be placed in their proper constitutional context and in some cases (including cases involving socio-economic rights) it may be imperative to apply constitutional provisions owing to the absence of pertinent ordinary legislation. Courts have also referred cases in which constitutional provisions (including the ones in which fundamental rights and freedoms) are invoked, especially those in which the constitutionality of a law or decision was an issue, to the Council of Constitutional Inquiry which in one instance went to the extent of finally deciding the case as presented to the court.[25] The general practice of avoidance by courts of adjudication of cases based on constitutional provisions is symptomatic of what would befall economic and social rights cases that invoke the relevant provisions of the Constitution though such cases have so far been rare, if not absent.

A deeper scrutiny of the relevant laws shows that the mandate of the House of Federation (and the Council of Constitutional Inquiry) "to interpret" the Constitution does not exclude courts from applying constitutional provisions on

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[25] The judgment of the Federal First Instance Court in the case taken by an opposition political party called Coalition for Unity and Democracy (CUD) against the ban of assembly and demonstration by the Prime Minister of Ethiopia in Addis Ababa and its vicinities after the May 2005 elections stands as one good example. See *Coalition for Unity and Democracy v. Prime Minister Meles Zenawi Asres*, Federal First Instance Court, File No. 54024, decision of 3 June 2005. CUD argued that the Court has jurisdiction over the matter by reciting constitutional (articles 13(1) and article 37) and legislative provisions that establish that the human rights provisions of the Constitution are enforceable by courts. It further argued that ordinary legislation have constitutional bases and, with the express wish to preclude the court from referring the case to the Council of Constitutional Inquiry, it stressed that the suit was based on the Proclamation to Establish the Procedure for Peaceful Demonstration and Public Political Meeting (Proclamation No. 3/1991, *Negarit Gazeta* 50th Year No. 4, Addis Ababa, 12 August, 1991). The Court framed the issue as: whether the directive of the Prime Minister, whose constitutional power as the chief executive it underlined, was in contravention with the Constitution. It then referred the matter to the Council of Constitutional Inquiry by invoking the provisions of articles 17 and 21 of Proclamation 250/2001, according to which courts may refer cases in which the constitutionality of the decision of a government official is disputed and the interpretation of the Constitution is needed – without considering the issue in light of Proclamation 3/1991 and the clarity or otherwise of the relevant constitutional provisions. Neither did the Council of Constitutional Inquiry consider whether there was a "constitutional dispute" giving rise to its jurisdiction. It rather took it upon itself to decide the case as presented to the court by concluding that the directive issued by the Prime Minister was not unconstitutional. See *Council of Constitutional Inquiry, decision taken on a regular meeting of 14 June 2005* (on file with author). This decision was sent to the Court, but the case was not reopened on the same matter as the contested ban of assembly and demonstration had expired. Surprisingly, from the records of the Court and the Council, the matter was not referred to the House of Federation. As can be gathered from articles 83 and 84 of the FDRE Constitution and also the provisions of proclamations discussed below, this is lamentable. Though suggestive of the Council's erroneous understanding of its mandate, this is not the general practice in the exercise by the Council of its power in relation to constitutional disputes as there is evidence that the House of Federation gives the final decision. See, for instance, the *House of Federation of the Federal Democratic Republic of Ethiopia, 1st Term 5th Year, Minutes of Extraordinary Meeting, Addis Ababa*, 7 July 2000 (on file with author). The representative of the Council of Constitutional Inquiry submitted recommendations on two issues of constitutionality which were referred to it by the House of Federation itself (which received them from the sources first) and the latter took final decision.

fundamental rights and freedoms. A close look at the provisions of Article 84 of the Constitution and Articles 6, 17 and 21 of the Council of Constitutional Inquiry Proclamation shows clearly that "constitutional disputes" are those in which the constitutionality of laws or decisions is contested and/or those which make the interpretation of some constitutional provisions necessary.[26] It may be that the precise meaning and scope of a constitutional provision is disputed or that a legislation invoked by parties or relied on by the court, or a decision given by a government organ or official is contested or considered to be inconsistent with the Constitution. Such instances may give rise to "constitutional disputes" that make constitutional interpretation necessary. When such disputes arise in a case already before a court of law, the court is not precluded from entertaining and ultimately deciding the case.[27] The court will submit a legal issue to the Council of Constitutional Inquiry only if it believes that there is a need for an authoritative constitutional interpretation in deciding the case. If the court believes that the constitutional provision in question is clear, it can apply it without referral to the Council.[28]

The above show that the mandate of the House of Federation to interpret the Constitution does not affect the power of the courts to adjudicate disputes that are based on the provisions of fundamental rights and freedoms including those on economic and social rights. The duty of the judiciary to enforce the rights

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26 Council of Constitutional Inquiry Proclamation, Proclamation No. 250/2001, Federal *Negarit Gazeta* 7th Year No. 40, Addis Ababa, 6 July 2001. See also Proclamation to Consolidate the House of Federation of the Federal Democratic Republic of Ethiopia and to define its Powers and Responsibilities, Proclamation No. 251/2001, Federal *Negarit Gazeta*, 7th Year No. 41, Addis Ababa, 6 July 2001. According to articles 6 and 17 of Proclamation No. 250/2001, the power of the Council of Inquiry is to investigate constitutional disputes (including disputes relating to constitutionality of laws) and submit recommendations to the House of Federation if it finds that it is necessary to interpret the Constitution. These articles as well as article 21 indicate in essence that for the mandate of the Council to be invoked, there should be an issue that necessitates constitutional interpretation in the first place. For an argument that both Courts and the House of Federation should have power to decide on constitutionality of laws and decisions, see A Fiseha (n 23 above), 19-22 (this author fails to address the issue of whether there should be a need to "interpret" specific constitutional provisions - for lack of clarity or some other reason - for the jurisdiction of the House of Federation to come into the picture).

27 See article 21, Proclamation No. 250/2001 (n 26 above). The court forwards only the legal issue that, it considers, needs to be interpreted and keeps the case pending before it for final decision after receiving the authoritative interpretation of the House of Federation. According to article 22, even when an interested party believes that there is a need for constitutional interpretation, the party shall first present his request to the court that has handled the case and can only go to the Council of Inquiry by way of appeal.

28 The Supreme Court of the Amhara Regional State has demonstrated a perfect understanding of the type of issues that call for the mandate of the Council of Inquiry in one exceptional case that concerned the right to bail (*State V Haile Meles and other*, Supreme Court of Amhara Regional State, File No. 21/90, decision of 1998 (1990 E.C.)). The defense argued that the Criminal Procedure Code of Ethiopia is unconstitutional in as far as it denies bail for suspects accused of crimes that entail imprisonment for fifteen years or more. The court decided that the contested provision (article 63) of the Criminal Procedure Code was not unconstitutional because the right to bail under article 19(6) of the FDRE Constitution has clear exceptions.

enshrined in the Constitution definitely extends to applying the provisions to concrete cases. While this provision of Article 13(1) makes the fundamental rights and freedoms of the Constitution justiciable, Article 37(1) makes bringing justiciable matters before judicial and quasi-judicial organs and getting decision thereon a right. That ordinary courts have jurisdiction over cases arising under the Constitution is further confirmed by Article 3(1) of the Federal Courts Proclamation.[29] The position of the courts of the country that they have no power to entertain and decide cases in which constitutional provisions are invoked is therefore wrong and hence should be changed.

II. Relevant Human Rights Treaties

Out of the international human rights instruments relevant to the protection of economic and social rights, Ethiopia has acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 11 September 1993, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 10 October 1981, and the Convention on the Rights of the Child (CRC) on 13 June 1991.[30] While the first of these instruments is wholly devoted to socio-economic and cultural rights, the latter two respectively enmesh women and children specific economic and social rights. At the regional level, the State has ratified the African Charter on Human and Peoples' Rights (ACHPR) on 15 June 1998, and the African Charter on the Rights and Welfare of the Child (ACRWC) on 27 December 2002.[31] Both these African instruments protect economic and social rights with other group of rights. Ethiopia is bound by all the above human rights instruments and its citizens are entitled to the socio-economic rights they provide for.

Under its supremacy clause, the FDRE Constitution provides that all international agreements ratified by Ethiopia are an integral part of the law of the land (Article 9 (4)). This means that the relevant provisions of instruments like the ICESCR, CEDAW, CRC, ACHPR[32] and ACRWC, with the standard of

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29 Federal Courts Proclamation, Proclamation No. 25/1996, Federal *Negarit Gazeta* 2nd Year No. 13, Addis Ababa, 15th February, 1996. Article 3(1) enounces "Federal Courts shall have jurisdiction over cases arising under the Constitution, Federal Laws and International Treaties".

30 See Office of the United Nations High Commissioner for Human Rights, available at <http://www.ohchr.org/english/countries/ratification> (accessed on 18.04.2007).

31 See African Commission on Human and Peoples' Rights, available at <http://www.achpr.org/english/_info/index_ratifications_en.html> (accessed on 18.04.2007).

32 The list of economic and social rights guaranteed by the ACHPR is not exhaustive as it fails to provide for the rights to housing, food, social security etc. The African Commission on Human and Peoples' Rights, the monitoring organ established by the ACHPR, has however read the right to housing and the right to food into the Charter. See *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96 (2001), African Human Rights Law Reports 2001

protection they accord to economic and social rights, are part of the laws of Ethiopia. Accordingly, in addition to the rights protected by Article 41 of the Constitution, the provisions of the above listed instruments on economic and social rights are part of the laws of Ethiopia and hence the argument that such rights are duly protected in the Ethiopian legal system.[33]

The protection of socio-economic rights through Articles 41 and 9 (4) of the Constitution is further strengthened by Article 13 (2) which provides that "the fundamental rights and freedoms shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia."[34] This means that the economic and social rights enshrined in the Constitution shall be interpreted in line with the relevant provisions of instruments like the ICESCR, CEDAW, CRC and the Universal Declaration of Human Rights (UDHR) which also incorporates socio-economic rights.[35] Such interpretation helps alleviate the problems resulting from the fact that Article 41

(Center for Human Rights, University of Pretoria) p. 60 – 75. It is believed also that it departs from the other international treaties in that it does not attach the qualification of progressive realization to the economic and social rights it incorporates. See C A Odinkalu "Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights" (2001) 23 *Human Rights Quarterly*, 327, 349. There is, however, a stronger case for understanding the obligation that the ACHPR imposes on states as one to realize the economic and social rights progressively within available resources at least in as far as positive (resource dependent) obligations are concerned. See C Mbazira "The Right to Health and the Nature of Socio-economic Rights Obligations under the African Charter: The Purohit Case" (2005), *ESR Review*, Vol. 6 No. 4, 15 – 18.

[33] Ethiopia follows the monist tradition where international treaties become an integral part of national law upon ratification. For a discussion on the monist/dualist distinction and the fallacies involved therein, see F Viljoen, *International Human Rights Law in Africa*, (Oxford University Press, 2007), 530 – 538 (after reviewing the problems with the monist/dualist classification and cases where the adoption of internal legislative measures domesticating provisions of treaties that were made integral part of national law by constitutions was required for their application, Viljoen argues that the deceptive label of 'monism' should be discarded in favour of an approach of making treaty provisions applicable without further domestic enactments). We argue that the provisions of treaties ratified by Ethiopia (as par of the law of the land) are applicable by the courts of the country without further need for a formal step of issuing any such enactment as "domesticating legislation".

34 It is worth noting also that where a constitutional dispute relating to the fundamental rights and freedoms enshrined in the Constitution is submitted to the Council of Constitutional Inquiry, it shall interpret the provision in question in a manner conforming to the principles of the UDHR, International Covenants on Human Rights and International Instruments adopted by Ethiopia. See Proclamation No. 250/2001 (n 26 above), article 20(2).

[35] One may say that the requirement of interpretation in accordance with the international instruments may also be an indication that these instruments are hierarchically (at least) parallel to the Constitution. there is, however, the argument that considering that international instruments get ratified by the organ that issues legislations, the House of Peoples' Representatives (article 55(12) of the FDRE Constitution) and that the Constitution is the supreme law of the land (article 9 (1)), international human rights treaties are hierarchically below the Constitution and have a status equal to legislations. Accordingly, if for instance a provision of a human rights treaty ratified by Ethiopia is inconsistent with the Bill of Rights, the latter prevails

and other relevant provisions of the Constitution are terse, vague or too general in their formulation. By making use of the provisions of instruments like the ICESCR, the provisions of Articles 41, 42, 43 and other relevant articles of the Constitution can be interpreted to have guaranteed classical economic and social rights.

By making international human rights treaties ratified by Ethiopia part of the law of the land, Article 9(4) of the Constitution extends the jurisdiction of Ethiopian courts to applying their provisions. Some believe that even if a ratified treaty is part of domestic law, the direct applicability of its provisions would depend on whether its provisions are "self-executing", i.e., whether it specifies in a rather clear way the entitlements of individuals or groups and the extent of the duties imposed on the state.[36] In the first place, the characterization of treaty provisions as "self-executing" in the context of justiciability of rights is rejected for want of strong jurisprudential foundation.[37] Secondly and more importantly, considering that legal rules are expressed in unavoidably vague wording[38] and that it is in the power of courts to interpret rights to decide their exact content, treaty provisions that are made part of domestic law should be directly applicable. The inclusion of the ratified treaties as part of the law of the land should therefore be enough for courts to be able to apply their provisions.

There actually is legal basis for the direct applicability of provisions of ratified treaties by Ethiopian courts. Article 3(1) of the Federal Courts Proclamation specifically provides that Federal Courts shall have jurisdiction over international treaties and Article 6(1) of the same proclamation states that Federal Courts shall settle cases or disputes submitted to them on the basis of, among others, international treaties.[39] In practice, however, litigants as well as courts avoid referring to international human rights instruments even in cases perfectly covered by treaties ratified by Ethiopia[40], and

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[36] See Coomans (n 1 above), 7, and Viljoen (n 33 above), 533.

[37] See M Scheinin "Direct Applicability of Economic, Social and Cultural Rights: A Critique of the Doctrine of Self-executing Treaties" in K Drzewicki *et al* (eds.) *Social Rights as Human Rights: A European Challenge* (Institute for Human Rights, Åbo Akademi University, 1994) 73.

[38] H.L.A. Hart, The Concept of Law (1963), Chapter VII.

[39] Proclamation No. 25/1996 (n 29 above).

[40] The very limited number of cases in which international instruments were applied are exceptions. One such exception is the very first decision of the Federal High Court in the trial of officials of the previous (*Derg*) regime for genocide, namely, *Special Prosecutor v. Col. Mengistu Hailemariam and 173 Others*, Federal High Court, Criminal File No. 1/87, Decision of 9 October, 1995 (instruments referred to include: the UDHR, Convention on the Prevention and Punishment of the Crime of Genocide, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment). See S A Yeshanew, Report and Commentary on "*Special Prosecutor v. Mengistu Hailemariam and 173 Others*, Federal High Court, Criminal File No 1/87, Decision of Meskerem 29, 1988 E.C. (9 October, 1995 G.C.)" *International Law in Domestic Courts*, ILDC 555 (ET 1995), (Oxford University Press, 2007). See also *Dr. Negaso Gidada v. the House of Peoples' Representatives and the House of Federation*, Federal High Court, appeal, Addis Ababa, Judgment of 4 January 2006 (in affirming the right of the appellant to freedom of opinion and expression and his right to vote and be elected, the Court referred to articles 18 and 19 of the UDHR and International Covenant on Civil and Political Rights, respectively, which it said are part of the law of the land by virtue of article 9(4) of the Constitution and that in accordance with article 13(2), the fundamental

many members of the judiciary believe that the rights in ratified international treaties, which are not otherwise clearly guaranteed in domestic laws, are not justiciable.[41]

The skewed attitude and practice in relation to the judicial application of provisions of ratified treaties is, it is believed, partly attributable to the fact that the full texts of such treaties are not published in the Official Legal Gazette of Ethiopia. Specific Proclamation with the title of the treaty is usually issued upon the ratification of a certain international treaty by the House of Peoples Representatives.[42] This is in accordance with Article 71(2) of the Ethiopian Constitution which provides that the President of the country shall proclaim international agreements approved by the House of Peoples' Representatives in the *Negarit Gazeta*. Such proclamations incorporate an article with a succinct statement that a treaty, indicating its full name, has been ratified or acceded to. They never reproduce the full text of the treaty in question and translate the treaty provisions into the official languages of the country.[43] What is more striking is the fact that such proclamations (providing that a treaty has been ratified or acceded to) in the Official Legal Gazette do not exist in relation to some ratified international human rights treaties including the ICESCR.[44]

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rights and freedoms shall be interpreted in conformity with these international instruments). The latter case demonstrated the perfect use to which article 13(2) of the FDRE Constitution should be put. Some lawyers argue that the judicial practice in which the provisions of international human rights instruments are rarely referred to is a result of the fact that domestic law, especially the Constitution, incorporates the provisions of international instruments. See R Mesele, "Enforcement of Human Rights in Ethiopia", Action Professionals' Association for the People, 31 August 2002, at 39, available at <http://www.apapeth.org/Docs/ENFORCEMENT%20OF%20HR.pdf> (accessed on 24.04.2007). But the truth is that the Bill of Rights of the FDRE Constitution is not substitutive of the diversified and elaborate provisions of international human rights treaties. Suffice it to consider the terseness of the provisions of article 41 on socio-economic rights as it stands. What is more, courts rarely refer to relevant constitutional provisions either.

41 S A Yeshanew, Protection of the Right to Housing and the Right to Health in Ethiopia: The Legal and Policy Framework, Action Professionals' Association for the People, April 2006 (Unpublished), 23 (on file with author) (conclusion reached after interviews with Judges and advocates of the various level of courts in Ethiopia).

42 See for example, Convention on the Rights of the Child Ratification Proclamation No.10/1992, and Proclamation to Provide for Accession to the African Charter on Human and Peoples' Rights, Proclamation No. 114/1998.

43 The Committee on the Rights of the Child has expressed its concern about the failure to publish the full text of the Convention on the official gazette. See Concluding Observations of the Committee on the Rights of the Child: Ethiopia CRC/C/15/Add.144 (31/01/2001), para. 14. The Human Rights Commission of the Country has now embarked on a project to translate and disseminate the human rights treaties ratified by Ethiopia in the major languages of the state. Interview with Mr Paulo's Firdissa, head of Human Rights Education and Research Department, on 31 July 2008.

44 Most international human rights treaties were ratified or acceded to by the Transitional Government of Ethiopia between 1991 and 1994. While ratification instruments were deposited with the United Nations and hence the treaties bind Ethiopia, their ratification was not published on the official Gazette, let alone their full texts. The requirement of article 71(2) of the Constitution that the President shall proclaim ratified treaties in the official gazette applies to those treaties that are ratified after the entry into force of the Constitution (1995). It is also argued that the formality of proclamation in the *Negarit Gazeta* should not affect the implementation and judicial applicability of the treaties that are duly ratified by the organ with authority – in this case, the Parliament of the Transitional Period.

According to Article 2 of the Federal *Negarit Gazette* Establishment Proclamation, all Laws of the Federal Government shall be published in the Gazette and all Federal or Regional legislative, executive and judicial organs as well as any natural or juridical person shall take judicial notice of Laws so published.[45] There is an argument based on this law that ratified international treaties should be published on the official gazette for their provision to be implemented at the domestic level.[46] But the above provisions apply to "the laws of the federal government", also called "Federal Laws".[47] And in the proclamation that defines the jurisdiction of Federal Courts and the substantive laws they apply, international treaties are referred to in addition to "Federal Laws".[48] International human rights treaties ratified by Ethiopia are therefore distinct from the body of law called "laws of the federal government" and hence are not among those laws which must be published in the federal official gazette in accordance with Article 2 of the Proclamation that established the gazette.[49] There is a further argument based still on the above provisions of the Proclamation that courts take judicial notice *only* of legal texts or provisions published on the official gazette. This is also a distorted argument for the law requires only that judicial notice be taken of laws published in the Official Gazette. It does not necessarily imply that the laws that courts may apply or take judicial notice of are only those whose texts are published in the gazette.

As regards international human rights instruments the ratification of which is published in the official gazette, one may possibly argue that the statement that the treaty has been ratified or acceded to is as good as publishing the full text of such instrument. Those who insist on the need to publish the full text maintain that it is only upon publication of the law/treaty on the official gazette that it can be deemed to have been known by the public - the publicity function of the gazette. A counter argument is that publication, which is required for the benefit of the public, should not serve as a reason to bar citizens from enjoying or invoking their rights in the international instruments ratified by the State and that the knowledge of the public, though important, should not matter that much

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45 Proclamation to Provide for the Establishment of the Federal *Negarit Gazeta*, Proclamation No.3/1995, Addis Ababa, 22 August, 1995, article 2.

46 Mesele (n 40 above) (several interviewed judges believe that the provisions of the Proclamation establishing the Gazette hinder the application by courts of the international human rights treaties).

47 Regional states have their own official Gazette other than the Federal *Negarit Gazeta*.

48 Proclamation No. 25/1996, article 3(1) (n 29 above). Article 6(1)(a) also states that Federal Courts shall settle cases or disputes submitted to them on the basis of Federal Laws and international treaties. Article 2 (3) of the Proclamation defines Federal Laws as laws "relating to matters that fall within the competence of the Federal Government as specified in the Constitution". They are those legislations that are issued by the House of Peoples' Representatives – the law-making body (legislature) of the Federal Government.

49 One may go on to argue based on this that international treaties ratified by Ethiopia may be applied by federal courts irrespective of their publication in the official gazette. While the converse reading of article 71(2) of the Constitution implies that the proclamation of ratified treaties in the *Negarit Gazeta* is a formality requirement that must be met, it should not affect their applicability where the House of Peoples' Representatives has ratified them in accordance with the Constitution.

(in relation specifically to the judicial applicability of the treaty provisions) for such instruments impose much of state obligations than individual responsibilities. In addition, domestic laws and other obstacles such as the non-publication of international treaties ratified by a state cannot justify the failure to apply the treaties domestically.[50] States and their judicial organs cannot, therefore, evade domestic application of state's international obligations resulting from the ratification of treaties by invoking domestic law or obstacles. But the thing is that there is no Ethiopian legislation that clearly precludes the application of relevant international treaties by regular courts.

The foregoing shows that the formal promulgation of ratified international treaties (which according to the Constitution are integral part of the law of the land) in the official gazette is not really required for the application of their provisions by courts and other organs with judicial power. This means that the socio-economic rights provisions of ratified human rights treaties may be judicially enforced in Ethiopia. But still, it should be underlined that the publication of the full text of the human rights instruments and their interpretation in local vernaculars would make substantial contribution towards the enforcement or application of the rights they protect. It would make it more known and easier for litigants as well as courts to refer to the treaty provisions. It is, therefore, submitted that the text of treaties, including the ones whose ratification was not promulgated, should be published in the official gazette with translations in domestic official languages.

III. Notes on the Justiciability Issue

We have shown above that the FDRE Constitution protects economic and social rights by incorporating them in its bill of rights as well as by making pertinent international treaties part of the law of the land. We have also argued that the rights are enforceable by courts and other organs with judicial power. But this latter argument cannot be put to rest without answering special concerns about the enforceability or justiciability of economic and social rights. It has been indicated earlier that there are principled objections to the constitutional protection and justiciability of this group of rights and also that there are by and large ready responses to them.[51] Considering that the conventional obligation of states in relation to socio-economic rights is one of "progressive realization within the maximum available resources"[52], there still remain

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[50] See Vienna Convention on the Law of Treaties (adopted on 22 May 1969 and entered into force on 27 January 1980), Treaty Series, vol. 1155, p.331, arts. 26 & 27.

[51] See n 12 above.

[52] See article 2(1) of the ICESCR, article 22 of the UDHR, and articles 41(4) & 90 of the FDRE Constitution.

questions about the mode of judicial enforcement of these rights in a country as poor as Ethiopia.

It is now generally agreed that human rights in general and socio-economic rights specifically entail duties to respect, protect and fulfil.[53] While the duties to respect and protect entail states' avoidance of interference with the enjoyment of rights and prevention of violation of the rights by third parties, respectively, the obligation to fulfill includes making available what is required to satisfy basic needs. Whereas the obligations to respect and to protect economic and social rights might have resource-demanding implications, they are not the primary subjects of the debate concerning the justiciability of this group of rights.[54] The major issues with the judicial enforceability of the rights relate to the resource-dependent fulfillment obligations.

The obligation to progressively realize economic and social rights does not entitle states, however poor they may be, to sit back and ascribe every failure on their part to lack of resources. The obligation requires states to begin taking steps immediately and fulfill the obligations step by step through deliberate, concrete and targeted measures.[55] Some of the rights are capable of immediate application by judicial organs – examples are the rights to equal pay for equal work and trade union rights as part of the right to work. There are also negative aspects to the obligations of states. For example, a state should not interfere with the enjoyment of legally obtained right to housing of individuals through forced eviction – the obligation to respect. A state may also protect its citizens from violations of their rights by third parties at relatively low cost. Through control and supervision of private health practitioners for example, a state may ensure quality health services. It may also avoid discriminatory practices in the provision of services that are meant to realize socio-economic rights without availability of resources being an issue. Cases concerning these negative aspects to the rights may be adjudicated and decided by courts of law in the same way as any other case.

Courts may also possibly adjudicate positive obligations that raise the issue of resource availability. They usually do this in civil and political rights cases and yet the justiciability of this group of rights has generally not been questioned. For example, in enforcing the right to counsel or legal assistance as part of the right to a fair trial, courts make decisions with significant resource implications. Courts may similarly enforce socio-economic rights even where the obligation in question is one of fulfillment. All

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[53] For classifications made by different authors at different times with various terminologies to the duties that human rights entail and the utilization of typologies of States' duties by the Committee on Economic, Social and Cultural Rights in the General Comments it issued and in its Concluding Observations on States' reports, see M Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, 2003) 157-248.

[54] IE Koch, "Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective" (2006), 10 *International Journal of Human Rights*, No. 4, 405 425.

[55] See General Comment No. 3 of the Committee on Economic, Social and Cultural Rights, the nature of States parties' obligations (article 2, para. 1 of the ICESCR), 14/12/90, paras. 2 & 5.

that it takes is the adoption of a well-though-out model of review. If and where Ethiopian courts are faced with issues concerning positive obligations of the state relating to legally guaranteed socio-economic rights, they should first interpret the relevant provisions to identify their normative content and then carefully develop a model of review that may be used to evaluate the steps taken to realize the rights against measurements that may be derived from their provisions. They may take lessons from the jurisprudence of such foreign judicial organs as the South African Constitutional Court which developed its famous 'reasonableness test' as a model of reviewing the implementation of economic and social rights.[56] Under this test the Court evaluated the 'reasonableness' of programs meant to realize socio-economic rights in terms of their comprehensiveness, coherence, coordination, transparency, responsiveness to urgent problems etc.[57] The mode of enforcing positive obligations in the realm of economic and social rights is still developing and Ethiopian courts may play their part in this jurisprudential development if they entertain and decide such cases.

IV. Conclusion

The FDRE Constitution provides protection to economic and social rights by entrenching them in its justiciable Bill of Rights and making them part of national policy principles and objectives that guide the governance of the country. While the relevant constitutional provisions are very sparse, the classic socio-economic rights may be read in to the Constitution by relating the specific provisions with the other rights it enshrines and the articles of ratified international human rights treaties which are integral part of the law of the land. It is, however, disturbing that Ethiopian courts barely apply the provisions of the Constitution and those of ratified treaties to concrete cases even where they are in point and are actually invoked by the parties. This mainly resulted from the wrong understanding of the mandate of the House of Federation to decide "constitutional disputes" as divesting courts of the power to adjudicate claims that are based on constitutional provisions. The mandate of the House of Federation is one to provide an authoritative interpretation of constitutional provisions if and when needed, and courts are obliged to enforce the rights and freedoms in the Bill of Rights. As regards international treaties ratified by Ethiopia, the reason may be that their provisions have not been published in the official gazette although that is not really a requirement for the enforceability of the rights by courts.

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[56] See *Government of the Republic of South Africa and Others v Grootboom and Others* (also called the *Grootboom Case)*, 2000 (11) BCLR 1169 (CC), paras 26 – 41.

[57] Note that the South African Constitutional Court derived the 'reasonableness' test from the state's obligation to take "reasonable measures" under articles 26 & 27 of the Constitution. But still, it is applicable in any setting where the obligation of the state is to progressively realize socio-economic rights. Note also that the 'reasonableness' test is criticized for denying direct individual right to the provision of concrete goods and services (only a right to demand that the state adopt a reasonable program), and throwing the burden on litigants to persuade courts of the unreasonableness of the State's programs. If Ethiopian courts adopt the 'reasonableness' model, they should address these problems with the approach of the South African Constitutional Court.

The prevailing judicial practice of avoiding application of constitutional provisions is responsible for the lack of jurisprudential development on the fundamental rights and freedoms in the Constitution. The judicial interpretation and application of the rights in concrete cases would help develop their normative content. Considering the terseness of the provisions of Article 41 and other pertinent provisions of the Constitution on socio-economic rights, engagement in constitutional litigation is extremely important. It is high time that the courts of the country started developing constitutional jurisprudence through the interpretation and application of fundamental rights and freedoms, including those on economic and social rights, in specific cases. Ethiopian judges should demonstrate more progressive stance in taking steps to apply the relevant constitutional provisions and finding doctrinal basis to their reasoning in judgments that relate to the constitutionally protected rights and freedoms. This would be bolstered through specialized trainings on the justiciability of human rights in general and socio-economic rights in particular targeting the judges of the various levels of courts in the country.

የገጠር መሬት ሥሪት በኢትዮጵያ :- በሕግ የተደነገጉ መብቶችና በአማራ ብሔራዊ ክልል ያለው አተገባበር

ሞላ መንግሥቱ*

መግቢያ

የሕግ መብት አንድ ሰው በህብረተሰቡ ውስጥ ያለው ደረጃ መገለጫ ነው። መብት ደግሞ የተለያዩ ገጽታዎች ያሉት ፅንሰ ሃሳብ ነው። ከእነዚህ ገጽታዎች የአንዱ አለመጠበቅ የአንድን ሰው ስብእና የተሟላ እንዳይሆን ያደርገዋል። ከመብት ገጽታዎች አንዱ የንብረት መብት ሲሆን ይህ መብት የሰው ልጅ በሕግ ሊጠበቁለት የሚገባ መብቶች ሁሉ መሠረት ነው። የንብረት መብት በተለመደ ትርጉሙ የራስ በሆነ ነገር የመጠቀም ወይም የመገልገል በሕግ የተጠበቀ ሥልጣን ማለት እንደሆነ ተደርጉ ሲወሰድ እናያለን። የንብረት መብት የያዘው ትርጉም ግን ከዚህም የሰፋ ነው። ምክንያቱም የንብረት መብት የሚኖረው አንድ የራስ የሆነ ነገር ሲኖር ብቻ አይደለም። ይህም ማለት አንድ ሰው በባለቤትነት የያዘው አንድ ግዙፍ ነገር ባይኖረውም የንብረት መብት ግን ይኖረዋል ማለት ነው። ለምን ቢባል አንድ ግዙፍ ነገር መደፈት የማግኘት መብትም የንብረት መብት ስለሆነ ነው። ከዚህም ሌላ የንብረት መብትና በባለቤትነት የሚያዘው ነገር በቀጥታ ግንኙነት ያላቸው ነገሮች አይደሉም። ምክንያቱም የንብረት መብት በሕግ ትርጉም የሚኖረው አንድ መብት አለኝ የሚል ሰው ከሌሎች ሰዎች ጋር ካለው ግንኙነት አንፃር ሲታይ እንጅ መብቱ ከሚተገበርበት ነገር ጋር ካለው ግንኙት አንፃር ሲታይ ባለመሆኑ ነው።

ስለዚህም የንብረት መብት ማለት አንድ ሰው ምን ምን ነገሮችን በባለቤትነት፣ ወይም ከባለቤትነት ባነሰ ደረጃ የያዘውን ነገር ለመገልለገልና ለመጠቀም የሚችልበት ሁኔታ ያለውን ስፋትና ገደብ የሚያስረዳና የያዘውን ነገር ሲገለገል ያለውን ነፃነት በማክበር ሌሎች ሰዎች ጣልቃ ላለመግባት ያለባቸውን ገደብ የሚያስረዳ ሥልጣን ማለት ነው። ከዚህ ትርጉም የምንረዳው ደግሞ የንብረት መብት እንዲኖር በሰዎች መካከል ማህበራዊ ግንኙነት መኖሩ አስፈላጊ መሆኑን ነው።ይህም የሚያስገነዝበን አንድ ሰው ያለው የንብረት መብት እንዲኖር በሰዎች መካከል ማህበራዊ ግንኙነት መኖሩ አስፈላጊ መሆኑን ነው። ምክንያቱም አንድ ሰው ያለው የንብረት መብት ሌሎች ሰዎች ይህን መብት ለማክበር ካለባቸው ግዴታ ጋር በእጅጉ የተሣሰረና ከዚህ አንጻር ካልታየም የንብረት መብት የሰውና የእቃ ግንኙት እንደሆነ ተደርጎ እንዲታይ ስለሚያደርገው ነው።

የንብረት መብት አንዱና በተለይ እንደ ኢትዮጵያ ባሉ ኋላቀር አገሮች ዋናው መሠረት ደግሞ መሬት ነው። ምክንያቱም ለአብዛኛው ዜጋ ሌላ የሥራ መስክ፣ ሌላ የገቢ ምንጭ፣ ሌላ በሀብትነት የሚያዝ ነገር በሌለበት ሁኔታ እንኳን የንብረት መብት ህልውና እና

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ማንነትም ከመሬት ጋር የተሣሰረ በመሆኑ ነው። የኢትዮጵያ ህዝብ አብዛኛው በገጠር ነዋሪና ኋላ ቀር በሆነ የግብርና ሥራ የሚተዳደር በመሆኑም በተለይ የገጠር መሬትን በተመለከተ ያለው የንብረት መብት የተመሠረተበት የመሬት ሥሪት ትክክለኝነትና የመብቱ በሰፋ ሁኔታ መከበር ለኢኮኖሚያዊ፣ ማህበራዊና ፖለቲካዊ እድገት መሠረት መሆኑ የማያከራክር ጉዳይ ነው።

የመሬት መብት መከበር የሚገለጸው በመሬት ሥሪቱ ትክክለኛ መሆን፣ ሥሪቱ ለተጠቃሚዎች በሚሰጠው መብት ስፋትና በመሬት አስተዳደሩ አመቺነት በአጠቃላይ ቢሆንም የዚህ ጽሑፍ ዓላማ የገጠር መሬት ሥሪቱ ለአርሶ አደሮች የሚሰጠውን መብትና የመሬት አስተዳደሩን ከሕጉ አንፃር መተንተን እንጂ አሁን ያለው የገጠር መሬት ሥሪት ለኢትዮጵያ ተጨባጭ ሁኔታ ተገቢ ነው ወይስ አይደለም የሚለውን ጥያቄ መመለስ አይደለም። በመሆኑም በኢትዮጵያ የመሬት ባለቤትነት የመንግሥትና የሕዝብ ነው የሚለውን የሕገ መንግሥት ድንጋጌ መሠረት በማድረግ የኢትዮጵያ አርሶ አደሮች የገጠር መሬት መብት ከባለቤትነት የሚያንሰው መሸጥ ወይም በሌላ ንብረት መለዋወጥ ባለመቻል ብቻ ሆኖ ስለ መብቱ በበታች ሕጎች ጠቦ ተደንግጓል የሚለው አስተያየት የዚህ ጽሑፍ ዋና የክርክር ነጥብ ሲሆን የገጠር መሬት መብቱ በአማራ ብሔራዊ ክልል ያለውን አተገባበር መተንተንም ሌላው የጽሑፉ ትኩረት ነው። ከዚህም በተጨማሪ የፌዴራሉ ሕገ መንግሥት ድንጋጌዎች አተገባበር ልዩነት የሚታይበት መሆኑን ለማመልከት ብቻ አግባብ በሆነበት ቦታ የሌሎች አንዳንድ ክልሎች የገጠር መሬት ሕጎችም ባጭሩ ይዳሰሳሉ። በታሰበው ሁኔታ ሃሳቦችን ለማቅረብ እንዲመችም ያለፈውን የኢትዮጵያ የገጠር መሬት ሥሪት በማስቀደም ጽሑፉ በተለያዩ ክፍሎች እንዲቀርብ ተደርጓል።

1. የቅድመ -1967 የገጠር መሬት ሥሪት አጭር ዳሰሳ[1].

የመሬት ሥሪት አርሶ አደሮችና ሌሎች የመሬት ተጠቃሚዎች መሬት የሚይዙበትን ሁኔታና የአጠቃቀሙን ሥርዓት የሚገልጽ ጽንሰ ሃሳብ ነው[2]። ይህ ትርጉም የመሬት ሥሪት መሬት ከማግኘት መብት የሰፋና የመብቱን ደረጃም ሆነ መብቱን ተግባራዊ ለማድረግ የሚያስፈልጉ ተቋማትን የሚያካትት መሆኑን ያስገነዝበናል። ስለዚህም በአንድ አገር ያለው የመሬት ሥሪት ግንኙነት መሬት መጠቀምን በተመለከተ አንድ ሰው ከሌላው ሰው ጋር ያለው ማህበራዊ ግንኙነት የሚገለጽበት ጽንሰ ሃሳብ ነው ማለት ነው። ይህ የሚጠቁመን ደግሞ የመሬት ሥሪት በተለይ በግብርና በሚተዳደር ህብረተሰብ የግለሰቦችን ማህበራዊና ኢኮኖሚያዊ ደረጃ የሚገልጽ መሆኑን ነው።[3] በተለይ እንደ ኢትዮጵያ ባሉ አገሮች የህብረተሰቡን አባላት ማህበራዊና ኢኮኖሚያዊ ደረጃ የሚገልጽ በመሆኑም የመሬት ሥሪት በአንድ አገር ለሚኖረው የዲሞክራሲ ግንባታም መሠረት ነው።

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[1] ከ1967 ዓ.ም. በፊት በኢትዮጵያ የነበሩት የገጠር መሬት ሥሪት ዓይነቶች በአሁኑ ጊዜ ታሪክ ቢሆኑም
መጠናታቸው ግን ከፍተኛ ጠቀሜታ አለው።

[2] Kenneth H. Parsons, Land Tenure, the University of Wisconsin press, Wisconsin (1963), P.44

[3] ibid P.4

4. Aberra Jembere, Legal History of Ethiopia 1434 – 1974: Some Aspects of Substantive and procedural Law, Leiden: Arika – Studiecentrum (1998) P. 123

በተለያዩ አገሮችና በተለያዩ ጊዜያት የሚኖሩት የመሬት ሥሪት ግንኙነቶች አንዳንድ ሊያመሳስሏቸው የሚችሉ ጉዳዮች ሊኖሩ ቢችሉም በጣም በርካታ የየራሳቸው የጐሉ አካባቢያዊ ልዩ ታሪኮች አሉዋቸው። በዚህም ምክንያት የቅድመ 1967 ዓ.ም. ኢትዮጵያ የገጠር መሬት ሥሪትም የራሱ የሆነ ባህሪ የነበረውና አንድንድ ጸሐፊዎች እንደሚገልጹትም በርካታ ሥሪቶችን ያካተተ ነበር[4] ::

የኢትዮጵያን የገጠር መሬት ሥሪት እጅግ እሩቅ ወደሆነው ዘመን ወደ ኋላ ሄዶ ለማጥናት በተበታተነ የመንግሥት አሠራርና በየአካባቢው ባህል ላይ በመመሥረቱና በመብዛቱ ምክንያት እንደዚህ ባለ አጭር ጽሑፍ አጠቃልሎ ለማቅረብ እጅግ አስቸጋሪ ነው። በዚህም ምክንያት በዚህ ጽሑፍ ትኩረት የሚሰጠው በተለያዩ የኢትዮጵያ አካባቢዎች የማዕከላዊ መንግሥት አሠራር እየተጠናከረ ከመጣበት ጊዜ ጀምሮ ያለውን ሥሪት ነው። ይህ ዘመን ደግሞ የሚጀምረው ከ17ኛው ክፍለ ዘመን እንደሆነ ከታሪክ እንገነዘባለን[5]። ከዚህ ዘመን ጀምሮ ከነገሥታት ነገሥታት ለውጦች እየተደረጉበትና የተለያዩ ገጽታዎች እየታየበት የመጣው የገጠር መሬት ሥሪት የጋራ ይዞታ፣ የግል ይዞታ እና የመንግሥት ይዞታ በሚል ሊከፈል ይችላል[6]። በእነዚህ ሥሪቶች ሥር ሊካተቱ የሚችሉ የመሬት ይዞታና አጠቃቀም አይነቶች ደግሞ በርካታ ነበሩ። እነዚህም ለምሳሌ የቤተክርስቲያን ይዞታ፣ የጉልት ይዞታ፣ የርስተ ጉልት ይዞታን የሚያካትቱ ናቸው።

ከላይ የጠቀስናቸው የመሬት ሥሪት ዓይነቶች ከተመሠረቱበት ዘመንም ሆነ ሰባለይዞታዎች ከሚሰጡት መብት አንፃር የተለያዩ ቢሆኑም ቢያንስ ሥሪቱን ከመወሰን አንፃር በአንድ ወይም በሌላ መልኩ የመንግሥታት ወሳኝነት ወይም ተጽእኖ የነበረበት መሆኑ ግን የሚያመሳስላቸው ባህሪ ነው።

የወል ይዞታ የሚባለው በሰሜኑና በመካከለኛው ኢትዮጵያ በክፊል የነበረ የመሬት ሥሪት ሲሆን የሚገለፀውም የርስት ይዞታ በሚል ነው። የዚህ ሥሪት መለያ በሃሪው ዘራቸውን ወደ ላይ ቆጥረው የሥሪቱ ቆርቋሪ ሰው የጋራ ተወላጆች መሆናቸውን የሚያረጋግጡ ሰዎች የጋራ ይዞታ መሆኑ ነው። የርስት ይዞታ መሬትን በተመለከተ አንዳንድ ፀሐፊዎች ይዞታው ከአንድ ሰው ወደ ሌላ ሊተላለፍ የሚችል ነው[7] ሲሉ ሌሎች ጸሐፊዎች ደግሞ የማይተላለፍ ነው[8] ይላሉ። እኔ እንደተገነዘብኩት እነዚህ ጸሐፊዎች ትኩረታቸው

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5. ibid
6. ibid

[7] Richard David Greenfield, Ethiopia: A New political History, pallmall press, London (1965) P.323; John Mankakis etal (ed), Ethiopian: Anatomy of a Traditional polity, Oxford University Press, Addis Ababa (1974) P.75

[8] . Aberra Jembere cited at note 4
9.G.W.B. H unitingford, The land Charters of Northern Ethiopia, Faculty of Law, A.A.U., (1965) P.11
10.ግሁተመሥላሴ ወ/መስቀል ስለየኢትዮጵያ የመሬት አስተዳደርና ግብር ጠቅላላ አስተያየት (ያልታተመ)
ገጽ፡ 14

ስለሚለያይ ነው እንጂ ሁለቱም ልክ ናቸው። ምክንያቱም የርስት ይዞታ መሬት የወል ባለይዞታ በሆኑት ርስተኞች መካከል መሬቱ ያለምንም ገደብ ከአንድ ሰው ወደ ሌላ ሰው ሊተላለፍ ይችላል።ይሁን እንጂ የርስት ይዞታ የርስተኞቹ የጋራ ይዞታ በመሆኑ ከርስተኞቹ ውጭ ለሆነ ሰው ግን ሊተላለፍ አይችልም።

የርስት ይዞታ መሠረቱ አንድን አካባቢ ማቅናትና መሬቱን በይዞታ ሥር ማድረግ ነው። እነዚህ የአንድ አካባቢ የመጀመሪያ አቅኚ የሆነ ሰው ተወላጆች ከጊዜ ወደ ጊዜ በአቅኚው አባታቸው የመሬቱ የጋራ ባለቤትነታቸው ተቀባይነት እያገኘ መጣ[9]። ስለዚህም የርስት ይዞታ ጥንታዊ መሠረቱ የቀዳሚነት ይዞታ መብት ነው ማለት ይቻላል። ይሁን እንጂ ከጊዜ በኋላ ነገሥታት ግዛታቸውን እያስፋፉና የማዕከላዊው አስተዳደር የተሻለ ጥንካሬ እያሳየ ሲመጣ በተለይ መሬት በቀላድ በተለካባቸው አካባቢዎች ከመሬቱ ሁለት እጁን ለራሱ አስቀርቶ አንድ እጁን ለባለይዞታዎች እንደተወላቸውና ለመንግሥት ከተያዘው ድርሻም ሲሦውን ለካህናት በመስጠቱ የቤተክርስቲያን ይዞታ በወል ሥሪቱ ውስጥ መመሥረቱን አንዳንድ ምንጮች ያስረዳሉ[10]።

የጥንት ባለይዞታዎችም ከመንግሥት ከተተወላቸው ሲሶ የመሬት ድርሻ ላይ ቤተክርስትያን እንዲተክል እያደረጉና ለካህናት መተዳደሪያቸውን እየሰጡ[11] የቤተክርስቲያን ሰበካንና የርስታቸውን ወሰን አንድ ማድረግ ቻሉ። በዚህም ምክንያት የአንድ የርስት ይዞታ መሬት ክልል መሬቱ በሚገኝበት ቤተክርስቲያን ሰበካ የተወሰነ እንዲሆን አደረገው። በአጠቃላይ ሲታይም የርስት ይዞታ በጋራ የተያዘና ለቤተሰብ በማንኛውም ሁኔታ ሊተላለፍ የሚችል ይዞታ ነው። የርስት ይዞታ በውስጡ ከቤተክርስቲያን ይዞታ ሌላ የጉልትና የርስተ ጉልት ይዞታም ይገኛል። የርስት ይዞታ የጋራ ይዞታ ቢሆንም ለሌላ ቤተሰብ ከማስተላለፍ በመለስ ለባለይዞታዎች የሚሰጠው መብት ሰፊ ነበር። የርስት ሥሪት ለዎችን በአንድ አካባቢ የሚገኝ መሬት የጋራ ባለይዞታ የሚያደርገው የዘር ሃረግን ከአንድ የጋራ አባት ግንድ መሆን በመቁጠር በመሆኑ በአንድ በኩል በቁጥርጥር ዝምድናም እንኳ ቤተሰባዊ ግንኙነትን ስለሚያጠናክር ለህብረተሰቡ ሠላማዊ ኑሮ መሠረት የመሆን ከፍተኛ ማህበራዊ ጠቀሜታ ነበረው። በሌላ በኩል ግን ከተለያየ የቤተሰብ ግንድ በሚወለዱ ሰዎች መካከል ርስቱ የእኔ አባት ያቀናው እንጅ የእናንተ አባት ያቀናው አይደለም። ስለዚህም የርስተኝነት መብቱም የእኛ ነው በሚሉ የተለያዩ ቤተሰቦች መካከል ረጅም ዘመን የሚፈጁ ክርክሮች ምክንያት የነበረና አንዳንድ ጊዜም በዚህ ዓይነት ቤተሰቦች መካከል መጋደልን በማስከተል ከፍተኛ ጠላትነትን ሲፈጥር የነበረ ሥሪት ነው። ከዚህም በተጨማሪ አንደኛ የርስት ሥሪት ከቤተክርስቲያን ጋር በመተሳሰሩ የክርስትና እምነት የማይከተሉ የህብረተሰቡ ክፍሎችን የመሬት ባለይዞታ አያደርጋቸውም።

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[10] .ማህተመሥላሴ ወ/መስቀል ስለየኢትዮጵያ የመሬት አስተዳደርና ግብር ጠቅላላ አስተያየት (ያልታተመ) ገጽ፡ 14

11.ማህተመ ሥላሴ ወ/መስቀል በቁጥር 10 እንደተጠቀሰው

ሁለተኛም የዘራቸውን ጥንታዊ አባት ቆጥረው ከአቅኝው ርስተኛ አባት ጋር በዝምድና ማገናኘት የማይችሉ ሰዎችም የመሬት ባለይዞታነት መብት አያገኙም። ይህ በመሆኑ ደግሞ የመሬት ይዞታ መብት ማግኘት የማይችሉት የህብረተሰቡ ክፍሎች ሁሉ የርስተኞች የመሬት ተጠማኝ ከመሆናቸውም ሌላ የሰዎች ማንነት የሚገለፀው ከርስተኝነት ጋር ተያይዞ ስለነበር በህብረተሰቡ ውስጥ በዝቅተኛ ደረጃ እንዲታዩ አድርጓቸው ነበር።

የጉልት ይዞታ ለተፈፀመ ውለታ ለመንግሥት ባለመሬቶች የሚከፍሉትን ግብር ተቀብሎ ለግል ለመቀጠም እንዲቻል የሚሰጥ መብት ነው። ባለፈው ለተፈፀመና ወደፊትም ሊፈጸም የሚችል የአንድን አካባቢ የማስተዳደርና ፀጥታ የማስከበር ተግባር በግል የሚሰጥ "የመሬት ይዞታ" መብት በመሆኑ ለልጅ የሚተላለፍ ይዞታ አይደለም። መንግሥት ከፈለገም ጉልተኛው ተግባሩን አልተወጣም ብሎ ሲያምን መልሶ ሊወስደው ይችላል። ይህ ይዞታ ከርስት ይዞታ ጋር ትስስር ስለሌለው የርስት ሥሪት በሌለባቸው የአገሪቱ ክፍሎችም የነበረ ይዞታ ነው[12]።

የርስተ ጉልት ይዞታ ደግሞ በርስት ስሪት አካባቢዎች ከርስት ይዞታ በተጨማሪ በግል ይዞታ አካባቢ ደግሞ ከግል ባለቤትነት በተጨማሪ ከመሬቱ የሚሰበሰበውን ግብር ሰብስቦ ለግል ለመጠቀም ከመንግሥት የሚሰጥ መብት ሲሆን መብቱ የሚሰጠውም ለመንግሥት ለተሰጠ አገልግሎት ነው። በመሬቱ ላይ ካለ የርስተኝነት ይዞታ ወይም ከግል ባለቤትነት በተደራቢነት የሚሰጥ በመሆኑም መልሶ ሊወሰድ የማይችልና ለተወላጅ ሁሉ በማንኛውም ሁኔታ ሊተላለፍ የሚችል ይዞታ ነው[13]።

የግል የመሬት ሥሪት በአብዛኛው በደቡብ የኢትዮጵያ ክፍል ተንሰራፍቶ የነበረ ሲሆን[14] ለእያንዳንዱ ባለይዞታ ሙሉ የመሬት ባለቤትነት መብት የሚሰጥ ሥሪት ነበር። በመንግሥት በግዴታ የተጣለ ሥሪት ስለነበርም ሥሪቱ ለሁሉም ዜጐች መሬት በግል ባለቤትነት የመያዝ መብት የሚሰጥ ቢመስልም የተወሰኑ ለመንግሥት ልዩ ቅርበት የነበራቸው ግለሰቦች ብቻ መሬቱን ሰብስበው ይዘው አብዛኛውን ህዝብ ግን መሬት አልባና የመሬት ተጠማኝ ያደረጉበት ሥርዓት ነበር። የመሬት የግል ባለቤትነት መብት ያለበት ሥሪት በመሆኑም መሬቱ በባለቤቱ ውሳኔ ሊሸጥ ወይም በሌላ ሁኔታ ለማንኛውም ሰው ሊተላለፍ የሚችልበት የይዞታ ዓይነት ነበር።

የመንግሥት ይዞታ በየትኛውም የኢትዮጵያ ክፍል የነበረ ሥሪት ሲሆን መሬቱን መንግሥት ለሚፈልገው የራሱ ተግባር የሚያውልበት አለዚያም ለባለመዋሉቹ እንደማደሪያ የሚሰጥበት ወይም ለመንግሥት ለሚገብር ተጠማኝ የሚሰጥበት የይዞታ ዓይነት ነበር[15]።

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[12]. Aberra Jembere cited at note 4, P.141

[13] [13] ibid

14.id. P. 123

[15] ማሀተመሥላሴ ወ/መስቀል በቁጥር 10 እንደጠቀሰው፣ Dessalegn Rahmato, Agrarian Reform in Ethiopia, Scandinavian institute of African Studies, Uppsala (1984), P.20

2. የድሮው መጨረሻና የአዲሱ መጀመሪያ፦ የ1967 ዓ.ም. የመሬት ሥሪት ለውጥ፣

በ1967 የተደረገው የመሬት ሥሪት ለውጥ በ1966 የተካሄደው ሕዝባዊ እንቅስቃሴ በአገሪቱ ያስከተለው አጠቃላይ የሥርዓት ለውጥ ውጤት አካል እንጅ ብቻውን የተከሰተ አልነበረም። ሕዝባዊ እንቅስቃሴውን ተከትሎ የደርግ መንግሥት የዘውድ አገዛዙን ተክቶ ሥልጣን ከያዘበት ጊዜ ጀምሮ የአገሪቱ የፖለቲካ ሥርዓት ሶሻሊስታዊ ርዕዮተ ዓለምን እየተከተለ በመምጣቱ የኢኮኖሚ ሥርዓቱም አብሮ በመለወጡ የመሬት ሥሪት ለውጥ እንዲከተል አደረገ።

የገጠር መሬት ሥሪት ለውጡ በሕግ ሲታወጅም በመጀመሪያ አጽንኦት የሰጠው እንደ ኢትዮጵያ ባሉ በእርሻ የሚተዳደሩ አገሮች አንድ ሰው በህብረተሰቡ ውስጥ ሊኖረው የሚችለው የኑሮ ደረጃ፣ መብት፣ እንዲሁም ክብርና ማዕረግ የሚወሰነው ከመሬት ጋር ባለው ግንኙነት በመሆኑ የዜጐችን እኩልነት ለማስከበር የመሬት ስሪቱን መለወጥ አስፈላጊ መሆኑን ነው[16]። ቀደም ብሎም እንደተመለከትነው ከ1967 ዓ.ም. ቀደም ብሎ በተለያዩ የአገሪቱ ክፍሎች ሰፍኖ የነበረው የመሬት ሥሪት ደግሞ ለሁሉም የአገሪቱ ዜጐች እኩል መብት የማይሰጥ በመሆኑ የመንግሥት ለውጥ ሲደረግ መሬትን በተመለከተ ሊያከራክር የሚችለው ምን ዓይነት ለውጥ ይደረግ የሚለው ጉዳይ እንጅ የመሬት ሥሪቱ መለወጥ አስፈላጊነት አልነበረም።

አጠቃላይ የፖለቲካ ሥርዓቱ የሦሻሊስት ርዕዮተ ዓለም ተከታይ በመሆኑም መሬትን የመሳሰሉ ሃብት ማፍሪያዎች የግል ባለቤትነት መብት በሥርዓቱ ተቀባይነት ስለማይኖረው የመሬት ሥሪቱ በአገሪቱ አንድ ወጥ ሆኖ "የሕዝብ ይዞታ" ተብሎ ታወጀ[17]። ስለዚህም በርስት ይዞታ፣ በግል ይዞታ ወይም በመንግሥት ይዞታ ሥር የነበረው የገጠር መሬት ሁሉ የህዝብ ይዞታ በመደረጉ ማንኛውም በእርሻ ለመተዳደር የሚፈልግ ሰው መሬት የማግኘት እኩል መብት እንዳለው ሕጉ ደነገገ። ይህ የመሬት ሥሪቱ መሠረታዊ መርህ ቢሆንም አንድ አርሶ አደር በመሬት ላይ ያለው የንብረት መብት ግን እንዲሁ ከላይ ስናየው ከሚመስለው እጅግ የጠበበ ነበር። የመጀመሪያው የመሬት መብቱ ውሱንነት የሚታየው የይዞታ መሬትን በሽያጭ፣ በለውጥ፣ በማውረስ[18] በማስያዝ፣ በወለድአገድ በመስጠት ወይም በሌላ መንግድ ማስተላለፍ በመከልከሉ ነው[19]። በዚህ ክልከላ ምክንያትም የመሬቱ ባለይዞታ ያለው መብት ከአንድ የመሬት ተከራይ ያላለፈና በግል እያረሱ የመጠቀም መብት ብቻ ነው።

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[16] የገጠርን መሬት የሕዝብ ሀብት ለማድረግ የወጣ አዋጅ ቁጥር 31/1967 መግቢያ

17.በቁጥር 16 እንደተጠቀሰው አንቀጽ 3(1)

[18] ባለይዞታው ሲሞት/ስትሞት ግን የትዳር ጓደኛው ወይም አካለመጠን ያላደረሰ ልጅ እነዚህ ከሌሉ ደግሞ አካለመጠን ያደረሰ ልጅ ተተክቶ በመሬቱ የመጠቀም መብት እንደሚኖረው በአንቀጽ 5 ተደንግጓል።

19.ከላይ በቁጥር 16 እንደተጠቀሰው አንቀጽ 5

የመሬት ሥሪቱ የህዝብ ይዞታ እንደሆነ በመታወጁ መሬት ሊሸጥ የማይችል ሀብት መደረጉ ከራሱ ከሥሪቱ ባህሪ የሚመነጭ መሆኑ ግልጽ ነው። ሆኖም ማከራየትንም ጨምሮ በሌላ ሁኔታ የመሬት ይዞታ መብትን መገልገልንም መከልከሉ ግን ሥሪቱ ለባለይዞታዎች የሰጠውን መብት ጠባብነት የሚያመለክት ነው። አዋጁ ከዚህም አልፎ በእርጅና ወይም በህመም ወይም አካለመጠን ባለማድረስ ወይም ለሴቶች ካልሆነ በስተቀር በይዞታ መሬት ላይ ሌላ ሰው ቀጥሮ ማሳረስም መከልከሉን ስንመለከት በሕግ የተሰጠውን መሬት የማግኘት እኩል መብት በተግባር ለመጠቀም ያለውን የመብት ጠባብነትና አስቸጋሪነት እንረዳለን።

በ1980 የወጣው የኢሕድሪ ሕገ መንግሥትም የገጠር መሬት ሥሪትን በተመለከተ ቀደም ብሎ ከታወጀው ሥሪት የተለየ ምንም ያስከተለው ለውጥ አልነበረም።ስለዚህም አዲሱ የገጠር መሬት ሥሪት በእንድ በኩል የተወሳሰበና ለተወሰኑ ዜጐች መብት በመስጠት ለአብዛኛው የህብረተሰብ ክፍል ግን መብት የሚነፍገውን ነባሩን የመሬት ሥሪት በማስወገዱ መልካም ገጽታ ያለው ቢሆንም በሌላ በኩል ግን ለባለይዞታዎች ከግል ባለቤትነት መብት በመለስ እንኳ መጠበቅ የሚገባውን መብት እጅግ በማጥበቡና የመሬት አስተዳደሩንም በመንግሥት አካላትና የፖለቲካ ካድሬዎች ሥር በማድረጉ ከንብረት መብት አንጻር ይህ ነው የሚባል ለአርሶ አደሮች ከድሮው የመሬት ስሪት የተሻለ የመሬት የተጠቃሚነት ለውጥ ሳያስከትል ቀርቷል። ከዚህም በተጨማሪ የመሬት አስተዳደሩ ተቋም የህዝብ ተሳትፎው የይስሙላ የሆነበትና ለፖለቲካው ባለ ታማኝነት ላይ የተመሠረተ በመሆኑ የመሬት ክፍፍሉን ፍትህ የጐደለው እንዲሆን ከማድረጉም በላይ በተለይ የርስት ይዞታ በነበረው የአገሪቱ ክፍል የመሬቱን ይዞታ የበለጠ እንዲበጣጠስ አደረገው። ይህም በመሆኑ በመጀመሪያው ለሥርዓቱ ለውጥ ምክንያት ከሆኑት መሠረታዊ ችግሮች አንዱ የነበረው የመሬት ሥሪት ችግር እንደገና የህብረተሰቡ አንድ የብሶት ምንጭ በመሆን በደርግ መንግሥትና በአርሶ አደሩ መካከል የነበረውን ግንኙነት በከፍተኛ ደረጃ እያሻከረው መጥቶ በርካታ አርሶ አደር የኢሕአዴግን ትግል በመደገፍ ለደርግ መውደቅ የራሱን አስተዋጽኦ እንዲያበረክት ምክንያት ሆነ።

3. የ1983 የመንግሥት ለውጥና የገጠር መሬት ሥሪት ሁኔታ

የደርግን መንግሥት በ1983 ከሥልጣን ያስወገደው ኢሕአዴግ እንደ መታገያ ያነሳቸው ከነበሩ ጥያቄዎች አንዱ የደርግ መንግሥት የገጠር መሬት ጥያቄን በአግባቡ አልመለሰውም የሚለው ነበር። በዚህና በተለይም በአርሶ አደሩ በነበረው የመሬት አስተዳደር መከፋት ምክንያት ከመሬት ሥሪት እስከ መሠረታዊ የመሬት አስተዳደር ለውጥ ከአዲሱ መንግሥት የሚጠበቅ ተግባር ነበር። ይሁን እንጅ ቀደም ብሎ የነበረውን የሶሻሊስት ሥርዓቱ ውጤት የሆነውን አጠቃላይ የኢኮኖሚ ግንኙነት በተመለከተ ብዙም ሳይቆይ በአዲሱ መንግስት በግል ባለቤትነት ላይ ወደ ተመሠረተው የገበያ ሥርዓት ለውጥ የተደረገ ቢሆንም በገጠር መሬት ይዞታው ላይ ግን ዝምታው አጭር ለማይባል ጊዜ ሰፍኖ ቆየ። ሐምሌ 15/1983 የወጣው የሽግግሩ መንግሥት መመሪያ ቻርተርም አንዳንድ መሠረታዊ የፖለቲካ አቅጣጫዎችን ከመጠቆሙ[20] በስተቀር ስለመሬት ሥሪቱ ምንም ያመለከተው ነገር

[20] የሽግግሩ መንግሥት ቻርተር ቁጥር 1/1983 አንቀጽ 10

አልነበረም። ስለዚህም የሽግግሩ መንግሥት ቻርተር በአንቀጽ 11 በደነገገው መሠረት ቻርተሩ በሕገ መንግሥት እስኪተካ ድረስ የገጠር መሬት ሥሪቱ በነበረበት በመቀጠሉና የመሬት አስተዳደሩም የእለት ከእለት ችግሮችን በማቃለል ላይ ተወስኖ በመቆየቱ ስለመሬት የሥሪትም ሆነ የአስተዳደር ለውጥ ከሚወጣው አዲስ ሕገ መንግሥት ድንጋጌ ሊጠበቅ ቆዬ።

3.1 የኢፌዴሪ ሕገ መንግሥትና የገጠር መሬት መብት

የመሬት ይዞታ ጥያቄ በአጠቃላይና የገጠር መሬት ይዞታ በተለይ ቀደም ብሎ በተደጋጋሚ ሲነሳና ሲያከራክር እንደነበረው ሁሉ የኢፌዴሪ ሕገ መንግሥት ከመውጣቱ በፊትም በየስብሰባዎችም ሆነ በየግል ውይይቶች የመነጋገሪያ ነጥብ ሆኖ ነበር። የመሬት ሥሪቱ ምን መሆን አለበት በሚለው ነጥብ ላይም ያሳምናሉ የተባሉ ምክንያቶች እየተሰጡ የተለያዩ አቋሞችም ሲገለጹ የቆዩ ቢሆንም ሕገ መንግሥቱ ቀደም ብሎ በነበረው መንግሥት ከነበረው በተለየ ሁኔታ የአገሪቱ የንብረት ባለቤትነት መብት ሥርዓት በግል ባለቤትነት ላይ የተመሠረተ መሆኑን በአጠቃላይ ደንግጎ የገጠር መሬት ይዞታ መብትን በማስፋትና መብቱን ለማስጠበቅ መሠረት የሚሆኑ ድንጋጌዎች በማካተት የመሬት ሥሪቱን በተመለከተ ግን መሠረታዊ ለውጥ ሳያደርግ ወጣ[21]። ስለዚህም የሥሪቱን አይነትና የግል ባለቤትነት መብትን በተመለከተ ጥያቄው አሁንም ቀደም ብሎ ከነበረው ሥሪት መሠረታዊ ለውጥ በታየበት መልክ በዚህ ሕገ መንግሥት የተደነገገበትን ሁኔታ መረዳት አይቻልም።

በኢፌዴሪ ሕገ መንግሥት የተደነገገው የገጠር መሬትን "የመንግሥትና የሕዝብ" ያደረገው ሥሪት ለኢትዮጵያ ሁኔታ ከግል ባለቤትነት ይልቅ ምን ያህል ትክክለኛ ሥሪት ነው የሚለውን ጉዳይ መተንተን የዚህ ጽሑፍ ዓላማ ባለመሆኑ ከዚህ በመቀጠል ሕጉ የገጠር መሬትን በተመለከተ ለባለ ይዞታዎች የሚሰጠው መብት ምንድን ነው የሚለውን ለማብራራት ይሞክራል።

የሕገ መንግሥቱ አንቀጽ 40 ንዑስ አንቀጽ 3 የገጠር መሬትን በተመለከተ የሚደነግገው ሁለት መሠረታዊ ነጥቦችን ነው። እነዚህም አንደኛው የመሬቱ ባለቤትነት የመንግሥትና የህዝብ ነው የሚለው ሲሆን ሁለተኛው ደግሞ መሬት ሊሸጥ ወይም ሊለወጥ አይችልም የሚለው ነው። ሁለቱም ነጥቦች ለገጠር መሬት ተጠቃሚዎች መብት የሚሰጡ ሳይሆኑ በተጠቃሚዎች መብት ላይ የተጣሉ ገደቦች ናቸው። በአጠቃላይም ሕገ መንግሥቱ የመረጠው በመሬት ላይ የተፈቀዱ መብቶችን በሙሉ ዘርዝሮ በመደንገግ ፋንታ አንድ የንብረት ባለመብት ሊኖሩት ከሚችሉ መብቶች መሬትን በተመለከተ የተከለከሉትን በዝርዝር ማስቀመጥን ነው። ይህም ማለት አንደኛ ማንም ሰው የገጠር መሬት የግል ባለቤት ሊሆን አይችልም ማለት ነው። ሁለተኛም ማንም ሰው የገጠር መሬትን በሽያጭ ወይም በገበያ ውስጥ አስገብቶ በሌላ ንብረት እንደ ሸቀጥ ሊለዋወጥበት አይችልም ማለት ነው።

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[21] የሕገ መንግሥቱ 40(1) ማንኛውም ኢትዮጵያዊ የግል ንብረት ባለቤት የመሆን መብት እንዳለው ሲደነግግ የዚሁ አንቀጽ ንዑስ አንቀጽ 3 ግን ከንዑስ አንቀጽ 1 በተለይ ሁኔታ የገጠርም የሆነ የከተማ መሬት ባለቤትነት መብት የመንግሥትና የሕዝብ ብቻ መሆኑን ደንግጓል።

የመሬት ባለቤትነት መብት የመንግሥትና የሕዝብ ነው ተብሎ መደንገጉ ራሱ መሬትን ከገበያ ሽቀጥነት ስለሚያወጣው የመሸጥም ሆነ በሌላ ንብረት የመለወጥ መብትን የሚያሳጣ በመሆኑ የተለየ አጽንኦት ለመስጠት ካልሆነ በስተቀር በድንጋጌው ውስጥ መኖሩ ካለመኖሩ የሚለየው ነገር ያለ አይመስለኝም::

ስለዚህም ይህን ድንጋጌ ብቻውን በማየት የምንገነዘበው በኢትዮጵያ የገጠር መሬት ሥሪት መሠረት አንድ የመሬት ተጠቃሚ አንድ የመሬት የግል ባለቤት ከሚኖረው መብት በተለየ የተከለከለው መሸጥና መለወጥን ብቻ ነው የሚለውን ነው:: ይህ ማለት ደግሞ አንድ የግል የመሬት ባለቤት በመሬቱ ላይ ካለው በቀጥታ የመጠቀም ፣ ከመሬቱ የሚገኘውን ፍሬ በሌላ ሁኔታ የመሰብሰብና በሽያጭም ይሁን በሌላ መንገድ ንብረቱን የማስተላለፍ መብት ውስጥ ከመሸጥ ወይም በሌላ ንብረት ከመለዋወጥ በስተቀር ሌሎች መብቶች የገጠር መሬት ባለይዞታውም አሉት ማለት ነው:: በተለይ የኢትዮጵያ አርሶ አደሮች እንዲሁም አርብቶ አደሮች መሬት በነፃ የማግኘትና ከመሬታቸው ያለመነቀል መብታቸው በሕግ የተጠበቀ መሆኑን የሚደነግጉትን የሕገ መንግሥቱ አንቀጽ 40 ንዑስ አንቀጽ 4 እና 5 ስንመለከት ሕገ መንግሥቱ የመሬት ተጠቃሚዎችን ሊከለክል የፈለገው መሬትን እንደ ሸቀጥ በገበያ አስገብቶ ከአንድ ተጠቃሚ ወደሌላ ተጠቃሚ ማስተላለፍን ብቻ መሆኑን በበለጠ እንረዳለን::

የገጠር መሬት ሥሪቱ የመሬት ባለቤትነቱ የመንግሥትና የሕዝብ መሆኑና አርሶ አደሮች ከሚያገኙት መሬት ያለመነቀል መብት እንዳላቸው መደንገጉ የሚያስገነዝበው በመሬት ላይ የሚኖረው መብት የይዞታ መብት መሆኑን ነው:: የመሬት የይዞታ መብት ደግሞ በይዞታ መብቱ ላይ ተመሥርቶ ከሚገኘው የመጠቀም መብት የተለየ ነው:: ይህን ስንልም የባለቤትነት መብት፣ የይዞታ መብትና የመጠቀም መብት የተለያዩና ከመጀመሪያው ወደ መጨረሻው ቅደም ተከተል እየጠበቡ የሚመጡ መብቶች ናቸው ማለታችን ነው:: ምክንያቱም የባለቤትነት መብት መሸጥን ጨምሮ ማንኛውንም በንብረት ላይ ሊኖር የሚችል መብት ሁሉ የሚያካትት ከመብቶች ሁሉ የሰፋ መብት ሲሆን የይዞታ መብት ደግሞ በኢፌዴሪ ሕገ መንግሥት መሠረት የገጠር መሬትን በተመለከተ አንድ የመሬት ባለቤት ሊኖረው ከሚችለው መብት ላይ በመሸጥ ወይም በመለዋወጥ መሬትን ለሌላ ማስተላለፍን ብቻ ለይቶ በመከልከል ሌሎችን መብቶች ግን የጠበቀ መብት ነው:: የመጠቀም መብት ደግሞ አንድ የገጠር መሬት የይዞታ መብት ያለው ሰው ሌሎች መብቶችን ሳይጨምር በመሬቱ ለመጠቀም የሚኖረው መብት ነው:: ስለዚህም የገጠር መሬት ባለይዞታ የሆነ ሰው የይዞታ መብቱን እንደጠበቀ የመጠቀም መብቱን ብቻ ለይቶ ለሌላ ሰው ሊያስተላልፍ ይችላል ማለት ነው:: የዚህ ዓይነት የመጠቀም መብት ማስተላለፍ ደግሞ መብቱ ለተላለፈለት ሰው የሚሰጠው መብት በመሬቱ የመገልገል መብት ብቻ ነው:: በዚህም ምክንያት የመጠቀም መብትን በኪራይ መስጠት ወይም የይዞታ መብትን በማያስተላለፍና የመጠቀም መብት ብቻ በሚሰጥ ሁኔታ በዋስትና ወይም በመያዣ መስጠት በሕጉ የተከለከለ አይደለም ማለት ነው::

የገጠር መሬት ሥሪቱን በተመለከተ ከላይ ከጠቀስነው አንቀጽ ድንጋጌዎች ጋር በተያያዘ ሊነሳ የሚገባው ሌላው ጥያቄ የይዞታ መብትን ከሽያጭ ወይም በሌላ ንብረት ከመለዋወጥ ውጭ በሆኑ ሌሎች ሁኔታዎች በቋመና ወይም በሞት ጊዜ ለሌላ ሰው ማስተላለፍ ይቻላል

ወይ የሚለው ነው። በእኔ እምነት ሕገ መንግሥቱ በገጠር መሬት ላይ መከልከል የፈለገውን መብት ለይቶ በመሸጥም ሆነ በመለዋወጥ ማስተላለፍ አይቻልም ብሎ በግልጽ ማስቀመጡ የይዞታ መብትን በሌላ ሁኔታ ማስተላለፍን ፈጽሞ መከልከል አለመፈለጉን የሚያሳይ ነው። የመሬት ይዞታ መብት ሊተላለፍ የሚችለው ደግሞ በሽያጭና በልውውጥ ብቻ ሳይሆን በስጦታም ሆነ በውርስ ሊሆን ይችላል። ስለዚህም የማስፈፀሚያ የበታች ሕጐች ይህን ጥያቄ እንዴት እንደመለሱት ወደፊት የምናየው ቢሆንም ከተመለከትናቸው የሕገ መንግሥቱ ድንጋጌዎች አንፃር ግን መብቱ የተከለከለ እንዳልሆነ እንገነዘባለን። ሕገ መንግሥቱ ከላይ ለማብራራት የተሞከረውን የገጠር መሬት ይዞታና የመጠቀም መብት የሰጠ ቢሆንም መሬትን የማስተዳደሩ ሥልጣን ግን ሙሉ በሙሉ ለመንግሥት በመሰጠቱ[22] አርሶ አደሩ ያለውን መሬት የማግኘት መብት በተመለከተ ቢያንስ ከመርህ አንፃር በመንግሥት ፈቃደኝነት ላይ ጥገኛ ከመሆን አላወጣውም።

የፌዴራሉ ሕገ መንግሥት መሬትን በተመለከተ ስለሥሪቱ፣ ስለመብቱ ወሰንና ስለአስተዳደሩ በአጠቃላይ የደነገገውን ተፈፃሚ ለማድረግም በፌዴራል ደረጃ አሁን ለታሪክ ጠቀሜታው ብቻ የሚጠቀሰው አዋጅ ቁጥር 89/1989 እና እሱን በመሻር ታውጆ አሁን በሥራ ላይ ያለው አዋጅ ቁጥር 456/1997 ወጥተዋል። አዋጅ ቁጥር 89/1989 የአርሶ አደሮችን የገጠር መሬት መብት በተመለከተ ብዙም ዝርዝር ድንጋጌ ያላካተተና ክልሎች እንዲያወጡ ለሚጠበቀው ዝርዝር ሕግም እንደ መመሪያ ሆኖ ለማገልገል ግልጽነት የሚጐድለው ሕግ ነበር። ሕጉ የገጠር መሬትን መጠቀምና ማከራየት እንደሚቻል አመልካች ድንጋጌዎች ቢይዝም[23] ውርስን በተመለከተ ግን የመውረስ መብቱን ከባለይዞታው ጋር አብሮ ነዋሪ ለሆነ ቤተሰብ ብቻ ወስኖ በመሰጠቱ[24] ከሕገ መንግሥቱ ድንጋጌዎች አንፃር ሲታይ የባለ ይዞታው መብት መጥበብ የታየበት ሕግ ነበር። የዚህን ሕግ እነዚህና ሌሎች ችግሮች ለመፍታትም ይመስለኛል አዋጅ ቁጥር 456/1997 የወጣው። የገጠር መሬት መብቱ ያለውን አፈፃፀም ከዚህ በታች ለመተንተን የምንሞክረውም ከዚህ አዋጅ ድንጋጌዎች ጋር በማገናዘብ ይሆናል።

3.2 የገጠር መሬት መብት አተገባበር በአማራ ብሔራዊ ክልል

የገጠር መሬት መብት አተገባበርን በውል ለመረዳት በመጀመሪያ መመልከት ያለብን ለአተገባበሩ መሠረት የሚሆኑ ማዕቀፍና ዝርዝር ሕጐች መኖራቸውን ነው። ሁለተኛው ትኩረት የሚሻ ጉዳይ ደግሞ ያሉት ሕጐች የመሬት መብትን መጠን ምን ያህል በአግባቡ አስቀምጠውታል የሚለው ነው። በሦስተኛ ደረጃ መታየት ያለበት ጉዳይ ደግሞ አርሶ አደሩ ያለው ፍትሕ የማግኘት መብትና የፍ/ቤቶች ተደራሽነት ናቸው።

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22 . የሕገ መንግሥቱ አንቀጽ 52(2) (መ) የክልል መንግሥታት የፌዴራሉ መንግሥት በሚያወጣው ሕግ መሠረት መሬትን እንደሚያስተዳድሩ ደንግጓል።

23 አንቀጽ 2(3)

24. አንቀጽ 2(3) (5)

3.2.1. ለአተገባበሩ ያለው የሕግ መሠረት፣

የፌዴራሉ ሕገ መንግሥት አንቀጽ 52(2) (መ) ክልሎች መሬትን የሚያስተዳድሩት የፌዴራሉን የመሬት ሕግ መሠረት አድርገው መሆን እንዳለበት በደነገገው መሠረት አዋጅ ቁጥር 456/1997 ለገጠር መሬት መብት አተገባበር ለክልሎች እንደ መመሪያ የሚያገለግል ሕግ ነው። የአማራ ብሔራዊ ክልል የገጠር መሬት ሕጎችም ይህንኑ አዋጅ መሠረት እንዲያደርጉ ይጠብቃል። አዋጅ ቁጥር 456/1997 አንድ የመሬት ባለይዞታ ያሉትን መብቶች በበቂ ሁኔታ ባይዘረዘርም መጠቀም፣ ማከራየትና ማውረስ እንደሚችል ግን በጥቅሉ ይጠቁማል[25]።

የመሬት ይዞታ መብት ቀጥታ ውጤቱ መጠቀም በመሆኑ ሕጉም ባለይዞታው በተለያየ ሁኔታ መሬቱን ሊጠቀምበት እንደሚችል በበቂ ደንግጓል[26]። የማከራየት መብትን በተመለከተ ግን እንደሚቻል ይደነግግና የሚቻለው ግን "ባለይዞታውን በማያፈናቅል ሁኔታ ከሆነ ነው`` የሚል አደናጋሪ ሐረግ በመጨመር ባለይዞታው መወሰን የሚገባውን ውሳኔ ወስኖ መብቱን ይገድበዋል። ማውረስን በተመለከተ ግን የቤተሰብ አባልን ጨምሮ በሕግ የመውረስ መብት ለተሰጠው ሰው ማውረስ እንደሚቻል በመደንገግ ለመውረስ መብት የሚኖራቸውን ሰዎች ግን ክልሎች በሕጋቸው እንዲወስኑ በሚጠቁም ሁኔታ በዝምታ ያልፈዋል።

በየክልሎች ሕጎች በዝርዝር ሲደነገጉ ሊጠቡም ሆነ ሊሰፉ የሚችሉትም እነዚሁ መብቶች ናቸው። በዚህ አዋጅ ከመሬት ባለይዞታዎች መብት ጋር በተያያዘ ያልተደነገገው የመጠቀም መብትን በዋስትና የማስያዝ መብት ነው። የሚደንቀው ግን የገጠር መሬት በሊዝ የተከራየ ባለሀብት የመጠቀም መብቱን በዋስትና የማስያዝ መብት እንዳለው በዚሁ አዋጅ አንቀጽ 8(4) የተደነገገ መሆኑ ነው። የኪራይ መብት ከይዞታ መብት ያነሰ በመሆኑ ሕጉ ይህን መብት ከተከራይ የተሻለ መብት ላላቸው የመሬት ባለይዞታ አርሶ አደሮች ሆን ብሎ ለመከልከል ፈልጎ ነው ያልደነገገው ለማለት አስቸጋሪ ይሆናል። ከዚህም በተጨማሪ መሬት ማግኘት የመሬት መብትን በዋስትና በማስያዝ በሚገኝ የገንዘብ ብድርና በቴክኒካዊ ድጋፍ ካልታገዘ ብቻውን የአርሶ አደሮችን ኑሮ ሊያሻሽል ስለማይችል የመብቱ መከበር ጠቀሜታው ከፍተኛ ነው[27]። ይሁን እንጂ መሬት የመጠቀም መብትን በመያዣ ወይም በዋስትና የማስያዝ መብት መከበር ግን ክልሎች የዚህን ሕግ ድንጋጌዎች ትርጉም በሚረዱበት ሁኔታ ላይ የተመሠረተ ይሆናል።

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[25] . አንቀጽ 2(4)፣ 5(1)(ለ)፣ 5(2)፣ 8(1)

[26] .አንቀጽ 5(1)(ለ)፣ 10(1)

27.Kenneth H. Parsons, cited at note 2, P.66

3.3. የአማራ ብሔራዊ ክልል ሕጐችና የገጠር መሬት መብት አተገባበር

3.3.1. የመብቱ ይዘትና አተገባበር ያለፈው ገጽታ አጭር ዳሰሳ

ቀደም ብሎ በአብዛኛው በርስት ስሪት ይተዳደር የነበረው የአማራ ብሔራዊ ክልል የገጠር መሬት እጅግ የተበጣጠሱ ማሳዎች የሚገኙበትና አካባቢውም እጅግ የተራቆተ አካባቢ በመሆኑ አግባብ የሆነ የገጠር የመሬት አስተዳደር መኖርን የግድ ይላል። የቆዳ ስፋቱ 17,700 ኪሎ ሜትር ስኩየር በሆነው በዚህ ክልል ነዋሪ የሆኑት 3.2 ሚሊዮን ገደማ የሚሆኑ አርሶ አደሮች በይዞታ ያላቸው የማሳ ብዛት 16 ሚሊዮን መሆኑን ስንገነዘብ[28] የመሬት ይዞታው ምን ያህል የተበጣጠሰና አንድ አርሶ አደር የሚኖረው አማካይ የማሳ ብዛትም መጠናቸው ከአውድማ ስፋት የማይበልጥ አምስት ቁርጥራጭ ማሳዎች እንደሆነ እንረዳለን። ስለዚህም በክልሉ የሚኖረው የመሬት አስተዳደርና አጠቃቀም ሕግ የአርሶ አደሮችን መሬት የማግኘት እኩል መብት፣ ከመሬት ይዞታ ያለመነቀል መብት፣ በይዞታ የመጠቀምና የማስተላለፍ መብት በተሟላ ሁኔታ የሚያስጠብቅ መሆኑ በፌዴራሉ ሕገ መንግስት በመሸጥ ወይም በመለዋወጥ ከማስተላለፍ በመለስ የተጠበቀውን መብት ለማስከበር ብቻ ሳይሆን መሬቱን የበለጠ ከመበጣጠስና ከመራቆት ለመከላከልም አስፈላጊነቱ ከፍተኛ ነው።

ይሁን እንጂ የፌዴራሉን ሕገ መንግሥት ተከትሎ የመጀመሪያውን የፌዴራሉን የመሬት አስተዳደር ሕግ መውጣት ግን ቀድሞ ለመጀመሪያ ጊዜ የወጣው የክልሉ የገጠር መሬት አስተዳደር አዋጅ ቁጥር 16/1989 በዋናነት ትኩረት የሰጠው የመሬት ሽግሽግ እንደገና ማካሄድን ነው። በዚህም ምክንያት በክልሉ በተለይ ኢሕአዴግ በ1983ዓ.ም. በተቆጣጠራቸው አካባቢዎች ብቻ የመሬት ክፍፍሉ እንዲካሄድ ተደረገ[29]። የመሬት ክፍፍሉ እንዲካሄድ ያስፈለገውም የገጠሩ መሬት በአብዛኛው በቢሮክራቶችና በደርግ የገበሬ ማህበር ተመራጮች ተይዟል በሚል ምክንያት ስለ ነበር[30] የመሬት ክፍፍሉ በአብዛኛው ቢሮክራት፣ ቅሪት ፊውዳል ተብለው የተፈረጁ አርሶ አደሮችን ይዞታ አራት ጥማድ ብቻ በመተው

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[28] ከአቶ ገበየሁ በላይ (የክልሉ የገጠር መሬት አስተዳደር ኤክስፐርት ጋር የተደረገ ቃለመጠይቅ)

29. አንቀጽ 3 ንዑስ አንቀጽ 2 እና 3 ከ1983 ዓ.ም. በፊት ከደርግ አገዛዝ ነፃ የወጡ የክልሉ አካባቢዎች የመሬት ክፍፍሉ ቀደም ብሎ የተከናወነ በመሆኑ የአዋጁ ድንጋጌዎች ተፈፃሚ የሚሆኑት በ1983 ከደርግ አገዛዝ ነፃ በወጡት የክልሉ አካባቢዎች ነው በማለት ይደነግጋሉ።

[30]የአዋጁ መግቢያ .... የገጠር መሬት በጥቂት የሥርዓቱ አቀንቃኝ በነበሩ ቢሮክራትና የገበሬ ማህበር ተመራጮች በመያዙ ምክንያት ሰፊ የይዞታ አለመመጣጠን ስለሚታዩ የመሬት ሽግሽግ ማካሄድ እንዳስፈለገ ይደነግጋል።

31.ሞላ መንግሥቱ፡ የንብረት መብት በኢፌዲሪ ሕገመንግሥት 1992 (ያልታተመ) ገጽ 22 የአዋጁ ማስፈፀሚያ ተደርጐ ሲሠራበት የነበረው የሽግሽግ መመሪያ ቢሮክራትና ቅሪት ፊውዳሎች ተብለው ለተፈረጁ ገበሬዎች የሚሰጣቸውን ከፍተኛ የመሬት መጠን ከሌሎች ገበሬዎች የሚሰጣቸውን ከፍተኛ የመሬት መጠን ከሌሎች ገበሬዎች ለይቶ በአንድ ሄክታር በመወሰኑ ክፍፍሉ ሌላ ኢፍትሐዊነትን አስከትሏል በማለት ተከራክሯል።

ሌላውን እየቀነሱ በማከፋፈል ላይ ያተኮረ ስልነበር ከፍተኛ የፍትህ ጉድለትና ፖለቲካዊ ገጽታ የታየበት የመሬት ክፍፍል ሆኖ አለፈ[31]።

አዋጁ ከዚህ ውጪ የባለይዞታዎችን መብት ማስከበርን በተመለከተ የደነገገው የመሬት ድልድሉ ከተጠናቀቀ በኋላ የገጠር ባለይዞታነት ማረጋገጫ ምስክር ወረቀት የሚሰጥ መሆኑን ብቻ ነበር። በዚህም ምክንያት አዋጁ የገጠር መሬት ይዞታ መብትን በዝርዝር በመደንገግም ሆነ በማስጠበቅ ያልተሟላ ከመሆኑም በላይ በሕጉ የተደነገገው የይዞታ ማረጋገጫ ምስክር ወረቀትም በወጉ ተግባራዊ ሳይሆን ያለፈውን ኢፍትሐዊ የመሬት ይዞታ አስተካክላለሁ በሚል ሌላ የሽግሽግ ኢፍትሐዊነት ተፈጽሞበት በአዋጅ ቁጥር 46/1992 የተተካ አዋጅ ነበር።

አዋጅ ቁጥር 46/1992 የገጠር መሬት የማግኘት መብትን፣ በይዞታ የመጠቀም መብትን፣ ለይዞታ መብት መጠበቅ ዋስትና መስጠትን በተመለከተ በመደንገግ የይዞታ መብት ያካተታቸውን መብቶች በአጠቃላይ በመደንገጉ ካለፈው ሕግ የተሻለ ሆኖ ቢታይም ከፍተኛ ውስንነቶች የነበሩት ሕግ ነበር። ምክንያቱም አንደኛ መሬት የማግኘት መብት ተግባራዊ የሚሆንበት አንዱ መንገድ የመውረስ መብት ሲሆን ይህን መብት ግን ከባለይዞታው ጋር አብረው ለሚኖሩ ለቤተሰብ አባላትና የመሬት ባለይዞታውን መሬቱን እያረሰ ለጦረው ሰው ብቻ ሰጥቷል። ሁለተኛም በይዞታ የመጠቀም መብት ተግባራዊ የሚሆንበት አንዱ መንገድ የማከራየት መብት በሕጉ ቢደነገግም የኪራይ ዘመኑንና ሌሎች ዝርዝር ስርዓቶችን የሚደነግግ ደንብ ባለመውጣቱ መብቱን በተሟላ ሁኔታ ተግባራዊ ማድረግ የሚቻልበት ሁኔታ አልነበረም። ከዚህም በተጨማሪ ሕጉ የመጠቀም መብትን በዋስትና ስለማስያዝ ምንም ነገር ባለመደንገጉ የሰጠው መብት ውሱን እንዲሆን አድርጐታል። በሦስተኛ ደረጃም ሕጉ የይዞታ ዋስትና መጠበቅን በአንቀጽ 6(3) እና አንቀጽ 8 የደነገገ ቢሆንም የመሬት ሽግሽግ አስፈላጊ ሆኖ በተገኘ ጊዜ ሁሉ ሊካሄድ እንደሚችል በአንቀጽ 10 በመደንገጉ በሕጉ ተጠብቋል የተባለውን የመሬት ይዞታ ዋስትና መልሶ ስጋት ላይ ጥሎታል። ይህ ደግሞ ለመሬት ተገቢው እንክብካቤና ጥበቃ እንዳይደረግ ምክንያት በመሆኑ የመሬቱን የበለጠ መጐሳቆል ከማስከተሉም በላይ በመሬት ላይ አስፈላጊውን ወጭ አውጥቶ በማልማት የምርት እድገት እንዲመጣ ለማድረግ ጉጉት እንዳይኖር አድርጓል። በመጨረሻም የመሬት መብት መሠረቱ ፍትህ የማግኘት መብት ሆኖ ሳለ ከላይ በተጠቀሰው አዋጅ ቁጥር 16/1989 አንቀጽ 22(1)(ሀ-ሐ) የተሰጠው መሬትን የሚመለከት አቤቱታ ለፍ/ቤት የማቅረብ መብት በአዋጅ ቁጥር 20/1989 በአንቀጽ 14(2) ለማህበራዊ ፍ/ቤት በስልጣንነት በመሰጠቱና የይግባኝ መብቱም በወረዳ ፍ/ቤት የመጨረሻ ውሳኔ ሰጭነት በአንቀጽ 30(1) በመወሰኑ የባለይዞታው በመደበኛ ፍ/ቤት ፍትህ የማግኘት መብት እጅግ የጠበበ እንዲሆን አድርጐት ነበር።

3.3.2. የመብቱ ይዘትና አተገባበር አሁን ያለበት ሁኔታ

የአማራ ብሔራዊ ክልል የገጠር መሬት አስተዳደርና አጠቃቀም ፖሊሲ የመሬት ይዞታ መብት መሠረታዊ መገለጫ ከሆኑት መካከል ይዞታን በውርስ የማስተላለፍና የመጠቀም መብትን በሙሉ ወይም በከፊል የማከራየት መብትን ማስከበር ዓላማው መሆኑን

ይደነግጋል። ከይዞታ ያለመነቀል ዋስትናን ለማረጋገጥም በሕዝቡ በራሱ ጥያቄ ካልቀረበ በስተቀር በክልሉ የመሬት ሽግሽግ እንደማይካሄድም ያስረዳል[32]። የዚህ ፖሊሲና የፌዴራሉ አዋጅ ቁጥር 456/1997 ተግባራዊ ማድረጊያ የክልሉ የገጠር መሬት አስተዳደርና አጠቃቀም አዋጅ ቁጥር 133/1998 ደግሞ የክልሉ የመሬት ባለይዞታዎች የፌዴራሉ ሕገ መንግሥት በግልጽ ካስቀመጣቸው ገደቦች በመለስ ሌሎችን አብዛኛዎችን መብቶች ለማካተት ሞክሯል።

ከላይም ለመጥቀስ እንደሞከርነው የገጠር መሬትን በተመለከተ በሕገ መንግሥት በግልጽ የተከለከለው መሸጥና መለወጥ ነው። መሸጥ ወይም መለወጥ ደግሞ የንብረት መብት ከሚገለጽበትና ተግባራዊ ከሚደረግባቸው መንገዶች አንዱ እንጅ ብቸኛው አይደለም። ስለዚህ መብት መከልከል መሠረቱ የመሬት ባለቤትነት መብት ለመሬት ባለይዞታዎች አለመስጠት ቢሆንም በንብረት መብት ላይ የመሸጥ መብትን መገደብ_ደግሞ ከኢትዮጵያ የፍትሐብሔር ሕግ ድንጋጌዎች እንደምንረዳው በግለሰቦች መካከል ከሚደረግ ውልም ሊመነጭ ይችላል[33]። ስለዚህ መሬትን ያለመሸጥ ወይም ያለመለወጥ ሕገ መንግሥታዊ ገደቡ ወይም ከውል የሚመነጨው ንብረትን ያለማስተላለፍ ግዴታ ሌሎችን የንብረት መብቶች ተግባራዊ ከማድረግ ወሰን የሚያበጅ ሆኖ መታየት አይኖርበትም።

3.3.2.1. በውርስ ወይም በስጦታ የማስተላለፍ መብት

ከመሬት ጋር በተያያዘ ባለይዞታው ከመሸጥና ከመለወጥ ውጭ የሚኖሩት መሠረታዊ መብቶች ማውረስ፣ በስጦታ መስጠት፣ የመጠቀም መብቱን ማከራየት፣ የመጠቀም መብቱን በይዞታ ማስያዝ፣ ከይዞታ ከመነቀል የመጠበቅ መብትን የሚያካትቱ ናቸው።

የማውረስ መብት መከበር አንድ የገጠር መሬት ባለይዞታ መሬቱን ለመንከባከብ፣ አስፈላጊ የሆነውን የጉልበትና የገንዘብ ወጭ አውጥቶ መሬቱን ለማልማትና አካባቢን በአግባቡ ለመጠበቅ ምክንያትና ፍላጐት እንዲኖረው ለማድረግ አስፈላጊ ነው። ከዚህም በተጨማሪ የባለይዞታው ተወላጆች ከባለይዞታው ጋር ባሉበት ጊዜም ሆነ ራሳቸውን ከቻሉ በኋላ ወደፊት መሬቱ ለእኔ ይተርፋል በሚል እምነት መሬቱ የሚያስፈልገውን እንክብካቤና ጥበቃ ለማድረግ የሚያስፈልገውን እገዛ እንዲያበረክቱ ሊገፋፋቸው ይችላል። ከዚህ በበለጠ ግን በአማራ ብሔራዊ ክልል በሥጋ ዝምድና ላይ የተመሠረተው የርስት ሥሪት ገንብቶት የነበረውንና የርስት ይዞታ ሲፈርስ አብሮ የመፈራረስ አዝማሚያ ያሳየውን ቤተሰባዊ በዝምድና ላይ የተመሰረተ ግንኙነት መልሶ ለመጠገን ትልቅ መሠረት ይሆናል።

ለአዲሱ ትውልድ ሊሰጥ የሚችል ትርፍ መሬት በሌለበት የክልሉ ሁኔታ፣ ውርስ መሬት ከወላጆች ወይም ሌሎች ቤተሰቦች ለተወላጆች የሚሰጥበት ዋናው መንገድ በመሆኑም

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32 . አንቀጽ 4.1.2.2 - 4.1.3.2.

33 የፍትሐብሔር ሕጉ አንቀጽ1428(1) " የማይንቀሳቀስ ንብረት ሀብትነትን ለሌላ ሰው የሚያስተላልፍ ሰው ንብረቱ የተላለፈለትን ሰው ንብረቱን እንዳይሸጥ፣ እንዳያስተላልፍ ለመከልከል ወይም ንብረቱን ለመሸጥ፣ ለማስተላለፍ ያለውን ሥልጣን ለመቀነስ ይችላል በማለት ይደነግጋል።

የገጠር መሬትን ማውረስ እንደማንኛውም ንብረት በአውራሹ ፈቃድ ላይ ተመስርቶ በሕግ ሊጠበቅ የሚገባው መብት ነው። ይሁን እንጅ ይህን መብት ማስከበርን በተመለከተ በፌዴራሉ ሕገመንግሥት የተደረገ ገደብ ባይኖርም የተለያዩ ክልሎች የገጠር መሬት ሕጎች ያካተቱዋቸው ድንጋጌዎች ግን ልዩነት ይታይባቸዋል። ለምሳሌም የትግራይ ብሔራዊ ክልል የመሬት አስተዳደርና አጠቃቀም አዋጅ አንድ አርሶ አደር መሬቱን በውርስ መሬት ለሌለው ልጁ ወይም የልጅ ልጁ ወይም ወላጁ መስጠት እንደሚችል በመደንገግ የማውረስ መብትን በእነዚህ ወራሾች ብቻ ወስኖታል።

ይኸው አዋጅ ስጦታን በተመለከተ ግን አንድ አርሶ አደር ከቤተሰቡ በስጦታ የገጠር መሬት ማግኘት እንደሚችል ከመደንገግ በስተቀር ዝርዝሩን አላስቀመጠም። ቤተሰብ የሚለው ቃልም በአዋጁ ትርጉም ያልተሰጠው በመሆኑ[34] በፌዴራሉ የመሬት አስተዳደርና አጠቃቀም አዋጅ የተሰጠውን ትርጉም ይይዛል ከተባለ በስጦታ የመስጠት መብት እጅግ የጠበበ ይሆናል። የደቡብ ብሔር፣ ብሔረሰቦችና ሕዝቦች ብሔራዊ ክልል የገጠር መሬት አዋጅ በበኩሉ የመሬት ይዞታ መብትን ማውረስ የሚቻለው ለቤተሰብ አባላት ብቻ እንደሆነ ሲደነግግ የቤተሰብ አባል ማለትም የይዞታ ባለመብቱን መተዳደሪያ ገቢ በመጋራት ከባለይዞታው ጋር በቋሚነት አብሮ የሚኖር ሰው[35] ማለት እንደሆነ ይደነግጋል። ይህ ድንጋጌ ለመሬት ባለ ይዞታዎች በፌዴራሉ ሕገ መንግሥት የተሰጠውን የይዞታ መብትን የማስተላለፍ መብት አጥብቦ የሚያስቀምጥ ድንጋጌ ነው። የኦሮሚያ ብሔራዊ ክልል የገጠር መሬት አስተዳደርና አጠቃቀም አዋጅ ደግሞ ማንኛውም የገጠር መሬት ባለይዞታ በውርስ ሕግ መሠረት የመውረስ መብት ላለው የቤተሰቡ አባል የማውረስ መብት እንዳለው ገልጾ የቤተሰብ አባል የሚለውን ሐረግም ከባለ ይዞታው የተወለዱ ልጆች ወይም ሌሎች መተዳደሪያ ገቢ የሌላቸውና በቋሚነት ከባለይዞታው ጋር የሚኖሩ ሰዎች ማለት ነው[36] በማለት ይተረጉመዋል። በዚህ ሕግ መሠረትም የማውረስ መብት ለልጆችና በቋሚነት አብረው ለሚኖሩ ያውም ሌላ መተዳደሪያ ለሌላቸው ሰዎች ብቻ ተወስኖ ይታያል። ለዚህ የገጠር መሬት ይዞታ መብትን የማውረስ መብት መወሰንና ከአንዱ ክልል ወደ ሌላው ክልል መለያየት መሠረት የሚሆን የበላይ ሕግ ግን አናገኝም።

የአማራ ብሔራዊ ክልል የገጠር መሬት አስተዳደርና አጠቃቀም አዋጅ ደግሞ የገጠር መሬት ይዞታን በስጦታ ወይም በውርስ ማስተላለፍ እንደ ሚቻል በግልጽ ደንግጓል[37]። የይዞታ መብትን በስጦታ መስጠት የሚቻለው ግን ለማንኛውም ሰው ሳይሆን በግብርና ሥራ ለሚተዳደር በቂ መሬት ለሌለው ልጅ ወይም የልጅ ልጅ ወይም የቤተሰብ አባልና ባለይዞታውን መሬቱን እያረሰ ወይም ሌላ ሥራ እየሠራ ከሥጦታው በፊት ቢያንስ ለሦስት ተከታታይ አመታት ለጠረ ማንኛውም ሰው ነው። ይህ አዋጅም ስጦታ ሊሰጣቸው የሚችል ሰዎችን በመዘርዘር ስጦታ የመስጠት መብትን ውሱን አድርጐታል[38]። ባለይዞታው መሬቱን ማውረስ የሚችለውም በኑዛዜ ወይም ያለኑዛዜ እንደሆነም በሕጉ ተደንጓል።

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[34] የትግራይ የገጠር መሬት አስተዳደርና አጠቃቀም አዋጅ ቁጥር 136/2000 አንቀጽ 5(2)፣ 17(1)(2)

[35] አዋጅ ቁጥር 110/1999 አንቀጽ 2(7) እና 8(5)

[36] አዋጅ ቁጥር 130/1999 አንቀጽ 2(17) እና 9(1)

[37] አዋጅ ቁጥር 133/1998 አንቀጽ 15(1)

[38] በቁጥር 37 የተጠቀሰው አንቀጽ 17(1)

የይዞታ መብት በጉዛዜ ማስተላለፍ የሚቻለው በግብርና ሥራ ለሚተዳደር ማንኛውም ሰው ቢሆንም ጉዛዜው ለአካለመጠን ያልደረሰ የሚች ልጅን ወይም ቤተሰብን ከወራሽነት የሚነቅል ሆኖ ከተገኘ ብቻ ግን ጉዛዜው ተቀባይነት እንደማይኖረው ገደብ ሆኖ እናገኘዋለን[39]::

የገጠር መሬት ባለ ይዞታው የመሬት መብቱን በተመለከተ ሳይናዘዝ ከሞተ ደግሞ ለአካለ መጠን ያልደረሱ የሚች ልጆች፣ አካለመጠን ያልደረሱ ሌሎች የቤተሰብ አባላት፣ አካለመጠን ያደረሱ ምንም መሬት የሌላቸው የሚች ልጆች፣ አካለመጠን ያደረሱ ምንም መሬት የሌላቸው ሌሎች የቤተሰብ አባላት፣ መሬት ያላቸው የሚች ልጆች፣ የሚች ወላጆች በዚህ ቅደም ተከተል መሠረት ማውረስ እንደ ሚቻል በአዋጁም ሆነ በደንቡ ተደንግጓል[40]::

የአማራ ብሔራዊ ክልል የመሬት አስተዳደርና አጠቃቀም ሕግ የይዞታ መብትን በስጦታ ወይም በውርስ ማስተላለፍን በተመለከተ በፌዴራሉ ሕጐች የተቀመጠ ገደብ እንደሌለ ከተመለከትነው አንፃር አንዳንድ ገደቦች ቢታዩበትም ከሌሎች ከላይ ከተመለከትናቸው ሕጐች አንፃር ሲታይ ግን በስጦታ የመስጠትም ሆነ የማውረስ መብት በተሻለ ሁኔታ ሰፋ ብሎ የተጠበቀበት ሕግ መሆኑን እንረዳለን::

የማውረስ መብት በሕይወት ዘመን የተፈራ ሀብትን ሁሉ በመጨረሻ ማን እንደሚወስደው የሚወሰንበት በመሆኑ የገጠር መሬት ባለይዞታው በህይወት ዘመን በመሬት ላይ የሚደረግ ጥረት ሁሉ ከህይወት ዘመን ያለፈ የወደፊት የቤተሰብ ዋስትናም አድርጐ ስለሚወስደው መሬትን ለመንከባከብ ትልቅ የሚያጓጓ ምክንያት ይሆንለታል:: ከዚህም በተጨማሪ ከንብረት መብትም አንፃር በበላይ ሕግ የተደረገ ገደብ በሌለበት ሁኔታ መብቱን መገደብ ሕጋዊ ሆኖም አይታይም:: የይዞታ መብትን በስጦታ የመሰጠት መብት ሽያጭ ወይም በሌላ ንብረት መለዋወጥ አይደለምና የሚከለከልበት ወይም የሚገደብበት ምክንያትም አይኖርም:: እንዲያውም የተወሰኑ የቤተሰብ አባላት መሬት ይዘው ሌሎች መሬት ባልያዙበትና በሌላ ሁኔታ መሬት የማግኘት እድል በጠበበበት ሁኔታ በቤተዘመድ መካከል መሬት በስጦታ መተላለፉ ኢኮኖሚያዊና ማህበራዊ ችግርን ለማቃለል ከማገዙም በላይ ቤተሰባዊ ግንኙነትን ስለሚያጠናክር ለበረታታ የሚገባው ተግባር ሆኖ ይታያል::

3.3.2.2 የማከራየት መብት

የገጠር መሬት ባለ ይዞታ የመጠቀም መብቱን በኪራይ ማስተላለፍን በተመለከተ በክልሎች የመሬት አስተዳደርና አጠቃቀም ሕጐች መካከል በአብዛኛው ተመሳሳይነት ቢኖርም መሬት በኪራይ ሊሰጥበት የሚችለውን ከፍተኛ ዘመንና ሊከራይ የሚችለውን መሬት መጠን በተመለከተ ግን ሰፊ ልዩነት አለ:: በመሬት የመጠቀም መብትን የማከራየት መብት በሕግ መጠበቅ የሚገባው የተከራዮችን መብት ለመጠበቅ ተብሎ ሳይሆን የመሬት ባለይዞታዎች ያላቸው የመጠቀም መብት አካል ስለሆነ ነው:: የመሬት መከራየት መሠረቱ የአከራይና የተከራይ ስምምነት ቢሆንም የኪራይ ስምምነቱን ከፍተኛ የኪራይ ዘመን በሕግ መወሰኑ

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[39] በቁጥር 37 የተጠቀሰው አንቀጽ 16 (1) (3)

[40] በቁጥር 37 የተጠቀሰው አንቀጽ 16 (5) እና ደንብ ቁጥር 51/1999 አንቀጽ 11(7)

ከኪራይ ዘለዓለማዊ አለመሆንና ከውልም በጊዜ የተወሰነ መሆን ምክንያት የሚመነጭ ከመሆኑም በላይ ከውል ጋር በተያያዘ የሚያጋጥሙ ችግሮችን ለመፍታትም አስፈላጊ ነው። ስለዚህም የመሬት የኪራይ ከፍተኛ ዘመንን በሕግ መወሰኑ የንብረት መብትን እንደሚያጠብ ተደርጐ ሊወሰድ የሚችል አይደለም። አንድ የመሬት ባለይዞታ መሬቱን የሚያከራየው ደግሞ ለፈለገው ሰው ነው። ማከራየት ሽያጭ ወይም ልውውጥ ባለመሆኑ ደግሞ አንድ ሰው የይዞታ መብቱን እንደጠበቀ መሬቱን በሙሉ ቢያከራይ ከሕጉ ጋር የሚቃረንበት ሁኔታ ስለሌለ በኪራይ የሚሰጠው መሬት መጠን መወሰን ያለበት በአከራዩ በራሱ እንጅ በክልል የመሬት አስተዳደር ሕግ መሆን አይኖርበትም።

በመሬት የመጠቀም መብትን የማከራየት የሕግ መሠረትና ዓላማ ይህ ሆኖ ሳለ በኦሮሚያና በትግራይ ብሔራዊ ክልል የገጠር መሬት አስተዳደርና አጠቃቀም ሕጐች መሠረት ግን ማከራየት የሚቻለው አንድ ሰው ካለው የይዞታ መሬት ከግማሽ ያልበለጠውን ብቻ ነው[41]። የዚህ የሚከራየውን የይዞታ መሬት መጠን በአከራዩ በመወሰን ፋንታ በመሬት አስተዳደር ሕጉ የመወሰን አስፈላጊነት ግን ሕገ መንግሥታዊ ምክንያት የለውም። የደቡብ ብሔር፣ ብሄረሰቦችና ሕዝቦች የመሬት አስተዳደርና አጠቃቀም አዋጅ ደግሞ መሬትን ማከራየት የሚቻለው ባለይዞታውን በማያፈናቅል ሁኔታ መሆን ይኖርበታል[42] በማለት ባለይዞታው ያለውን የማከራየት መብት በተዘዋዋሪ ሁኔታ የይዞታ መብትን በሙሉ ማከራየት እንደ ማይቻል በመደንገግ ገደብ ያስቀምጣል። የዚህ አዋጅ የማስፈጸሚያ ደንብ ከዚህም ባለፈ ሁኔታ ባለይዞታው ከማከራየት ቀንሶ የሚያስቀረው መሬት ቢያንስ የቤተሰቡን አመታዊ ፍጆታ የሚሸፍን ምርት የሚሰጥ መሆን እንደሚኖርበት በመደንገግ[43] ገደቡን የበለጠ ያጠናክረዋል።

ይኸኛው ገደብ ደግሞ ምን ያህል መሬት ለቤተሰቡ ፍጆታ በቂ ምርት ሊሰጥ እንደሚችል ለመወሰን አስቸጋሪ በሆነበትና በተለይ ደግሞ አንዳንድ ባለይዞታዎች ያላቸው የመሬት መጠን ጠቅላላውም ቢሆን እንኳ ለቤተሰቡ አመታዊ ፍጆታ የሚበቃ የምርት መጠን መስጠት የማይችልበት እድል ባለበት ሁኔታ ባለይዞታዎች የሚኖራቸውን መሬት የማከራየት መብት አስቸጋሪ ያደርገዋል። ይህ ገደብ እንዳለ ሆኖ የዚህ ሕግ መልካም ጐን ሌላ የሥራ አማራጭ ያለው ወይም ለተሻለ የሥራ እድል ወደ ሌላ አካባቢ የመሄድ ፍላጐት ያለው የመሬት ባለይዞታ ግን መሬቱን በሙሉ ማከራየት እንደሚችል በልዩ ሁኔታ መደንገጉ ነው[44]። ከላይ ከጠቀስናቸው የክልል ሕጐች እንደተመለከትነው በገጠር መሬት የመጠቀም መብት ላይ የሚከራየውን መሬት መጠን በተመለከተ ገደብ የተደረገው ባለይዞታዎች ከመሬታቸው እንዳይፈናቀሉ ለማድረግ ነው የሚባል ከሆነ አንደኛ ከመሬት መፈናቀል የሚከተለው ይዞታ ሲተላለፍ እንጅ የመጠቀም መብት ለተወሰነ ጊዜ በኪራይ ሲሰጥ አይደለም። ምክንያቱም መፈናቀል ማለት የይዞታ መብትን ማጣት ማለት እንጅ የመጠቀም መብትን ለተወሰነ ጊዜ ማቋረጥ ማለት ባለመሆኑ ነው። ሁለተኛ የደቡብ ብሔሮች፣ ብሔረሰቦችና ሕዝቦች ክልል ሕግ በልዩ ሁኔታ መሬትን በሙሉ ማከራየት እንደሚቻል መደንገጉም ማከራየት ከይዞታ መፈናቀልን እንደማያስከትል መቀበሉን

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41 በቁጥር 36 የተጠቀሰው አንቀጽ 10 እና በቁጥር 34 የተጠቀሰው አንቀጽ 6
42 በቁጥር 35 የተጠቀሰው አንቀጽ 8(1)
43 ደንብ ቁጥር 66/2000 አንቀጽ 8(1) (ለ)
44 በቁጥር 43 የተጠቀሰው አንቀጽ 8(1) (ሐ)

የሚያረጋግጥ ነው። ስለዚህም የገጠር መሬት ይዞታን በሙሉ ማከራየት እንደማይቻል በሕግ በመደንገግ በባለይዞታዎች የማከራየት መብት ላይ ገደብ ማድረጉ በቂ ምክንያት ያለው ሆኖ አይታይም።

የአማራ ብሔራዊ ክልል የመሬት አስተዳደርና አጠቃቀም ሕግ ግን የገጠር መሬት ባለይዞታ የሆነ ማንኛውም ሰው የመጠቀም መብቱን ለማንኛውም ሰው በኪራይ ማስተላለፍ ይችላል[45] በማለት የደነገገ በመሆኑ በኪራይ ሊሰጥ በሚችለው የመሬት መጠን ላይ ገደብ አለማድረጉን እንገነዘባለን። ይህም ማለት በዚህ ሕግ መሠረት አንድ የገጠር መሬት ባለይዞታ ቢፈልግ በከፊል አለዚያም በሙሉ መሬቱን ሊያከራይ ይችላል ማለት ነው። በዚህም ምክንያት ሕጉ ባለይዞታው መሬቱን ሊያከራይ ሲፈልግ ምን ያህል የመሬት መጠን ማከራየት እንዳለበት ራሱ እንዲወስን መብቱን ጠብቆለታል ማለት ነው።

የገጠር መሬት መብትን በተመለከተ በፌዴራሉ ሕገ መንግሥት በባለ ይዞታዎች ላይ የተቀመጠው ክልከላ በመሸጥ ወይም በመለዋወጥ ማስተላለፍ ብቻ ሆኖ ሳለ በባለይዞታው በሚከራየው የመሬት መጠን ላይ የክልሎች ሕጎች ሊለያዩ የቻሉበት መሠረት ምን ሊሆን ይችላል ለሚለው ጥያቄ መልሱ ምን አልባት የፌዴራሉ የመሬት አስተዳደርና አጠቃቀም አዋጅ አንቀጽ 8(1) አንድ አርሶ አደር እሱን በማያፈናቅል መልኩ ከይዞታ መሬቱ ላይ ማከራየት ይችላል በማለት ያሰፈረው ድንጋጌ ሊሆን ይችላል የሚል ነው። እውነትም ``እሱን በማያፈናቅል መልኩ`` የሚለው ሐረግ አንድ የመሬት ባለይዞታ መሬቱን በሙሉ ማከራየት አይችልም የሚል መልእክት ያዘለ ይመስላል። ይሁን እንጅ ቀደም ብሎም ለማስረዳት እንደተሞከረው መሬትን ማከራየትና ከይዞታ መፈናቀል የሚገናኙ ነገሮች አይደሉም። ምክንያቱም አንድ ሰው መሬቱን በሚያከራይበት ጊዜ የሚከራየው የመጠቀም መብቱ ብቻ በመሆኑ የይዞታ መብቱ የሚቀረው ከሱ ጋር እንጅ ለተከራዩ የሚተላለፍ ባለመሆኑ መሬትን በሙሉ በማከራየት ከይዞታ መፈናቀል ሊከተል አይችልም።

የማከራየት መብት ደግሞ መሠረታዊ የንብረት መጠቀም መብት እንጅ አስተዳደራዊ ጉዳይ ባለመሆኑ በፌዴራሉ የመሬት አስተዳደርና አጠቃቀም ሕግ መሬት የማከራየት መብትን በከፊል መሬቱ ላይ ብቻ እንዲወሰን ማድረጉ ከፌዴራሉ ሕገ መንግሥት ጋር የሚጋጭ ይሆናል። ስለዚህም የፍዴራሉ ሕገ መንግሥት አንቀጽ 40(3) በመሬት መብት ላይ ያስቀመጠው ገደብ በማከራየት መብት ላይ የሚኖር ገደብን የሚያካትት ባለመሆኑ አንድ የገጠር መሬት ባለይዞታ መሬቱን በከፊልም ሆነ በሙሉ የማከራየት መብቱ በሕግ እንዲገደብ ለማድረግ የሚያስችል ምክንያት የለም።

ቀደም ብሎም ለመግለጽ እንደተሞከረው የመሬት ኪራይ ከፍተኛ ዘመን በሕግ መደንገጉ በመሬት መጠቀም መብት ላይ እንደ ገደብ የሚታይ ባይሆንም ለገደቡ መነሻ የሚሆኑት ምክንያቶች ግን በመብቱ ላይ ተዘዋዋሪ ተጽእኖ ስለሚኖራቸው ዘርዘር አድርጎ ማየቱ ጠቀሜታ ይኖረዋል። የገጠር መሬት የሚከራይበት ከፍተኛ ዘመን በክልሎች ሕግ እንደሚወሰን በተደነገገው መሠረት በትግራይ፣ በኦሮሚያ በደቡብ ብሔሮች፣ ብሔረሰቦችና ሕዝቦች፣ በአማራ ብሔራዊ ክልሎች እንደ ቅደም ተከተሉ 20 ዓመት፣ 15 ዓመት፣ 10

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[45] በቁጥር 37 የተጠቀሰው አንቀጽ 18(1)

ዓመት፣ 25 ዓመት ነው። ከፍተኛው የኪራይ ዘመን ሊለያይ የቻለበት ምክንያት፣ የመሬት አስተዳደሩ በክልሎች ልዩ ሁኔታ ላይ ተመሥርቶ የሚተገበር ስለሆነ አንድ ዓይነት እንዲሆን አይጠበቅም።

ይሁን እንጅ ይህ ከፍተኛ የመሬት ኪራይ ውል ዘመን ከአማራ ብሔራዊ ክልል በስተቀር በሌሎች ያለው ተፈፃሚነት መሬቱ ለአልሚ ባለሀብት በሚከራይበት ጊዜ ብቻ ሲሆን መሬቱ ልማዳዊ የአስተራረስ ዘዴ ለሚጠቀም አርሶ አደር በሚከራይበት ጊዜ ተፈፃሚ የሚሆነው ከፍተኛ የውል ዘመን ግን ከላይ ከተጠቀሰው እጅግ ያነሰ ነው[46]። የአማራ ብሔራዊ ክልል የመሬት አስተዳደርና አጠቃቀም ሕግ ግን 25 ዓመት ከፍተኛ የመሬት ኪራይ ውል ዘመኑ ለማንኛውም ተከራይ በተመሳሳይ ሁኔታ ተፈፃሚነት እንደሚኖረው ደንግጓል።

የመሬት ኪራይ ውል ከፍተኛ ዘመን በሕጉ መደንገግ የሚኖርበት የውልን ዘለአለማዊ ሊሆን አለመቻል መሠረት በማድረግና ተዋዋዮች በውላቸው የጊዜ ገደብ ባላስቀመጡበት ጊዜ የውሉን ክፍተት ለመሙላት እንጂ በተለይ የመሬት ኪራይን በተመለከተ የተከራዩን ማንነት መሠረት በማድረግ የሚሆንበት ምክንያት የለም። ተከራዩ ማንም ይሁን ማን የገጠር መሬት ኪራይ ዘመን ረጅም መሆንን ይፈልጋል። ምክንያቱም በመሬቱ ላይ ተከራዩ አስፈላጊውን ወጭ አድርጐ በማልማት በቂ ገቢ ለማግኘት ጊዜ የሚጠይቅ በመሆኑ ነው። ይህ ምክንያት ደግሞ ተከራይ ለሆነው አልሚ ባለሀብትም ሆነ ልማዳዊ አስተራረስ ዘዴ ለሚጠቀመው ተከራይ አርሶ አደርም እኩል ተፈፃሚነት አለው። ከዚህም በተጨማሪ ለማንም ተከራይ የዘመኑ ረጅም መሆን ተከራዩ መሬቱን ወደፊትም ረዘም ላለ ጊዜ እንደሚጠቀምበት በማመን እንዲንከባከበውና በማልማት እንዲጠብቀው ለማድረግ ስለሚያስችል ለአከራዩም መሬቱ በእንክብካቤ እንዲያዝ በማድረግ ጠቀሜታ ይኖረዋል።

ከዚህም በተጨማሪ መሬቱን ለማን ማከራየት እንደሚፈልግ የመወሰን መብቱን ለአከራዩ መተው እንጅ የኪራይ ውል ከፍተኛ ዘመኑን በመለያየት መብቱን በተዘዋዋሪ መንገድ መገደቡም በቂ ምክንያት የለውም። ከሁሉም በላይ ግን በበርካታ የአገሪቱ ክፍሎች አሁን ባለው ሁኔታ የእርሻ መሬት ጥበት በመኖሩ ብዙ ልማዳዊ የአስተራረስ ዘዴ የሚጠቀሙ አርሶ አደሮች ከሌሎች አርሶ አደሮች መሬት ተከራይ በመሆናቸው የዚህ ዓይነት ተከራዮች ረዘም ያለ የኪራይ ዘመን የሚያገኙበትን የሕግ መሠረት ማስቀመጥ አስፈላጊ ስለሚሆን የኪራይ ውል ከፍተኛ ዘመኑን አንድ ዓይነት ማድረግ ያለው አሰፈላጊነት የጐላ ይሆናል።

3.3.2.3 የመጠቀም መብትን በዋስትና ማስያዝ

አንድ ንብረት በእዳ ዋስትናነት የሚያዘው ባለእዳው እዳውን ባይከፍል ባለገንዘቡ የተያዘውን ነገር ለእዳው መክፈያ ለማድረግ እንዲችል ነው። አሁን ባለው ኢትዮጵያ የገጠር መሬት ሥሪት ሁኔታ ግን የግል የመሬት ባለቤትነት ባለመኖሩ ባለይዞታው የሌለውን የባለቤትነት መብት ለሌላ ሰው በመያዣነት ሊሰጥ አይችልም። ይሁን እንጂ የገጠር መሬት ባለይዞታ በመሬቱ ላይ የይዞታና የመጠቀም መብት አለው። ባለይዞታው የይዞታ መብቱን በዋስትና ቢያስይዝ ደግሞ ግዴታውን ባልተወጣ ጊዜ ይዞታው ለባለገንዘቡ እንዲተላለፍ

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[46] በትግራይ ብሔራዊ ክልል 3 ዓመት፣ በኦሮሚያ ብሔራዊ ክልል 3 ዓመት፣ በደቡብ ብሔር ብሔረሰቦችና ሕዝቦች 5 ዓመት ነው።

ስለሚያደርግና ይህ ደግሞ በፌዴራሉ ሕገ መንግሥት የተከለከለለውን መሬትን የመሸጥ ውጤት ስለሚያስከትል በሕግ የሚፈቀድ አይሆንም። ባለይዞታው ያለው በመሬት የመጠቀም መብት ግን በኪራይ ሊተላለፍ እንደሚችል ሁሉ በዋስትናም ሊያዝ ይችላል። ምክንያቱም የመሬት ባለይዞታው የመጠቀም መብቱን በዋስትና ያስያዘበትን ግዴታ ሳይወጣ ቢቀር ባለገንዘቡ የሚኖረው መብት ከመሬቱ ከሚያገኘው ምርት ገንዘቡን ማስመለስ እስኪችል ድረስ ባለይዞታውን ተክቶ በመሬቱ መጠቀም ነው።

ይህ ደግሞ የመሬት ይዞታ መብት መተላለፍን የሚያስከትል ባለመሆኑ ባለይዞታው በፌዴራሉ ሕገ መንግሥት ከተፈቀዱለት መብቶች አንዱ ሆኖ መታየት ይኖርበታል። ይህን የመከራከሪያ ነጥብ የበለጠ የሚያጠናክረው ደግሞ የፌዴራሉ የገጠር መሬት አስተዳደርና አጠቃቀም አዋጅ በገጠር መሬት የመጠቀም መብት በዋስትና መያዝ የሚችል መሆኑን በመቀበል በአንቀጽ 8(4) የገጠር መሬት በሊዝ የተከራየ ባለሀብት የመጠቀም መብቱን እንደዋስትና ለማስያዝ ይችላል በማለት መደንገጉ ነው። ይህ ከሆነ ደግሞ ከመጠቀም መብቱም በተጨማሪ ከአንድ ተከራይ የተሻለ የሆነው የይዞታ መብት ያለው አርሶ አደር በገጠር መሬት የመጠቀም መብቱን እንደዋስትና ሊያስይዝ የማይችልበት የሕግ ምክንያትም የለም።

ይሁን እንጂ የአማራ ብሔራዊ ክልልም ሆነ የሌሎች ክልሎች የመሬት አስተዳደርና አጠቃቀም ሕጐች አንድ የገጠር መሬት የተከራየ ባለሀብት በመሬቱ ላይ ያለውን የመጠቀም መብት በእዳ ዋስትናነት ማስያዝ እንደሚችል የደነገጉ[47] ቢሆንም አንድ የገጠር መሬት ባለይዞታ አርሶ አደር በመሬት የመጠቀም መብቱን ማስያዝ እንደሚችል ግን ምንም የደነገጉት ነገር የለም። አንድ ባለሀብት መሬት ሊከራይ የሚችለው ደግሞ ከመንግሥት ወይም ከባለይዞታ አርሶ አደር ነው።

በዚህ ምክንያትም የመሬቱ ባለይዞታ የሆነው አርሶ አደር የመጠቀም መብቱን በዋስትና የማስያዝ መብት ሳይኖረው ከሱ የተከራየው ባለሀብት ግን የተከራየውን መሬት የመጠቀም መብት በዋስትና ሊያስይዝ ይችላል የሚል መደምደሚያ ላይ ያደርሳል። ይህም አከራዩ የሌለውንና ሊሰጥ የማይችለውን መብት ለተከራዩ የሚሰጥ በመሆኑ በሕግ አግባብ ሆኖ አይታይም። ይህ ደግሞ የፌዴራሉ ሕገ መንግሥት ለገጠር መሬት ባለይዞታው ከሰጠው መብት አንፃር የባለይዞታ አርሶ አደሮችን መብት የሚገድብ ሆኖ ይታያል። ስለዚህም የአማራ ብሔራዊ ክልል የመሬት አስተዳደርና አጠቃቀም አዋጅ የገጠር መሬት ባለ ይዞታዎችን መብት ከማስከበር አኳያ የሚታይበት አንድ መሠረታዊ ጉድለት አርሶ አደሮች የመጠቀም መብታቸውን በዋስትና ማስያዝ እንደሚችሉ አለመደንገጉ መሆኑን እንገነዘባለን።

[47] በቁጥር 37 የተጠቀሰው አንቀጽ 19(1)

3.3.2.4 የመሬት ይዞታ መብት መከበር ዋስትና እና የፍትሕ መብት

የገጠር መሬት ይዞታ መብት ዋስትና የለሽ ሊሆን የሚችልባቸው በርካታ ምክንያቶች አሉ። ከነዚህም መካከል አንዱ አርሶ አደሮች ያላቸው የመሬት ይዞታ መብት ራሱ በጊዜ የተገደበ አለመሆኑን በግልጽ በሕግ አለመደንገግ ነው። ይሕ በሕግ ካልተጠበቀ ደግሞ ይዞታው በማንኛውም ጊዜ እየተቆረሰ ለሌላ ሰው እንዲሰጥ ወይም ለሌላ ለተፈለገ ተግባር እንዲውል ለማድረግ ለአስተዳደሩ በር ስለሚከፍት በኢፌዴሪ ሕገ መንግሥት የተሰጠውን ከይዞታ ያለነመቀል መብት በአተገባበር ችግር ምክንያት ዋስትና የለሽ ያደርገዋል። ሁለተኛው ምክንያትም በየጊዜው የመሬት ሽግሽግ እንደ ሚካሄድ በሕግ መፍቀድ ነው። የገጠር መሬት ሽግሽግ ማድረግ የሚያስፈልገው መሬት ካላቸው ቀንሶ መሬት ለሌላቸው ሰዎች ለመስጠት በመሆኑ ከተቀባዩ አንፃር ፍትሐዊነቱ ባያከራክርም መሬት ከሚቀነስበት ባለመብት አንፃር ደግሞ የንብረት መብትን ስጋት የተሞላበትና ዋስትና የለሽ ያደርገዋል።

ከዚህም ሌላ በተለይ እንደ አማራ ብሔራዊ ክልል ባለ መሬቱ እጅግ በተበጣጠሰበትና በተራቆተበት አካባቢ በየጊዜው የመሬት ሽግሽግ ማድረግ የሚታረሰውን የአንድ ሰው ይዞታ መጠን እጅግ እያሳነሰ ጥቅም እንዳይሰጥ ከማድረጉም በላይ በይዞታ ዋስትና ማጣት ምክንያት ለመሬት የሚደረገውን ጥበቃና እንክብካቤ በመቀነስ አካባቢው የበለጠ እንዲራቆት የራሱን አስተዋጽኦ ያደርጋል። ሦስተኛው ምክንያት ደግሞ የአንድ የገጠር መሬት ባለይዞታ መሆንን የሚያረጋግጥ ምስክር ወረቀት ለባለይዞታው አለመሰጠት ነው። የመሬት የግል ባለቤትነት በተፈቀደበት ሥሪት የባለቤትነት ማረጋገጫ ምስክር ወረቀት እንደሚሰጥ ሁሉ ለገጠር መሬት ይዞታ መብትም ማረጋገጫ ምስክር ወረቀት ካልተሰጠ አንዱ የመሬቱ ባለይዞታ ነኝ ባይ ከሌላው ባለይዞታ ነኝ ባይ የተሻለ መብት ያለው መሆኑን ለማረጋገጥ አስቸጋሪ ይሆናል። ይህ ከሆነ ደግሞ የይዞታ መብት ዋስትናን በሕግ በቂ ጥበቃ የሌለው እንዲሆን ያደርገዋል።

በዚህም ምክንያት የአማራ ብሔራዊ ክልል የገጠር መሬት ሕግ የገጠር መሬት ይዞታ መብት የጊዜ ገደብ እንደሌለው በመደንገግ የመሬት ሽግሽግንም በመርሕ ደረጃ በመከልከሉ[48] ከዚህ አንጻር ሊኖር የሚችለውን የይዞታ ዋስትና ማጣት ሥጋት እንደቀነሰው እናያለን። የገጠር መሬት ይዞታ ማረጋገጫ ምስክር ወረቀት መስጠትን በተመለከተም በሕጉ ከመደንገጉም በተጨማሪ በክልሉ ለሚገኙ 96% ገደማ ለሚሆኑ አርሶ አደሮች የምስክር ወረቀቱ በመስጠቱ[49] የመሬት ይዞታ ዋስትና የተሻለ የሕግ ጥበቃ አግኝቷል ማለት ይቻላል።

የገጠር መሬት ባለይዞታዎች መብት ጥበቃ በሕግ በበቂ ደረጃ ተደንግጓል ቢባል እንኳ መብቶቹ በሚጣሱበት ጊዜ አጥፊዎችን ለማረምና መብቱን መልሶ ለማስከበር እንዲቻል ለማድረግ ፍትሕ የማግኘት መብት ከሌለ የሕጉን ድንጋጌ ትርጉም አልባ ያደርገዋል። አርሶ አደሮች ያላቸውን የመሬት ይዞታ መብት በተመለከተ የፍትሕ መብታቸው መረጋገጥ

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[48] አንቀጽ 5(3)፣ 8(1)

[49] ከአቶ ገበየሁ በላይ (የክልሉ የገጠር መሬት አስተዳደር ኤክስፐርት) ጋር የተደረገ ቃለ መጠይቅ።

እንዲችልም ፍ/ቤቶች በአግባቡ የተደራጁና ለአርሶ አደሮች ተደራሽ የሆኑ መሆን አለባቸው። ይሁን እንጅ በአማራ ብሔራዊ ክልል አዋጅ ቁጥር 148/1999 እስከ ወጣበት ጊዜ ድረስ[50] ማንኛውም የገጠር መሬት ክርክር በመጀመሪያ ደረጃ በማህበራዊ ፍ/ቤቶች ታይቶ ቀጥሎ በመጀመሪያ ደረጃ ፍ/ቤት በይግባኝ የመጨረሻ እልባት እንዲያገኝ ተደርጐ ስለነበር አርሶ አደሮች ያላቸው በመደበኛ ፍ/ቤት ፍትህ የማግኘት መብት ውሱን ሆኖ ቆይቶ ነበር።

የገጠር መሬት መብት ለአንድ አርሶ አደር ከፍተኛው የንብረት መብት ነው። ምክንያቱም መሬት ለአርሶ አደሩ ኑሮም፣ የማንነት መገለጫም፣ አገርም ነው። ስለዚህም አርሶ አደሩ ፍትህን ከመሬት መብት ነጥሎ ከሌላ መብት ጋር በማያያዝ ሊያይ የሚችልበት ሁኔታ የለም። አብዛኛው የሕብረተሰብ ክፍል በግብርና ሥራ በሚተዳደርበት አካባቢ የተቋቋመ ፍ/ቤትም ፍትህ መስጠቱን ማረጋገጥ የሚችለው ለአርሶ አደሩ የመሬት መብት ጉዳዮች ክፍት ከሆነ ብቻ ነው። ስለዚህም የመሬት ክርክር ወደ ፍ/ቤት እንዲቀርብ ከተፈቀደ በፍ/ቤቶች ላይ የሥራ ጫና ይኖራል በሚል ምክንያት[51] ማንኛውም የገጠር መሬት ጉዳይ በመጀመሪያ ደረጃ ማህበራዊ ፍ/ቤት እንዲታይ ማድረጉ ትልቁን መብት አሳንሶ ማየትና ለአርሶ አደር አካባቢ ፍ/ቤት የሚያስፈልግበትን ምክንያትም መዘንጋት ይመስላል።

ከ1999 ጀምሮ ግን በአማራ ብሔራዊ ክልል ማንኛውም ከገጠር መሬት ጋር የተያያዘ አቤቱታ በመጀመሪያ ደረጃም መደበኛ ፍ/ቤት መቅረብ እንደሚችል በሕጉ በመደንገጉ የመሬት ባለይዞታዎችንም ሆነ ሌሎች ተጠቃሚዎችን መብት ለማስጠበቅ የሚያስችል የተሻለ የፍትሕ ተቋማዊ ሁኔታ አለ ማለት ይቻላል።

4. ማጠቃለያ

የቅድመ 1967 የኢትዮጵያ የመሬት ሥሪት፣ የወል ይዞታ፣ የግል ይዞታና የመንግሥት ይዞታ በሚል የተከፈለና በውስጡም የተለያዩ ንዑስ የይዞታ ዓይነቶችን የሚያካትት ውስብስብነት የሚታይበት ሥሪት ነበር። በአንድ አገር ያለው የመሬት ሥሪት ዓይነት የመሬት ባለ ይ ዞታዎችን መብት በማስፋትም ሆነ በማጥበብ ረገድ ከፍተኛ ሚና ይኖረዋል። በተለይ እንደ ኢትዮጵያ ባሉ ለንብረት መብት ዋናው መሠረት መሬት በሆነባቸውና አብዛኛው የህብረተሰብ ክፍል በባህላዊ የግብርና ሥራ በሚተዳደርባቸው አገሮች የመሬት ሥሪቱ የመሬት ባለይዞታዎችን የንብረት መብትም ሆነ የእያንዳንዱን ባለይዞታ ማህበራዊ ደረጃ በመወሰን ከፍተኛ አስተዋጽኦ ይኖረዋል።

በኢትዮጵያ በ1967 የመሬት ሥሪት ለውጥ ከተደረገበት ጊዜ ጀምሮ የመሬት ባለቤትነት የመንግሥት ሆኖአል። ስለዚህም መሬት በግል ባለቤትነት ሊያዝ እንደማይችል በሕግ በመደንገጉ የመሬት ተጠቃሚዎች መብት የይዞታ መብት ብቻ እንዲሆን አድርጐታል። የኢትዮጵያ ፌዴራላዊ ዴሞክራሲያዊ ሪፐብሊክ ሕገመንግሥትም የአገሪቱ የንብረት

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50 የአማራ ብሔራዊ ክልል የገጠር መሬት አስተዳደርና አጠቃቀም አዋጅ ማሻሻያ አዋጅ

51 የዚህ ጽሁፍ አዘጋጅ በክልሉ ማንኛውንም የገጠር መሬትን የሚመለከት ክርክር በመጀመሪያ ደረጃ ሥልጣንነት ለመደበኛ ፍ/ቤት መሰጠት አለበት እንጅ በማህበራዊ ፍ/ቤት መታየት የለበትም በማለት ከአንዳንድ የክልሉ የዳኝነት አስተዳደር ኃላፊዎች ጋር ካደረገው ውይይት የተገነዘበው።

መብት መሠረት በአጠቃላይ የግል ባለቤትነት መብት ላይ የተመሠረተ መሆኑን በግልጽ ሲደነግግ በተለይ የመሬት ባለቤትነት ግን በመንግሥት እንደሚያዝ በመወሰኑ የገጠር መሬት ተጠቃሚ አርሶ አደሮች በአሁኑ ጊዜ ያላቸው መብት የይዞታ መብት ብቻ ነው።

በንብረት ላይ የሚኖር የግል ባለቤትነት መብት ለባለቤቱ የሚሰጠው መብት ሰፊና መሸጥ መለወጥን ጨምሮ በርካታ ከንብረቱ በሚገኙ አገልግሎቶች መጠቀምን የሚያካትት ነው። በዚህም ምክንያት በአሁኑ ጊዜ ያለው የገጠር መሬት ሥሪት ለመሬት ባለይዞታዎች የሚሰጠው መብት ምን ዓይነት የንብረት መብቶችን የሚያካትት ነው የሚለውን ጥያቄ መመለስ በዚህ ጽሑፍ ከፍተኛ ትኩረት የተደረገበት ነጥብ ነው።

የኢትዮጵያ ፌዴራላዊ ዴሞክራሲያዊ ሪፐብሊክ ሕገ መንግሥት መሬትን በተመለከተ የደነገገው አንደኛ የመሬት ባለቤትነት የመንግሥትና የህዝብ ብቻ ነው፤ ሁለተኛ መሬት የማይሸጥ የማይለወጥ የጋራ ንብረት ነው፤ ሦስተኛ የኢትዮጵያ አርሶ አደሮች መሬት በነፃ የማግኘትና ከመሬታቸው ያለመነቀል መብታቸው የተከበረ ነው የሚሉ ቁም ነገሮችን ነው።

ከዚህ የሕገ መንግሥቱ ድንጋጌዎች መረዳት የሚቻለው አንድ የገጠር መሬት ባለይዞታ በንብረት መብትነት እንደማይኖረው ተለይቶ የተቀመጠውና አንድ የግል የንብረት ባለቤት ከሚኖረው መብትም የሚለየው መሬትን የመሸጥና የመለወጥ መብት አለመኖር ነው። ስለዚህም አንድ የገጠር መሬት ባለይዞታ አርሶ አደር መሬቱን ከመሸጥ ወይም በሌላ ንብረት ከመለዋወጥ በስተቀር ማንኛውም አንድ የግል ባለቤት የሚኖረው የንብረት መብት ሁሉ እንደሚኖረው በኢፌዴሪ ሕገ መንግሥት የተፈቀደ እንደሆነ ለመገንዘብ ብዙ ክርክር የሚጠይቅ ሆኖ አይታይም።

አንድ የገጠር መሬት ባለ ይዞታ ከመሸጥ ወይም በሌላ ንብረት ከመለወጥ በመለስ የሚኖረው የንብረት መብት ደግሞ በመሬቱ በግል መጠቀምን፣ ማከራየትን፣ ማውረስን፣ በስጦታ መስጠትንና የመጠቀም መብቱን በእዳ ዋስትናነት ማስያዝን የሚያካትት ነው። እነዚህ መብቶች በሕገ መንግሥት ሳይሆን በዝርዝር ሕግ የሚደነገጉ በመሆናቸው የመሬት ይዞታ መብት በሚተገበርበት ጊዜ ሊጠቡ ወይም ገደብ ሳይደረግባቸው ተፈፃሚ ሊሆኑ ይችላሉ።

በኢፌዴሪ ሕገ መንግሥት መሠረት መሬትን የማስተዳደር መብት ለክልሎች የተሰጠ በመሆኑ የአማራ ብሔራዊ ክልልም የገጠር መሬት አስተዳደርና አጠቃቀም ሕግ አውጥቶ የባለይዞታዎችን መብት በማስተዳዳር ላይ ይገኛል። በፌዴራሉ ሕገመንግሥት የገጠር መሬት መብትን በተመለከተ ባለይዞታው የተከለከለው መሸጥ ወይም በሌላ ንብረት መለዋወጥን በተመለከተ ብቻ በመሆኑ የክልል የገጠር መሬት አስተዳደርና አጠቃቀም ሕግ ከነዚህ መብቶች በመለስ ባሉ መብቶች ላይ ገደብ ለማድረግ የሚያስችለው የሕግ መሠረት የለም።

ይሁን እንጅ መሬትን ማከራየትን፣ ማውረስንና በስጦታ መስጠትን በተመለከተ የአንዳንድ ብሔራዊ ክልሎች ሕጐች በኪራይ ሊሰጥ በሚችለው መሬት መጠን ወይም በኪራይ ውሉ ከፍተኛ ዘመን ወይም መውረስ በሚችለውና ስጦታ ሊሰጠው በሚገባው ሰው ላይ ገደብ ያደረጉ ቢሆንም የአማራ ብሔራዊ ክልል ሕግ ግን ከዚህ በተለየ ሁኔታ ደንግጓል። በዚህ

ሕግ መሠረት በገጠር መሬት የመጠቀም መብትን ለማንኛውም ሰው ከ25 ዓመት ላልበለጠ ጊዜ ማከራየት፣ የይዞታ መብትን በኑዛዜ ለማንኛውም በግብርና ሥራ የሚተዳደር ሰው ወይም በሕግ ለማውረስ ይቻላል። ከዚህም በተጨማሪ የይዞታ መብትን ሕጉ ለዘረዘራቸው የተወሰኑ ባለመብቶች በስጦታ መስጠት እንደሚቻልም ደንግጓል። ስጦታ መስጠትን በተመለከተ የተቀመጠው ገደብ በቂ የሕግ ምክንያት ያለው ስለማይመስል ሕጉ ውሱንነት ቢታይበትም ስለማከራየትና ማውረስ የደነገገው ግን የፌዴራሉ ሕገ መንግሥት ከደነገገው የመሬት ይዞታ መብት ጋር የሚጣጣም ሆኖ ይታያል። ነገር ግን በክልሉ የወጡትን የገጠር መሬት ሕጐች በዝርዝር ተግባራዊ ለማድረግ የሚያስችል መመሪያ እስከአሁን ያልወጣ በመሆኑ ችግሮች ሊያጋጥሙ ስለሚችሉ የመመሪያው መውጣት ያለው አስፈላጊነት ከፍተኛ ነው።

የገጠር መሬት ይዞታ መብት ብቻ በሕግ በተፈቀደበት ሁኔታ የመሬት ይዞታ መብትን በዕዳ ዋስትናነት አስይዞ የይዞታ መብትን በእዳ መክፈያነት ለባለገንዘቡ ማስተላለፍ ውጤቱ ሽያጭ ስለሚሆን በሕጉ የተከለከለ ቢሆንም የመጠቀም መብትን በዕዳ ዋስትናነት ማስያዝ ግን የሚከለከልበት ምክንያት የለም። ምክንያቱም በዕዳ የተያዘው በመሬት የመጠቀም መብት ከሆነ ባለገንዘቡ መብት የሚኖረውም ዕዳው ተከፍሎ እስኪያልቅ ድረስ መሬቱን መጠቀምና በመጨረሻ የመጠቀም መብቱን ለባይዞታው መመለስ ስለሆነ የሽያጭ ወይም የመለዋወጥ ውጤት አይኖረውም።

የሕግ ውጤቱ ይህ ቢሆንም የአማራ ብሔራዊ ክልል ሕግ የመጠቀም መብትን የመሬት ባለይዞታ ከሆኑት አርሶ አደሮች ያነሰና የተከራይነት መብት ብቻ ላላቸው ተከራይ ባለሀብቶች ግን በዕዳ የማስያዝ መብት ፈቅዶ ለአርሶ አደሮች አለመፍቀዱ በቂ የሕግ መሠረት ያለው ሆኖ አይታይም። በመሬት የመጠቀም መብት በዕዳ ዋስትናነት ማስያዝ ደግሞ የመሬት ባለ ይዞታው ሊጠበቅለት የሚገባ አንዱ የንብረት መብት ከመሆኑም ሌላ አርሶ አደሮች መሬታቸውን ለማልማት የሚረዳ ገንዘብ ከሕጋዊ የገንዘብ ተቋማት ጋር በመስማማት ለማግኘት የሚረዳ መንገድም በመሆኑ የመብቱ አለ መፈቀድ በመሬት በመጠቀም መብት ላይም ተጽዕኖ ስለሚኖረው ትኩረት የሚሻ ጉዳይ ሆኖ ይታያል።

የገጠር መሬት መብት በቂ የሕግ ዋስትና እና የፍትሕ ጥበቃ ከሌለው ብዙ ትርጉም የለውም። ለአርሶ አደሮች በቂ ፍትሕ ተሰጥቷል ማለት የሚቻለው ከመሬት ጋር በተያያዘ የሚነሱ ችግሮች በፍትህ አካሉ ታይተው ውሳኔ የሚያገኙበት ሁኔታ ከተመቻቸ ብቻ ነው። ምክንያቱም ለአርሶ አደሩ ትልቁ መብት የመሬት መብት ነው። ማንኛውም ሀብቱም፣ ሕይወቱም ከመሬት ጋር የተሳሰረ በመሆኑ መሬትን የሚመለከት ጥያቄ ሁሉ በግል በመግባባት ችግሮችን መፍታትን በሚያበረታታ ሁኔታ በፍ/ቤት ውሳኔ ማግኘት እንዲችል ፍ/ቤቶች ለአርሶ አደሮች ተደራሽ መሆን መቻላቸው ለገጠር መሬት ይዞታ መብት መጠበቅ መሠረት ነው።

የሕግና የሕግ ተቋማትን ትምህርት ማስተማርና መማር

ሰላሙ በቀለ*

አጀማመር (መንደርደሪያ)

ይህን ፅሁፍ ሳዘጋጅ ወደ ኋላ ተመልሼ ማስታወሻዎችን ሳገላብጥ ብዙ ትዝታ ቀሰቀሰብኝ፤ የብዙ ተማሪዎቼ ፊት ገጭ አለ። ለምሳሌ ፍፅም 20 ዓመት የሕግ ትምህርት ቤትን ትቶ፣ ብዙ ሕይወት አሳልፎ ኖሮ ኖሮ መጥቶ እንደገና ከልጅ ልጆቹ ጋር ሀ ብሎ የሕግ ትምህርት ጀምረ። «Senior Citizen» (አንጋፋ ዜጋ) እለው ነበር። ብዙ ያነበበና የሚያውቅ ስለነበረ የሚያነሳቸው ጥያቄዎችና የሚያደርገው ክርክር የጮለበተ ነበር። ከተመረቀ በኋላ በኢቴቪ ETV የእንግሊዝኛ ዜና አንባቢ ሆነ። የአበበ ባልቻ ቲያትረኛና ነጋዴ መሆን አላስደነቀኝም። ምነው ቢባል ጥብቅና ከትያትር ጋር በጣም የተቀራረበ ነው። ጥሩ ጠበቃ ጥሩ የቲያትር ተዋናይ መሆን ይችላል። ጥሩ ተዋናይ ግን ሕግ ካልተማረ ጥሩ ጠበቃ መሆን አይችልም፤ ይህ ትክክል ነው። የአበበ ነጋዴ መሆን ምንም አይገርምም። በትምርታቸው ሳቢያ ብዙ የሕግ ባለሞያዎች የተዋጣላቸው ነጋዴዎችና የኩባንያ መሪዎች ናቸው። ይህ ማስረጃ በማያስፈልገው ሁኔታ በአሜሪካ ዩኤስኤና ካናዳን ጨምሮ፣ አሁን ደግሞ ላቲን አሜሪካን ደቡብ አሜሪካን፣ ኤሮኘንና ጃፖንና አካባቢዋ ያሉትን አገራት ጨምሮ ይገኛል።ፈረንጅ እንደሚለው <u>ኤማን አፍ አል ትሬድስ።</u>

ይህስ በጄ ይሁን እግዚፍጥረታት ፈቅዶ ብዙ ተማሪዎች አስተማርኩ። አሁን ትዝ ሲሉኝና ከራሴ ጋር ብቻዬን ስጫወት እገሌ የት ይኖር ይሁን? እገሌስ ምን ይሠራ ይሁን? ሲል መንፈሴን አሳብ መንጥቆ ይወስደዋል። ይህ ማለት ሁሉም ተዋጥቶላቸዋል ማለት አይደለም። በሰው ልጅ ኑሮ ሕግና ደንብ መሠረት መውደቅ መነሳት ያለ ነው።

በዚህ አርእስት ጽሑፍ ፃፍ ስባል የአርእስቱን ይዘት «ምናምንቴ» ደረቁን ከመዘገብ ይልቅ እስከዛሬ ያላወሳሁትን መግለፅ ፈለኩ።

ይህን የምታነቡ ምንአልባት በሕግ ትምሕርት ሒደት አልፋችሁ ይሆናል። ከሆነ ዘመኑን አስቡት፤ እንዲሁም ተሞክሮውን። በዚህ ጽሑፍ አርእስት ጉዳይ "ላወራ" የምችለው ከራሴ ተሞክሮ በመነሳት ነው። ስለቁምነገሩ ማሰብና ማውጠንጠን የጋራችን ነው ብሎ በማመን ነው። ሕግ ያልተማራችሁ አንባቢዎች ደግሞ ከይቅርታ ጋራ የሕግ ትምሕርትን ክብደትና ችግር ተረዱልኝ።

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* በአዲስ አበባ ዩኒቨርስቲ ሕግ ፋክልቲ ረዳት ፕሮፌሰር (የቀድሞ)

1. የሕግ ማስተማሪያ ዘዴ

ይህ ለዛሬው አርእስት ጥሩ መግቢያ ነው። ሳሳንዛዛው በአጭሩ እንደሚከተለው ነው።

1.1 አገር ቤት

እኔ ተማሪ ሆኜ አስተማሪዎቻችን የተለያየ የማስተማር ዘዴ ነበራቸው። ዘዴው አንድ ዐይነት ይሁን የሚል አቋም አልነበረም። ኋላ አስተማሪ ሆኜ በወቅቱ ከነበሩት ነባር አስተማሪዎች ጋር (በተለይ ዲን ቶምሰንና ፕሮፌሰር ችቹኖቪች) ስንጫወት ስለማስተማር ዘዴ ሁልጊዜ በአካዳሚክ ኮሚሽንና በፋኩልቲ ስብሰባ የተጧጧፈ ክርክር ይደረግ ነበር። ይህ ሁኔታ እኔም አስተማሪ ከሆንኩ በኋላ ያከራክር ነበር። በጐ ነው ጥሩ፣ ክፉ ነው መጥፎ ውስጥ ሳልገባ አስተማሪዎቼን የሚከተለውን ዘዴዎች ይጠቀሙ ነበር። የእያንዳንዳቸው ዘዴ የመጡበትን በስተኋላ ሲያንፀባርቅ፣ አንዳንዶቹ ደግሞ ራሳቸው የተማሩበትን ዘዴ ትተው ይበጃል የሚሉትን ይጠቀሙ ነበር።

ዲን ፖል ሶክራቲክ የሚባለውን ይጠቀም ነበር። ይህ ዘዴ አስተማሪው በአንድ ነጥብ ላይ መጠነኛ ማብራሪያ ይሰጥና ከዚያ እሱ ጥያቄ ይጠይቃል፤ ተማሪዎቹ ለጥያቄው መልስ እንዲሰጡ ይጋብዛል፣ ግብግብ። እንደማስታውሰው ስንጨናነቅ ትክክል የሆነና ያልሆነ መልስ ለመስጠት አትሞክሩ፣ መልስ ይሆናል የምትሉትን ከነተግቢው ምክንያት ጋር አቅርቡ ይል ነበር።

ሴድለር ሶክራቲክና ሌክቸር ዘዴ ይጠቀም ነበር። የሱ ትምህርት በጣም ከባድ ነበር። ለስሙ የሥነ ሥርዐት ሕግ ይባል ነበር እንጂ በጣም የሰፊ ሰፊ ነበር። ዐይናችን ሲፈጥ ያይና ወደ ሌክቸር ዘዴ ይዛወራል።

ሌውንሽቲን ኬዝ ዘዴ የሚባለውን ነበር የሚጠቀመው። ኬዝ ዘዴ የሃርቫርድ መምህራን የነበሩ ስቶንና በተለይ ላንግደን የፈበረኩት ነው ማለት ይቻላል። የመጀመሪያውን ኬዝ ደድሊንን የሚረሳ የሕግ ተማሪ ይገኛል ብዬ አላምንም። በጣም የሚደንቅ ዘዴ ነው።

ችቺኖቪች ሌክቸር ብቻ ነበር የሚጠቀሙት። እንዳውም ቁራጭ ርሳሳቸው አትረሳኝም። ብዙ ጊዜ በትምርቱ ስለሚመሰጡና ትምርቱንም በጣም ስለሚያውቁት ከራሳቸው ጋር ሲጫወቱ ድምፃቸው ጥፍት ይልብናል። የሚያስተምሩት እንዳይጠፋብን ድምፃቸውን ለመስማትና የሚሉትን ወፍ ስንዴ እንደምትለቅም ለመልቀም ወደሳቸው የሚቀርበውን የፊት ወንበር ለመያዝ የነበረው ሽሚያ አይረሳኝም። አንዳንድ አወቅን የሚሉና ሶክራቲክ ዘዴን አጥብቀው የሚወዱ የሳቸውን ዘዴ ሲያናንቁ ግብዞች ናችሁ እያልኩ እገስፃቸው ነበር።

እስታንገር ዓለም አቀፍ ሕግ ሲያስተምር ዲስካሽን ብቻ ነበር የሚጠቀመው። ካናካቴው ብዙ ጊዜ፣ ያን ጊዜ ሬሲንግ ክለብ እሚባለው፣ ጃንሜዳ ወስዶ ቢራና ለስላሳ እየጋበዘ ነበር የሚያስተምረን። መቼስ ዮሐንስ ጎሩይ ሚስጥር አወጣህ ባይለኝ የእስታንገርንና የቶፒንግን ቢራ የጠጣው የትየ ለሌ ነው።

ቸርችና ሲልኪ ሶክራቲክ፣ ዲስካሽንና ሌክቸር ዘዴዎች እየቀላቀሉ ነበር የሚጠቀሙት። ቶፒንግ ፒተር ሳንድና ኢማንኩተር አመጣጣቸው ከኢሮኘ ዩኒቨርሲቲ ትራዲሽን ስለነበር ሌክቸር ብቻ ነበር የሚጠቀሙት። ቢሆንም አልፎ አልፎ ዲስካሽን ይጋብዙ ነበር።

እንግዲህ እኔ በግሌ ቀና ሆኖ ያገኘሁት ዘዴ ሶክራቲክና ዲስካሽን ነበር። ሌክቸር ለማብራሪያ ያህል ሲጥመኝ፤ ሕግን በሱ ብቻ ማስተማር የሕግ ትምህርትን ግብ እንደማይመታ ተሰማኝ። ለምን ቢባል በግሌ እንደገባኝ እነዚህ ዘዴዎች በማስማር መማሩ ሒደት እንደኛ ተማሪውን የሚያሳትፉ ሲሆን ሁለተኛ ወደፊት የሕግ ባለሞያው በግሉ እንዲያስብና ሐሳቡን እንዲገልፅ ያስተምሩታል። አክቲቭና ኢንታርአክቲቭ ያደርጉታል። እኔ እስከሚገባኝ ድረስ የሕግ ባለሞያ ሥልጠና አንቀጽ ጠቅሶ ማነብነብ ሳይሆን ሐሳቡን በትክክል ገልጾ፣ መፍትሔ አቅርቦ ተከራክሮ፣ አስረድቶ ማሳመን ነው። ከዚህ ወዲያ ቀላምዶ ያልሆነውን ሆነ፣ የሆነውን አልሆነም ብሎ ዘበራርቆ የሚያዘበራርቅን የሕግ ባለሞያ ለማለት ይከብደኛል።

እርግጥ ተማሪዎች ሆነን ሁላችንም ከሌክቸር ዘዴ ትራድሽን የመጣን ስለነበርን ሌሎቹ ዘዴዎች ሳያደናግሩንና ራስ ምታት ሳይሰጡን አልቀሩም። ኋላ በመጠኑም ቢሆን ጥቅማቸው ሲገባን ለመራቀቅ መሞከር ቋመጠን።

1.2 አሜሪካ

አሜሪካ አገር ሃርቫርድ ሕግ ት/ቤት ስማር ተመሳሳይ ሁኔታ ነው ያጋጠመኝ። ከትምህርቱ መክበድ በስተቀር ምንም የዘዴ ለውጥ አላገኘሁም። ትምህርቱ ደግሞ ለአሜሪካ ጉዳይ ተብሎ የተቀረፀ ስለሆነ እሱን ቷት ብሎ ማጥናቱ ብዙም ጠቀሜታ የለውም፣ በተለይ አሜሪካ አገር ተማርኩ ከማለት ውጭና እዛው ቀርቶ ለመሥራት ዕቅድ ከሌለ ።

ሳክስ ሊጋል ፕሮሲስ ስያስተምር እንደ ዲንፖል ሶክራቲክ ዘዴ ብቻ ነበር የሚጠቀመው። መቼስ በጥያቄ ሲያፋጥጥ አያድርስ ነው። ትቶ አይተውም። አንዳንድ ጐበዝ ተማሪ ቢከራከረውም በመጨረሻ ያልታሰበ ጥያቄ ሲያመጣ የተማሪው ክርክር ወጣ ወጣና እንደ ሽንበቆ ተንከባለለ ስሩ ተቆርጦ ነው። መቼስ ጐበዝ ተማሪዎች ከሱ ጋር መከራከር ደስ ይላቸዋል። እሱም ይረካል እንደኔ ያለው ግን ካሁን አሁን ጠየቀኝ ሲል ሸሸት ነው። አንድ ቀን ዓለም አቀፍ ተማሪዎች ግብግ ተደርጐ ቢያስተዋውቁኝ፣ «አላየሁህም ምን አልባት የመጨረሻ ኋለኛው ወንበር ይሆናል የምትቀመጠው {ልክ ነው}፣ ትምህርቱን እንዴት

አገኘኸው» አለኝ «ጥሩ ነው ግን ከባድ ነው፤» ብለው፣ «ምን አልባት የማስተማሪያ መጽሐፍ ስለሌለው ነው፤ እያዘጋጀሁ ነኝ» አለኝ። ይህንን እንዲመጣ አርጌ የሕግ ቤተ መጻሕፍት ውስጥ ነበር። መቼስ ጠፍቶ ወይም ተሰርቆ ይሆናል።

ክክስ ሌበር ሎ ሲያስተምር እንደ ሴድለር ሶክራቲክና ሌክቸር ነበር የሚጠቀመው። የተወሳሰበውን አቅልሎ ሲያቀርበው ይደንቅ ነበር። ሰውዬው በጠባዩ ረጋ ያለ ስለነበረ በሶክራቲክ ዘዴው ብዙም አያስጨንቅም። ሳቂታና ነገር አቅላይ ስለነበር ተማሪዎች እንደፈለጉ ይከራከሩታል። መጨረሻ ላይ «ትክክለኛውን ክርክር ከደረስክበት እባክህ ንገረኝ የአሜሪካ ጠቅላይ ፍርድ ቤት ተመሳሳይ ጉዳይ አለኝ፤» ብሎ ይዘጋል። ተማሪ ሁሉ ሆ ብሎ ይስቃል። አለባበሱና ቁመናው ዘናጭ ነው።

ፎሮይንድ የሕገ መንግሥት ሕግ ያስተምር ነበር። እሱ የሕግ ት/ቤቱ ብቻ ፕሮፌሰር ሳይሆን የሃርቫርድ ዩኒቨርስቲ ፕሮፌሰር ነው። ይህ ማለት በየትኛውም የዩኒቨርስቲ ፋኩልቲ ውስጥ ማስተማር የሚችል። አብዛኞዎቹ አስተማሪዎች ከኤል ኤል ቢ ዲግሪ ሌላ የሌላቸው ሲሆኑ እሱ ብቻ ኤል ኤል ዲ ነበረው። ልክ እንደ ቹቹኖቪች ሌክቸር ነው የሚያረገው፤ እንዳውም ሁልጊዜ መጽሐፍ ይዞ ገብቶ ያን አንብቦ ሰዓቱ ሲደርስ ጠቅሶን ይወጣል። ዕውቀቱ ግን የማይደረስበት ነው። መጽሐፏን ስላሳየን ከመጽሐፏ ይሁን ከተሞክሮው የሚያስተምረን መለየት አይቻልንም። ብዙ ጊዜ የአሜሪካ ጠቅላይ ፍ/ቤት ዳኛ እንዲሆን ስሙ ተጠቁሞ እምቢ ያለ ሰው ነው። ኢን ዘ አይ ኦፍ ዘ ስቶርም ያለውን ስለጠቅላይ ፍ/ቤት የጻፈውን ካነበብኩ በኋላ የእምቢታው ምክንያት የገባኝ መሰለኝ።

ዲን ግሪዝወልድ ታክስ ሎ ነበር የሚያስተምረው። የአሜሪካ ታክስ ሎ በጣም ውስብስብና አስቸጋሪ ነው፤ ሰፊ ከመሆኑም በላይ ዝርዝሩ ማለቂያ የለውም። የታክስ ሎ ኢክስፐርቶች እንኳ ጠቅላላውን ሳይሆን በተወሰነ ክፍል ነው ጠይቀው የሚረዱት። ለምሳሌ የኮርፖሬት ታክስ ኤክስፐርት ስለ ካፒታል ጌንስ ዕውቀቱ ውሱን ነው። እንዲሁም የፌዴራል ታክስ ኤክስፐርትና የስቴት/ሚኑሶፖል ታክስ ኤክስፐርት። ታዲያ ዲን ግሪዝወልድ ያንን ተራራ ነው ፈልፍሎ ንዶ የሚያሳፍሰው። የሚጠቀመው የዲስከሽን ዘዴ ነበር።

በኋላ ስታንፎርድ፣ ፖል አልቶ፣ ካሊፎርንያ ለትምህርት ሔድኩ። በዛ ወቅት በመጠኑም ቢሆን የተማሪነቱንና የአስተማሪነቱን ሒደት ስላየሁት የስታን ፎርድን የተማሪነት ዘመን በደንብ ለማጣጣም ቻልኩ። ስታንፎርድ አስተማሪዎቹ የሚጠቀሙበት ዘዴ ከኛም ሆነ ከሃርቫርድ በጣም የተለየ ነው። በብዛት ሌክቸርና ዲስካሽን ነው። ማናቸውም ሶክራቲክ ወይም ኬዝ ዘዴ አይጠቀሙም። በርትን ለምሳሌ ኢንተርናሽናል ፕራይቬት ሎ ሲያስተምር ብላክቦርድ በብዛት ይጠቀማል። እንዲህ ብሎ ነገር እኛም ዘንድ ሃርቫርድም አልነበረም። ሊ፣ ገና በ30 ዓመቱ ሙሉ ፕሮፌሰር ቴነርድ የሆነ፣ ስለቻይና ሕግ ሴሚናር ሲሰጥ የሚጠቀመው ዲስከሽን ነው። እንዳውም አርእስት ተሰጥቶን እኛ ነበር

የምናቀርበውና ዲስካስ የምናረገው። ስታንፎርድ ያሉት አስተማሪዎች ከአንድ ሁለቱ በስተቀር ሁሉም ወጣቶች ነበሩ።

2. ማስተማር ስጀምር

ለጥቂት ዓመታት አገር ውስጥ ገቢ፣ አየር መንገድና ትምባሆ ሞኖፖል ከሠራሁ በኋላ ጠበቃ ሆንኩ። በዚያ ወቅት የሰርተፊኬት፣ ዲፕሎማና የዲግሪ (በማታና ቀን) ትምህርቶች ይሰጡ ነበር። ከነዚህ ሌላ በልዩ ፕሮግራም ለዳኞች፣ ለፖርላማ አባሎች፣ ለአስተዳደር, ሰራተኞችና ለፖሊሶች ትምህርት ይሰጥ ነበር። ሁሉንም የተጠቀሱትን አስተምሪያለሁ። የዲግሪ ተማሪዎችን ሳስተምር ሶክራቲክ ዘዴ ነበር የምጠቀመው። ሌሎቹ ግን ከዕድሜያቸው፣ ሁኔታቸውና የትምህርቱም ዓይነት ሌላ ዘዴ መጠቀም ስለማያስችል ሌክቸር ነበር የምጠቀመው። በኋላም ዲን ቶምስን አግባብቶኝ ጥብቅናውን ትቼ ሙሉ ቀን መደበኛ አስተማሪ ሆንኩ።

ወደ አስራ ሶስት ያህል ትምህርቶች አስተማርኩ። በመጨረሻም ሊጋል ሒስትሪ ኮርስ እንዲኖር አካዳሚክ ኮሚሽን እንዲፈቅድ ጠይቄ ከፈቀደ በኋላ ኮርሱን ራሴ ማስተማር ጀመርኩ። በተከታታይ ዓመታት ለብዙ ዘመን ያስተማርኩት ሊጋል ሒስትሪ ነው።

በነዚህ የማስተማር ረጅም ዘመንና ውጣ ውረድ መታከት ከኬዝ ዘዴ በስተቀር ሁሉንም የማስተማር ዘዴዎች ተጠቅሜያለው። የሌክቸር ዘዴን ወደኋላ ብዙም አልጠቀምበትም ነበር። ሌክቸርም ባይሆን ሰፋ ያለ ማብራሪያ ብዙ ጊዜ እሰጥ ነበር።

3. ሊጋል ሒስትሪ ትምህርት መጀመር

አንዳንድ ሰዎች የሕግ ታሪክን አስፈላጊነትና ጥቅም አያምኑበትም። ከሞያ አንፃርም የሕግ ባለሞያ መማሪያ መጽሐፍ ውስጥ የታወጀው ሕግ ነው ይላሉ። እርግጥ ይህ መሠረታዊ ነው፤ የሕግ ትምህርት በዚህ ብቻ ከተወሰነ አስተያየትን ያጠባል። አባባሉም ፍፁም የሆነ ዩቲሊታሪያን እምነት ነው። የሕግ ሞያም የሮቦት ሥራ ይሆናል ።

ታሪክ ለሕግ ፍትሐዊ አካባቢው ነው፤ አካባቢውን ያላወቀና ግምት ውስጥ ያላስገባ ከስሕተትና ጥፋት ውስጥ ይደርሳል። ታሪክን የማያቅና ያልተረዳ በታሪክ የተሰራውን ስሕተት ይደግማል ይባላል።

የታሪክ ክስተቶች ለሕግ ፍትሐዊነትና የበላይነት ማስረጃና ዋስትና ናቸው። አዋጅ በፋብሪካ የሚፈበረክ ሳይሆን መጀመሪያ አለው፤ ታሪካዊ ምክንያት አለው። የሕግ እድገት ወፍ ዘራሽና ቆርጠህ ቀጣዮል ሳይሆን መሠረቱ የሕግ ታሪክና አመጣጥ ነው ።

ለታሪክ ዋጋ የማይሰጡ ታሪክ የምንሠራው እኛ ብቻ ነን ብለው የሚዘብቱ ናቸው። እነሱ ከየት መጡና፣ ካላፈ ታሪክ ነዋ! የሚተካቸውስ? መጪ የወደፊት ታሪክ አይደለም።

በግሌ በታሪክ የማያምኑትን በአንድ ዐይነት ቡድን እፈርጃቸዋለሁ። እነሱንም እንደየሁኔታው የሚከተሉት ጥቅሶች የሚገልፃቸው ይመስለኛል።

‹‹In the eyes of empire builder's men are not men but instruments Napoleon Bonaparte›› (ለግዛት አስፋፊዎች ሰዎች ሰው ሳይሆኑ መሣሪያ ናቸው። ናፖሊዮን ቦና ፖርት)

‹‹Do not hold the delusion that your advancement is accomplished by crushing others.›› Marcus Talluis Cicero (ሌሎችን በመጨፍለቅ እኔ አድጋለው የሚል ቅዥት አትያዝ። ማርከስ ቱሊየስ ሴሲሮ።)

"Men in authority will always think that criticism of their policies is dangerous." (Henry Steele Commager (ባለሥልጣኖች ፖሊሲያቸውን መንቀፍን ሁል ጊዜ አደገኛ አርገው ያስባሉ። ሔነሪ ስቲል ኮማገር።)

"If you are neutral in situations of injustice, you have chosen the side of the oppressor." Bishop Desmond Tutu. (በኢፍታሐዊነት ጉዳይ ገለልተኛ ከሆንክ የጨቋኙን ወገን መርጠሃል። ቢሾፕ ዴዝመንድ ቱቱ።)

ከዚህ በላይ ጥቅሳቸውን የፃፍንላቸው ሰዎች በተለያዩ የታሪክ ዘመን (ከ106 ክክ ልደት በፊት እስከ 12ኛው ምዕተ ዓመት የኖሩና ቱቱ አሁንም በሕይወት ያለ ነው።) ሁሉም ጥቅስ የሚያመለክተው የፍትሕ ጉዳይንና ታሪክን ስለሚዘነጉ ወገኖች ነው።

4. የሊጋል ሒስትሪ ትምህርት ችግሮች

ትምርሕቱን በማስተማር ረገድ ዋናዎቹ እኔን የገጠሙኝ ችግሮች የዘዴ፣ ምርምርና ጥናትና የማስተማሪያ ማተሪያል ነበሩ። አሁን ስለነዚህ ለጫውታችሁ።

4.1. ዘዴ

ስለማስተማሩ ዘዴ ለመወሰን መጀመሪያው ላይ ችግር ገጠመኝ። ትምርቱ እንደ ሌሎች የሕግ ትምህርቶች፤ ለምሳሌ የወንጀል፣ ፍትሐብሔርና ንግድ ወ.ዘ.ተ. ሕጐች ደረቅ ትምርት አደለም። በዐይነቱና በወጥነቱ በአዋጅ ያለ ሕግ ደረቅ ነው። ሊጋል ሒስትሪ ሕግና ታሪክ የተዛመዱበት ነው።

ለደረቅ ሕግ እላይ በሰጠሁት ምክንያት ሶክራቲክ ዘዴ መጠቀም ጥሩ ነው። ኮንስትቲውሽናል ሎው በጠባዩ ከደረቅነት ይልቅ ወደ ስፋትና ሊጋል ሒስትሪ ቢቃረብም ለሱ ዲን ፖል እንዳረጋገጠው ሶክራቲክን ባመዛኙ መጠቀም ይቻላል። ሶሶሎጂ አፍ ሎ በጠባዮ ለሊጋል ሒስትሪ በጣም ቅርበት አለው፤ እሱን ሳስተምር ተመሳሳይ ችግር ነበር የገጠመኝ።

እኔ እስከተረዳሁት ድረስ ታሪክን ለማስተማር ተመራጩ ዘዴ በአመዛኙ ሌክቸር ነው። አልፎ አልፎ ጥያቄዎችና ዲስካሽን ይደረጋሉ ።

የነበረብኝ ውሳኔ የቱን ዘዴ ብጠቀም የሊጋል ሒስትሪን ዕውቀት፣ ጠቃሚነትና አስፈላጊነት ለተማሪዎቹ አስተላልፋለሁ የሚል ነው። በሊጋል ሒስትር ጠቃሚነትና አስፈላጊነት ጥርጥር አልነበረኝም። ታሪክን ያልተገነዘበ በታሪክ የተሰሩትን ስሕተቶች ይደግማል የተባለው ዋዛ አይደለም። ታሪክ ደግሞ አሰስ ገሰሱና ተረት አይደለም። የልጆች ማስፈራሪያ አይደለም።(ጅብ ይበላሃል ፖሊስ ጆሮህን ይቆርጣል እንደማለት።)

መጀመሪያ ሌክቸር እጠቀም ነበር። በዚህም ተማሪዎቹ ስልቹ ሆኑ። አንዳንዶቹ እንደውም ከትምህርቱ ይቀራሉ። ከመጡትም አንዳንዶቹ ያንቀላፋሉ። ከዚህም ውጪ ሌሎቹ ብዙዎች አፍጠው ማየት ነው እንጂ ተሳተፊ (ኢንተርአክቲቭ) አልነበሩም።ጥቂቶች ብቻ ፈራ ተባ እያሉ ይሳተፉ ነበሩ፤ ሊክቸሩንም ወደ ዲስካሽን ይወስዱት ነበር። ከነዚህ ብዙዎቹ ዕድሚያቸውን ከርቸሌ (ወህኒ ቤት) ዩኒቨርስቲ ፈጅተው የመጡ ናቸው።

ከዛ በወቅቱ ከማስተምረው ዐቢይ አርዕስት አንድ ሃሳብ አነሳና ሌክቸር ሳይሆን ማብራሪያ ቢጤ እሰጥና ሶክራቲክ ዘዴ ጀመርኩ፤ እንደሁኔታው እሱን እተውና ወደ ዲስካሺን እገባለሁ። ሁለቱን ዘዴዎች እያደባለቅሁ መጠቀም ከጀመርኩ በኋላ የተማሪዎቹ ተሳትፎ በጣም ጨመረ። ከትምህርትም የሚቀሩ አልነበሩም። ይህ ዘዴ የመጨረሻውን ሁኔታ ፈፀሜ ላረጋግጥ ባልችልም፣ ተማሪዎቹም እኔም ተጠቅመንበታል እላለሁ።

እስከቅርብ ጊዜ የቀድሞ ተማሪዎቼ፣ የአሁን ጓደኞቼ ስለ አንዳንድ ነገር እያነሱ ያጫውቱኝና ሲሞግቱኝ ብዙ ያላየሁትንና የረሳሁትን ያስታውሱኛል። ይገርመኛል። በወቅቱ የተማሪዎቹ ተሳትፎ በግልፅ ይታይ ነበር።

4.2. ሪሰርች

በእርግጥ ለሊጋል ሒስትሪ ብዙ ማንበብና ምርምር ማድረግ ነበረብኝ። ያልሔድኩበት ቤተ መጻሕፍት አልነበረም። ለምሳሌ ቤተ መጻሕፍት መመዘክር የቁም ፀሐፊና የአርካይቭ ክፍል ኃላፊ የነበሩ አቶ መላኩ ዘብሔረ ጐጃም በጣም ረዱኝ። አንድ ቀን ደግሞ መነን ት/ቤት ቤተመጻሕፍት ቤት ሂጄ የጥንት መጽሐፎችና ሪፖርቶች አየሁ።

የኢትዮጵያ ሊጋል ሒስትር ለዚሁ ተብሎ ከተፃፏ መፀሐፎች የሚገኝ ሳይሆን ስለታሪክ፣ ሶሶዎለጂ፣ አንትሮፖለጂ ወ.ዘ.ተ. ጥናቶች ነው ያለው። በዚሁ ዐይነት የሪሰርች ሜዳ ሰፊ ስለነበር እንደ አበበ ቢቂላ /ምሩፅ ይፍጠር/ኃይሌ ገብረሥላሴ /ቀነኒሳ በቀለ/ደራርቱ ቱሉ/ጥሩነሽ ዲባባ/መሠረት ደፋር ሳንባ፣ ልብና ዊል ፖወር ይጠይቅ ነበር። እኔ ደግሞ እንደዛ አይነት ሳንባ፣ ልብና ዊልፖወር ስለአልነበረኝ ሪሰርቹን አጠበብኩት።

ከዚህ በተረፈ የፕራይማሪና ሴከንደሪ ምንጮች ትልቅ ችግር ነበር። በመሠረቱ የኢትዩጰያን ሊጋል ሒስትሪ ሶስት ክፍል አርገን ነው ማጥናት ያለብን። አንደኛ አክሱም-ክርስቲያን፣ ሁለተኛ ባህልና ልማድ የኦሮሞን ገዳ እንደምሳሌ ወስዶ እና ሶስተኛ እስላሚክ (ሸሪያ) ሕግ ግንኙነት ያለውን ባህልና ልማድ አገናዝቦ።

እንግዲህ በዚህ ዐይነት የፕራይማሪና ሴከንደሪ ምንጮች የተዝረከረኩ ናቸው። የሚከተለውን እንደምሳሌ እንይ። ለአክሱም-ክርስትያን ፍትሐ ነገሥት፣ ሥርዐተ ነገስት፣ መዋዕለ ነገሥት (ክሮኒክል) እንደ ዋና የምንጭ ምሳሌ ይጠቀሳሉ። ለሁሉም ክፍሎች ሰከንደሪ ምንጮች በብዛት አሉ። የበጅ፣ ሰቪን ሮብንሰን፣ ሥርግው ሀብለ ሥላል፣ ታደስ ታምራት፣ መርዕድ ወልደአረጋይ፣ ባሕሩ ዘውዴ፣ አስመሮም ለገሠ፣ ትሪሚንግሃም፣ ማርጃሪ ፐርሃም፣ ሃበርላንድ ጠቃሚ የሚባሉ ምንጮች ናቸው። ዝክረ ነገር ደግሞ በአብዛኛው ፕራይመሪ ነው። በኢትዮጵያ የካቶሊክ ቤተ ክርስቲያን ካርዲናል የነበሩ አባ ጳውሎስ ፀዳዋ ወደ እንግሊዝኛ የተረጐሙት ከነመቅድምና የግርጌ ማስታወሻ ፍትሐ ነገሥት ተወዳዳሪ የማይገኝለት ፕራይመሪ ምንጭ ነው። በሌላ አንፃር ደግሞ የእንኮንቲ ሮሲን፣ ጊውዲ፣ ቼሩሊ ሰከንደሪና ፕራይመሪ ምንጮች አሉ።

ይህ ሁሉ ቢኖርም ማነፃፀርና መጭመቅ የግድ ነው። ድካሙ ሁሉ እዚህ ላይ ነው። ሰከንደሪው ወደፕራይማሪ ሲጠቁም፤ ፕራይመሪው ደብዙ ሲጠፋ አስቸጋሪውና ተስፋ አስቆራጩ ይህ ነው። በዚህ ዐይነት ነበር· የማስተማሪያ መጽሐፍ ላዘጋጅ ያለምኩትና ያቀድኩት።

4.3 የማስተማሪያው ማቴሪያል

ይህን ለማዘጋጀት ስማሰን ብዙ ተማርኩ። ተማሪዎችን ከፋም ለማ በግርድፍ የተዘጋጀው ማተሪያል ምን ያህል ጠቅሞ ይሆን ዛሬም የምጠይቀው ጥያቄ ነው። የሚቆጨኝ እሱን በደንብ አስተካክዬ፣ በኢሹ፣ ጥያቄና መልስና ማብራሪያ እየሰጠሁ እያረምኩ እስራዋለሁ ስል ዘመኔን ረስቸው ጥሩተኛ ተብዬ ጡረታ ወጣሁ። ከዛ እሱም ጥሩተኛ እኔም ወደ ቀረኝ ዘመን አኗኗር ተዛወርኩ።

በየምክንያቱ አንዳንድ ሰዎች ስለማቴሪያሉ ሲያነሱብኝ፣ ለምሳሌ መምህራን ኤልያስ ኑርና መ·ራዱ፣ ካለበት አወጣና አቧራውን አራግፌ ሳገላብጠው ጭራሹን ተሰፋው ጭልም ይላል።ችግሩ በአሁኑ ወቅት የተቀነሰ ቢመስልም ዋና ዋናው

ችግር እንዳለ ነው። ያንን ለመቋቋም የኔ ሁኔታና ዕድሜ የሚችለው አይመስለኝም። አሁን የሚያጓጓና ብርታት የሚጋብዝ የተስፋ ሁኔታዎች ያን ጊዜ ቢኖሩ ምንኛ በተሰራ።

እንግዲህ ችግሮቹ ምንም ይሁኑ ምንም መፍትሔው ያለው እኔ ዘንድ አይመስለኝም። እንደተባለው ሴትየዋ ልጇ ጠፋ ብላ «ያገር ያለህ! አገር ይታሰልኝ ...» ብላ ጮኸች አሉ። ጐረቤትዋ የሆነ ሰው "አገር ለምን ይታሰሳል! እንዴትስ አርጐ ይሰማ አንቺ እየጨህሽበት፤" አላት ይላሉ። ወጣ ወረደ የሚከተለው ስለማቴሪያሉ ሁኔታ በአጭሩ ሳያሰረዳ አይቀርም ብዬ አምናለሁ።

የማቴሪያሉን ቴብል እቭ ኮንቴንት (አርዕስት ማውጫ) ያየ ምኞታዊና ሐሳባዊ ነው ቢል እውነቱን ነው፤ በዛ መንፈስና ስሜት ነበር ያዘጋጀሁት። በሱ መሠረት እንደማላስተምርና ማተሪያሉንም ጨርሼ እንደማላዘጋጀው አውቀው ነበር። ኘላን ማውጣቴ ነበር።

ቴክስቶቹ ወጥ ሳይሆኑ እንደ የአርእስቱና ምዕራፉ የቀረቡ ነበሩ። የመጀመሪያ መግቢያ ምዕራፎች ቴክስቶች (ለምሳሌ) ስለ ጥንታዊ ሕግ ሚስፖታሚያ፣ ግሪክ እና ሮማን ሲሆን፣ ኢሹ እያወጣሁ ጥያቄና መልስ እያደረግሁ ነበር። ማለት ልክ እንደ አሜሪካን ሎ ስኩል ማስተማሪያ ማተሪያል። ይህ አድካሚና ጊዜ የሚወስድ ሆነ፤ ማስተማሩንም ሊጐትትብኝ ሆነ። እሱን ወደፊት የሥራ ቀጠሮ ሰጠሁና የቴክስቶች ተዋፅኦ ማውጣት ጀመርኩ። ለምሳሌ ስለታሪክ ካር (እኔን ከ ቶይን ቢ ይልቅ ያስደነቀኝ ብዙ ተማሪዎቼም ተደናቂ ሆነዋል)፣ ባርኩን ስለ ሊጋል ሒስትሪ ምንነትና ኢንተርዲሲኘሊነሪ አቀራረብ፣ ስለ ሕግ ሶሶዎሎጂ፣ ሐዛርድ የራሻን ሕግ ሐዛርድ በ ሞስኮ የተማረ አሜሪካዊ ሲሆን ሃርቫርድ ያስተማረ በራሻ ሕግ ኤክሰፐርት ነበር። እላይ ያነሳሁት የስታንፎርድ ፕፎፌሰር በቻይና ሕግ ከዚያ ስለኢትዩጵያ። በነገራችን ላይ በደርግ ዘመነ መንግሥት ስለ ማርክዚም ሌሊንዝም ትምህርትና የማስተማር ዘዴ ከዋናው ወንዝ እንድንጠመቅ ታዘን ሞስኮ በሔንድንበት ወቅት የሌኒን ዩኒቨርስቲ ፋኩልቲዎችን እንደናይና አስተማሪዎችንም እንድናነጋግር በጠየቅነው መሠረት ሕግ ትምህርት ቤትን ስንጐበኝ በዓለም አቀፍ ታዋቂ የነበረውና የዓለም አቀፍ ሕግ ኤክስፐርት የሆነውን ፕፎፌሰር ቶንኪንን ስናነጋግር ስለ ራሺያ ዩኒ ሲስተም ስጠይቀው ምዕራባዊ ነው እንደኢሮኘ ነው ብዙ ኢሮፒያንና አሜሪካኖች የፃፉትን እንጠቀማለን ብሎኛል ፤ በተለይ ሐዛርድን ጠቅሶ ይታያችሁ ማተሪያሉን በማዘጋጅበት ወቅት ሪሰርች ወጪ እና አሲስታንት ብሎ ነገር የለም፤ ጣርና ጋር፤ማሰን ብቻ ነበር። እነ ሎዊንሽታይንና ሴድለር ወጪና ረዳቶች ነበርዋቸው። ታዲያ ምን ይባላል። ለማንኛውም ከሞላ ጐደል ማተሪያሉ አገልግሎት ሰጥተዋል። በተለይ የኋላ ተማሪዎች የአሁን ተማሪዎችም በአጋጣሚ ስንገናኝ እንደተጠቀሙበት ነግረውኛል።

ሥራው ግን በጣም ፈታኝና አድካሚ ነበር። ሶስት አራት ጊዜ መከለስና መሻሻል ነበረበት። አሜሪካ አገር የሎ ስኩል አስተማሪዎች ማተሪያል የሚያዘጋጁት

በቀላሉ ወደ 20 ዓመት ካስተማሩ በኋላ ነው። ስለሆነም ፍሮይንድ የታወቀ አስተማሪና የሃርቫርድ ዩኒቨርስቲ ፕሮፌሰር- Teaching Material አልነበረውም። የሚነበቡ መጻሕፍት ብቻ ይጠቁማል። እንዲሁም ስዘርሳንድ። አቅትዋቸው ሳይሆን ምክንያት ነበራቸው። የሳክስ Legal Process በኔ ጊዜ ያልታተመ ረቂቅ ነበር። ይህ እንግዲህ በነሱ ደረጃ ነው። የኛ ደረጃና ችግር ደግሞ እራሱን የቻለ ነው። በተለይ አሜሪካኖቹ ለኛ ለኢትዮጵያዊያን አስረክበው ከሔዱ በኋላ የሪሰርች ጉዳይ አከተመ ጀርናሉ ሰንት ጊዜ ካቆመ በኋላ ነው የታተመው። እዚህ ላይ አጥብቄ ላሳስብ የሞከርኩት የነበረውን ችግር እንጂ የማተሪያሉን ስሕተት፣ ውሱንነትና ድክመት ለመካድ አደለም፤ ለመሸፈን አደለም፣ ለማድበስበስም አደለም፣ ብዙ ስሕተቶችና ድክመቶች አሉበት።

5. መዝጊያ

ከዕለታት አንድ ቀን ፒያሳ ጫማ አስጠርግ ነበር። አጠገቡ የጥላሁን ገሠሠ ዘፈን ምድርና ሰማይ እያደባለቀ ከሙዚቃ ቤት ተለቋል። ሊስትሮው እቀመጥበታለሁ አለ በድንገት ግርም አለኝና፣ "ምኑን?" አልኩት። "የምን ታረጊዋለሽን?ችግር፣" አለኝ። ዘፈኑ ውስጥ "ምን ታረጊዋለሽ?ምን ታረጊዋለሽ?" የሚል ስንኝ ነበር። ጫማዬን አስጠርጌ የሌስትሮውን አነጋገር እያሰላሰልኩኝና ብቻዬን እየሳቅሁ ተነስቼ ሔድኩ። አሁንም እቀመጥበታለሁ። አሜን።

Book Review

Assefa Fiseha, *Federalism and Accommodation of Diversity in Ethiopia: A Comparative Study*[*] (Revised Edition; 2007). Addis Ababa: Artistic Printing Enterprise. Pp. xv; 480. Price not indicated.

GETACHEW ASSEFA[•]

I am in no doubt that I will risk any exaggeration in saying that Assefa's book is the first comprehensive work which is devoted to the multifaceted issues arising in the context of the new Ethiopian federal system.[1] From the enormous amount of literature reviewed from wide backgrounds such as law, political science, social and political anthropology, and from the extensive review and analysis of facts on the ground, one can easily see that the book has gone far beyond the legal text analysis, which is customary in legal researches. It, in this regard alone, represents a commendable break from the usual legal researches we see. I hold a sincere belief that Assefa's book represents a dawn of a new era for legal research in Ethiopia.

The book was an attempt to explain the most vexing questions that face all federations in general and multiethnic ones in particular with a great focus on its main subject: Ethiopia. The leading research agenda the author has had while embarking on the work was to see whether the Ethiopian federal arrangement has put in place mechanisms that best accommodate 'the various ethno-linguistic groups in Ethiopia'(p.2.). The author has also other very pointed ancillary research questions that served as guidelines to decipher the large Ethiopian and foreign comparative materials that have gone into the book. Important such questions include questions on 'how best to restructure the constituent states' of Ethiopia in order to establish 'a more viable federal system'; the models of federal arrangements that are suitable to adapt to the Ethiopian reality; the

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[*] The book is a revised and updated version of the PhD thesis the author defended on 9 November 2005 (University of Utrecht, the Netherlands, as indicated on p. ii of the book)

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[1] It is true that we have many academic research exercises on the Ethiopian federal arrangement as part of master's and doctoral researches by foreigners as well as by Ethiopians. As a comprehensive list of these works is not yet available, it is not possible for this writer to mention the works here. We also know that the Ethiopian federal system has been so far a subject of some conferences and discussion forums in Ethiopia and abroad. See For example, David Turton (ed.), *Ethnic Federalism: The Ethiopian Experience in Comparative Perspectives* (James Curry, Oxford, 2006); _____ ; *First National Conference on Federalism, Conflict and Peace Building* (Symposium Proceeding published by the Ministry of Federal Affairs, Addis Ababa, 2003)

optimal ways and extent of dividing powers that best serve the Ethiopian context; the mechanisms of ensuring the proper balance between the shared-rule and self-rule aspect of a federal arrangement that best suits the Ethiopian reality (p.3).

Organizationally, the book is divided up into 9 chapters including a chapter on conclusions and recommendations (and excluding the introductory part). In what follows, I will use the organization of the book and present my observations of the outstanding issues of the book and attempt comments which the author may want to take into account during future editions of this important book. I trust that the approach I adopted will suit the reader of the book and also my comments because as I have observed it each of the chapters of the book sort of stand capably on its own (though they are interdependent and interconnected).

The first chapter lays a foundation for the discussion in the book by looking at the past political and administrative history of Ethiopia. One of the most striking contentions the author makes in the first chapter of the book , aside from the many informative and interesting discussions on the Ethiopian historiography, as approached in quite different ways by Ethiopian historians, is about the historic Ethiopia's (before 1889, i.e., before Emperor Menelik II reign) being a '*de facto* federal state. The author argues that before the reign of Emperor Menelik II, Ethiopia's power relation between the centre and the peripheries was one of decentralization than centralization on the basis of what he calls 'provincialism'.[2] (pp. 16-21).

This is a very interesting reading of the administrative history of Ethiopia. But I think it is interesting to point out also that the autonomy in respect of the provinces existed in favour of those who were strong enough to exert it; many a people have been enslaved and subjugated by both the central and provincial authorities without any sign of self rule. So to that extent, one should forewarn a reader of Assefa's book the *de facto* federation in Ethiopia lacked almost absolutely a principle of equality of peoples.

In his review and analysis of the 20th century crises of the Ethiopian State, Assefa presents an interesting summary of what unfolded in this period in the political as well as socio-economic landscape of the then Ethiopia. He tells us that most of the students of the political history of Ethiopia seek to explain the crisis in two major lines. The one line is an attempt to explain the crises as resulting from the monopolization of political power and thereby material and social resource by some in exclusion of the others, and that ethnicity at best was a factor or an element but not a sole cause of the 20th century crises in Ethiopia. (pp.55-57).This line of understanding contends that ethnicity was used as an instrument to further the agenda of power and resource access. The second major line of explanation of the state crises which was popularized by the Ethiopian Student Movement of the 1960s is along the existence of ethnic/national operation (pp.69-82). Assefa sees merit more in the combined contribution of both positions and

[2] See pp. 16-21. The author cites many scholars that have in different ways endorsed the idea that historic Ethiopia approximated a federal system.

concludes that the most important reason for the failure of the 20th century Ethiopian State was the latter's failure to accommodate ethno-cultural diversities of the inhabitants that were brought into the Ethiopian empire primarily as of Menelik II's era. This failure, according to him was manifested both in terms of dominance of the one ethnic group (the [Shewan] Amhara) in exclusion and marginalization of the others politically, socially, culturally as well as economically.

The second (pp.99-138), third (139-164) and fourth (pp.165-112) chapters of the book are devoted predominantly to the comparative aspect of the work. The author deliberately selected thóse federations that recognize multiculturalism as a political fact and which have fashioned in creatively different ways their public life by taking this fact into account (p.6). After making basic and helpful discussions about the concept of federalism (and federations); some important common denominators of federations; and institutional conditions of federations in the second chapter[3], the author focused on one specific aspect of federal institutions in the third chapter, namely, the second/upper legislative house in federations.

The third chapter of the book has in a clear and interesting manner brought out the rationale for the existence of upper houses; the nature of their composition; and the functions they render. The author has shown us in this chapter that in all federal and federal-like systems, upper houses are not constituted on the basis of normal election principles of 'one man one vote' (as it is the case for lower houses) but rather through special system designed to ensure equal or at least equitable representation of the states forming the federation. Because of the nature of its composition, the author explains, these houses are meant to protect the interests of the states units at the federal level against the federal government's derogation from, or encroachment upon the states powers, and guarantee the participation of the states in federal decision-making as an aspect of the shared-rule. He also tells us that at least the federations considered in the study (except the Ethiopian one) have constitutionally empowered their upper houses with legislative competence..

The author in this chapter points out that as it does not empower the House of the Federation (the federal upper house) with legislative competence, 'the Ethiopian Constitution fails to entrench the states, or to use the terms of the Constitution, the nations, nationalities and peoples to be part of the federal law-making process' and that this exclusion of the states or the nationalities from the federal law making process may have negative consequences especially in situations where the central government

[3] One of the important points he makes in the discussion in the second chapter for example is that there are theoretical, legal and practical consensus that in the division of powers between the center and the units, division is often made in such a way that the scale of power is tipped in favour of the center for the latter to prevail in the events of conflict. See for example, pp.108-114. The Author also succinctly discussed in the same chapter the fundamental legal and institutional requirements for a successful federation (pp. 120-127).

power is controlled by a group or a party different from those controlling the states' governments (pp.144-45).

The above is a very plausible position which I agree with. But I believe that one should look at this matter within the context of the whole Ethiopian constitutional dispensation including the powers given to the Ethiopian Upper House. My disagreement with the author's conclusion is that he did not look at the Ethiopian arrangement (for a non-legislative upper house) as an arrangement that tries to put in place a uniquely composed upper house (fundamentally different from all other federations known to us so far) with a different balance of power and institutional competence that gives enough leverage, for the entities it represents, against the federal government in its own ways.

Contrary to the author (and some others agreeing with him as explained in the book) who believes that the states are let-down by the Constitution in this regard, I argue that from the point of view of the states' (or the nationalities') interests at the federal level, the power of the House of the Federation (HoF) to interpret the Constitution offsets the most important shortcoming that may have resulted from its being a non-legislative house. This is in short because any overreaches or derogations by the federal government, through its laws or other decisions, on the powers and interests of the states (against the federal Constitution's division of powers) could be corrected by the House of the Federation through its constitutional interpretation power. So here in the Ethiopian case, what we have is not a situation where once laws are enacted they become out of the reach of the body that represents the states or the sub-national entities, as in other federations; rather precisely, what we have is a situation in which the end of the power of the federal legislative chamber, i.e., the House of peoples' Representatives (HoPR), in respect of a given law, marks perpetually the beginning of the power of the House of the Federation to nullify that law in *toto*, or any part of it through its interpretation power thereby replacing the law or its part with its own decision. So, this way, the Ethiopian arrangement emasculates the danger that the federal government might bully the states unconstitutionally through the House of Peoples' Representatives or the federal executive. My point is that given the fact that the House of the Federation cannot be a legislative chamber and an interpreter of the Constitution at the same time[4], the existing constitutional setup seems to me to have creatively designed an alternative system that uniquely protects the interests of the states and/or the nationalities at the federal level.

[4] The author's argument in this chapter that the HoF should be given a legislative competence cannot in my opinion be accepted unless its power to interpret the Constitution is withdrawn, for otherwise this will have a consequence of making the HoF a law-maker and a judge on the constitutionality of the law it makes at the same time.

Another finding of the author I would like to view critically is the one that relates to the system of representation of the nationalities in the HoF. Assefa states that the Constitution endorses almost the same principle of composition for the HoF as the one for the composition of the lower house (p.149). By citing Art.61 (2) of the Constitution, he states: 'the organizational principle of the HoF is the same with the HoPR except that there is a significant difference in the number of constituencies, 100,000[5] for the former and one million for the latter', and concludes that 'this puts into question the rationale for setting up a second chamber in a federation' and that it is wrong to consider the House as a defender of the rights of nationalities (e.g., p.162, footnote 97; p.243). Again, to briefly state my perspective on this, I say that the fear of the author that the HoF would be composed in such a way that the more populous nationality would end up in having more representatives in it thereby turning the House into 'a nearly majoritarian House' is correct on the face of it. But I think at the same time that given the current nature of the states of the Ethiopian federation, there is very little chance, if at all, for the more populous groups to dominate the decision in the HoF. One should see from the author's figure (on p.149), the number of representatives for the most populous state, Oromia (for the 2001-2005 term of House) was 18, while it was 51 for SNNPS (Southern peoples State).[6] Since individual nationalities are the ones to be represented in the HoF, the most diverse state (as opposed to the most populous state, hence group in some cases) ends up in having the greatest number of representatives in HoF. Because of this, I believe that the Upper House in Ethiopia also serves the interests of diversity in its own ways because of the careful design. In addition, just briefly, one should not also forget that in Ethiopia, the reason for the federal arrangement was not solely the need to accommodate interests of least populated (hence numerically minority) groups, but also, perhaps more so, in order to accommodate the interests of those numerically not terribly minorities (in some case numerically large or largest) but felt marginalized in the past.[7] So the constitutional arrangement should address the interests of those populous groups who would feel swamped, if the Constitution were to opt for equal or so representation for all nationalities, by the numerous small groups in the country. By making the representation of the HoF less majoritarian (by requiring one million people for one additional representation) on the one hand and by granting at least one representative for every nationality in the country on the other, it seems to me that the Constitution has fairly addressed the needs of both the numerically small and the numerically large groups in the country.

[5] According to Proclamation No. 532/2007, a size of a constituency shall be determined proportionately by taking into account the total population of the country (during every election) on the basis of the maximum number of seats of the HoPR, which is 550, including seats for special representation (not to be less than 20; Art. 54, FDRE Constitution).

[6] The figure has slightly changed for the current (2005-2010) term.

[7] The Oromo people are the case in point.

The fourth chapter is devoted to explaining in depth the approaches taken by some multiethnic states in designing a workable federal solution to accommodate their diverse societies. Accordingly, the author has thoroughly discussed the Nigerian, Swiss and Indian federations in the light of the above vantage point and brought out very interesting account of both the development and the current state of being of those federal systems. The information in this chapter offers very helpful insight for public policy in Ethiopia as well.

The core of Assefa's book, I believe, is Chapter 5. This can be observed from the title of the Chapter itself: Federalism and accommodation of diversity: The Ethiopian Experience. Here, the author has tried to address the research question of the entire book (see also top of p.213). He also looked at practical matters and concerns of implementation that have unfolded since the start of the Ethiopian federation. Assefa asserts in this part of the book that the Ethiopian Constitution which brings into being the federal system contains some contradictions in combining 'ethno-nationalism and self determination on the one hand and federalism on the other (p.219). He also points out here that (he did also point out this earlier in the third chapter of the book, reviewed above) the states of the Ethiopian federation are not guaranteed ways of participating in federal decision making and hence the shared-rule aspect of federalism has not been adequately addressed (p.228). He also points out importantly that there is no principle of federal supremacy in the Ethiopian constitutional federalism. He explains that as the case of overlap of powers remain inevitable in federations, it is important that federal constitutions enshrine a principle of supremacy of federal laws over state laws, which the Ethiopian Constitution fails to do (p.229). He further argues that unlike other federations where the elements or forces of unity slightly prevail over those of diversity, in the case of the Ethiopian federation, the reverse is the case (pp. 229-30). He convincingly argues in this connection that the study of federations and discourses on federalism show that a federal system aims at creating a stable and perpetual state either out of many units that come together or by preserving a state through 'a timely recognition of its inner diversity'. Hence, the argument is that federal supremacy is pivotal in creating a perpetual federal system.

Assefa also mentions in this part of his work about the issue of compatibility of secession as a constitutional right, and federalism (pp. 234-36). He has discussed the Ethiopian Constitution's provisions in this regard and the arguments and debates that were held during the making of the Ethiopian Constitution back in early 1990s. However, in view of the fact that secession is one of the thorniest issues at home and abroad, and in view also of the fact that amidst this controversy the Ethiopian Constitution has taken such a bold step of constitutionalizing secession unconditionally, a little more unpacking of the discourses surrounding the concept would only be more appropriate and expected in the book, which has not been done.

Assefa also suggests that in view of the many differences between the states of the Ethiopian federation, it may be wise to rethink the federal arrangement again and set up an asymmetric system. He indicates that although the Constitution aims at creating

symmetrical federalism, there is in practice a political asymmetry as regards some of the member states (pp.240-42). The consequence of this suggestion is for example that there will be differentiated levels of federal-state power and jurisdictional relations depending on the dictates of the facts on the ground in relation to the concerned states. The author has shown that the idea of asymmetry has been put to use by federations he has studied. I believe that this is an idea worthy of putting on the table for discussion in Ethiopia as well.

Assefa also discussed briefly but clearly the opinions of both the detractors and supporters of the Ethiopian ethnically based federalism (pp.47-53). He concludes in this regard that although the federal system has both foundational (owing to the problems in the Constitution itself) and practical limitations, it remains to be the only measure that could ensure the survival of the Ethiopian state. He points out in this same Chapter that the outstanding foundational limitations include the failure to take into account historic mobility of people and inter-group relations; failure to incorporate principles of asymmetry; its inability to put in place a system to guard against the danger of local tyranny; and absence of a compelling power-sharing schemes among the major contending groups (through for example PR election system). He has boldly and lucidly indicated the weak points in the foundational framework that needs to be reconsidered for the Ethiopian federal system to be able to forge a more perfect union while celebrating diversity. I believe that Assefa has initiated great thoughts which the political system may want to consider, further improve and put into action for a better Ethiopia.

Assefa also passes on a suggestion (which he says is made by others and he seems to concur with) in the same Chapter that may raise the eyebrows of many a people: a suggestion on restructuring of the Amhara and Oromia states (p.265) and also Somali state (p.266-7). He believes that restructing these states 'addresses not only the asymmetric federal system but also brings administrative convenience. The author mentions the ideas and options propounded by those who favour the restructuring of the states (p.266). He makes it clear that the restructing suggestion should not be confused with a call for adopting the American style geographical federalism for he says the latter is incompatible with the context of multi-cultural federal systems (p.267). Rather, the author makes a suggestion for restructuring the states somewhat along the line of Swiss cantonal structuring where the same language speakers live in many different cantons that are made to reflect and protect the essential attributes of diversity (see p.267).

This idea of restructuring proposed by Assefa certainly is a proposal to consider. However, as we can see from the book, the proposal has been only concisely discussed. But one would want to see more data and information on the Ethiopian reality that may convince the reader, including the one opposed to the idea, to see merit in the proposal. We would have liked to see more on how the new proposal if implemented would turn the existing problems around in terms of promoting the interests of those citizens of the states to be subjected to restructuring; in terms of promoting positive inter-ethnic

relations across the several states in Ethiopia; in terms of promoting the self-rule of the various nationalities and the overall national unity of the country, and so on. Most importantly, I believe that those nationalities in the states to be restructured need to be assured that they will have nothing to lose, but to gain, by the act of restructuring, and that their identity as a people in each case would remain intact across the sub-divisions to be created. More needed to be discussed in the book in this regard as well.

In addition to the above, the author's suggestion for restructuring seems to have in mind primarily the size of the three states selected. But, one may ask a worthy question as why the restructuring be limited only to consideration of size, and to only the three states. For example, should not we think the restructuring of the Amhara State along with restructuring of the Beneshangul/Gumuz State in which parts of the two states may be merged on the basis of practical considerations to be carefully designed? So I think that Assefa's suggestion is thought-provoking and interesting as it is, but at the same time more issues that are provoked by the suggestion itself needed to be addressed.

The book in chapters 6 and 7 deals with division of legislative powers, and division of executive powers and intergovernmental relations, respectively. In the sixth Chapter, Assefa essentially grapples with the two contending views regarding the constitutional viability or autonomy (in respect of law making powers) of the states of the Ethiopian federation. Many observers believe that the division of powers made by the Ethiopian Constitution devolved very insignificant powers to the states by concentrating more powers at the center. Assefa wants to show the reader that 'if the provisions of the Constitution are taken seriously, at least as far as the self-rule is concerned, the powers of the states are more comparable to a confederation than a federation' (p.293).

Considering the pattern of power division in some federations (USA; Germany, Switzerland and India) and comparing those with each other and the Ethiopian arrangement, Assefa draws out a conclusion that each of these federations has followed quite different approaches in the matter (294-342). As regards the main contention he makes, i.e., that the states of the Ethiopian Federation wield considerable power, Assefa strongly argues that 'the comparative study seems to suggest that the constituent [Ethiopian] states rather have an overwhelming amount of power at least so far as self-rule is concerned' (p.342-43). He states that the sates make their own procedural and civil laws; their own constitutions; they are constituted of nationalities that are sovereign and have the right to self-determination up to and including secession. Furthermore, the states have the power to make and execute social and development policies, strategies and plans. He likewise contends that though the constitutional powers of the states are generous, there is a tendency of centralization of powers as a matter of the political practice in the Ethiopian federation owing to the factors he explains in the book (343-51).

In the seventh chapter, Assefa points out very interesting issues regarding federal executive powers and intergovernmental relations in the Ethiopian federation. He states

that though the Ethiopian Constitution envisages a situation of dual powers and institutions (Art.50 (2)), most of the federal executive institutions are not established in the states (nor are there clear delegations of powers) and hence there is a gap in enforcing federal laws in the states (p.355-57). Assefa notes that in a system with division of powers between the two orders of government such as Ethiopian (where exclusive powers are given to one or the other), a clear division of executive power is crucial. He also argues here that there are no comprehensive formal, constitutional or otherwise, system of intergovernmental relations between the Federal Government and the constituent states in Ethiopia. He discusses a sort of extra-constitutional mechanisms by which the federal government 'cooperates with' or influences the governments of the four peripheral states of Ethiopia (Afar, Beneshangul/Gumuz, Gambella, and Somali). These mechanisms currently are the advisorship of the Ministry of Federal Affairs (one of the executive organs of the Federal Government), the party structures, and the process of policy making (pp. 387-95).

In this respect, Assefa cites works of foreign researchers such as Lovise Aalan (2002) who for example asserted that 'the advisors from the Ministry of Federal Affairs virtually run the regional government and hindered self-administration'.[8] He also discusses the overbroad powers practiced by the party officials of the EPRDF that were involved in many of the regions, including Oromia, and took important decisions derogating from the self-rule powers of the states (pp.387-88). He tells us that this situation has changed for the better since 2001 most importantly because of the reform of the EPRDF (following the split of the TPLF) and its realizations of the negative effects of such an approach to some of the states (p.388). More so, with the establishment of the Ministry of Federal Affairs, the relationships between the Federal Government and the four states have become more formally intergovernmental than anything else. Assefa, however, tells us that the Ministry though a good attempt at formalizing the Federal-state relations in respect of the four states, still cannot be taken to be an able substitute for inter-governmental institutions that exist in the federations he has thoroughly discussed in chapter seven of his book. He also indicated a possibility for overlap of powers between this Ministry and the HoF (p.390). Assefa also commented in a concise but pointed way the impact of the centralized party workings on the state autonomy and the constitutional division of powers (p.391-94). He tells us that the centralism of the party system has effects in all of the states either through the EPRDF or the affiliated ruling parties in the non-EPRDF controlled states.

Assefa's book contains very rich comparative information on the little known area of intergovernmental relations in federations. It also points out the legal lacunae as well as the practical problems in this regard in the career of the Ethiopian federation so far. These discussions I believe are very instructive and helpful for the policymakers of the country. I would have liked this part of Assefa's book to have gone a couple of steps further. The one is to compare the kind of informal relations between the federal and

[8] P. 387. See also his reference to J. Young's work (pp. 386-87).

the states governments in Ethiopia with those systems of intergovernmental relations be extensively discussed (e.g. Germany's) and comment pointedly on the possible merits of the informal system at work in Ethiopia. Because it seems to me that formalization is not a goal in itself; the goal rather is the federal system's and the people's benefiting from the goings on in reality.[9] Second is a discussion on the views from the states and the citizens (of the states) about what they thought of the informal inter-party or intergovernmental relations that have been going on since the inception of the federation. Knowing their reflection on this would have given the reader information to cross-check the veracity for example of the views of the scholars the author included in the book that all along paint a gloomy picture on the matter.

In the last substantive chapter of his work (Chapter 8), Assefa discussed adjudication of disputes in federations with a focus on the Ethiopian system. Assefa explains extensively the Ethiopian system of constitutional interpretation by the HoF, which departs from other systems in which courts interpret constitutions. He explains the reasons that led to the Ethiopian approach during the making of the Ethiopian constitution (402-06).

Besides, Assefa takes issue with the laws enacted by the HoPR (proclamations No. 250/2001 and 251/2001) on further defining the constitutional interpretation powers of the HoF and its aide, the Council of Constitutional Inquiry (CCI) on two grounds. The first is whether it is constitutional to have the powers of the HoF defined by the HoPR in the first place. Assefa believes that this should not have been the case. This is an interesting matter to argue over. But, I would also like to point out to the reader that on the contrary the fact that the HoPR is a law-maker on "all matters" assigned by the Constitution to the Federal jurisdiction would make it competent to pass such a law. Furthermore, I think that it is only appropriate from the point of view of checks and balances between the two federal houses since the HoF is an interpreter of the Constitution. If the powers defined for HoF by the laws have constitutionality problems, it can be brought to the HoF for review; this would have been problematic if HoF were to define its own powers.

The second ground of Assefa's disagreement with the laws is that the latter have unconstitutionally broadened the powers of the HoF to interpret the Constitution thereby taking away from the judiciary the powers the Constitution apparently gives to the courts. This is without any exaggeration a very intriguing and tantalizing issue. I cannot deal with the matter in such a limited space. But I would leave it my cautioning the reader to look further into the laws and the Constitution before agreeing or disagreeing with Assefa's views. One should for example ask whether the Constitution has unequivocally spoken about the limits or bounds of interpretable matters or not. On should also first understand what the framers intended to mean by "constitutional

[9] This is not to say that there is merit in the system of advisorships where the advisors became so powerful and made the state rulers puppets. That was not acceptable. But other efforts of informal engagement of capacity building that helped the citizens of those states should be accommodated.

dispute" on the one hand and "constitutional interpretation" on the other. Lastly, how are these issues of interpretable matters handled in other jurisdictions? For example, isn't it the case that all matters for constitutional interpretation, whether legislative or executive acts, are dealt with by the constitution interpreter single handedly? I would leave this matter here as it will not be practicable to address each of these in this review.

In conclusion, I would like to state once again that Assefa's book is well done. It is very educative for students of Ethiopian constitutional law as well as for law and policy makers of Ethiopia. I hope they will make a good use of it. I also hope the author will take into account the points and issues I have indicated in this review in future edition of the book.

Book Review

Hailu Zeleke, *Insurance in Ethiopia: Historical Development, Present Status and Future Challenges*, Printed by Master Printing Press, 2007. Pp IX + 308. Price: Birr 42.

SEYOUM YOHANNES*

Hailu Zeleke found a niche subject, Insurance in Ethiopia that was lacking in coverage, so he wrote a book on it. And he did a great job doing it. The book, Insurance in Ethiopia: Historical Development, Present Status and Future Challenges is a detailed no-nonsense book that hands you a truck load of information on the Ethiopian Insurance Industry and its regulation right from its inception.

Hailu begins by unpacking concepts basic to understanding insurance like peril, hazard, probability, and more importantly risk, in chapter one. He deals with the latter at length and does a good job at that. In chapter two, he dwells on insurance, its importance and development. Among other things, he explains the pooling of risks and the law of large numbers that underlie the workings of the insurance industry. If you are mathematically inclined, you will certainly enjoy Hailu's explanation of the law of large numbers at pp 26 to 31. If you are not, just skip it. The math-free elucidation does the job just as well. In Chapter three and four he very briefly discusses the development of insurance in Ethiopia till 1970. His treatment of this topic is not particularly impressive though. I will come back to that at a later point.

Chapter 5 deals with the first proclamation and legal notice issued to regulate the insurance industry in 1970 and 1971 respectively. The author outlines the main features of the proclamation (Proclamation No.281/1970). In particular, matters like minimum capital, place of incorporation, the deposits required to engage in insurance and the regulatory bodies that were entrusted with running the industry have been briefly discussed by the author in this chapter. The author also raises the salient features of Legal Notice 393/71 like submission of application for license, issuance of license and renewal of the same, qualification requirements of insurance auxiliaries, actuaries and submission of annual financial statements to the Controller. He winds up the chapter by showing how the industry reacted to the issuance of these new laws and by analyzing the performance of the industry between 1967 and 1972.

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In chapter 6, the author dwells upon the insurance industry during 1974 to 1994. This is the period when the insurance business was monopolized by a state owned company established pursuant to Proclamation 68/1975. The author gives interesting facts and figures about this period. Then follows chapter 7, where the author discusses the reemergence of private insurance companies following the demise of the military regime. Totaling 104 pages, this is the longest and the most informative chapter in the book. It deals with various things including Proclamation 86/1994 and the Council of Ministers Regulation No 201/1994 that were issued to regulate the industry in a market economy context, the reemergence of private insurance companies, investment by the companies, insurance auxiliaries and actuaries, workforce profile of the industry and financial performance of the nine insurance companies that were in the field till June 30, 2005. As he compares and contrasts the nine insurance companies active in the field, in this chapter, the author shows his rare skill in being able to condense overwhelming information into comprehensible figures and tables. That the author is clearly an expert in the field will not be lost on anyone who reads this chapter of the book.

Competition in the Ethiopian insurance sector has been dealt with in Chapter 8. The assessment of the existence and extent of competition in the industry is based on documents uncovered by the author's research, and questionnaires filled out by players in the field. This is followed by Chapter 9 that deals with the regulation and supervision of the insurance industry in Ethiopia. After analyzing the goals of supervision and the capabilities of the National Bank of Ethiopia entrusted with the task of supervision, the author concludes that the insurance sector is given low emphasis by the regulator compared to the banking sector. This is manifested, according to the author, by the disturbing lack of benchmarks against which the performance of the insurers is to be measured and the dearth of skilled personnel in the Insurance Supervision Department at the National Bank of Ethiopia.

In chapter 10, the author deals with the problems of the insurance industry. Based on questionnaires filled out by stakeholders like the insurance companies, the regulatory body, associations of insurers and insurance professionals he identifies the most worrisome problems, and comments on them. The three chapters that follow are very brief, a total of 23 pages. Chapter 11 titled 'present status and challenges of insurance industry in Ethiopia' gives some information regarding post 2005 developments in the industry such as the formation of two new insurance companies and growth rate of the industry. It also deals with the future challenges based on the perception of stakeholders in the sector. This could, perhaps, well have been made part of chapter 10 as the issues are more or less the same and the informants the same class of persons. Chapter 12, a mere three pages, deals with insurance associations in Ethiopia. Chapter 13 is recapitulation of the preceding chapters.

If I had to pick on something to critique, I would say that:

Perhaps inadvertently, the author sometimes fails to acknowledge sources. I doubt the analysis of 'peril' in terms of an interaction among physical resources, human resources and a given operating environment is the author's original work. Note also the author quiet strangely concludes from this very analysis that 'all these show that hazards are bound to exist perpetually and hence the possibility of undesirable contingency to mankind would remain *eternal*. Thus, risk will remain with mankind *forever*.' (Emphasis mine). This conclusion does not follow from the analysis. In any event, it is unnecessary as perpetuity of mankind let alone peril is highly contestable. It seems the author's choice of words like 'perpetually', 'eternal' and 'forever' was not carefully considered. (See pp 9 to 10). Similarly, at p 88 he indicates conditions that would lead to cancellation of license under the Insurance Proclamation 86/1994 without indicating the exact provision(s) of the law thus making it difficult for the reader to consult the article(s) reference is being made to.

Neither the organization nor the content of chapter three and four is great. The two chapters deal with essentially the same theme, development of insurance in Ethiopia. The former is on developments up till 1960 while the latter chapter deals with the rise of domestic insurance companies in 1960s. The two chapters total 12 pages of which chapter four is only four pages. The two could have easily been reduced into one chapter. Looking at the content of these two chapters, one also wonders what the intended readership is. The author, for instance, summarizes the insurance provisions of the Commercial Code of 1960 in a single table with no further treatment. I doubt there is any person who can benefit from such a superficial treatment. He also gets bogged down in unimportant details. Cases in point are description of the Head Office of Imperial Insurance Company, the number of cars its parking lot could accommodate at a time etc... (See p. 45).

While very informative the book does have organizational problems. For instance, though chapter 5 is entitled 'The First Insurance Proclamation-1970,' the author deals with Legal Notice No 393/71 and also analyzes the performance of the insurance industry between 1967 and 1972. This is clearly beyond the scope of the chapter given its title. Other instances of organizational problems are chapter 11 that deals with more or less the same issues as chapter 10 and chapter 12 consisting of three pages.

At times one also gets the impression that the author is given to belaboring points he already made. On many occasions the author very aptly summarizes information in a table and then gives a figure that does nothing more but summarize identical information. Good examples are Table 11 at p 59 and figure 5 at p 60, p 12 and figure 8 at p 62, table 13 and figure 9 at p 63, table 15 and figure 10 at p 65, table 30 and figure 20 at pp 99 and 100, respectively, etc. No wonder we have a total of 66 tables and 85 figures in the book, the annex excluded.

Back to the good stuff, this book is an extensive and factual compilation of information on the insurance industry and its regulation in Ethiopia. The language is very good,

spelling and other typographic errors are extremely rare. All in all, the book is a vital read for financial planners, managers in the insurance sector, regulators and college students taking business courses in Ethiopia. So, if you tend to shy away from self-published works, I strongly suggest you don't do the same in this case.

Finally, I would like to take a moment to salute Hailu's impressive feat of writing a book in today's Ethiopia. Given the dearth of information, paucity of resources, the manifold challenges life poses and close-to-nil material reward of writing, few professionals dare attempt to write books. All these did not stop Hailu. He very much deserves a shower of accolades.