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Emerging Separation of Ownership and Control in Ethiopian Share Companies: Legal and Policy Implications

Income Tax Assignment under the Ethiopian Constitution: Issues to Worry About

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Revisiting Company Law with the Advent of Ethiopia Commodity Exchange (ECX): An Overview

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Articles: Research articles that identify, examine, explore and analyze legal and related legal principles, concepts and statutory stipulations based on research findings from primary and secondary sources and that aim at interpretation, description, exploration or diagnosis towards the solution of problems in the realms of application and development of laws;

Comments: Case comments that highlight and analyze issues, laws and their interpretation and application in case decisions or fact situations under consideration; *Comments* on concepts and principles related with law or relevant to the legal profession.

Thoughts, monographs, essays, observations, and reasoned critique from experienced members of the legal profession;

Summary Notes: Notes that shed light on a topic of study and which target at student needs;

Book Reviews

* * *

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Articles shall not exceed 30 (or under exceptional circumstances 35) pages. *Comments* may range from five to ten pages. The maximum size for *Thematic Comments* shall be twenty pages.

ARTICLES

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EMERGING SEPARATION OF OWNERSHIP AND CONTROL IN ETHIOPIAN SHARE COMPANIES:

LEGAL AND POLICY IMPLICATIONS

Fekadu Petros Gebremeskel [♣]

Abstract

Ownership and control are often concurring attributes in the ordinary situation of property ownership. In the context of publicly held companies, a phenomenon occurs whereby the persons who own the company are precluded from controlling it. The reason for this is that as the number of shareholders rises, control is delegated to managers, and shareholders are limited to ineffective control *via* shareholder general meetings. This article posits that the separation between ownership and control is growing in Ethiopia, and submits some empirical evidence in support of this claim. Relying on the data and literature on corporate governance, the article attempts to show the deficiency of the Commercial Code in protecting the rights of minority shareholders in the context of such publicly held companies.

Key words:

Corporate governance, corporate control, minority shareholder rights, ownership & control, share companies

Abbreviations

OECD	Organization of Economic Co-operation and Development
IPO	Initial public offering
LLSV	Raphael La-Porta, Florencio Lopez-de-Silanes Andrei Shleifer, and Robert W. Vishny

[♣] LL.B, LL.M (AAU); former Arbitration Tribunal Manager at ECX; currently studies International Dispute Settlement at Geneva University Graduate Institute for International & Development Studies. The writer thanks Ato Tadesse Melaku, Ato Elias Nour and the article's external assessors (who remain anonymous).The Article has greatly benefited from their comments. The writer also thanks MoTI (Ministry of Trade & Industry) staff for their cooperation in availing access to the Ministry's archives, and Ato Helaway Tadesse, Sr. V. President of Zemen Bank S.C, for promptly providing him with the data that was necessary for this article. For any questions or comments with regard to this work, the writer is glad to be contacted through: fekaduros@yahoo.com

Introduction

The share company is one of the forms of business organizations recognized under the Ethiopian Commercial Code. It is established through the issuance of shares to an unlimited number of members as provided for by Articles 304-509 of the Commercial Code. The result of public subscription toward the formation of a share company is often accumulation of huge capital from thousands of shareholders.

Publicly held share companies give rise to a host of complex corporate governance issues. On the one hand, they necessitate the transfer of management of the company from the numerous shareholders into the hands of a few managers. And, such a mechanism inherently carries with it the risk of unfair advantage or exploitation by the managers against dispersed shareholders. On the other hand, should any one or more persons own a chunk of the corporate capital, control of the company will largely fall into their hands, and small holders face the same or even greater risk of exploitation.

The Commercial Code of Ethiopia has basic rules on the governance of such companies. However, these rules are not adequate to safeguard minority shareholders from undue exploitation. This article attempts to deal with what the potential problems can be and what type of legal change, if any, needs to be made to address the newly evolving corporate governance issues in Ethiopia in the context of publicly held companies for safeguarding minority rights. The article does not promise or claim to provide the panacea for all corporate governance problems in the country. Nor does it attempt to unveil the "vast corporate governance malpractices" that are assumed to exist in the country. At the current state of corporate disclosure this is almost impossible.[1]

[1] The writer had to visit the National Bank of Ethiopia (NBE) several times to get some statistical data on private banks. Unfortunately, his request was denied by the Bank's Legal Directorate, even if he had a letter of support which showed research objectives. The Banking Business Proclamation 592/2008 apparently says nothing on disclosure by the bank to the public. Quite inexplicably, such documents which should be with the Ministry of Trade and Industry (as per the requirement of the law) do not exist there in case of banks and insurance companies. However, Proclamation 592/2008, under Article 10 (5) requires all banks to make available at their head offices free of charge, to any interested person their share registers that show the names and voting rights of their shareholders. The writer's repeated attempt did not bear fruit in getting the required information from the banks either, except from one. Understandably, banks are more reluctant to disclose their documents. The realistic solution would be to give this service at the NBE or MoTI level. If it is so difficult to get shareholder data for academic purposes, it would be much more so for the investing public that

The article is limited to analyzing the trend of corporate ownership dispersion, and the resulting divorce between ownership and control - a trend which renders every shareholder a minority. It also suggests solutions. The article starts with an overview of the notion, models and issues of corporate governance with the aim of laying down the conceptual bases for the subsequent discussion. The second section addresses the evolution of the ownership pattern in Ethiopia. The third and fourth sections deal with the underlying legal and institutional causes and effects of the different corporate governance paradigms. The conclusion underlines the implications of the themes addressed. In this article the terms "managers" and "board of directors" are used interchangeably.

1. An Overview on Corporate Governance Mechanisms

Since the usage of the term "corporate governance" by Robert Tricker in his book titled "International Corporate Governance,"[2] published in 1984, the term has gained prominence in company law and literature. The issues addressed under the "corporate governance" label are, however, nearly as old as company law itself, although the notion has not been static in terms of content. Corporate governance is one of those fluid concepts in corporate law and finance which scholars rarely attempt to define. The range of issues that fall under "corporate governance" are tightly intertwined with those of corporate finance.[3] For instance, as per one definition, corporate governance "deals with the ways in which suppliers of finance to corporations assure themselves of getting a return on their investment."[4] Such a definition seems to be too narrow to accommodate all the issues that arise in relation to modern day corporate governance, and reveals the complexities involved in the concept.

Indeed, modern corporate governance may also involve corporate social responsibility with a view to addressing the interests of employees, local communities and the public at large, and not merely the interest of suppliers of capital. It is thus not surprising to sometimes see misconceived usage of the term. For example, Article 14 (4) (c) of the Banking Business Proclamation 592/2008 which states "The National Bank may issue directives on the duties, responsibilities and *good corporate governance* of the boards of directors" seems to distort the idea of corporate governance. Corporate governance is not

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looks for a target company's net worth. Corporate disclosure, a central facet of corporate governance, is at a rudimentary stage in Ethiopia.

[2] Cited in Anne Carver (1997), " Corporate Governance: Capitalism's Fellow Traveler?", in Fiona M. Patfield, (ed.) *Perspectives on Company Law:2,* (London: Kluwer Law Int.), p. 71

[3] *Corporate law and Corporate Governance: The Hungarian Experience,* < http://www.econ.core.hu/doc/dp/dp/mtdp0411.pdf > p.4

[4] *Ibid.*

just a single strand in the managerial duties of the board of directors.' Quite to the contrary, the notion of 'corporate governance' refers to the overall legal, institutional and regulatory framework in which the interests of stakeholders surrounding companies are coordinated and protected. Note that the concept is much wider than corporate management. The latter notion occupies a pivotal place in the discourse of corporate governance, but does not replace it. Broad as it is, corporate governance is generally shaped by not only company law, but also other areas of laws and customs such as auditing and accounting practices, contract law, bankruptcy law, securities law, tax law, and so on.

The role that corporate business plays in modern economies has brought companies to the spotlight. Thus, corporate governance nowadays refers to all the issues in relation to ownership and control of corporate property, shareholders' rights and treatment, powers and responsibilities of the board of directors, disclosure and transparency of corporate information, the protections of the interests of stakeholders in addition to that of shareholders, enforcement of rights, etc.[5] What lies at the heart of all these issues is the question of ownership and control of the company which is inextricably correlated with ownership of its shares.

The macro level causes and effects of demutualization of ownership and control permeate the corporate governance debate.[6] Meanwhile, the rights, responsibilities and roles of owners of property in the form of shares and its managers remain to be an enduring problem. With the emergence of companies with several thousands of shareholders (each possibly holding less than a fraction of one percent of the capital), complete separation occurs between ownership (vested in the shareholders) and control, which lies in the hands of few individuals who manage the company.[7] Within this context, a host of governance issues inevitably arise some of which are summarized below.

Corporate governance problems begin from the danger to shareholders' most traditional right to dividend and extend to such complex issues as protection of corporate assets from misuse by managers, minority rights to representation in the board, challenging the decision of the board in a court of law, suing the board or third parties on behalf of the company, and leaving the company upon free will, etc.[8] Moreover, there is an important subject of the

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[5] Corporate Governance in Developing Countries: Shortcomings, Challenges and Impact on Credit <http://www.uncitral.org/pdf/english/congress/Cooper_S_rev.pdf> p. 3.

[6] S*ee* Generally, Raphael La-Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny (1998)," Law and Finance", *Journal of Political Economy, 106# 6.,*

[7] *See* generally Adolf Berle and Gardner Means (1933), *The Modern Corporation and Private Property* (New York: The Macmillan Company).

[8] All these issues are elaborated in detail in, OECD Principles of Corporate Governance, (2004).

corporate governance controversy which relates to the powers and responsibilities of the board. This raises crucial issues such as: What powers does the board have? Who is it accountable to? How is it organized? What are its standards of liability? Another pertinent issue relates to the disclosure of information to the shareholders and the public by the company for which the management is responsible. What, when, and how to disclose corporate information are very relevant questions in modern corporate climate.

Moreover, the role of stakeholders, which, needless to say, is a far more complex issue, seems to be the latest addition to the stock of themes addressed within the gamut of corporate governance. It has in fact, to some extent, reshaped the very conception of a company. Thus issues such as what are the legitimate ends of corporate business? what, if any, are the social responsibilities of the company, etc. are addressed within this context. And finally, traversing all these issues is the question of enforcement of rights. Indeed, this is where corporate governance and the issue of good governance (raised at the political landscape) converge. Effective enforcement of rights of various stakeholders is indeed indispensable, in addition to and apart from the literal articulation of laws.

These issues can be broadly divided into two classes. (1) The intra-company issues (issues of ownership and control); and (2) the relationship between the company and outer stakeholders such as employees, creditors, local communities and the general public. Although the theme of this article falls within the former, the discussion that will follow addresses the problem from the perspective of minority right protection.

1.1- Modalities of Corporate Control

Minority right discourse is generally part of corporate ownership and control discourse. Hence, a few preliminary points about corporate control need to be said. The concept of corporate ownership in the present context refers to ownership of the shares in a company. Despite some controversy as to who owns a company[9], the article assumes that for all practical purposes, the company is the collective property of its shareholders. Thus, there is no need to discuss the notion of corporate ownership here.

In the corporate climate, control can be organized in various ways. In its most natural form control can be exercised through complete ownership of the

< http://www.oecd.org/dataoecd/32/18/31557724.pdf >

[9] Charles De Hoghton (1970), *The Company: Law, Structure and Reform in Eleven Countries* (London, George Allen and Unvin Ltd.), p,33; John Kay and Aubrey Silberston (1997), "Corporate Governance", in Fiona M. Patfield (eds.) *Perspectives on Company Law:* No. 2 (London: Kluwer Law Int.), pp. 52 – 54.

company. Such is usually the case under Ethiopian law, for example, when five persons form a share company and run it either by themselves or by their hired managers whom they can freely remove.[10] The second form of creation of control is by majority ownership. As the size of companies and shareholders grows, complete ownership gives way to part ownership. The ownership of a majority of the shares by an individual or small group of individuals gives to the individual or the group virtually all the powers of control, in particular the power to select and remove the board of directors.[11]

Corporate control can also be created by legal devices with neither complete nor majority ownership. Such legal arrangements include pyramiding and the use of non-voting shares. Non-voting shares preclude certain group(s) of shareholders from taking part in corporate decision making in exchange for some benefit. Article 399(2) of the Commercial Code envisages this possibility. But the proportion of such non-voting shares cannot exceed half of the share capital under Ethiopian law.[12] Pyramiding involves "the owning of a majority of the stock of one corporation which in turn holds a majority of the stock of another-a process which can be repeated a number of times."[13] With the setting up of two or more intermediate companies each of which is controlled by majority ownership of its stock by the company higher in the series, "complete legal control of a large operating company can be maintained by an ownership interest equal to a fraction of one percent of the property controlled."[14]

The other, perhaps the last scheme in the evolution of corporate control in modern capitalism is what is known as management control which results from dispersion of share ownership, save the possibility of existence of a block-holder under certain circumstances. When the largest single shareholding amounts to a fraction of one percent of the capital, no shareholder is "in a position through his holding alone to place important pressure upon the management or to use his holding as a considerable nucleus for the accumulation of the majority of votes necessary to control." [15] Thus, control over the company remains in the hands of the management.

1.2- Share Ownership Pattern and Governance Models

Corporate governance styles differ across different legal systems. No two countries can be similar in absolutely every respect, and thus countries have

[10] Commercial Code of Ethiopia Article 307(1) cum Article 317.
[11] Berle & Means, s*upra* n. 7, p.71, See also Article 350(1) & (2) cum Article 419 (2) & 421(3), and Article 365 of the Commercial Code of Ethiopia,1960.
[12] *Id* , Article 36(3) &(4).
[13] Berle & Means, s*upra* n. 7, p. 72.
[14] *Ibid.*
[15] *Ibid.*

diversity. Therefore, corporate governance scholars categorize legal systems along lines of broadly shared systems and institutions. On the basis of patterns of ownership and control, the corporate governance literature typically distinguishes two major corporate governance models. One based on equity finance and control primarily by capital markets with a characteristic feature of diffuse ownership; and the other based on debt finance and control by banks in the dual role of shareholders and major creditors" with a characteristic concentration of ownership.[16] Equity (share) financing and control by capital markets characterize the Anglo-American corporate governance paradigm, and debt financing and control by banks is typically associated with the corporate governance style of Germany and Japan.[17]

1.2.1- The Dispersed Ownership Model

For the most part of the 20th century and henceforth, the US, UK and most of the English speaking world has consistently maintained dispersion of ownership and its concomitant consequence of separation of control and ownership.[18] Dispersed ownership model of corporate governance is characterized by "strong securities markets, rigorous disclosure standards, and high market transparency, in which the market for corporate control constitutes the ultimate disciplinary mechanism" on management.[19] Therefore, publicly held companies in US and UK have a higher rate of dispersion of ownership compared to their Civil Law counterparts.[20]

Diffuse ownership emerges in many ways. While some companies may undergo different stages of development before they are held by the broader public, many publicly held companies are outrightly established by a public offering of shares.[21] In some other cases smaller family held companies may go public by offering their shares to the public.[22] Such a change is often motivated

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[16] Katharina Pistor (2000), *Patterns of Legal Charge: Shareholder and Creditor Rights in Transition Economies* (European Bank Working Paper No.49), p. 21.

[17] *Ibid.*

[18] *See* Generally, Brian R. Cheffins (2002), "Corporate law and Ownership Structure: A Darwinian Link?, *University of New South Wales Law Journal, 25 #2; See* also, The Berle-Means Corporation in the 21st Century. *<http://www.law.upenn.edu/currently/seminars/businesslawscholarship/papers/Gordon.pdf >*

[19] John D. Coffee (2001), "The Rise of Dispersed Ownership: The Role of law and State in the Separation of Ownership and Control," *The Yale Law Journal, 111* # 1, p.3.

[20] *Id.,* p. 56.

[21] *See* the Commercial Code of Ethiopia, Articles 317-322; *See* also Tom Hadden, (1977) *Company Law and Capitalism,* 2nd ed. (London: Weidenfeld and Nicholson), p. 298.

[22] Coffee, *supra* n. 19, *p. 25.*

by the need for a huge capital for business expansion. Still in other cases, state enterprises may be transformed into publicly held companies by adopting privatization through offering shares to the public.[23]

Anglo-American companies exhibit the largest number of companies with diffuse ownership. An empirical study conducted by La Porta, Lopez de Silanes, Shleifer and Vishny (hereinafter referred to as LLSV) compared stock ownership patterns in countries that follow the Anglo American model, the Scandinavian Model, the German Civil Law model, and the French Civil Law model (the latter three are commonly referred to as Civil Law models). The study found that followers of the Anglo-American model exhibit the lowest level of concentration of ownership, or the highest level of dispersion.[24] For example, a comparison of the combined average stake of the three largest shareholders in the top ten publicly held companies yielded only 20% in the USA. French Civil Law system scored the highest average concentration of ownership of 54%, while the average combined block of three largest shareholders in the German Civil Law family was 34% and that of the Scandinavian was 37%.[25] The USA of course seems to have experienced dispersion of corporate ownership much earlier. As of 1929, the combined block of shares of the twenty largest shareholders in each of the biggest companies- Pennsylvania Railroad, Pennsylvania Telecom Company, and Pennsylvania Steel Company- were respectively 2.7, 4.0 and 5.1 percent.[26]

High level of dispersed ownership means absence of owners of big blocks of shares (block holders). In a company with numerous shareholders, the absence of such block holders gives rise to the surrender by shareholders of control to managers.[27] The lack of control by shareholders is generally attributed to lack of collective action or problems in coordination. Shareholders in a publicly held corporation typically have limited legal right to engage in its day to day management.[28] Each of the dispersed small holders will thus have little

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[23] Unfortunately in Ethiopia, Privatization of Public Enterprises Proclamation 146/1998 fails to state this mode of privatization; See Article 5(2) *cum* Article 7.

[24] La Porta et al, s*upra* n. 6, p. 1146.

[25] *Ibid,* p. 1147.

[26] Berle & Means, s*upra* n. 7, p.47.

[27] *id.,* p. 6. Even in the 19th century, Karl Marx had asserted that "stock companies in general…have an increasing tendency to separate [the] work of management as a function from the ownership of capital, be it self owned or borrowed" , see Karl Marx, Capital (Republished, 1973), Vol.III, (New York: International Publishers), pp. 387-388.

[28] Stephen G. *Markes* (1999*), "*The Separation of Ownership and Control"*, in* Bouckaert, Boudewijn and De Geest, Gerrit (eds.), *Encyclopedia of Law and Economics, 3,* p. 629.

information and much less motivation to monitor the management. Though dispersed small holders can become powerful by coming together, the cost of making such coordinated action is often high. Even voting in which shareholders are expected to be more organized has often been manipulated by the managers to the latter's advantage.[29]

The managers may thus be lured to using their control over corporate assets to promote their own interests at the expense of that of the shareholders. To the extent that the management pursues its own interest at the expense of the shareholders, it imposes what economists call "agency cost."[30] Concern over agency cost in widely held public companies was expressed even much earlier. Adam Smith, in the Wealth of Nations*,* 1776 had said*:*

> The directors of such companies [. . .], being the managers rather of other peoples' money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which the partners in a private co-partnery watch over their own. Like the stewards of a rich man, they are apt to consider attention to small matters as not for their master's honor, and very easily give themselves a dispensation from having it. Negligence and profusion, therefore, must always prevail, more or less in the management of the affairs of such a company.[31]

While agency cost can never be completely avoided, the Anglo-American style of corporate governance has its inbuilt system of reducing it. There are three mechanisms of minimizing agency cost. First, the labour market for corporate executives has a disciplinary role on the conduct of managers. Managers want to perform well in order to impress potential employers at a better term.[32] Secondly, bad management which sufficiently causes a decline in the market share for products or services can cost management its job.[33] The most effective disciplinary tool in the widely held company however is the third mechanism-hostile takeover. Hostile takeover occurs when shareholders unhappy with the performance of their company opt to walk out by selling their shares to a control bidder. If managers perform persistently badly, an outsider may take over by buying a majority of the shares through a hostile takeover i.e., one rejected by managers but accepted by shareholders.[34]

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[29] *bid.*

[30] *Supra* n. 28, P. 695; *See* also, Enya He and David A. Sommer*, Separation of Ownership and Control: Implications for Board Composition,* <http://www.aria.org/meetings/2006papers/He_Sommer_ARIA_2006.pdf > p. 6

[31] Adam Smith (1776), *The Wealth of Nations,* Book 5, Chapter 1, Part 3, Art. 1.

[32] Cheffins, s*upra* n. 18, p. 17.

[33] *Ibid.*

[34] Carver, *supra* n. 2, *p. 86.*

The risk of losing one's job following a takeover can thus serve as one of the means that can discipline management. Other means of reducing agency cost include specifying managerial duties legislatively, administratively, or contractually and putting in place effective enforcement mechanisms. In this respect, enforcement mechanisms by public regulatory organs, private self-regulation (such as stock exchanges) and individual rights of action (in derivative and/or class action) are very instrumental.[35]

The Anglo-American model has other virtues as compared with systems characterized by concentrated ownership. To begin with, the separation of ownership and control often carries with it the benefit of hiring more qualified managers since executives are hired on the basis of their managerial credentials, than on their ability to finance the firm or their family connections with dominant shareholders.[36] The absence of block holders also creates a convenient working environment for professional managers since small dispersed owners are ubable to interfere with the business of the management. Thus, the agency cost problem may to some extent be offset by this benefit.

From the capital markets perspective, dispersed ownership brings high liquidity to stock markets and cheapens the cost of capital[37] provided there is a stock market in place. Clearly, dispersion of ownership and stock market liquidity tend to mutually reinforce each other. More dispersion results in more liquidity as there will be more market participants. On the other hand, the more liquid the stock market, the easier it becomes for shareholders to liquidate their holdings thereby making exit easier for unhappy shareholders. Shareholder exodus also plays the role of monitoring management to some extent, since such act of shareholders reflects on the state of the company, and eventually leads its stock prices to fall. The existence of a liquid market encourages investors to easily buy or sell securities. Dispersed ownership of stocks has also the economic benefit of distribution of risk, in comparison to the concentrated ownership model where few block holders bear all or most of the risks of businesses.[38]

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[35] George Bittlingmayer (1999), "The Market for Corporate Control (Including Takeovers)", *in* Bouckaert, Boudewijn and De Geest, Gerrit (Eds.), *Encyclopedia of Law and Economics, 3,* p. 703.

[36] *Cheffins, supra* n 18, p. 4.

[37] Terry O'Neill (1997), "The Patriarchal Meaning of Contract: Feminist Reflections on the Corporate Governance Debate", in Fiona M. Patfield (Ed.), *Perspectives on Company Law:2,* (London: Kluwer Law Int.), p. 36.

[38] This seems to be the explanation behind the current Ethiopian Banking Business Proclamation No. 592/2008 which under Article 11(1) limits maximum holding of a shareholder to 5% in the following words:

1.2.2- Concentrated Ownership Model

The concentrated ownership model is essentially characterized by the existence of controlling block holders in the company. Often, countries with this paradigm of corporate governance tend to have weak securities markets, and low disclosure and market transparency standards. As opposed to the case in diffuse ownership governance systems, only a modest role is played by the market for corporate control, a greater part of the monitoring role being played by large banks.[39] According to the data compiled by LLSV, most of Civil Law legal systems exhibit this system of corporate governance with varying degrees. The two systems that form a good representative model in contrast with the dispersed ownership style are Germany and Japan. In Germany for instance, as of 1997, "eighty-nine percent of all listed companies have a single shareholder controlling more than twenty percent of their equity."[40] While this may not necessarily mean that there are no small holders in Germany and Japan that have tiny fractions of corporate capital, it is obvious that where there are a few block holders, the latter exercise greater corporate power thereby suppressing the small holders.

An immediate effect of the concentrated ownership model on stock market development seems to be negative. The reason is that large block holders that wield corporate power may not easily liquidate their holding or more technically do not change their market positions, negatively affecting liquidity. Secondly, the few small holders cannot create enough liquidity as the volume of stocks on the market will be lower. On the other end of the spectrum, small investors will not be ready to buy shares for fear of domination by block holders. A study comparing Continental stock market practice with that of the Anglo-Saxon concludes that, in Continental models, such as the German and Japanese systems, "stock market liquidity is not an issue . . . Accounting information is often murky. There is only limited protection against insider trading. As a result stock markets play a lesser role than the Anglo-American model."[41]

The threats that dominant shareholders pose on minorities are too complex and can hardly be explained in this article. Arranging for purchase of additional shares on favorable terms which is not available otherwise, is just one of many

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"No person, other than the Federal Government of Ethiopia, may hold more than five percent of a bank's total shares either on his own or jointly with his spouse or with a person who is below the age of 18 related to him by consanguinity to the first degree."

[39] Coffee, s*upra* n. 19, p. 3.

[40] *Ibid,* p. 23.

[41] Carver, s*upra* n. 2, p. 86.

examples.[42] In other cases, block-holders may transfer corporate assets by orchestrated transaction with related companies that skim profits from a publicly quoted firm in favor of privately owned ones.[43] It is also possible for block holders to extract benefits "via high pay and bonuses for employed family members and associates, inappropriate related party transactions, systematic bias in business decisions and changes in the capital structure, through special issuance of shares favoring the controller."[44] In a study, on shareholder and creditor rights in transition economies, Katharina Pistor concludes that "firms with highly concentrated ownership typically have a shareholder whose stake is large enough to effectively control management. The strong position of a block holder may, however, endanger the position of minority shareholders"[45]

Even when no fraud is involved, the interests of block holders seem to be susceptible to conflict with minority interests. Block holders (being big investors) often prefer a strategy of long term return on their investment, which may easily come in square conflict with minority shareholders, who seek immediate return. One solution for this problem is to make distribution of dividends compulsory for years ending in net profits. Indeed, countries that adopted their laws from France have rules that require companies to pay out a certain fraction of their declared earnings as dividends.[46] In Ethiopia too, Article 456 (1&2) of the Commercial Code compels the distribution of net profit to shareholders as dividend after deduction of legal reserve.

The foregoing analysis should not be taken as an unqualified rejection of concentrated ownership and of block-holder governance. Concentrated ownership continues to be as prevalent a choice, as that of dispersed ownership. As the relative effect of a governance model on corporate performance has not been agreed upon among scholars, no one model can get an unqualified endorsement or an outright rejection.[47]

First of all, if diffuse ownership creates problem of agency cost, the logical converse of this should be true, i.e., concentrated ownership must reduce this cost. The reason for this is simple. Often, "block holders will tend to be efficient monitors than dispersed shareholders. To elaborate, controlling shareholders are

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[42] Cheffins, s*upra* n. 18, p. 24.

[43] *Ibid;* In Ethiopia the recent governance havoc in Bank of Abyssinia is exemplary of the problem block holders can cause to management. The bank was reported to have lost 75% profit in year 2007/2008 due to dominant shareholders who interfered in management's roles. See *Capital* Oct. 25 2009 Edition.

[44] Annotations to OECD Principles, *supra* n. 8, p. 42.

[45] Pistor, s*upra* n. 16, p. 11.

[46] La Porta *et al, supra* n. 6, p.1132.

[47] Cheffins, s*upra* n. 18, p. 27.

likely to have a financial stake which is large enough to motivate them to keep a careful watch on what is going on" around the company.[48] The other benefit of concentrated ownership is that the presence of large block-holders such as a family yields competitive economic advantages stemming from continuity and long term orientation. In this respect, the Anglo-American dispersed ownership model is criticized for its features of unhealthy orientation towards short term profits.[49] The "financial institutions which collectively own much of the equity in American and British publicly held companies have been identified as the primary sources of this bias."[50]

2. The Evolution of Ownership and Control in Ethiopian Share Companies

The Commercial Code of Ethiopia has been facilitating the formation of share companies since its enactment in 1960.[51] However, the formation of Share Companies was suspended during the Military Regime and was resumed only during its final years when it issued a policy of mixed economy and mainly after the collapse of the regime in 1991. Most of the companies formed at the beginning were private limited companies. For example among the 125 companies formed from 1991 till the end of 1993, 119 were private limited companies and only 6 were share companies.[52] Although the rate of company formation improved subsequently, it was the number of private limited companies that increased at an accelerated rate as opposed to that of share companies (*See* table 1 below). Most of the share companies formed during this period often had five or a few more members. It was only since roughly 2005 that share companies[53] started selling shares to the wider public and thereby started creating bigger shareholding base.

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[48] *Ibid,* p. 19.

[49] *Ibid,* p. 21. It is to be recalled that the capital markets of US and UK were accused of being responsible for the current global financial meltdown due to their admitted character of motivating greedy short term oriented high risk appetite.

[50] *Ibid.*

[51] J.D. Von Pischke (1968), *Shares and Share Trading in Addis Ababa,* (Addis Ababa, College of Business Administration, Hailesillassie I University), p. 4, note 1.

[52] Abu Girma (1994), "Problems and Prospects for the Emergence of a Stock Market in Ethiopia," in Getachew Yoseph and Abdul Hamid Bedri Kello (Eds.), *The Ethiopian Economy: Problems and Prospects of Private Sector Development (*Addis Ababa, *Proceedings of the Third Annual Conference on the Ethiopian Economy*), p.217.

[53] Companies such as Hibret Bank S.C and Wogagen Bank S.C, Fana School, Yetebaberut Beherawi Petroleum, etc were among the precursors of public offerings of shares since 1990s E.C.

Table 1: The number of companies formed in the period 1996-end of July 2001 E.C (i.e. 2003 to 2009 G. C.)

Year in Gregorian Calendar	Share Companies	Private Limited Companies
11 Sept. 2003-10 Sept. 2004	17	604
11 Sept. 2004-10 Sept. 2005	14	2382
11 Sept. 2005-10 Sept. 2006	11	1437
11 Sept. 2006-10 Sept. 2007	30	1097
11 Sept. 2007-10 Sept. 2008	17	1113
11 Sept. 2008-6 August 2009	21	947

Source: The Trade Registry at the Ministry of Trade and Industry

The last two years (i.e., 2008 and 2009) in Ethiopia have seen an unprecedented growth in the number of companies under formation through initial public offer of shares (IPOs). While this has helped the companies to mobilize large amounts of capital from the public, it has also brought about the dispersion of corporate ownership among several thousands of shareholders in each of these companies. The trend in dispersion is at least partly the result of the design of company promoters who not only lower the minimum shareholding threshold to enable small income group to buy shares, but also provide the upper limit of share subscriptions preventing the emergence of block holders.[54]

The separation of ownership and control can practically become complete where no shareholder has more than a fraction of one percent of the capital. But it should also be borne in mind that separation of ownership and control will definitely be incomplete even when there are several thousands of holders with a fraction of one percent of the capital, if one person has a big block of shares enabling him/her to exercise control. On the other hand, a company with just a hundred or more shareholders may exhibit a clear separation if the distribution of shares is more or less even. (*See*[*] in table 2 below) Therefore, separation of ownership and control does not necessarily require the existence of thousands of shareholders in a given company.

[54] Among the fifteen initial public offerings (IPOs), most of which offering more than 100 million capital reviewed for this article, 11 had 5000 ETB (5 shares) as the minimum shareholding; while the maximum allowed in thirteen of the cases was 5 percent of the total shares offered.

Table 2: Ownership pattern in some of the non financial companies

Name of Company	Combined holdings of highest 10 holders in %	Average holding in %	Combined holdings of Directors in %	No of shareholders
Cheha Business S.C	5.64	0.564	3.954	177*
Ehil Berenda Ehil Negadewoch S.C	9.0	0.909	6.363	110*
Papirus school S.C	3.89	0.432	3.03	231
Shola S.C	4.295	0.359	7.51	110
Sky Bus S.C	1.138	0.020	0.399	2793
Yeshera Tera Berhan Limat S.C	6.57	0.657	5.921	152*
Crystal Tannery S.C**	6.666	0.083	2.583	630

Source: Ministry of Trade and Industry

*All the shareholders in these companies have evenly equal number of shares.

**Source: interview with the Company's General Manager, on 7 July 2009.

Table 3: Ownership pattern in some of the banks

Name	The combined holdings of highest 10 holders in %	Average holding in %	Combined holdings of Directors in %	No of shareholders	The highest single holding in %
Brehan Int. Bank*	undisclosed	0.016	undisclosed	6000	1.4%
Buna Bank**	undisclosed	0.008	undisclosed	11,200	0.9 %
Zemen Bank ***	9.37	0.034	1.659	2,878	2%
Awash Int. Bank****	undisclosed	0.037	undisclosed	2700	Undis-closed

Source:*Reporter, 11 Oct, 2009 Edition ;**Addis Fortune, 4 Oct. Edition; ***Zemen Bank; ****http://awash-international-bank.com/Governance%20home.html

The above data shows that there is a movement especially in the financial sector and since very recently in other sectors as well from a closely held company towards more and more broad based share ownership. At present, there are many more companies with IPOs (Initial Public Offerings).

3. The Causes of Diffuse/Concentrated Models of Governance

Various explanations, which are at times contradictory, are given about the emergence of particular models of governance in a given country. A persuasive explanation in this regard is made by LLSV, who argue that the particular pattern of corporate governance in a given country is determined by the degree of protection that its law gives to minority shareholders.[55] While, therefore, strong minority right protection gives rise to diffuse ownership[56], weaker protection tends to discourage such pattern of ownership and gives way to block-holding.[57] Other theories advanced to explain the prevalence of one pattern of governance over the other include, trade policy, size of a country's economy, political ideology, etc.[58]

3.1- Level of Minority Right Protection

The concept of minority shareholder protection is relative and can only be explained in relative terms. In order to minimize arbitrary conceptions, researchers analyze it on the basis of selected indices. A more systematic presentation of the analysis is that of LLSV as reproduced below.[59] One thing to be noted is that the indices are concerned solely with shareholder rights during voting in general meetings because that is how shareholders exercise power in a company.[60] These indices (on Table 4, below) are also in conformity with the OECD Principles on Corporate Governance.[61]

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[55] La Porta *et al*, *supra* n. 6, pp. 1116, 1145.

[56] A corporate ownership can be said diffuse if the shares are owned or held by hundreds or thousands of shareholders none of whom own more than a fraction of one percent of the company's capital. Even when one or more shareholders own more than one percent an ownership structure will be diffuse, if the percentage of capital held is not large enough to enable the holder to control the company.

[57] *Ibid.*

[58] Brian R. Cheffins, *Comparative Corporate Governance and The Australian Experience: A Reform Agenda,* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=268935> p. 30.

[59] La Porta *et al*, s*upra* n. 6, p.1122.

[60] *Id.*, p.1126.

[61] Except the one-share one vote standard on which OECD Principles do not take a position, (see OECD Principles on Corporate Governance, Supra n 7, p.41) the rest are either expressly stated, or fall within the broad languages of the Principles. Part II, C.4 provides the right of proxy voting, Part III. A.5 broadly states the importance of making exercise of voting rights in general meetings simple. It disapproves preconditions to exercise voting rights, which obviously includes conditions such as depositing shares during general meetings. The annotations to the Principles state cumulative voting, pre-emptive right to purchase newly issued shares, derivative suit mechanisms, p. 42.

Table 4: Minority shareholder protection index

	Variable	**Description**
1	Proxy voting by mail allowed	Equals one if the law allows shareholders to mail their proxy vote to the firm, and zero otherwise
2	Shares not blocked before meeting	Equals one if the law does not allow firms to require that shareholders deposit their shares prior to a general shareholders meeting thus preventing them from selling those shares for a number of days, and zero otherwise.
3	Cumulative voting or proportional representation	Equals one if the law allows shareholders to cast all their votes for one candidate standing for election to the board of directors (cumulative voting) or if the law allows a mechanism of proportional representation in the board by which minority interests may name a proportional number of directors to the board, and zero otherwise.
4	One share one vote	Equals one if the law requires that ordinary shares carry one vote per share, and zero otherwise. Equivalently this variable equals one when the law prohibits the existence of both multiple voting and non-voting ordinary shares and does not allow firms to set a maximum number of votes per shareholder irrespective of the number of shares owned, and zero otherwise.
5	Oppressed minority mechanisms	Equals one if the law grants minority shareholders either the judicial venue to challenge the decisions of management or of the general meeting, or the right to walk out of the company by requiring the company to purchase their shares when they object to certain fundamental changes such as merger, asset dispositions and changes in the articles of association. The variable equals zero otherwise. Minority shareholders are shareholders who collectively own 10 percent or less of the share capital.

Countries that score one point for each of these variables obtain five points. What the hypothesis shows is that while there is no country whose legal system scores zero for all the five variables, those countries following the Common Law tradition consistently score the highest.[62] Some countries from the French Civil Law tradition such as Chile scores 5 points and Norway from Scandinavian Civil law 4 points. Otherwise the average for Civil Law traditions is 2.33, Scandinavian 3.0, and that of the Common Law is 4.[63] Among African countries, South Africa scores 5 points and Kenya, Nigeria and Zimbabwe each score 3 points and Egypt scores 2 points. With the exception of Egypt all have Common Law systems.[64]

The LLSV study analyses forty-nine developed and developing economies. In contrast, Pistor's analysis is limited to transition economies in Eastern Europe. That may explain the slight difference in emphasis between the two sets of indices. Pistor's indices are the following.[65]

1. The right to proxy voting by mail;
2. Absence of the obligation provided by law compelling shareholders to deposit their shares prior to shareholders' meeting;
3. Cumulative voting or proportional representation of minorities on board of directors;
4. Legally recognized right of shareholders to sue directors or to challenge the decisions of shareholder meetings in court;
5. The minimum percentage of share capital that entitles a shareholder to call ordinary general meeting is less than or equal to 10 percent; and
6. Shareholders have pre-emptive rights when new shares are issued that can be waived only by a shareholder vote.

If we look at the Commercial Code of Ethiopia, two of these rights (under number 5 and 6) are provided clearly. Voting by proxy is provided in Articles 398(1) and 402 but no voting by mail is allowed. Hence the score for that will be zero as per the LLSV index. Note that the importance of this right is stressed by the OECD Principles on Corporate Governance Part II.C.4. The minimum percentage required for shareholders to call general meetings is 10% of the capital under Article 391(2). Likewise, the pre-emptive right of shareholders to buy newly issued shares in proportion to their shareholding is unequivocally

[62] La Porta *et al*, s*upra* n. 6, pp.1130-1131.
[63] *Ibid.*
[64] *Ibid.*
[65] Pistor*, supra* n. 16*,* p.5.

provided under Article 345(4) and 470(1). This too is in compliance with the OECD Principles on minority rights as reflected in the Annotations.[66]

But the most important minority protection provisions seem to be those under 2, 3 and 4 of Pistor's index (that are also partly provided under LLSV index 2 & 3) which the Commercial Code fails to provide for. Article 401 of the Code specifically requires shares to be deposited during shareholder meetings. Hence Ethiopia's score for index number two in LLSV, will be zero. Cumulative voting and minority representation in the board are alternative mechanisms of minority right protection. Cumulative voting relates to voting during board elections in which the votes of the contending groups will be multiplied by the number of board seats and calculated for the contenders' nominees in accordance to the proportion of each group's summed up votes. This essentially avoids a majority-take-all outcome. Annotations to OECD Principles Part III.A.2 suggest cumulative voting as a mechanism of minority right.[67]

While cumulative voting is one means of ensuring proportional representation, the method envisaged under Article 52 surely is not. Article 352 calls for proportional representation in boards and reads as follows:

> Article 352 -*Right of a minority*
>
> > Where there are several groups of shareholders with a different legal status, the articles of association shall provide for each group to elect at least one representative on the board of directors.

What this article provides is not sufficiently clear. First, what is a legal status? Is the law referring to the class of shareholders under Articles 335, 336 and 337? In other words, it seems to require a situation where shareholders are divided into several groups with each shareholder having some internal bond by which to identify with its group and vote in concert. However, this cannot be envisaged in share companies with thousands of shareholders. Though the notion will be easier to comprehend in a closely held company, it will be less useful in the dispersed ownership model. In the absence of a clear provision that can be implemented, Ethiopia scores zero for the LLSV: analysis index number 3.

The other important minority protection mechanism the Commercial Code fails to set out under Article 365(1)[68] is the derivative suit mechanism i.e., the

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[66] Annotations to OECD Principles, *supra* n. 8, p.42.

[67] *Ibid.*

[68] It appears that the drafter of the provisions (Prof. Escarra) had initially drafted the provisions in Article 364-367 with the aim of providing for derivative suit mechanisms. This seems evident from his *Exposé des Motifs* in which he states:

right to initiate suits against directors or third parties on behalf of the company. Since directors act on behalf of the company, it becomes difficult to enforce claims on behalf of the company if the redress is to be sought from the directors themselves.[69] On top of that, directors may forgo legitimate claims of the company against third parties due to collusion with outside business partners or in return for some illicit consideration.[70] Therefore, where any shareholder considers that the company should be taking legal proceedings against directors or some third party, but neither the board nor the general meeting does so, the right to take action on behalf of the company should pass to individual shareholders[71] subject to defined conditions in order to prevent abuse of rights. The OECD Principles also incorporate this element under Principle number III. A.2. Annotations to these principles emphatically stress the importance of derivative suit:

> Experience has shown that an important determinant of the degree to which shareholder rights are protected is whether effective methods exist to obtain redress for grievances at a reasonable cost and without excessive delay. The confidence of minority investors is enhanced when the legal system provides mechanisms for minority shareholders to bring lawsuits when they have reasonable grounds to believe that their rights have been violated.[72]

Ethiopia again fails on this index. A shareholder's right to challenge decisions of the general meeting (anti-block holder provision in Pistor's analysis or the oppressed minority mechanism in LLSV analysis) is provided under Article 416(2-5). Article 463 also gives minorities the right to withdraw from the company when fundamental changes are made to the Articles of Association, or to the company. Thus, Ethiopia scores one point for the index of oppressed minority mechanism in the LLSV index number 5. The one share one vote index

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"These very important provisions regulate the liability of directors and the procedure for enforcing this liability by individual or class action. These articles […] represent a sufficiently simple and precise statement of one of the most complex problems in company law, i.e., the action which can be brought by each shareholder in the case where the fault of the directors has prejudiced the company's property as well as his own property." See Peter Winship, (1974), *Background Documents of the Ethiopian Commercial Code of 1960* (Addis Ababa, Faculty of Law, Haile Sellassie I University) p.64.

It is more probable that, the original rules Prof. Escarra drafted were later changed either by Prof. Jauferet who replaced him upon his sudden death without completing the drafting, or by the Codification Commission.

[69] Hadden, *supra* n. 21, *p.277*.

[70] *Ibid.*

[71] *Ibid* .

[72] Annotations to OECD Principles, *supra* n. 8, p. 41.

of LLSV index is met in Ethiopia as Articles 347(3) and 407(2) of the Commercial Code precisely provide for this right. So here will be one more point for Ethiopia.

Generally, the minority protection regime of the Commercial Code meets two of the six criteria from Katharina Pistor's index, and two of the five points in the LLSV index. Given that the protections lacking under the Code are the most important ones that can minimize minority shareholder exploitation by managers and/or block holders, it can be said that the law is inadequate in shareholder protection.

But a slight twist can raise the scores to four in these indices. For instance the cumulative voting under Article 352 can say what it is supposed to mean with a slight revision. So does the question of proxy voting by mail. As to derivative suit it appears that the drafter initially set out to provide the mechanism clearly and it was somewhat later on that the procedure was deleted.[73]

Pistor further elaborates these minority protection indices under four headings: voice, exit, anti-manage, and anti-block. *Voice rights* refer to shareholder control of the company through voting rights and shareholder suits, and in particular include the rights that minority shareholders are entitled to, such as the right " to call an audit commission, a minimum quorum requirement for shareholder meeting to take binding decisions, super- majority requirement for adopting decision that affect the existence of the corporation in its current form" and " the possibility to fire directors and managers at any time without cause, and the absence of provisions that mandate employee or state representation on the board."[74]

The *exit* index is composed of rules that facilitate shareholders to leave the company such as provisions that protect the right to sell shares without prior approval by other shareholders or the directors, absence of extensive formal requirements for selling one's shares, and rules that facilitate exit by shareholders in case of takeovers and other major transactions that may endanger their position in the company.[75] *Anti-manage* index comprises rules that aim to protect shareholders against management such as the right to sue management, rules against self-dealing, rules that require management to abstain from or disclose transactions that compromise their loyalty to the company.[76] *Anti-block* rules include provisions that put forth the rights to

[73] See *supra* n. 68.
[74] Pister*, supra* n. 16, p. 10.
[75] *Ibid,* p. 11.
[76] *Ibid.*

challenge decisions of shareholders meeting with the view to limiting or avoiding opportunism by controlling block-holders.[77]

While these protections are available at varying degrees in different legal systems, the better their level is in a system, the higher will be the level of minority protection.[78] Translated into LLSV hypothesis, the higher will be dispersion of ownership and the separation from control. Better protection of these rights encourages small investors to buy shares giving rise to higher level of dispersion. The theory is simple: A good minority shareholder protecting law coupled with a good enforcement system will drive capital into companies, since the share buying public will have no reason to fear as the legal system gives it protection.[79]

If, on the other hand, minority right protection is poor, it would tend to give way to a pattern of concentrated ownership. There are at least two reasons why the ownership pattern in such systems will be more concentrated:

> First, large or even dominant, shareholders who monitor the managers might need to own more capital, *citrus paribus*, to exercise control rights and thus to avoid being expropriated by the managers. This would be especially true when there are some legal or economic reasons for large shareholders to own significant cash flow rights as well as votes. Second, when they are poorly protected, small investors might be willing to buy shares only at such low prices that make it unattractive for corporations to issue new shares to the public. Such low demand by minority investors for corporate shares would indirectly stimulate ownership concentration. With poor investor protection, ownership concentration becomes a substitute for legal protection because only large shareholders can hope to receive a return on their investment.[80]

Through time, a regime which offers poor minority protection will attract mostly block-holders making concentrated ownership prevail. A minority protective regime on the other hand can boost the confidence of investors, and strengthen the capital market. Annotations on the OECD Principles on Corporate Governance states that "investor confidence that the capital they provide will be protected from misuse or misappropriation by corporate managers, board members or controlling shareholders is an important factor in capital markets."[81] And, such confidence means that small investors will be willing to pay a better price for shares offered for sale, which in turn lowers the cost of capital for

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[77] *Ibid.*
[78] La Porta *et al*, *supra* n. 6, p.1152.
[79] *Ibid.*
[80] La Porta *et al, supra* n. 6, p.1145.
[81] Annotations to OECD Principles, s*upra* n. 8, p. 40.

firms that sell equity. Moreover, most controlling shareholders will be content to unwind their holdings first because the law will largely preclude them from exploiting their position; and secondly they will not need to privately monitor the managers since the law takes over that task.[82] They will rather prefer to diversify their portfolio in such a scenario, than concentrate it.

Despite its persuasiveness, the above justification fails to explain the historical development of dispersed ownership in USA and UK from which the model was widely copied elsewhere.[83] Neither in the USA nor in the UK did strong minority shareholder protection precede dispersion of ownership.[84] This is partly explained by the typical characteristics of commercial law development that "legislative action seems likely to follow, rather than precede, the appearance of securities markets; in substantial part because a self-conscious constituency of public investors must first arise before there will be political pressure for legislative reform that intrudes upon the market."[85] This does not, however, mean that level of protection of minority shareholders does not affect ownership patterns. The empirical evidence compiled by LLSV, over forty-nine countries has shown that there is a consistent association between defuse ownership and high level of minority protection on the one hand, and poor minority protection and concentrated ownership, on the other.[86]

There is however one thing that should not be left unsaid about the development of diffuse ownership in UK and USA. Minority investors were not left at the complete mercy of managers and or controlling shareholders. In both countries self regulation by stock exchanges played an important role by ensuring corporate disclosure, furnishing strict listing requirements, and controlling insider dealing and self dealing by managers and block holders.[87] What this implies is that self regulation by stock exchanges can make up for lack or deficiency of the law in protecting minority rights.

3.2- Political Ideology

Assuming that the protection of strong minority equity holders does not cause diffuse ownership and its superstructure governance model, it means that other causes should account for it. There are various explanations in this line. One

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[82] *Cheffins, supra* n. 18, p. 6.
[83] *Coffee, supra* n. 19, pp. 25-44.
[84] Cheffins, Corporate Governance: Australian Experience, s*upra* n 58, p. 30.
[85] *Cheffins, supra* n. 18, p. 65; *see* also Fekadu Petros (2008), Effect of Formalities on the Enforcement of Insurance Contracts in Ethiopia, in *Ethiopian Journal of Legal Education,* 1, p.38.
[86] La Porta et al, *supra* n. 6, 1126-1151.
[87] Cheffins, Corporate Governance: Australian Experience, s*upra* n. 58, pp. 32-33.

explanation holds that the pattern of equity ownership correlates with the extent to which a country follows right wing or left wing political ideology.[88] Thus, in social democracies, that is, nations with governments that are deeply concerned about distributional issues, that favor employees over investors, and play a larger role in the economy,[89] there will be greater concentration of ownership.[90] According to Marc Roe the most ardent proponent of this view, this occurs "because as social democracies prefer the interests of other constituencies to those of shareholders, they will pressure corporate managers to suppress shareholder interests in favor of broader constituencies, and only concentrated large shareholders can effectively compel managers to resist these pressures."[91]

This thesis fails to explain why and how diffuse /concentrated ownership emerges. First, no convincing reason exists to show that block-holding will be an effective defense from the pressure to cater for non-shareholder interests.[92] Secondly, whereas countries such as England have the exemplary form of diffuse ownership they are pure social democracies. On the other hand, East Asian Countries have concentrated ownership without being social democracies.[93]

3.3- Economy Size

The other theory advanced to explain why concentration or dispersion arises, looks at the size of the economy. In bigger economies, economies of scale will necessitate bigger companies the financing of which may give rise to wide holding. The assumption is that a few individuals will lack both the ability and willingness to hold big blocks in such companies, than in their smaller counterparts.[94] In contrast, in countries where small companies dominate, which will more likely be a smaller economy, concentration of ownership will prevail as it will be easier to hold blocks in such companies.[95] Even a country's trade policy may have impact on the pattern of governance. For example, "a country which offers generous tariff protection for its domestic products will tend to have smaller companies than would otherwise be the case"[96] The rationale is that "the tariff barriers will permit 'under-sized' firms to survive when, under open

[88] Mark Roe cited in *id*, pp. 22-23.
[89] *Ibid.*
[90] Coffee*, supra* n. 19, p. 71.
[91] *Ibid.*
[92] *Id.,* p.72.
[93] *Id., pp. 72-73.*
[94] Cheffins, Corporate Governance: Australian Experience, *supra* n 58, p. 40.
[95] *Ibid* .
[96] *Id.,* p. 39.

market conditions, they would lack the resources and infrastructure required to remain competitive"[97]

The "economy size" theory also fails to explain how one form prevails over the other. Simply, it contradicts with glaring realities. If this explanation is correct, why would Germany and Japan, bigger economies than the UK have more concentrated ownership? Why did far smaller economies have diffuse pattern of ownership?[98] Obviously, the minority right protection explanation appears to be backed by more solid evidence. Given that it is more recent and explores forty-nine economies makes it more convincing.

Drawing back on Ethiopia, what is triggering the growth of dispersion of ownership is not clear. The rise of inflation might have made saving less attractive for the public,[99] driving investment towards the widely available publicly offered shares. However, comprehensive study of shareholder profiles needs to be conducted along with the analyses of the volume of savings in banks during the recent period IPO boom.[100] As such, econometric analyses are beyond the scope of this article, and I shall skip this issue.

As far as share companies engaged in banking business are concerned, there seems to be a governmental policy against block holding. Article 11 (1) of Proclamation 592/2008 which regulates banking business, prohibits any person other than the FDRE Government from holding more than 5 percent of the shares in bank. Moreover, while Article 2 (11) defines a shareholder who owns 2 percent or more of the shares as an influential shareholder, the Proclamation refers to fitness criteria to be met by such a person under Article 4 (1). The Proclamation also states that a share transfer that will make a person an influential shareholder be approved by the National Bank under Article 10 (1). Taken together, these provisions seem to show that, the government's policy is towards diffuse ownership in financial companies. It is not however clear whether or not there is a clear policy with regard to non financial companies.

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[97] *Id.,* p. 40.

[98] *See* generally La Porta *et al, supra* n. 6.

[99] In Habesha Cement S.C, for instance more than 40% of the shareholders have 5000 ETB (5 shares) each which is the minimum allowed holding, whereas 90% of the shareholders in Buna Bank (i.e., 10, 350 out of 11,500) own less than 100,000 shares each. See Reporter, (Amharic Version) of Oct. 11 Edition. Likewise, in Brehan Bank S.C, the size of shareholders owning less than 100,000 is 95% percent, (i.e., 5708 out of 6000 shareholders) see, Addis Fortune, Oct.4 Edition.

[100] According to Access Capital research, in the year 2009, more than a billion Birr share sale was launched by six companies. See, Access Capital SC, (2009), *The Ethiopia Macroeconomic Handout:*, p.25. It is not clear whether or not bank deposits dropped by an equivalent amount.

The most important thing in the context of this article is the implications of the minority right protection thesis for Ethiopia which is witnessing an evolution in the pattern of corporate ownership. The question is should Ethiopia not pursue the policy of encouraging small investors and push the move forward by further protecting minority rights? The answer for this has to be affirmative. If the country needs to create a middle income segment of its population, and if it wants to have big companies that can pool capital from the broader public and compete on global level in post WTO accession, encouraging the public to invest in share companies is an indispensable policy.

The fact that dispersion of ownership is emerging in Ethiopia without legal change should not undermine the importance of such changes. Therefore, the urgency of the need to reform the law towards achieving better minority protection cannot be over-emphasized. On the other hand, even if it is believed that better minority protection has no correlation with diffuse ownership, the need for revising the law along the lines of better minority protection will still be strong. There is already a broad base of minority shareholders in Ethiopia creating a sufficient constituency to justify overhauling the laws and institutions of corporate governance to achieve better corporate governance.

4. Ownership Pattern and Corporate Performance

The notion of corporate performance is vague since different tests are needed to measure performance. But, in this section we shall adopt the narrow conception of the profitability of business. The positive relationship between dispersed ownership and liquid stock market is undisputed. Though stock exchanges do not play a capital formation function,[101] there is a growing body of research suggesting that an active securities market is an engine for economic growth.[102] Some scholars suggest that diffuse ownership induces better corporate performance since dispersed small shareholders who have a small percentage of their personal wealth tied up in the company will let managers undertake projects that are worth exploiting. Such a hypothesis is maintained by contrasting this possibility to risk-averse block-holders who will tend to discourage risk-taking and avoid potentially lucrative business opportunities.[103]

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[101] Araya Debessay and Tadewos Haregewok *(1994),* "Towards The Development of Capital Market in Ethiopia"*,* in Getachew Yoseph and Abdul Hamid Bedri Kello (Edrs.) *The Ethiopian Economy: Problems and Prospects of Private Sector Development (*Addis Ababa, Proceedings of the Third Annual Conference on the Ethiopian Economy), *p. 228.*

[102] Coffee, *supra* n. 19, p.5.

[103] Cheffins, *supra* n. 18, p. 15

On top of this, management by qualified professionals (which is more often the case in dispersed ownership model companies) gives them some edge.[104]

However, the relationship between governance patterns and corporate success is not indisputably settled as far as empirical observations are concerned. While the findings of some studies have been found to be contrary to the above assumptions that companies with ownership concentration outperform those with diffuse ownership, this was explained by the theory that large shareholders are active monitors of managers and as a result bring value to their investment.[105] Indeed, measuring corporate performance vis-à-vis governance style seems to be a difficult exercise. For example, in the 1980's German and Japanese companies scored high performance over their American counterparts, and it was at once suggested that America should revisit its corporate governance style in light of the German and Japan models. But the idea immediately subsided and the argument was reversed because since the 1990s US corporations outperformed their German and Japanese counterparts.[106]

Therefore, the contribution of ownership pattern and governance style to performance is not yet conclusively settled. What this implies is that a governance model alone is not the determining factor in as far as corporate performance is concerned. There can be other factors that influence profitability and growth. But corporate governance is not solely about performance. Neither is company law. It is also about the creation and maintenance of a fair and equitable economic relation among investors. Secondly, as set out in the preceding section, the influence that legal rules have in determining the prevalent model is clear. Hence performance should not be the sole basis in making the choice of rules towards the formulation of one model in preference to the other.

Conclusions

The corporate climate in Ethiopia is changing with the emergence of newer companies with several thousand shareholders who have no control over the company. In such cases, control over the company is left in the hands of a few managers who in the worst case scenario may in turn be controlled by block holders. To borrow the expression of Berle and Means, the rise in separation of ownership and control is giving rise to the "ownership of wealth without appreciable control and control of wealth without appreciable ownership."[107]

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[104] *Ibid.*
[105] *Ibid,* p. 27.
[106] Carver, s*upra* n. 2, p. 87
[107] Berle & Means, s*upra* n. 7, p. 69

Although such a development is to be encouraged for its overall positive economic impact, there is a need to be cautious that shareholders may be subjected to exploitation in the hands of corporate managers or block-holders. There is therefore, a need to carefully re-design the law with the view to protecting shareholder interests and thereby create conducive environment for the flow of capital. This significantly requires appropriate laws and institutions which can address the corporate governance problems that can arise under the new context of separation between ownership and control.

The tight regulatory environment under Proclamation 592/2008 within which financial companies, especially banks operate brings their managers and block holders under a strict control of the National Bank. But that does not seem to be enough in protecting minority rights. Financial regulation, which is the objective of the National Bank, is just one aspect of the governance and does not give sufficient solution to the problems minority investors face in these companies. A look at Articles 12-17 of the Proclamation reveals that the objective of the National Bank is not that of protecting minority shareholders. Instead, it pays attention to the protection of depositors and the maintenance of a sound monetary system. This is evident in light of the various provisions of the Proclamation including the ones which give the National Bank power to dismiss or suspend the board of directors or take other drastic measures none of which are contingent upon the request of shareholders. Therefore, the conclusions and recommendations in this article regarding entrenching minority rights hold valid for financial companies as well.

Problems related to corporate governance are similar in all countries. That is why countries such as Japan, Ecuador and Thailand have hybrid company laws[108] that benefit from the synthesis of different legal traditions and indigenous realities. Ethiopia's Commercial Code is also hybrid.[109] In his *Exposé des Motifs,* Professor Escarra explains the selection of best foreign laws while he was drafting the Company Law part of the Commercial Code:

> [T]he goal to attain is to encourage one day the investment of Ethiopian savings in large broad based enterprises [….] This is why, without taking into account the so called preference to be given to this or that model in the Continental or the Anglo American legal system, I had always in mind the interest of Ethiopia and I have selected the solutions which I believe to be the best no matter where they come from, on condition that they may be applied to Ethiopian conditions.[110]

[108] La Porta et al, s*upra* n. 6, p.1119.
[109] See Cheffins, Corporate Governance: Australian Experience, *supra* n. 58, Introduction, p. iii.
[110] *Ibid,* p. 61.

The company law section of the Commercial Code can therefore be easily reformed without much problem. There is very little problem of path dependence, if any, in this respect. So both the existing systems of minority protection can be strengthened and new mechanisms be introduced.

The most important changes that are needed to address the governance problems at the wake of growing separation between ownership and control include strengthening the *voice* and *exit rights* of shareholders. With regard to the *voice rights*, introduction of derivative suit mechanism seems to be relevant. However, as derivative suits are prone to abuse, sufficient conditions should be provided to prevent abusive exercise of the right. Both as a mechanism of shareholder empowerment and as a good corporate governance practice there should be a better regime of disclosure of corporate information.

Exit rights should be easily available through two mechanisms: One is the introduction of the principle of mandatory bid. Secondly, the oppressed minority exit right under Article 463 should be strengthened. In order to expedite these exit rights there is an urgent need to introduce stock markets. In the absence of organized stock markets there can be no meaningful right of exit. Indeed, this is the most fundamental question that the growth of dispersed ownership in Ethiopia is posing. Moreover, there is adequate shareholding constituency in Ethiopia to support a viable stock market. It is to be noted that only 6000 shareholders had created a relatively functional stock market during Emperor Haile Selassie's reign.[111] This is almost half of the number of shareholders in Buna Bank (see table 3 *supra*). Moreover, the absence of stock market at present may create share illiquidity. In the long run, the public may therefore, be discouraged from buying shares thereby affecting the availability of capital for companies.

A related mechanism of assuring exit rights of shareholders in takeover situations is what is known as mandatory bid rule introduced in England[112] and transplanted to many parts of the world including EC and Brazil.[113] According to this rule, a shareholder who acquires control over a company is obliged to buy shares of minorities at the same price he paid for control. This in effect means that minority shareholders are not only guaranteed the right to exit the

[111] Pischke, s*upra* n. 51.

[112] John Armour, Simon Deakin, Prabirjit Sarkar, Mathias Siems, Ajit Singh, (2008), Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origin Hypothesis, *Law Working Paper*, 108/2008, <http//ssrn.com/abstract=1094355> p.38.

[113] Pedro Testa, (2006), *Mandatory Bid Rule in the European Community and in Brazil: A Critical View,* LL.M Thesis, the London School of Economics and Political Science, p.17.

company when control is transferred from one to the other; they also get a right to share from the control premium.[114]

Other areas such as proxy voting by mail and the requirement of depositing shares during board meetings should be liberalized to the extent possible. There seems to be no significant contention and problem to introduce these changes. The issue of cumulative voting or minority representation in the board may however be ineffective in the context of dispersed ownership unless it is carefully devised. In such cases, cumulative voting may not be a sufficient solution since the problem will not be intra-shareholder struggle. Instead, use of external (independent) board members has been found effective in other legal systems.[115]

The ideal model is to divide the board of directors into *executive* and s*upervisory* and then assign independent directors in the supervisory board to effectively monitor executive directors. Such supervisory board would be distinct from the executive board and may be composed of both shareholders and external/non shareholders. In the dispersed ownership model this seems to work much better if it is associated with the cumulative voting system.[116] In order to prevent the influence of managers or block-holders in the selection of external directors, cumulative voting should be used to allow minorities to put their representatives in the supervisory board. But, it may be less productive to use cumulative voting for the election of the executive board members, lest decision making in the executive board will be greatly hampered by dissenting challenges.[117] Today's business world indeed requires rapid decision making. This seems to cater for the needs of efficient business decision-making, and meanwhile ensure a fair degree of control for minorities. ■

[114] I*d*., p.18

[115] *See* for instance the practice in Germany and Japan, in Yoshimichi Hiraide (1998), The Structure of Company Management and Shareholder Control in Japan, in Barry A.K. Rider, *et al*, (editors), *Commercial Law in a Global Context: Some Perspectives in Anglo-Japanese Law* (Kluwer Law International, London), p. 153.

[116] *Ibid*.

[117] *Ibid*, p.158.

INCOME TAX ASSIGNMENT UNDER THE ETHIOPIAN CONSTITUTION: ISSUES TO WORRY ABOUT

Taddese Lencho ♣

If you can look into the seeds of time

And say which grain will grow, and which will not

William Shakespeare, *Macbeth*, Act 1, Scene 3, lines 58-59

Abstract

The revenue provisions of the Ethiopian Constitution are striking on a number of levels. By and large, the revenue provisions do not evince conformity with what the theories of fiscal federalism generally prescribe in the area of assignment of revenue powers. In addition, the revenue provisions of the Ethiopian Constitution are more detailed than their counterparts elsewhere. And, the Ethiopian Constitution departs from the assignment formula set for expenditure powers and prescribes a special procedure for assignment of 'undesignated taxes'. These features of the Ethiopian Constitution raise a number of questions and concerns. This article uses the income tax assignment in the Ethiopian Constitution to highlight some of these questions and concerns. There is ample evidence to show that the assignment formula adopted by the Constitution, indeed its predecessor - the 1992 law - was motivated by the desire to divide the power of taxation over existing taxes in Ethiopia rather than to reinvent the wheel. However, there might be a tension between the formula the Constitution adopts to assign tax powers and the prescriptions of the theories of fiscal federalism. The article explores the implications of this assignment.

Key words:

Income tax, Ethiopian Constitution, fiscal federalism, revenue assignment, global income tax, schedular income tax

♣ Lecturer in Law, Addis Ababa University, Faculty of Law; LL.B (AAU); LL.M (University of Michigan Law School, Ann Arbor); PhD Candidate, University of Alabama Law School; I am grateful to all those who gave constructive comments on the earlier drafts of this article.

Introduction

With the exception of the brief federal experiment with Eritrea between 1952 and 1962, modern Ethiopia operated as a heavily centralized state until the Dergue was removed from power in 1991 by a coalition of forces under the Ethiopian Peoples Revolutionary Democratic Front (EPRDF), the ruling party in Ethiopia.[1] A transitional period Charter was signed immediately thereafter, which put Ethiopia on a course of a federal-type structure. A law was passed in 1992 to distribute revenue powers between the central government and the regional governments.[2] This experiment with fiscal federalism culminated with the promulgation of the Constitution in 1995, which is the basic law that now regulates fiscal as well as other relations between the federal government and the regional governments.

The fiscal provisions of the 1995 Constitution reflect the political compromise that was reached by the dominant forces at the time of the writing of the Constitution. However, the assignment formula adopted by the Constitution creates a tension between what was politically and historically desirable at the time of the adoption of the Constitution and what might transpire in the future, particularly because of the unusual specificity of the Constitution in this regard and because the Constitution, in its revenue provisions, seems to disregard the importance of tax powers as instrumentalities of economic policies of re-distribution of income and wealth and stabilization.

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[1] The ruling party EPRDF is a coalition of four major parties – Tigray Peoples' Liberation Front (TPLF), Amhara National Democratic Movement (ANDM), Oromo People's Democratic Organization (OPDO), and Southern Ethiopian Peoples' Democratic Front (SEPDF). These parties operate in the four major regions of the federation, including the capital, Addis Ababa. In addition, the EPRDF has its affiliates in all the other regions – the Afar People's Democractic Organization in Afar Regional State, the Somali People's Democratic League (SPDL) in Somali Regional State; the Gambella Peoples' Democratic Front (GPDF) in Gambella Regional State, the Beneshangul-Gumuz Peoples' Democratic Unity Front (BGPDUF) in Beneshangul-Gumuz Regional State, and the Harari National League (HNL) in Harari Regional State; see Assefa Fiseha, "*Theory versus Practice in the Implementation of Ethiopia's Ethnic Federalism*," in David Turton (2006, ed.). *Ethnic Federalism: the Ethiopian Experience in Comparative Perspective*, East African Studies, Addis Ababa University Press, Addis Ababa, pp. 156-157; Eshetu Chole, '*Keynote Address'*, and '*Issues of Vertical Imbalance in Ethiopia's Emerging System of Fiscal Decentralization'*, in Eshetu Chole (ed.,1994), Fiscal Decentralization in Ethiopia, Addis Ababa University Press, pp. ii, 167.

[2] Proclamation No. 33/1992, a Proclamation to Define the Sharing of Revenue Between the Central Government and the National/Regional Self Governments, *Negarit Gazetta*, 52nd Year, No. 7.

The assignment of income tax powers is a good example of the specificity of the Ethiopian Constitution. What the revenue provisions of the Ethiopian Constitution did was to divide the different income tax sources into smaller slices and share them between the federal government and the regional governments. It is known that the existing income tax system in Ethiopia is based (as has always been) on sources of income rather than the individual taxpayer who earns the income. All that the revenue provisions did was take these sources of income as they were recognized at the time of the writing of the Constitution and divide them between the federal government and the regions.

This article asks whether such specificity is desirable in the long run and raises questions of whether the Constitution can withstand major economic changes with ramifications upon the income tax system. The article, for example, asks whether the Ethiopian Constitution is broadly consistent with the normative theories of fiscal federalism, and if not, what the possible implications are going to be. For that, this article starts with a brief overview of the normative theory of fiscal federalism. Then, the article deals with the income tax assignment approach of the Ethiopian Constitution and forwards some theories about its inspiration – the scheduler orientation of Ethiopian tax being one of them. It also deals briefly with the practice of income tax law making (both at the federal level and the regions) and what that means or says about federal-state fiscal relations in Ethiopia. The major theme of this article will be the implications or concerns of revenue assignment under the Ethiopian Constitution from an income tax point of view. And finally, the article ends with some concluding remarks.

1. Theories of Fiscal Federalism In Income Tax Assignment

Few countries pursue the course of decentralization on grounds of its perceived economic efficiency or equity. Political, social, cultural or historical forces are likely to dominate the discourse of decentralization at the formative stage of its evolution and development.[3] Nonetheless, some economists have sought to justify decentralization on economic grounds. One advantage of decentralization is that it accommodates diverse needs and preferences of citizens. Since the benefit incidence of certain public goods is spatially limited, decentralization permits provision of these goods consistent with the various preferences of persons and communities.[4] Related to this, it is argued that individuals attain greater freedom and responsibility when public goods are provided in a

[3] Richard A. Musgrave and Peggy B. Musgrave (1989, 5th edition), *Public Finance in Theory and Practice* (New. York: McGraw Hill), p. 446.

[4] *Ibid*, p. 456; see also John F. Due and Ann F. Friedlaender (2002), *Government Finance: Economics of the Public Sector* (Delhi: A.I.T.B.S. Publishers & Distributors), p. 486.

decentralized fashion.[5] Besides, decentralized decision-making approximates those of the market more closely than those of centralized provision because it allows for closer popular control over the provision of public goods.[6] And lastly, economists believe that decentralization encourages experimentation and innovation in the provision of public goods.[7]

The normative theories of fiscal federalism start from the premise that tax powers (besides being a means of generating revenues for government) are also instruments of expenditure powers. Hence, a logical point to start is to identify the expenditure powers of the federal government vis-à-vis the states, and to allocate taxes that are instruments of these powers to the layer or level of government possessing those expenditure powers.[8] That is why assignment of expenditure powers should precede the assignment of tax powers, for otherwise there is a danger of misallocation of tax powers to a layer that is not invested with corresponding expenditure powers.

In the realm of expenditure assignment, economists use the classification of the economic functions of a state first developed by Richard Musgrave, which views the role of state as one of 'allocation', 'distribution' and 'stabilization'.[9] Without inviting much distraction from the main points, it may be in order to define 'allocation', 'distribution' and 'stabilization' functions. Richard and Peggy Musgrave describe the allocation function as 'the process by which total resource use is divided between private and social goods and by which the mix of social goods is chosen'.[10] Social goods (popularly known as public goods) are those goods which exhibit certain characteristics for which the market mechanism is unsuitable.[11] National defense is a classic example of these goods.

The distribution function of fiscal policy calls for adjustment of the distribution of income and wealth in conformity with what society regards fair or just state of distribution. Here taxation may enter the process as an instrument

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[5] Bernard P. Herber (2005, 5th edition), *Modern Public Finance* (Delhi: A.I.T.B.S. Publishers & Distributors), p. 338

[6] *Ibid*, p. 337; Due and Friedlaender, *supra* note 4, p.487.

[7] Due and Friedlaender, *supra* note 4, at 487; there are of course downsides to decentralization, such as loss of scale economies and destructive tax competition; see Vito Tanzi (2001), *On Fiscal Federalism: Issues to Worry About* at <http://www.imf.org/external/pubs/ft/seminar/2000/fiscal/tanzi.pdf> ; Herber, *supra* note 5, pp. 335-337.

[8] See Anwar Shah (2007), "Introduction: Principles of Fiscal Federalism", in Anwar Shah (ed.), *The Practice of Fiscal Federalism: Comparative Perspectives, A Global Dialogue on Federalism,* vol. 4, (McGill: Queen's University Press), p. 9.

[9] See Richard and Peggy Musgrave, *supra* note 3, pp.3-14.

[10] *Ibid*, p. 6.

[11] *Ibid*, p. 7.

of transfer of income and wealth from the high income to low income households.[12] And stabilization function has the objective of maintaining high employment, reasonable degree of price level stability (in other words, fighting inflation) and an appropriate level of economic growth.[13] Again taxes enter the picture as fiscal instruments to achieve any or all of the above objectives.[14] There are disagreements among economists and politicians over how much (and sometimes if) governments are in a position to deal with these issues. Once the issues are settled, however, taxation is definitely one of the most prominent instruments for achieving these economic and political objectives.

Economists generally believe that the allocation function of the public sector is subject to wider decentralization to lower levels of government while the other two (distribution and stabilization) functions are beneficially reserved to the central/federal government.[15] In the division of allocation functions of government, one principle that is frequently invoked is the 'subsidiarity principle', which supports assignment to the lowest order of government (or the government closest to the people) unless there are compelling arguments for assignment to the higher orders of government.[16] The principle of 'subsidiarity' is also supported on grounds of efficiency. Efficiency demands that the jurisdiction that has control over the minimum geographic area capable of internalizing the benefits as well as costs should be charged with the responsibility of providing the service.[17] Local and state governments are the primary candidates for the provision of most public goods on grounds of efficiency. Local and state governments understand the concern of local residents better; they are more responsive to the people for whom the services are intended; and unnecessary layers of jurisdiction (in other words bureaucracies) are eliminated and competition and innovations are enhanced when local and regional jurisdictions assume the provision of public goods.[18] Only public goods for which compelling cases can made for national provision should be retained by the federal government. The compelling grounds are the existence of substantial externalities or economies of scale and countervailing

[12] The distribution function may be achieved through progressive taxes combined with subsidies of low income households or financing of public services catering primarily for low income households (e.g. subsidized low income housing; see, Musgrave, *supra* note 3, pp.6 and 11.
[13] *Ibid*, p. 6.
[14] *Ibid*, p.13.
[15] *Ibid*, p. 455. See also, Charles M. Tiebout (1956), "A Pure Theory of Local Expenditures", *the Journal of Political Economy*, Vol. 64, No. 5, at 418.
[16] Anwar Shah, *supra* note 8, p. 8.
[17] *Ibid*, p. 9.
[18] *Ibid.*

administrative and compliance costs.[19] With the exception of national public goods like national defense, many other public services can be decentralized to the states and local governments.

The literature on fiscal federalism has a contrary advice with respect to the assignment of both distribution and stabilization functions. The reason in both cases is the fear of leakage that might result from disparate regional and/or local policies of distribution and stabilization.[20] In the area of distribution, for example, no regional or local government could be effective in its distributive goals if other regions move in an opposite direction.[21] Similarly, no regional and/or local government can be effective in stabilizing its economy when its efforts can be readily undermined through leakage resulting from the contradictory activities of other regions or localities.

The theories of fiscal federalism in the areas of revenue assignment are not of peremptory nature. Federal systems will do well to heed these normative theories, but departures from them are tolerated, and indeed many federal systems do not strictly adhere to these theories. That is why we observe divergent approaches of revenue assignment in different federal systems, which goes to show that fiscal federalism is not just about economics. In any case, based largely on the expenditure assignments in federal systems, the normative theories of fiscal federalism suggest the following criteria in the assignment of revenue powers:[22]

(i) progressive redistributive taxes should be central;

(ii) taxes suitable for economic stabilization should be central; lower level taxes should be cyclically stable;

(iii) tax bases distributed highly unequally between jurisdictions (e.g., resource taxes) should be centralized; taxes on mobile factors of production are best administered at the center;

(iv) taxes based on residence (e.g., sales of consumption goods to consumers or excises) are suited for states;

(v) taxes on immobile factors (e.g., property taxes) are better left for local levels;

(vi) benefit taxes and user charges might be used at all levels.

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[19] *Ibid*, p. 10.

[20] Richard and Peggy Musgrave, supra note3, pp. 454-455; Due and Friedlaender, *supra* note 4, p. 486.

[21] For contrary arguments, see Anwar Shah, *supra* note 8, pp. 11-13.

[22] Kibre Moges (1994), '*The Conceptual Framework for Fiscal Decentralization'*, in Eshetu Chole (ed.), *supra* note 1, pp 5-6 quoting Anwar Shah, Perspectives in the Design of Intergovernmental Fiscal Relations (1991), WPS, World Bank.

The following table shows the broad distribution of taxes if the theory of fiscal federalism were to hold sway:

Table 1: Tax Assignment according to the theory of Fiscal Federalism

Tax Category	Determination of		Tax Collection and Administration
	Base	Rate	
Customs duties	F	F	F
Income Tax	F	F, S	F
Estate & Gifts	F	F, S	F
Corporate Income Taxes	F	F, S	F
Resource Taxes	F	F, S	F
Retail Sales	S	S	S
VAT	F	F, S	F
Excises	S	S	S
Property tax	S	L	L
User charges	F, S, L	F, S, L	F, S, L

Source: Kibre Moges[23] Table 2, quoting Shah[24]

Notes: F = Federal S = State L = Local

2. Assignment of Income Tax Powers: The Impact of the Schedular System on the Constitution

Federal systems do not exhibit any pattern of uniformity in allocating income taxes.[25] Although not conclusive, there appears to be some differences in approaches between those federal systems that have a global system of income taxation and those that have adopted schedular approaches of income taxation.[26]

[23] See *Ibid*, p. 6.

[24] Anwar Shah, *supra* note 22.

[25] Solomon Negussie (2006), *Fiscal Federalism in Ethiopian Ethnic-Based Federal System* (Netherlands: Wolf Legal Publishers), p. 127.

[26] The schedular approach of income taxation, still in use in some countries including Ethiopia, segments income by sources. Each schedule of the income tax has its own rules of computation of gross income, taxable income, tax rates, and methods of

Countries with global system of income taxation tend to allocate income taxes to the federal government while those with schedular system of income taxation tend to share income taxes between federal government and states.[27] The Ethiopian Constitution of 1995 seems to follow a set formula in allocating income tax powers between the federal government and the regional governments. With respect to employment income taxes (i.e., taxes on wages and emoluments),[28] the Constitution allocates them on the basis of the identity of the employer. If the employer is the federal government or an international organization, the federal government exercises an exclusive power of taxation of employment income.[29] If an employer is anyone other than these two (that includes regional governments, private enterprises and non-governmental organizations), the power to impose tax on employment income belongs to the regional governments.[30] Incidentally, some have argued that employment income taxes are assigned to the regional governments on grounds of the benefits employees receive from regional governments. [31] If employment

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assessment. In contrast global income tax systems aggregate the income of a person from 'all' sources and apply the tax rate on the whole. In reality, there are no pure global systems of income taxation. Some types of income (e.g. capital gains) may receive special treatment in an otherwise global income tax system; see John Tiley (2005, 5th.ed.), Revenue Law, Hart Publishing, p. 136; see also Lee Burns and Richard Krever, Individual Income Tax, in Victor Thuronyi (1998, ed.), Tax Law Design and Drafting, International Monetary Fund, Vol. 2, pp,. 495-496.

As Holmes noted:

"[u]nder the global system of income taxation, all income, regardless of its source is aggregated and subjected to a single schedule. The purpose of the global approach is 'to distribute interpersonal tax burdens, vertically and horizontally, according to the ability to pay principle'. Aggregating income under a global tax renders a progressive tax scale more effective (vertical equity) and does not discriminate between income from different sources (horizontal equity). Taxation under the schedular system identifies income by source and imposes tax, sometimes at different rates, separately on the total income derived in each source clarification." Kevin Holmes (2001), *The Concept of Income: A Multidisciplinary Analysis* (The Netherlands: IBFD Publications), p. 28.

[27] Solomon Nigussie, *supra* note 25, p. 127.

[28] Employment income taxes are sometimes mistakenly referred to as 'personal income taxes' in Ethiopia. There are no personal income taxes in Ethiopia, in the strictest sense of the expression.

[29] The Constitution of the Federal Democratic Republic of Ethiopia, *Federa*l *Negarit Gazetta*, 1st Year, No. 1, Article 96(2); Solomon Nigussie, *supra* note 25, p. 127.

[30] Constitution , *supra* note 29, Article 97(1).

[31] Solomon, for example, writes that the allocation of personal income taxes to the regional governments is justified because these taxes, according to him, finance local public goods and services; see Solomon Nigussie, *supra* note 25, p. 128.

income taxes are cast as 'benefit taxes', it may be justified to assign these taxes to the regional governments, but that is not the reason.[32] Employment income taxes are assigned on the basis of the identity of the employers, rather than the residence of the employees. It is difficult to see how the benefits employees receive can be gleaned from the identity of the employers. If benefits were the reason why employees are subject to regional tax powers, employees of the federal government and international organizations working and residing in the regions should also also pay these taxes to the respective regional governments of which they are residents.

The formulaic allocation of income taxes extends to other sources of income subject to tax in Ethiopia. Income tax on business profits is allocated on the basis of ownership of the business or the legal form of business organization. The federal government is given exclusive power of taxation of profits generated by government enterprises owned by the federal government.[33] The regional governments hold exclusive power of taxation over government enterprises owned by the regional governments and private sole-proprietorship businesses.[34] The regional governments also hold an exclusive power of taxation of income from agricultural activities, as long as the income is derived by private farmers and cooperative societies.[35] The Constitution assigns taxation of corporate income as well as income of shareholders concurrently to the federal government and the regional governments.[36]

The other source of income tax which undergoes a similar formula of 'slicing the pie' is rental income tax. This source of income is divided by the Constitution between the federal government and regional governments based

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[32] See Richard and Peggy Musgrave, *supra* note 3, p. 454. The distinction between benefit-based taxes and general purpose taxes is a matter of degree rather than of substance. In principle, all taxes must be based on the benefits derived from public services. But specific benefits need not be (and in some cases cannot be) proved for taxes to become general obligations on individual taxpayers. Unlike in the general purpose taxes, however, there is a strong link between the taxes and the benefits taxpayers receive in the case of benefit-based taxes. Excise taxes on petroleum, for example, are justified by the benefits road users derive from the construction and maintenance of roads. These taxes are not general purpose taxes. Their burdens fall on road users only. Similarly, income taxes may be used particularly at the local government level to impose the burden of local government services on residents of the locality only. Residence becomes an indirect identifier of the beneficiaries of local government services.

[33] These are profit-making enterprises; Constitution, *supra* note 29, Article 96(3).

[34] *Ibid*, Article 97(4) & (7).

[35] *Ibid*, Article 97(3).

[36] *Ibid*, Article 98(2).

on the identity of the 'lessor' or 'landlord'. If the lessor is the federal government (in other words, if the federal government owns the building leased), the Federal Government has an exclusive power of taxation over that source of income.[37] The power to impose tax on rental income derived from any other property (this includes all regional government owned properties and privately-owned properties) is exclusively given to the regional governments.[38]

As can be readily observed, the Ethiopian Constitution goes to great lengths in listing the tax powers of both the federal government and the regional governments in a language as concrete as can be imagined. But if Article 99 were any evidence, there was no intention to exhaust all the tax powers, much less the income tax powers. Those taxes which are not expressly stated in Articles 96, 97 and 98 are regarded as 'undesignated' and should undergo allocation by the 2/3rds majority vote of the two Houses.[39] In providing for this special procedure to settle the locus of 'undesignated taxes', the Constitution departs form the principle of 'residuality', which is followed in the area of expenditure assignment.[40]

It is now more than fifteen years since the Constitution was approved. Since the approval of the Constitution in 1995, the Joint Houses met and voted to allocate certain income taxes which were undesignated by the Constitution.[41] The Joint Houses designated income taxes on royalties derived by enterprises as 'concurrent' taxes and royalties derived by individuals as 'regional' taxes.[42] There are still many more undesignated and yet to be discovered income tax sources awaiting determination of the two Houses. [43]

In thinking about the Ethiopian Constitution, we may wonder as to what could have motivated the framers of the Constitution to divide income tax powers (indeed all tax powers) in such a particular and specific manner. In attempting answers to this question, we may postulate four different hypotheses:

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[37] *Ibid*, Article 96(6).
[38] *Ibid*, Article 97(6).
[39] *Ibid*, Article 99.
[40] *Ibid*, Article 52(1).
[41] Berhanu Assefa (2006). *Undesignated Powers of Taxation in the Distribution of Fiscal Powers between the Central and State Governments under the FDRE Constitution*, LL.B Thesis, Faculty of Law Library, Archives, pp. 59-60.
[42] *Ibid.*
[43] Capital gains taxes (although stated as taxable in the Federal Income Tax Proclamation) are arguably undesignated taxes; see Income Tax Proclamation No. 286/2002, *Federal Negarit Gazetta*, 8th year, No. 34, Article 37; There are also many other types of income not even anticipated under the current income tax laws of Ethiopia – annuities are a good example.

(i) The general normative theories of fiscal federalism as developed mainly by economists;

(ii) The comparative experience of other federal systems;

(iii) The division of revenues during the Transition Period (1992-1995); or

(iv) The schedular feature of Ethiopian income tax system on the ground.

We may dismiss the first hypothesis (the normative theory of fiscal federalism) as the most improbable, for we quickly notice what little resemblance there is between what the normative theory prescribes and how the Ethiopian constitution divides tax powers. The normative theories of fiscal federalism generally favor assignment of income taxes to the federal government, which is clearly not the case for the Ethiopian Constitution. Besides the normative theories of fiscal federalism seldom get into as many details as the Ethiopian Constitution does. It is unlikely that the framers had the normative theories of fiscal federalism in mind in writing the revenue provisions of the Constitution.

Comparative experience also has little influence over the revenue provisions of the Ethiopian Constitution except perhaps in shaping the provisions of the law that preceded the Ethiopian Constitution – Proclamation No. 33/1992- in regulating division of revenues in the Ethiopian federal system. The details of the Ethiopian Constitution in this regard are almost unprecedented. No Constitution to my knowledge goes to as much details as the Ethiopian Constitution in allocating tax powers between the two layers of the federation. The Indian Constitution is fairly detailed on matters of tax power sharing, but not even the Indian Constitution comes close to the Ethiopian Constitution.[44]

That leaves us with the two hypotheses left. There is reason to believe that the 1992 law and the schedular design of the Ethiopian income tax system had something to do with shaping the revenue provisions of the Ethiopian Constitution. The 1992 law regulated the division of revenues during the Transition Period and the political forces that dominated during the transition period were also the forces that shaped the writing of the Constitution. A cursory comparison of the 1992 law with the Constitution's revenue provisions cannot pass without noticing the striking resemblance between the two laws. To be sure, there are minor differences of language, but their similarity is striking overall. The categories of revenues are similar; the types of taxes that are

[44] We may consult the Constitutions of the Swiss, Canadian, Australian, Nigerian, and Indian Constitutions. None of them are as detailed as the Ethiopian Constitution. The US Constitution does not even bear comparison; see Constitutions of the World at <http://www.constitution.org/cons/natlcons.htm> last visited on December 6, 2009.

categorized as federal, state or concurrent are also similar.[45] The details are also strikingly similar, if not downright identical. There is one area where the 1992 law clearly had an upper hand over the Constitution – it has more rules about revenue sharing than does the Constitution, obviously because the 1992 law dealt with revenue sharing and revenue sharing only, whereas the Constitution, like any constitution, deals with many matters other than just revenue sharing.

The 1992 law is abrogated by the Constitution, but it has thrown many a light over matters that were left unsaid or said ambiguously by the Constitution (although this is not publicly acknowledged). For instance, the Constitution says nothing about the levying and collection of concurrent taxes but the 1992 law has a clear provision on this which states that concurrent taxes are fixed and collected by the central (federal) government and then shared with the regions on the basis of derivation.[46] When the Joint Houses determined the formula of sharing revenues from concurrent sources, their decision went the way of the procedures laid down in the 1992 law. This is more than mere coincidence. The 1992 law is the voice behind the silences and ambiguities of the 1995 Constitution.

We may trace the Constitution's revenue provisions to the 1992 law, but to what do we trace the 1992 law itself? This takes us to the design of the income tax system of Ethiopia – the fourth hypothesis. In reading the revenue provisions of the Constitution, one cannot but be struck by the conservative approach of the framers of the Constitution. We quickly realize that they did not set out to 'reinvent the wheel' but to allocate existing taxes on the basis of simple indicators like the identity of employers, lessors or the form of business organizations. It is instructive to note that neither the 1992 law nor the 1995 Constitution occasioned a reform of the tax system to bring into conformity with the division of revenues, because both laws required division of existing taxes rather than reorganizing the tax system on the ground. No major income tax reform occurred until seven years after the Constitution, and the major income tax reforms of 2002 do not seem to have been motivated by the Constitution but by factors that had little to do with the federal arrangement.

It is difficult to imagine the division of revenues like that of the Ethiopian Constitution without the schedular income tax system on the ground. Since the revenue provisions divide revenues from existing taxes, they were more specific and more particular than the schedules of the income tax – that could not have

[45] Compare Article 96 of the Constitution with Article 5(2) of Proclamation No. 33/1992; Article 97 of the Constitution with Art. 5(3) of Proclamation No. 33/1992; and Art. 98 of the Constitution with Article 5(4) of Proclamation No. 33/1992, *supra* notes 2 and 29.

[46] See *supra* note 2, Article 8(4).

been avoided unless the sharing was based strictly on the existing schedules. If we scrutinize the revenue provisions of the Constitution closely, we realize that these provisions make reference to the existing income tax sources like employment, business, lease and agriculture to allocate tax powers over those to either or both layers of the federation. We can assign schedules to each of these sources mentioned in the Constitution or trace them to some of the autonomous income tax laws of Ethiopia, like the agricultural income tax laws and the mining income tax law. Those who worked out the assignment formulas of the Constitution most likely had a copy of the existing taxes of Ethiopia at the time and simply decided to allocate the taxes on criteria that seemed to them could be executed without a hitch on the ground.

3. Income Tax Lawmaking in Practice

For many years after the passing of the Constitution, the regional governments simply used the federal tax laws as source of authority to levy and collect regional taxes, including income taxes.[47] The turnover tax law, for example, is a federal tax law, but the tax is collected mostly by the regional governments. Some have wondered if this practice had any constitutional basis, but since taxpayers mounted no challenge, the practice has so far attracted little attention.[48]

The one area of taxation powers where the regional governments have shown some legislative muscle is in the agricultural income taxes, presumably because these taxes are the exclusive preserve of the regions.[49] In recent times, however, some regional governments have managed to pass their own income

[47] Timothy R. Muzondo *et al* (2000), "Ethiopia: Introduction of a VAT and a Presumptive Income Tax and Reform of the Income Tax", International Monetary Fund, Fiscal Affairs Department, p.21.

[48] *Ibid*; the challenge would have spurred the regional governments to issue their own tax law, which was very easy to do. An otherwise savvy taxpayer might frown upon such practice but decide against challenging it because he knew that the regions could produce their own tax laws upon instant notice.

[49] There is even some variation among regions in the taxation of agricultural income. In some regions (Oromia, Benishangul-Gumuz and Gambella) the tax is levied on agricultural income with a progressive tax rate scale, while in other regions, the tax is fixed amount per hectare of land; see The Federal Democratic Republic of Ethiopia (May 2007), the New Federal Budget Grant Distribution Formula, House of Federation, Economic and Social Study Department, Addis Ababa, pp. 20-21. Some say that this variation is superficial, arguing that the diktat comes from the center even in the area of agricultural income taxes; see Deso Chemeda (2008), Agricultural Income Taxation in Oromia, Senior Thesis, Faculty of Law, Addis Ababa University (unpublished).

tax laws – probably upon realizing that they could no longer invoke federal tax laws to levy and collect regional income taxes.[50]

However, before we find fault with the practice of tax law-making in the regions, we must remember that the Federal tax law making process is not entirely innocent. When the Federal Government issued the current income tax law in 2002, it was barely aware of the niceties of the federal system – if the content of the 2002 income tax law is anything to go by. The 2002 income tax law covers not just federal income tax bases, but also state tax bases, and undesignated tax bases. The best illustration of this tax law's overreach is to compare the 2002 income tax law with the income tax laws of Ethiopia back in the days when Ethiopia was a unitary state.[51] There is surprisingly no difference between the two tax regimes in terms of income tax bases upon which tax was to be levied.

Another way is to compare the tax bases mentioned as subject to income tax under the 2002 tax law with the tax bases that are assigned exclusively to the regional governments and those that were 'undesignated' in the Constitution. Of the tax bases given to regional states under the Constitution, we may mention taxation of small businesses (called category C taxpayers). These taxpayers are subjects of regional state jurisdiction (unless they are organized as companies) by virtue of Article 97(4) of the Constitution.[52] The income tax law of 2002 has detailed provisions on the assessment of the income and taxation thereof of small businesses. A presumptive assessment method (known as 'standard assessment') has been instituted for small businesses, with standard assessment tables for all types of small businesses attached to the 2002 income tax law.[53]

Of the undesignated taxes (at least undesignated in 2002), we may cite examples of taxes on royalties from patents and copyrights, taxes on interest accruing on bank deposits, and tax on transfer of capital.[54] Since the 2002

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[50] See, for example, Oromia Regional Government Income Tax Proclamation No. 74/2003, *Megeleta Oromia*; Amhara Regional Government Income Tax Proclamation No. 76/2003, *Zikra Hig*.

[51] Compare the Income Tax Proclamation No. 286/2002 with the now repealed Proclamation No. 173/1961 (as amended).

[52] Article 97(4) of the Constitution in part states: "States shall levy and collect profit… taxes on individual traders carrying out a business within their own territory.' See, Constitution, *supra* note 29.

[53] See Income Tax Proclamation, supra note 43,, Article 66; Council of Ministers Income Tax Regulations No. 78/2002, *Federal Negarit Gazetta*, 9th year, No. 18, Articles 21 and 22.

[54] See Income Tax Proclamation No. 286/2002, supra note 43, Articles 31, 36 and 37; Some of these taxes have since 2002 been designated by the Joint Houses (see above); Berhanu Assefa, *Supra* note 41.

income tax law came out with little consciousness of the federal structure and division of powers, the regions simply relied upon this ostensibly federal tax law to levy and collect regional income taxes.[55] It is only later that some of the regions even moved to issue their own tax laws. But the regions did not really issue their own tax laws if by issuing tax laws one implies a self-conscious, self-directed, deliberate process of law making. All of the regions that have issued their own laws have taken the federal tax law of 2002 as a model..[56] The regional income tax laws are not just eerily similar to the federal tax law; the regions have not even bothered to sift out provisions that are clearly inappropriate from the vantage of regional income tax jurisdiction. For example, we find the same article (number as well as content) referring to a provision that is clearly not a regional income tax jurisdiction –dividend tax.[57]

4. Possible Problems and Challenges Ahead

A federal system of government by definition involves decision-making at multiple levels of government. While this decision-making process is more amenable to participatory government and rigorous procedures to reach a consensus, it can lead to gridlocks if different levels of government entertain divergent positions on reform in one or another direction.[58] Divergent positions are to be expected from time to time between the federal government and the states. In contrast, in unitary governments, since decision-making at least in theory is made by the center and local governments have little autonomy of their own, we can expect reforms to go through more quickly than in federal systems.[59]

One possible problem that might arise from the assignment formula adopted in the Ethiopian Constitution is in the prospect of transforming the income tax system of Ethiopia. Suppose the federal government is convinced that the

[55] In defense of the federal government, some may argue that the Federal Government has the duty to nurse a nascent federal system by writing a 'common tax legislation,' from which the regional governments may take what they want. But the Federal Government could have followed less paternalistic approaches to assist the regional governments in this regard: like writing a non-binding model regional tax laws.

[56] Even the preamble of the federal income tax law is used verbatim.

[57] See Article 34 of both Oromia Regional State and Amhara Regional State Income Tax Proclamations, supra note 50, and compare them with Article 34 of the Federal Income Tax Proclamation, *supra* note 43.

[58] See Jessica R. Adolino and Charles H. Blake (2001), Comparing Public Policies, Issues and Choices in Six Industrialized Countries (Washington, DC: CQ Press), pp. 66-68.

[59] *Ibid*, p. 66.

income tax system should be global.[60] Because of the modality of assignment adopted in the Ethiopian Constitution, this type of reform will require not just reforming the tax system at the federal level but also the income tax systems of the regional governments. The federal government alone cannot succeed in transforming the income tax system from one that is schedular to a global income tax system. It requires the consent of all regions, which is usually difficult to obtain, if the regions exercise substantial autonomy in judgment. The only course of action open to the federal government is to seek constitutional amendment to push through that sort of tax reform. What would it take for a constitutional amendment to succeed, whatever is on the table? A constitutional amendment of this kind requires a 2/3rds majority vote in favor of the proposal by the joint Houses of Peoples' Representatives and of the Federation and a vote by a majority in favor of the proposal by 2/3rds of the regional councils.[61] Each of these requirements is a tremendous hurdle. We must remember that not all proposals for constitutional amendment are equal. Some amendments are so procedural and formal that they are guaranteed to slide through the hurdles very easily. Others are so radical that their chances of getting through these hurdles are very slim. Tax reform, particularly the one sought above, is of the latter type.

We must anticipate a great deal of resistance from the regional governments in particular. If the tax system were to become global, what would happen to regional tax powers? Would the tax reform lead to erosion and weakening of regional tax sources? These are some of the fears the regional governments would express and take actions to forestall. The fear that the tax reform might lead to the federal government taking over the tax powers reserved to the regions is enough to decide the results against the proposal. The regions wield substantial power over the course of constitutional amendments and they are going to use them if they perceive that the amendment (even if a minor one) affects their vested interests. As a result, many a sound proposal will be stymied for lack of support or enthusiasm for it at the regional level.

In rejoinder to this fear, the 2002 tax reforms may be held up as evidence that reform was possible after all. Seven years after the passing of the Constitution, the Federal Government of Ethiopia successfully carried out a major income tax reform without having to go through the rigmaroles of constitutional amendments. The 2002 tax reforms introduced what might be

[60] For a brief distinction between schedular and global income tax systems, see foot note 26 above.

[61] See Constitution, *supra* note 29, Article 105(2).

called 'major' changes in the income tax system of Ethiopia.[62] If tax reform of that magnitude succeeded seven years after the Constitution, we may ask, why not in the future?

We must realize that the 2002 tax reforms occurred in an extremely auspicious political environment. They occurred at a time when both the federal government and the regional governments were controlled by a single party.[63] The ruling party is known for enforcing strict party discipline on its member organizations as well as affiliates.[64] The delicate balance of 'enforced consensus' is held together for the moment by the ruling party's system of party discipline. If and when opposition groups take control of either the federal bodies or one or two of the regions, the balance may not hold. If that happens through constitutional means (i.e., through free and fair elections), fierce battles will be fought over any serious proposal for an amendment of the Constitution – without which a tax reform of any magnitude is unlikely to succeed.

The other challenge and concern surrounding the division of revenues under the Ethiopian Constitution is whether it leaves the Federal Government with sufficient fiscal powers to achieve desirable fiscal policies of stabilization and distribution *(For comparison of the assignment of revenues under the theories of fiscal federalism and under the Ethiopian Constitution, see Table 2 below*). Taxation is an important instrument of fiscal policy, and if the latter were to become effective, the federal government should wield sufficient powers of taxation to achieve desirable economic policies.[65] The extent to which any government can effect desirable changes in tax rates and bases depends upon that government's control over tax rates and tax bases for the purposes of implementing its fiscal policy as well distribution of income and wealth.[66]

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[62] The 2002 income tax reforms did not transform the income tax system of Ethiopia from a schedular one to a global system; but there were many other areas where major changes were introduced.

[63] Suberu writes "not only does (sic) the EPRDF coalition and its affiliated parties control all governments at the federal and regional state levels by relatively large majorities, but the national leadership appears to have foisted a highly disciplined and intrusive central party structure on the whole federal administration system", Rotimi Suberu, (2006), '*Federalism and the Management of Ethnic Conflict: the Nigerian Experience'*, in Turton, David, *supra* note 1 p. 85.

[64] See Assefa Fiseha, *supra* note 1, pp. 156-158.

[65] Girma Seyoum, '*Fiscal Decentralization and Macroeconomic Management in Ethiopia'*, in Eshetu Chole, *supra* note 1, at 135; Richard and Peggy Musgrave, supra note 3, pp. 11, 13; see also, John Kenneth Galbraith (7th printing, 1958), *the Affluent Society* (A Mentor Book), p. 247.

[66] Girma Seyoum, in Eshetu Chole, *supra* note 1, p. 135; Richard and Peggy Musgrave, *supra* note 3, pp. 11, 13.

Table 2: Comparison of Tax Assignment under the Ethiopian Constitution and the Theory of Fiscal Federalism

Type of tax	Ethiopian Constitution	Fiscal Federalist Theory	Article
Income tax on Federal Government and International organization employees	Federal	Federal/state	96(2)
Income tax on federal government enterprises	Federal	Federal	96(3)
Income tax on lottery winnings and other games	Federal	State	96(4)
Income tax on air, rail and sea transport services	Federal	Federal	96(5)
Income tax on federally owned houses	Federal	Federal	96(6)
Taxes on monopolies	Federal	Federal	96(8)
Income tax on state government employees and employees of private enterprises	State	Federal/state	97(1)
Income tax on private farmers and agricultural cooperatives	State	Federal /state	97(3)
Income tax on individual traders	State	Federal/state	97(4)
Income tax on inland transport services	State	Federal/state	97(5)
Income tax on rental of private houses and other properties	State	Federal/state	97(6)
Income tax on state government owned enterprises	State	Federal/state	97(7)
Income tax on employees of state government owned enterprises	State	Federal/state	97(7)
Income tax on companies and shareholders	Federal/state (concurrent)	Federal/state (concurrent)	98(2)

Source: Ethiopian Constitution 1995), *supra* note 29, and Kibre Moges, in Eshetu Chole, supra note 1, p. 6.

The division of revenues adopted in the Constitution is not conducive to the attainment of optimal stabilization and distribution policy by the federal government. In the assignment of expenditure powers, the Ethiopian Constitution is broadly consistent with the theories of fiscal federalism – at least in the assignment of stabilization and redistribution powers.[67] In the assignment of tax powers, however, it did not seem like this was taken into account- which may raise fears of countercyclical policies at the regional level. The Constitution may have followed some simple indicators for division of revenues between the two layers of Ethiopian federation, but in so doing it may have opened itself to some problems.

Let's take some examples to illustrate our point. Assume that the Ethiopian economy has experienced a rise in prices, raising fears of inflation. In that situation, the theory recommends that the federal government should raise tax rates to reduce aggregate demand.[68] This kind of policy can be effective only if the federal government has the constitutional power to raise tax rates that affect all households and businesses, at least a substantial number of households and business to have traction. Under the current division of revenue powers, there are many households and businesses outside federal control. In the area of income taxes, the federal government has no control over employees of regional governments and private enterprises, the profits of sole proprietor businesses (whose size and number can only increase in the future) and more importantly, farmers. What if the regions were reluctant to go along with the ideas of raising taxes?

The same fears can be expressed over the capacity of the federal government to implement appropriate distribution policy, if need be through the instrumentality of taxes. There is a large swath of taxpayers out there who are not subject to federal tax powers. Can the federal government be effective in its distribution policies when these taxpayers are not directly affected by its tax policies? Can the federal government impose progressive income taxes with a view to redistributing income and wealth? It is doubtful.

Many federal systems permit income taxation at both layers of government (federal and state).[69] So one may ask: why is Ethiopian revenue assignment a source of problem when others are not? The issue is not really about devolution of income taxes to the regions but the peculiar approach taken by the Ethiopian Constitution. In other federal systems, the federal government retains the

[67] See Constitution, *supra* note 29, Article 51(2), (4), & (7).
[68] Richard and Peggy Musgrave, *supra* note 3, p. 13.
[69] State governments (and sometimes local governments) impose income taxes in the United States, Canada, and other federal systems; See Shah, *supra* note 8, pp. 105, 142, 161, 330, and 355.

capacity to reach significant numbers of taxpayers although the same taxpayers may be subject to state and/or local income tax jurisdiction. In Ethiopia, that is not really the case. The federal government cannot, through the income taxes, reach farmers, cooperatives, businesses organized as sole proprietorships, employees of state governments and employees of private enterprises. With these taxpayers beyond the reach of the federal income tax system, can the federal government be effective in its stabilizing and distributive role? It is once again very doubtful.[70]

Both stabilization and distribution are not matters of immediate concern in Ethiopia, however, for at least two reasons. First, interpersonal distribution of income and wealth is not an important policy in Ethiopia because of the level of the country's economic development. In the future, as the economy grows, it may become an important agenda of the federal government. Secondly, there have not been divergent regional tax policies so far- the reasons of which have been alluded to above. There is a rule in the Federal Financial Administration Law[71] which enjoins regions to harmonize their tax policies and systems with that of the federal government. It is not certain if the federal government can invoke this law as binding upon the regions because it is not after all the Constitution. So far, the regional governments are moving in perfect sync with the federal government. As far as the Constitution is concerned, there is no reason why regional governments cannot adopt a counter-federal tax policy. That can create problems down the line in the areas of stabilization of the economy and distribution of income and wealth.

Concluding Remarks

The revenue provisions of the Ethiopian Constitution are marked by their unusual specificity. It is surmised that the existing taxes at the time of the writing of the Constitution provided the drafters with the material from which the assignment was undertaken. The schedular approach of the Ethiopian income tax system, for example, had something to do with the way the Constitution divided revenue powers over income taxes in Ethiopia. The specificity of the Constitution is both good and bad. It is good because little is left for interpretation. The great details of the Constitution have this advantage:

[70] Since the Constitution follows similar approaches with respect to other taxes (notably sales taxes), our doubts may even increase as we add more taxes into the mix.

[71] See the Federal Government of Ethiopia Financial Administration Proclamation, 15th year, No. 56, Article 64(1) ; the repealed Federal Financial Administration Proclamation contained an identical prescription of tax harmonization; see Federal Government of Ethiopia Financial Administration Proclamation No. 57/1996, *Federal Negarit Gazetta*, 3rd year, No. 14 (now repealed and replaced), Article 58.

in most cases it is clear which layer of government has what tax powers. That does not mean that there will be no disputes, but the disputes that can possibly arise in this regard have been considerably reduced owing to the specificity of the Constitution.

However, details in a constitution can have downsides, because it may arrest substantive tax reforms. As a result of the specificity of the Constitution, it is now almost inevitable that any serious tax reform at the national level must be accompanied or preceded by a measure of constitutional amendment to accommodate tax reform proposals. Constitutional amendment processes are notoriously slow and riddled with uncertainties. If the amendments are perceived as reorganizing taxation powers in the Constitution, for example, they are going to be resisted particularly if opposing political forces occupy either the federal bodies or the regional governments. The possible transition of Ethiopian income tax system from a schedular to a global tax system is used as an illustration of the gravity of the question, but the same argument can be made for reform of the tax system in so many other directions.

The revenue provisions of the Ethiopian Constitution can also be faulted for disregarding the dictum of fiscal federalists that taxes which are instruments of stabilization and distribution be in the hands of the federal government. The revenue provisions have devolved certain stabilizing or redistributing taxes to the regional governments. There is therefore fear that the federal government may not have enough powers on the tax side to effect desirable economic policies. The realization of this fact may again call for constitutional amendment, which, as pointed out earlier, is not easy to get through.

Finally, a disclaimer is in order. The argument put forward in this article may be misconstrued as an argument for centralizing certain powers or even worse concentrating powers in the hands of the federal government. Nothing of that sort is intended. All that the article calls for is the reorganization of certain tax powers without in any way diminishing the powers of the regions in the federal system of Ethiopia, but by meanwhile conferring adequate revenue powers upon the regions. ■

LEARNING TO LIVE WITH CONFLICTS:

FEDERALISM AS A TOOL OF CONFLICT MANAGEMENT IN ETHIOPIA -- AN OVERVIEW

Tsegaye Regassa[♣]

Abstract

This article explores the relationship between federalism and conflict in the light of the experience of the federal experiment in contemporary Ethiopia. By reinforcing the truism in federal studies that federalism is not a panacea to the ailments of divided societies that are prone to conflict, it seeks to point out that while federalism, as a reaction to some long-standing historic problems, helps us deal with some conflicts, it also has the potential to generate some other (new) ones. By assuming that conflict is primarily a relation of divergence of interests among parties with diverging strategies and methods, the article describes federalism in general and the federal experiment in Ethiopia and its persistent attempts to deal with the old and new conflicts that emerged in/from the past and are emerging day by day. Throughout, it is argued that we need to understand federalism as a tool of governance that both solves and generates different kinds of conflicts, and that we need to lessen our expectations of the federal experiment (by remembering that it does not establish the 'peaceable kingdom' that idealist philosophers long hoped for), and take the modest road of learning to live with the conflicts.

Key Words:

Conflict, constitution, ethnic diversity, Ethiopia, federalism, states.

[♣] (LL.B, LL.M, PhD Candidate), teaches at the Institute of Federalism and Legal Studies (IFLS) of the Ethiopian Civil Service College (ECSC) and at the Law Faculty and the Institute of Federal Studies (IFS) of the Addis Ababa University (AAU). Currently, he is also a Visiting Professor of African Law and Legal Pluralism at the Law Faculty of the University of Trento, Italy. He can be contacted at tsegayer@gmail.com. The draft version of a part of this paper was presented at a Training Workshop organized by the Council of Nationalities (CON) of the Southern Nations Nationalities, and Peoples' Regional State (SNNPRS) in July 2009, Hawassa. I am indebted to the participants who, by giving me their insightful and empirically informed comments, have enriched the piece in more ways than one. I am also grateful to the two anonymous referees who through their helpful comments, contributed to the betterment of this piece.

Introduction

Ethiopia is a land of diverse peoples with divergent interests.[1] The demographic diversity is expressed in multiple ways such as ethno-national, cultural, religious, economic way of life, and so on. Of late, diversity of the ethno-cultural type has become salient in the public square.[2] As a result, ethnicity is taken seriously in the endeavor to reconstruct the state as a multi-national, multi-cultural federal polity, *de facto* as of 1991 and *de jure* as of 1995.[3] This salience of ethnicity in public life is the result of a history of uneven and conflicted relations among ethnic groups. Federalism was allegedly chosen to respond to the challenge of ethno-national conflicts that beleaguered the old Ethiopian state from the time it has been built into a multi-ethnic empire often seeking to build one nation out of many.[4] This has been taken to mean that federalism is opted for in order to serve as a panacea for all the conflicts in Ethiopia.[5] Needless to

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[1] This diversity has prompted the Italian historian, Carlo Conti-Rossini, reportedly to have said the now almost proverbial saying that Ethiopia is "*un museo di popoli*" to mean a museum of peoples. See, for example, Donald N. Levine (1974), *Greater Ethiopia: the Evolution of a Multi-ethnic Society*. (Chicago and London: University of Chicago Press), pp. 19-20.

[2] Bahru Zewde refers to this increasing salience of ethnicity as "the deification of ethnicity". See Bahru Zewde (2008), *Society, State and History: Selected Essays*. Addis Ababa: Addis Ababa University Press, p. 20.

[3] Both the Transitional Charter of 1991 and the Federal Democratic Republic of Ethiopia (FDRE) Constitution of 1995 stress the constitutive power (alias *pouvoir constituant*) of "nations, nationalities, and peoples" although the wording in the Preambles of the two constitutional documents differs slightly in the two cases. Thus the Charter arrogates the constitutive power to "the Peace Loving and Democratic Forces/Elements of Ethiopia," (paragraph 4 of the preamble) whereas the Constitution begins with "We, the Nations, Nationalities, and Peoples of Ethiopia." See the Transitional Period Charter of Ethiopia, Proclamation No. 1, *Negarit Gazeta*, 50th Year, 22 July 1991 and Proclamation N0.1/1995, the Constitution of the Federal Democratic Republic of Ethiopia, *Federal Negarit Gazeta*, 1st Year, No.1 (1995).

[4] The old Ethiopian state had a varying territorial expanse over the centuries, its peripheral boundaries bulging and shrinking, and bulging again, across time in history. The idea of building one nation out of many evokes the thought of the *E Pluribus Unum* (*out of many, one*) motto which is more benign than the assimilationist stance of the old Ethiopian state, although this in itself is more integrationist than the *plures in uno* (to mean *many in one*, or *within one, many*) motto that should be the hallmark of a pluralist, multi-culturalist polity that tolerates, nurtures, and cherishes diversity.

[5] This is what prompts many among the public to ask if the federal dispensation has solved conflicts or has perpetuated and intensified the incidence of conflicts. One quickly notes that this (at times misguided) question is often asked rhetorically only to answer it by saying that it has actually triggered more conflicts than it has solved. But in truth—and scholars of federalism agree here—federalism is not a panacea. As such,

say, facts emerging from the federal experiment for the last decade and half did not prove that it is a panacea. Indeed at times, it might have contributed to the emergence of new--or the accentuation and multiplication of old—conflicts.[6]

This article aims at exploring the potential of the Ethiopian federalism as a way of managing, or rather living with, conflicts. In order to do that, I address myself to the following questions: Does federalism resolve or prevent conflicts or does it cause, multiply, and perpetuate them? Was the Ethiopian federalism a response to and a cause of conflicts? What conflicts did it respond to? How effectively did it do so? What conflicts has it caused? How did it prepare for them? How has it responded to conflicts that are its own creation? In other words, has it given solution to pre-constitutional conflicts? Has it faced post-constitutional conflicts? How did it respond to both? Is there any normative, institutional, and procedural capability to effectively respond to and learn to live with post-constitutional/federal conflicts? What were the old conflicts anyway? How effective was our federalism in its response to it? What are the new conflicts? How effective have we been in our response to them? What challenges have been faced? How have they been overcome? Where did we fail, and why?

In this article, I argue that conflicts are bound to be with us always. We won't "resolve" them. Nor can we eradicate them. We can prevent them. We can handle or manage them when they do occur. We can transform them when we are lucky. Federalism, with all its limitations, helps in this venture.

It is a truism to say that Ethiopia is riddled with conflicts. Class conflicts and status conflicts predominated the political terrain of the 20th century. Economic conflict and ethno-national conflicts were singled out as the

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while it "dissolves" some conflicts, it might also, unwittingly, trigger or resuscitate others. See, for example, Ronald Watts (2008), *Comparing Federal Systems* (2rd ed). (Montreal and Kingston: McGill-Queen's University Press) and George Anderson (2008), *Federalism: An Introduction*. (Oxford: Oxford University Press) both of whom hold that federalism is far from being a panacea for all conflicts.

[6] The many disputes that the state and federal institutions (such as the House of Federation [HoF], Ministry of Federal Affairs, the Council of Nationalities of the SNNPRS, etc) are seized with suggest that there is a notable incidence of conflicts in many parts of the country. Such disputes that are presented to these institutions for their legal/adjudicatory resolution include: the Silte quest for self-definition and distinct recognition; the numerous border conflicts that often occur between the Oromia region and the Somali, SNNPRS, Amhara, etc regions; conflicts over access to power through election (between groups dubbed 'highlanders' and 'natives' in the Benishangul/Gumuz region; conflict related to the quest for reassignment in one Zone as opposed to another (e.g. Dalena Woreda of the Wolaita Zone); the quest for one's own Zone (e.g. Gofa) or Special Woreda status; etc.

politically most important conflicts in Ethiopia's political history.[7] In recent years, ethnic conflict gained salience. Resolution, management, and transformation or responding to ethnic conflict has gained pre-eminence in the political realm.[8] Consequently, the quest for ethno-cultural justice, equality, and self-determination is high on the priority agenda.[9] Federalism is conceived as the only effective, appropriate, and legitimate response to ethno-national conflicts. Indeed, in the Ethiopian context, federalism was a response to old ethno-national conflicts. As such, it blunted some demands.[10] It responded to some demands.[11] It led to looking at some questions squarely in the eye—taking the bull by the horn.[12] As a result, one can say that it helped pacify "the big house". It devolved

[7] The 1974 Revolution succeeded in making class conflicts (conflicts arising out of economic hierarchy) as the most salient and the most pressing ones and, indeed, tried to respond to the demands of the poor chiefly through land redistribution schemes. Conflict of ethno-national type (conflicts arising out of status hierarchy) were appreciated but subordinated to the economic conflicts. Edmond J. Keller (1995), "The Ethnogenesis of the Oromo Nation and its Implications for Politics in Ethiopia," *Journal of Modern African Studies*, vol. 33, No.4, p. 623, refers to the 1974-1991 revolution as one of the two social revolutions of Ethiopia, the second being the one that succeeded it since 1991 ("1991 onwards"). Following his tack, one can thus describe the 1974 revolution chiefly as a class revolution and the 1991 revolution chiefly as a revolution for ethno-cultural justice.

[8] One needs only making a cursory glance at the Transitional Charter of 1991, Proclamation no 7/1992, the FDRE Constitution, and the nine State Constitutions to confirm this pre-eminence of ethnicity.

[9] One can say that these are the underlying values that shaped the making of the FDRE Constitution. The Transitional Charter, negotiated among major ethno-nationalist liberation fronts, was chiefly a truce document meant to confront ethno-nationalist clashes by responding to the quest for ethno-cultural justice (demand for the exercise and enjoyment of cultural, linguistic and religious rights, the demand for recognition of one's identity, the demand for participation in public decision-making, the demand for autonomy, etc), equality, and self-determination (internal and external).

[10] Such is the case, for example, with regard to the claim for autonomy, or linguistic justice, cultural rights, etc. In some cases, even the claim for self-determination (e.g. secession) has lost its sharp edge. The postponement of the Somali demand for secession temporarily and the vacillation of the Oromo Liberation Front (OLF) between the choice of secession or of asserting equality and autonomy in a democratic Ethiopia are examples of such blunted demands.

[11] E.g. the right to equality and non-discrimination (art 25), political participation through representation (arts 38 cum 54(2)), the right to use of language in education, courts, civil service, and media (at least within one's locality, with or without translation), the right to enjoyment of culture (art 39(2)), the right to self-government (art 39(3)), etc.

[12] The secession clause in the now (in)famous art 39(1) of the constitution marks a bold move with few, if any, precedents. By inscribing it in the constitution as a right,

conflicts to sub-national levels.[13] It reduced national ailments to sub-national and local levels. And that is as it should be.

Ethiopian federalism triggered other conflicts. One cannot gainsay that new conflicts have emerged. The federalist project has two tasks to perform at a time: 1) that of responding to old conflicts, transforming them, answering old questions, satisfying old demands; and 2) that of managing new conflicts, coping with new challenges, investing in conflict transformative projects.

Detractors of Ethiopia's federalism often ask simple questions that suggest an oversimplification of the matter: *has the federal arrangement solved or exacerbated conflicts?* This must have come from the misunderstanding that federalism is a panacea. Federalism does not guarantee a "perpetual peace,"[14]or "the peaceable kingdom."[15] *Federalism is a compromise, a negotiated*

Ethiopia went beyond the "kill the tribe to build the nation" motto of many an African country. It reduced Ethiopia to a destructible union of (perhaps indestructible) sovereign ethnic units ("nations, nationalities, and peoples"). This clause originally meant to remove the military solution from the political equation—to serve as the paradoxical case of the dividing that unites—served, rather strangely, the purpose of preserving the unity while threatening it. Whatever its advantage, by endorsing secession, Ethiopia took the bull by the horn and so far, the bull hasn't killed it. One can surmise—stretching the metaphor of the bull--that perhaps through this clause, the bull finally might be domesticated.

[13] Hence, the numerous local cases that are vying for attention at the regional level (e.g., in the Council of Nationalities of the SNNPRS) and at the Federal level (e.g. in the House of Federation).

[14] Immanuel Kant is said to have penned a book entitled *Perpetual Peace* but mainly referring to peace among nations, in the realm of what today can be called Public International Law. See Immanuel Kant (1795), *Perpetual Peace: a Philosophical Sketch*, available in electronic version at http://www.mtholyoke.edu/acad/intrel/kant/kant1.htm (accessed in June 2009).

[15] The famous painting by Edward Hicks entitled *The Peaceable Kingdom* inspired by the verses in Isaiah 11: 6-9 readily come to mind. The text of Isaiah 11:6-9 reads as follows:

> "The wolf will live with the lamb, the leopard will lie down with the goat, the calf and the lion and the yearling together; and a little child will lead them. The cow will feed with the bear, their young will lie down together, and the lion will eat straw like the ox. The infant will play near the hole of the cobra, and the young child puts his hand into the viper's nest. They will neither harm nor destroy on all my holy mountain, for the earth will be full of the knowledge of the Lord as the waters cover the sea."(See Holy Bible, NIV, 1978).

Will Kymlicka (1995) appropriately used the painting as the cover page for his book *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press).

settlement, a covenant, a human institution, an imperfect one at that, more a project than a reality.[16] Federalism is not a panacea. It does offer some solution. But it also solves problems by diverting old conflicts, or creating (new), or transforming all, conflicts. To put it more bluntly and directly: just as much as it solves, it creates (and, at times, multiplies) much, conflicts. Ethiopian federalism preserved (partial) unity, brought about partial peace, established temporary truce, attempted to guarantee ethno-national equality, and partially dispensed ethno-cultural justice. But by doing so, out of the solutions for old problems, are born new conflicts: conflicts for new power,[17] new resources,[18] and new opportunities.[19] As a result, there is now heightened awareness of the new self. There are now new demands for a distinct identity,[20] new demand for self-governance and autonomy,[21] new quest for local economic justice, new quest for political empowerment and participation, new quest for statehood,[22] new quest

[16] As a compromise, it does not grant all the demands of all the parties involved. Consequently, most parties will be half happy (or more or less) rather than fully happy. As a project, an unfinished one at that, it invites experimentation, trial and error, ups and downs, successes and setbacks.

[17] New power spaces created as a consequence of devolution of power to local (State, Zone, and Woreda) centers.

[18] New resources include those that local authorities are entitled to use (e.g. economic facilities such as land) but mainly budgetary resources that come to them in the form of transfer (be it as a grant, subsidy, etc from the federal government) or revenue they are entitled to raise at the sub-national level.

[19] Opportunities that create access to social capital such as network, education, health, and other economic facilities.

[20] The case of the Silte, the Donga, the Zay, and a host of others exemplify this. The Silte case for self-definition and local self rule has long been decided by the House of Federation (HoF). The Donga and the Zay cases are yet to be decided.

[21] The case of the Gofa exemplifies this kind of claim. The Gofa quest for a Zone status separate from the Gamo-Gofa Zone has been presented to the HoF, the Office of the Prime Minister, the Legislative Council of SNNPRS, Council of Nationalities of SNNPRS, and the political parties of both the federal and the state offices of the EPRDF in a letter dated 21/7/98 EC. The case has not yet been decided.

[22] E.g. the case of the Gamo and the Sidama in SNNPRS. The Gamo quest for a separate Statehood (from SNNPRS) has been formally presented to the Federal, State, and Zonal authorities in a letter dated 10 Hamle 1997 EC. The Sidama quest for statehood separate from the SNNPRS has been presented to the Council of Nationalities (CON) of SNNPRS in an application/petition dated 02/01/98 EC. The Sidama Zone has since dropped their request with a letter dated 26/8/98 EC apparently after a long series of political negotiation.

for territory (hence border disputes).[23] Some conflicts emerge out of the problem of design, some out of the problem of practice.[24]

It is my key argument therefore that instead of expecting federalism to solve all our conflicts, it is advisable to take the more modest road and learn to live with conflicts. That is what federalism offers: to learn to live with conflicts. I also argue, albeit only tangentially, that federalism is often the only, not necessarily the best, choice countries have.

The overall goal is to contribute to the effort at clarification of thought and visions regarding conflicts and federalism. If we have a clearer idea of what conflicts are, how they are to be handled, what federalism is, how it is to be framed and implemented, especially in diverse and divided societies, then we will be better fortified to appreciate the predicaments we are in and to develop a more systematic approach to conflicts that federalism is meant to manage or that it has perhaps triggered. Thus, it will be in order to ask as many questions as possible about conflicts and federalism and try to give an answer to these questions. In order to do that, I will chiefly rely on survey of literature and analysis of laws and policy documents.

Given the fact that conflict is a dynamic process rather than a static incident,[25] discussion on the *Anatomy of Conflicts* with a particular reference to the meaning, phases and methods of their management would have been necessary as a prelude to the theme of this article. However, the limited scope of this article does not allow it, and I will address the theme in a forthcoming article. This article is organized into three major sections (other than the introduction and conclusion). In section one, I discuss ethno-national conflicts: what they are, what they call for, how they are conceptualized, and how they are approached for their resolution or management. In the second section, I discuss the methods of living with conflicts through and/in federalism. Here, I try to approach federalism both as a solution to and a 'cause' of conflicts at a time.

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[23] The case of the Yem, the case of Dale Woreda between the Sidama and Wolayta Zone of the SNNPRS, the case of the Guji Oromo in the Sidama Zone, the border dispute between the Somali and Oromia Regions, are only examples of these conflicts.

[24] See Tsegaye Regassa (ed) (2009), *Issues of Federalism in Ethiopia: Towards an Inventory* (Constitutional Law Series, No.2). (Addis Ababa: AAU Press), for an elaborate discussion of the issues of Ethiopian federalism in three categories, namely that of Design, Practice, and Culture.

[25] See Medhane Tadesse (2006), *The Quest for Conflict Settlement in Ethiopia's Periphery*. (Addis Ababa: Friedrich-Ebert Stiftung (FES)), for example, on the dynamic and processual nature of conflicts. "Conflicts are historical processes, not static facts" p. 6.

In section three, I discuss federalism and conflicts in the context of Ethiopia. Ethiopia, being a country of many—and at times conflicting—images, heritages, or personalities, it is imperative that we discuss issues related to 'images' and perception of its problems and solutions. The contending ethnic demands and the federal response thereof are also considered. Federalism and its place in Ethiopia's past and present are discussed relatively extensively. Issues related to the design and the practice of the federal dispensation are identified. Some of the challenges and the limits of the federal dispensation in the face of increasing tensions and competitions among groups at the local and sub-national levels is also sketchily presented by referring to examples of recent cases that emerged from the states. The section is brought to an end through a tentative description of the prospect as we look ahead into the years to come.

1. Ethno-National Conflicts and their (Ir)resolution

1.1- What are they?

What are ethno-national conflicts? In simple terms, ethno-national conflicts can be viewed as conflicts between and/or among ethnic or national groups that are in relationships. But not much clarity is obtained from such a definition. There is undertheorization of the nature of ethnic conflicts. As a consequence, both the definition of, and the theories that explain, ethnic conflict do not command consensus among scholars. Donald Horowitz, in his magisterial work on ethnic conflicts (entitled *Ethnic Groups in Conflict*) suggests that ethnic conflict is "the struggle for mutually exclusive rewards or the use of incompatible means to a goal."[26] By alluding to Lewis Coser's definition, Horowitz goes on to adopt a definition which views ethnic conflict as "a struggle in which the aim is to gain objectives and simultaneously to neutralize, injure, or eliminate rivals."[27]In Horowitz's definition, conflict--posed as a struggle, strife or collision--is distinguished from competitition.[28]

Clearly, this definition assumes diversity/plurality and relations among diverse groups. It also implies a divergence of pursuits of benefits and incompatibility of means used to attain a goal. Ethno-national conflicts thus can be viewed as a struggle between and/or among diverse groups who, having (perceived) incompatible goals, use incompatible means to achieve their goals. This definition however assumes clarity as to what we mean by ethnicity or nation. Adrian Hastings makes a helpful distinction between ethnicity and nation by stipulating that while ethnic groups are peoples tied to one another chiefly

[26] Donald Horowitz (1985), *Ethnic Groups in Conflict* (Berkeley: University of California Press), p. 95.
[27] *Ibid*.
[28] *Ibid*.

through a shared *spoken* language, a nation is a group tied to each other through a *written* vernacular.[29]

1.2- What Causes Ethnic Conflicts?

There are a number of theories forwarded to explain the nature and causes of ethnic conflicts. Donald Horowitz, for example, identifies three major categories of theories of ethnic conflicts, namely modernization theory, class theories, and cultural difference theories.[30] According to modernization theories, ethnic conflicts, as a "mere relic of an outmoded traditionalism"[31], will go away if modernization penetrates the domain of ethnic existence. Ethnic conflict is also viewed as an obstruction to the inexorable progress toward modernity,[32] and as such may result in the inevitable tension between tradition and modernity which in turn causes some conflict. The competition among groups for the fruits of modernity (infrastructural, educational, new wealth, etc) might also cause conflict.[33]

Class theories of ethnicity hold that belief in a particular ethnic identity is part of an ideology that "masks class interests and diverts the working class from pursuing their interests."[34] As such it is malleable to elite manipulation and instrumental utilization for the elite's own pursuit of class and political interests. Cultural difference theories such as the one promoted by Furnivall maintain that conflict among ethnic groups arises out of incompatibilities among their cultures. It is an attempt at explaining many an ethnic conflict on the basis of cultural differences. It holds that plural societies are "defined by dissensus and pregnant with conflicts."[35]

According to Will Kymlicka,[36] a proponent of liberal multiculturalism, liberalism's blindness to groups rights, and the consequent insensitivities to minority claims lead to ethnic tensions in a polity. The quest for freedom (of a group) from 'external domination' and (of an individual) from 'internal restrictions' thus justify the quest for ethno-cultural justice. The denial of justice

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[29] Adrian Hastings (1997), *The Construction of Nationhood: Ethnicity, Religion, and Nationalism* (Cambridge: Cambridge University Press), pp. 1-35, but especially pp. 3, 11-12.
[30] See generally Donald Horowitz, *supra* note 26.
[31] *Ibid* , p 96.
[32] *Ibid.*
[33] *Ibid*, p. 102.
[34] *Ibid*, p. 106.
[35] J.S. Furnivall (1954), "Some Problem of Tropical Economy" in Rita Hinden, ed., *Fabian Colonial Essays* (London: Allen & Unwin), (as quoted in D. Horowitz, *Ibid*, p.136).
[36] See generally Will Kymlicka, *supra* note 15.

often leads to conflicts and tensions. Misrecognition causes tensions and conflicts. Similarly, Iris Marion Young characterizes most ethnic demands as part of the response and resistance to different classes of oppression, namely exploitation, marginalization, powerlessness, violence, and cultural imperialism.[37]

John Markakis, a long-time scholar on Ethiopia, suggests that causes of ethnic conflicts are mostly competition for resources and power although in what looks like a lapse in thought he also seems to endorse the cultural difference theory when he tried to explain the Issa-Afar conflict in the light of historical/traditional enmity between the two groups.[38] Merera Gudina[39] attributes ethnic conflicts in Ethiopia to, among other things, contending nationalisms that have emerged and evolved over time in Ethiopia. He also deplores the incomplete transition to democracy as a result of which we continue to have political instability that is rooted in ethnicity.[40]

In a similar vein, Lovise Aalen[41] alludes to the democratic deficit, human rights deficit, and the one party dominance in Ethiopia as the cause of many an ethnic discord. Likewise, Assefa Fiseha[42] makes the observation that poor political culture and poor federal culture continue to serve as the hotbed for ethno-national contentions in Ethiopia. In the context of Ethiopia, one can fairly say that the sources of ethnic conflict have often revolved around the competition for resources, power, and opportunities.

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[37] See generally Iris M. Young (2000), *Inclusion and Democracy* (Oxford: Oxford University Press). See also I. M. Young (1990), *Justice and the Politics of Difference*. (Princeton: Princeton University Press).

[38] John Markakis (1998), *Resource Conflict in the Horn of Africa* (London: Sage Publications). See also his (1987) *National and Class Conflict in the Horn of Africa*. (Cambridge: Cambridge University Press). See also Edmond J. Keller (1981), "Ethiopia: Revolution, Class, and the National Question," *African Affairs*, vol 80, No. 321, pp. 519-549, for a summary of the various explanations of ethnic conflicts in Africa in general and in Ethiopia in particular.

[39] See generally Merera Gudina (2003), *Ethiopia: Competing Ethnic Nationalisms and the Quest for Democracy,* 1960-2000 (Addis Ababa: N.P Shaker Publishing).

[40] *Ibid*, e.g. pp. 160-161.

[41] See generally Lovise Aalen (2000), *Ethnic Federalism in a Dominant party State: The Ethiopian Experience, 1991-2000*. (Bergen: Christian Michelsen Institute). See also her (2008), *Institutionalizing the Politics of Ethnicity: Actors, Power, and Mobilization in Southern Ethiopia under Ethnic Federalism*. (Oslo: PhD Dissertation (submitted to the Department of Political Science of the University of Oslo).

[42] Assefa Fiseha (2005/2006), *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* (Nijmegen: Wolf Publishers), pp. 432-433, for example.

1.3- Modes of Responding to Ethno-national Conflicts

Anyone dealing with the problems of ethno-national diversity has a number of options to choose from in order to deal with them. But mostly, the responses depend on the nature and types of claims put forward by the different groups within a polity. Some groups, considering their numerical smallness, might just want security of survival. They thus claim recognition and security of existence, equality and non-discrimination, identity, enjoyment of cultural and linguistic rights, the right to homeland, representation and participation in the politics of the encompassing polity, and autonomy. In extreme cases, they might demand self-determination.[43]

The responses to these diverse demands differ from country to country and from time to time. The approaches often taken in response to the demands of diversity and difference historically took the form of extermination (genocide), assimilation, misrecognition, marginalization, exclusion, domination, and recognition.[44] A positive response took the form of tolerance, equalization, affirmative action, power-sharing, and accommodation treading the multiculturalism road.[45] Federalism is also a mode of positively responding to the challenge of diversity. (But in most divided societies concerned with the task

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[43] Note that these are more or less the kind of rights minorities can claim in multi-ethnic, multi-linguistic, and multi-cultural/religious communities. For a comprehensive list and rigorous legal analysis of the rights of minorities, see Patrick Thornberry (1991), *International Law and the Rights of Minorities*. (Oxford: Clarendon Press).

[44] Thornberry, *supra* note 89, identifies a spectrum of responses to demands by minorities by specially noting those that range in between assimilation and integration including fusion and segregation (p.3). In relation to genocide as a response, he says "regrettably, crude attempts at physical destruction of groups are still made by states, even if not admitted to be such: no state proclaims genocide as a policy." (p.4). For the many and varied responses to the demands of diversity, see also the two oeuvres by Iris Marion Young, *supra* note 83. For incisive analyses of the two most prominent forms of negative reaction to the demands of diversity, namely exclusion and domination, see Melissa S. Williams and Stephen Macedo (eds) (2005), *Political Exclusion and Domination*. (New York and London: New York University Press).

[45] The responses offered by voices of multiculturalism such as Charles Taylor (1994), "The Politics of Recognition" *Multiculturalism* (Amy Gutmann, ed). (Princeton: Princeton University Press); Will Kymlicka (1995), (chiefly in his) *Multicultural Citizenship*, *supra* note 15. James Tully (1995), *Strange Multiplicity: Constitutionalism in an Age of Diversity*. (Cambridge: Cambridge University Press); and Alain-G Gagnon and James Tully (eds) (2001), *Multinational Democracies*. (Cambridge: Cambridge University Press).

of nation-building, positive responses were hard to come by, the most extreme form of which propagated the slogan 'kill the tribe to build the nation.'[46])

1.4. Federalism as one among Many Responses to Ethno-national Conflicts

Federalism is often used as a tool of accommodating diversity. Daniel Elazar, one of the leading proponents of the expansion of the federal idea in modern times, and who is otherwise very skeptical about the success of ethnic federalism, says that "Federalism has become a very popular "solution" for problems of ethnic conflict in public discourse."[47] But owing to the fact that the American model is often taken as the prototypical model of federalism, a federal type that takes ethnicity into account in the process of carving its constituent units is viewed as rather unconventional. They also observe that:

> [E]thnic federations are among the most difficult of all to sustain and are least likely to survive because constituent units based on ethnic nationalisms normally do not want to merge into the kind of tight-knit units necessary for federation. It may be that confederations of ethnic states have a better chance of success. Ethnic federations run the risk of civil war, while ethnic confederations run the risk of secession. *The management of ethnic nationalism is both the most common and the most difficult reasons for federalism today.*[48](Italics added.)

Indeed most scholars consider ethnic federalism with a degree of suspicion because to base a federal arrangement on such an inflexible trait such as ethnicity is to freeze the compromise and negotiation inherent and necessary for an operational federal system.[49] Nonetheless, trends in recent years suggest that perhaps ethnic federalism must be given a chance because it has two major

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[46] This was the expression frequently used in post-colonial countries that not only took nation-building seriously but sought to do it even at the expense of internal diversities. See the phrase used in Will Kymlicka (2007), "The Global Diffusion of Multiculturalism" in *Governing Diversity: Democratic Solutions in Multicultural Societies* (Razmik Panosian, Bruce Berman, and Anne Linscott, eds). (Montreal/Kingston: Rights & Democracy/EDG (Ethnicity and Democratic Governance)). Here, Kymlicka says: "'kill the tribe to build the nation' was a popular expression in many post-colonial African countries." p. 11.

[47] Daniel Elazar (1994), *Federalism and the Way to Peace*. (Kingston/Queen: Institute of Intergovernmental Relations), p. 167.

[48] *Ibid*, pp.167-168.

[49] Daniel Elazar, who says, "ethnic nationalism tends to subordinate all free government to its uncompromising position. Federalism is a democratic middle way requiring negotiation and compromise. All aspects of society fostering uncompromising positions make federalism more difficult, if not impossible" in *Ibid*, p. 168, is only an example.

advantages: a) it brings about peace and stability in conflicted societies; and b) it entrenches and institutionalizes ethno-cultural justice. In countries such as that of the horn –which share common peoples, cultures, fears, and vulnerabilities— ethnic federalism with the secession clause might even help for regional integration.[50] It is important, however, that for ethnic federalism to effectively respond to the challenge of diversity, it needs to be augmented by electoral and political system that provide for power-sharing, equal representation, veto power on select matters, etc. It should also be working under the provenance of a legitimate, supreme, and rigid constitution that can be interpreted impartially and neutrally (or evenly). It should also be supported by a robust minority rights regime that can protect new minorities or minorities within minorities.

2. Learning to Live with Conflicts through Federalism: Federalism as a Solution and as a Cause of Conflicts

As has been hinted at earlier on, federalism is not a panacea to all ailments. It is not an insurance against conflicts. It is therefore imperative that a society learns to live with conflicts in and through a federation by preparing for conflicts that might be triggered by the adoption and operation of a federal structure.[51] Such a preparation requires the institutional and procedural readiness and readiness in terms of putting in place a systematic set of policies, strategies, and methods for handling conflicts. But before we delve into the discussion of how we live with conflicts, it is important to discuss the features, variants, types, and modes of operation of federalism.

2.1. Federalism in General

2.1.1. What is Federalism?

The conventional view with regard to federalism is that it is a form of non-centralized mode of organizing a polity.[52] Thus it is said that "federal polities are

[50] See Tsegaye Regassa, "Federalism in Ethiopia and its Relevance to other Multi-ethnic Polities of Africa" (Unpublished paper presented in the Law Faculty of the University of Trento, Italy, May 2009, forthcoming in *Bahir Dar University Law Journal*, 2010) for a discussion of its transplantability elsewhere and its use as a tool of (re)integration of the countries of the Horn of Africa.

[51] Conflicts that might be triggered by a federal arrangement are those that result from the units' and sub-units' heightened self-awareness and increased awareness of their rights and powers to be claimed both vertically from the federal government and horizontally from each other. Such conflicts include, but are not limited to, competition over (newly discovered) power, resources, and opportunities.

[52] See Daniel Elazar (1985), "The Role of Federalism in Political Integration" in *Federalism and Political Integration* (Daniel Elazar, ed). (Lanham, MD: Jerusalem Center for Public Affairs/ University Press of America), pp. 13-16.

characteristically non-centralized."[53] It refers to a "union of separate states in which power is divided and shared between a strong union government and strong state governments."[54] Inherent in the federal idea is thus the idea of "shared rule and self-rule."[55] Moreover, federalism presumes the existence of at least two layers (tiers) of government in a polity, namely, that of the Federal (General, also Union) government and of the State (Local, also Provincial, or even Cantonal-- in the case of Switzerland) governments.

The idea of shared rule and self rule in federalism is advantageous in many respects. Kincaid argues that federalism, as it is practised in the United States, has "solved the fundamental problem of human governance and liberty." He goes on to state that federalism aspires to "maximize the democratic and economic advantages of both small and large republics by minimizing the anarchistic temptations of small republics to fight each other and the monopolistic temptations of large republics to become tyrannical."[56]

Thus it is evident that federalism intensifies democracy by creating an atmosphere of popular participation at, at least, two levels. Further, federalism helps preserve the particularities of smaller republics in a big polity by first *protecting them from potential degeneration into non-existence and by, secondly, breaking the imperialistic hegemony of larger republics*. (Whether this value of federalism can still be maintained in a post-cold war era where there is a resurgence of politics of identity is extensively debated relatively recently in Graham Smith's work.[57]) But the potential for pluralism, and better local liberty and consequent better legal and even political penetration in federalism can

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[53] *Ibid* p. 14. Here, Elazar rightly insists on the distinction between non-cetralization and decentralization by saying, "Non-centralization is not the same as decentralization, though the latter term is frequently—and erroneously—used in its place to describe federal systems. Decentralization implies the existence of a central authority, a central government that can decentralize or recentralize as it desires. In decentralized systems, the diffusion of power is actually a matter of grace, not right; in the long run, it is usually treated as such."

[54] John Kincaid (1995), "Foreword" Federalism: What is it? Where Might it take us?, *(Law Related Education)*, Vol 19, No.3.. (Chicago: American Bar Association), p.1.

[55] Ronald Watts, *supra* note 5, p. 7. See also Daniel Elazar, *supra* note 92, pp.5-16. See also the centrality of this idea in other works such as Michael Burgess (2006), *Comparative Federalism: Theory and Practice*. (London/New York: Routledge), pp.11-49 (which analyzes the conceptual roots of federalism, federations, and federal political systems); and Daniel Elazar (1996), "Federalism, Diversity, and Rights" in *Federalism and Rights* (Ellis Katz and G. Alan Tarr, eds). (Lanham, MD/London: Rowman and Littlefield), p.2.; George Anderson, *supra* note 5, ch. 2.

[56] Kincaid, *supra* note 54, p.2.

[57] Graham Smith(ed) (1995), *Federalism: The Multi-ethnic Challenge*. (London: Longman).

hardly be denied. It is important to note at this juncture that while federalism is an important instrument to accommodate local differences and the quest for local/provincial autonomy in a large polity, it is not only large polities that need it. Small nations, too, might want to adopt federal arrangements for various reasons one among which is diffusion of power across the land so that central tyranny is avoided.[58]

2.1.2- Variants

Etymologically the word 'federalism' comes from the Latin, *foedus*, meaning "covenant".[59] Hence, the covenantal roots of American federalism[60] which is considered an example of a prototype of federations.[61] Traditionally therefore, federalism, being essentially a covenant or a treaty, is a solemn agreement among smaller polities to form a larger perpetual polity. It is from this covenantal idea intrinsic to federalism that Daniel Elazar develops his thesis of various forms of organizing governments on the federal line. He thus identifies four major forms of state organization that could roughly be called "federal", namely: a) Federation; b) confederation; c) federacy; and d) associated statehood.[62] A brief explanation of each is in order.

Federation, for Elazar, is a kind of government which "establishes a common general government in which to form a polity, and constituent units which both govern themselves and share a common constitutional government of the whole."[63] It is the form of government in which "powers are delegated to [the general government] by the people of all the units. Its dissolution can only come about through the consent of all or a majority of its constituent units."[64] It is a system in which "the general government has direct access to every citizen and supremacy in those areas in which it is granted authority."[65]

Moreover, for Elazar, *Federation*, which is the prototype of a federal political system, "is the form of government invented by the founding fathers of

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[58] Anderson, *supra* note 5.

[59] Kincaid *supra* note 54. But see also Daniel Elazar and John Kincaid (1984), *The Covenant Connection: Federal Theology and the Origins of Modern Politics*. (Lanham, MD: Center for the Study of Federalism and University Press of America) for a more comprehensive treatment of the federal idea as essentially covenantal.

[60] Donald Lutz (1988), *The Origins of American Constitutionalism*. (Baton Rouge: Louisiana State University Press).

[61] Elazar *supra* note 47.

[62] *Ibid*, pp. 159-160

[63] *Ibid*, p. 159.

[64] *Ibid*.

[65] *Ibid*.

the United States in the constitution of 1987."[66] Archetypal examples of modern federations are the US, Switzerland and Canada. In his opinion therefore prototype federations are those which are formed through aggregation rather than devolution. Consent of the unit is also inherent to (convenantal) federation. This notion of federation can be more clearly understood when it is contrasted to the other forms of organizing states on the federal line such as confederation and federacy.

Confederation is a system in which "the constituent units form a union but retain most sovereign and constituent powers."[67] Thus in a confederation the constituent units "establish and maintain continuous control over the general government which must work through them to reach the citizenry."[68] Moreover, "the secession of individual units may be possible by prior constitutional agreement without general consent."[69] As can be noted from the foregoing, while the general government has direct power over citizens of the states in a federation, such is not the case in a confederation. In the latter case, the constituent unit's government serves as a medium between the citizens and the general government. In addition, in a confederation, the units have a pre-arranged right of secession preserved for them from the very beginning. Thus, in confederation, unilateral withdrawal from the "Union" is possible. This is perhaps because in confederations, the units preserve their sovereignty. The Greek Achean League, and the United provinces of the Netherlands are mentioned as classic examples of confederations, while the European Union is taken as the best modern example.[70] It is important to note here that confederations, to the extent they allow secession, mark less permanent commitment to form a "more perfect union" which is the essence of covenantal federalism.

Federacy is "an asymmetrical relationship between a federated state and a large federate power, providing for potential union on the basis of the federated state maintaining greater internal autonomy by foregoing certain forms of participation in the governance of the federate power."[71] It is thus a transitional step to union. Notable also is the imbalance between the units, i.e., between "the federated state" (which usually might not have had a prior experience as a viable state) and the (larger) "federate power". While federacy is similar to federations in the sense that both have potential for subsequent unity, it does not seek to

[66] *Ibid*.
[67] *Ibid*, p. 160.
[68] *Ibid*.
[69] *Ibid.*
[70] *Ibid*.
[71] *Ibid.*

preserve the identity of the constituent units, thereby always leaving sufficient space for self-rule-which is the essence of federations. It is significant to note that while federations might facilitate homogeneity among the citizens in the constituent units, it does not necessarily and usually lead to a unity that obliterates the constituent units. Federacy, however, might lead to subsequent obliteration of the autonomy of the federated state. Elazar [72] and Friedrich[73] mention Puerto Rico as a federacy (to the US), although it is noted that the term frequently used for this kind of arrangement in the US is "commonwealth."

Associated statehood is also an asymmetrical relationship in which the "federated state is less bound to the federate power, and the constitution which binds them usually has provisions for the severance of ties between the two under certain specified conditions."[74]This arrangement "is similar to federation." That is to say, just in the same way confederation differs from federation because it allows secession from the union, associated statehood differs from federacy because it allows breaking of ties from the federate power. Thus, one can say that associated statehood is as loose a federacy as confederation is loose a federation.

The foregoing are the four major forms of organizing polities on a federal basis, but other quasi-federal arrangements also exist. Unions (like the UK); leagues, condominiums (Andorra with France and Spain); constitutional regionalization (e.g. Italy); and constitutional home rule (like Japan) are mentioned by Elazar as forms of quasi-federal arrangements.[75]

2.1.3- Federalism as a Mode of Organizing a Polity

From among the three basic ways of the emergence of polities, namely *conquest* (or force), *organic development* (or accidental evolution), and *covenant* (or reflection and choice), federalism is akin to covenant (or reflection).[76] That is to say, federalism is different from a form of government established by use of force which usually culminates in "hierarchically organized regimes ruled in an authoritarian manner."[77] It is thus different from a system in which there is a "power pyramid" in which "the conqueror (is) on top, his agents in the middle,

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[72] Elazar (1987), *Exploring Federalism*. (Tuscaloosa, AL: University of Alabama Press); See also Elazar, *supra* note 47.
[73] Carl J. Friedrich (1968), *Trends of Federalism in Theory and Practice* (New York: Praeger).
[74] Elazar, *supra* note 47, p. 160.
[75] *Ibid*.
[76] *Ibid*, pp. 18-19 citing Madison in *Federalist* 1. Also, see Elazar *supra* note 72.
[77] *Ibid*, p. 18

and the people underneath the entire structure."[78] As such, federalism seems to be at odds with centralist authoritarianism.

Federalism is also seen as distinct from organic evolution which:

> involves the development of political life from its beginning in families, tribes, and villages to large polities in such a way that institutions, constitutional relationships, and power alignments emerge in response to the interaction between past precedent and changing circumstances with a minimum of deliberate constitutional choice.[79]

Being largely a product of historical accidents, organic evolution results in oligarchic regimes with a predilection to be on the top of the power pyramid or at the center.[80] It thus might create a center-periphery tension with the regime ending to be at the center and at the top. Interestingly, in similitude to conquest, this form of state "creation," also tends to be hierarchical which is not necessarily the case in federalism. Federalism, being a product of "reflection and choice" (in the words of *The Federalists*[81]), is unlike *conquest* and *evolution.* Elazar states that "polities whose origins are covenantal reflect the exercise of constitutional choice and broad-based participation in constitutional design."[82] Such polities are "essentially federal in character"- in spite of their structure-i.e., "each polity in a matrix compounded of equal confederates who come together freely and retain their respective integrities even as they are bound in a common whole."[83] Moreover, "such polities are republican by definition."[84]

Most, characteristically, federalism is a system in which decisions are made after deliberate negotiation.[85] It is the element of negotiation inherent in federalism that attracts societies that even "ail" from "natural" diversities such as culture religion, ethnicity, etc, to federalism. Such societies that are divided on "transgenerational religious, cultural, ethnic, or ideological" lines (also called consociational polities) venture to adopt non-territorial federations which are jointly governed by coalitions of the leaders of each group.[86] Such trends leaning towards non-territorial federations which is necessitated by "re-assertions of ethnic and regional identities, now worldwide in scope," have given

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[78] *Ibid*.
[79] *Ibid*, p. 19
[80] *Ibid.*
[81] *The Federalist Papers* (1969/1999), (Charles R. Kesler and Clinton Rossiter, eds). (New York: Mentor), p 1.
[82] Elazar, *supra* note 47, p.20.
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid*, p.71.
[86] *Ibid*, p.22.

rise to various paces of federalism, while also ushering in what is called "the federalist revolution."[87] A post-modern federalism, "a federalism that is not simply based upon territorial boundaries but recognizes the existence of long enduring peoples as well,"[88] is suggested for the purpose of handling pluralism of recent years.

That federalism is congenial to pluralism is too obvious to argue. That pluralism safeguards liberty is the basic federal argument.[89] But the manner of institutionalizing pluralism constitutionally determines the durability of federal arrangements. Thus, pluralism rooted in individual liberty and choice is more convenient to sustain in federal arrangements than those rooted in primordial ties.[90] The latter forms of pluralism sustain themselves by making it difficult for integration to happen. In the context of such rigid form of pluralism (such as the ones evoked by multi-ethnicity), federal principles are said to work if they can "combine kinship (the basis of ethnicity), and consent (the basis of democratic government) into politically viable, constitutionally protected, arrangements involving territorial and non-territorial polities."[91] In such circumstances, federalism both maintains and contains pluralism." "The virtue of federalism," Elazar asserted, "not only lies in its utility in maintaining pluralism but also in simultaneously containing it."[92]

Comparative studies of federalism indicate that federalism can best be maintained in societies where: a) there are strong civil societies that help limit government; b) sovereignty is broken thereby allowing for division and sharing of powers between the general (federal) government and local (State) governments, also leaving room for continuous vibrant intergovernmental relations; c) territoriality is the basis of state formation, although at times it might need to be "augmented by ... consociationalism or … other forms of non-territorial power sharing"[93]; d) there is a total or uniform federalism that is evenly spread over the entire polity created by the federalism thereby disallowing different patterns of behavior to be displayed by the federal government vis-à-vis the different constituent units. (In other words, there should be no special empowerment of some constituent units as against others or no special restriction of the power of one as against the other.); e) there is a

[87] *Ibid*, pp. 21-23.
[88] Daniel Elazar (ed) (1991), *Federal systems of the World: A Hand book of Federal, Confederal, and Autonomy Arrangements*. (London: Longman Group), P. 2-3.
[89] Elazar, *supra* note 47, p. 25.
[90] *Ibid*.
[91] *Ibid*, pp.23-24.
[92] *Ibid*, p.31.
[93] *Ibid*, p. 164.

political culture that is supportive of, or congenial to, federalism; f) a will to federate exists; g) there is a broad-based consent obtained usually through negotiations, renegotiations and compromises; h) there is "balance between cooperation and competition" in intergovernmental relations, i.e., where there is a degree of cooperation that engenders dual and cooperative federalism, and yet sufficient room is left for the states to make their own decisions and exercise their "freedom to say "no" to the federal government decisions[94]; and i) where there is an efficient system of separation of powers among the organs of the federal government.[95] In sum, therefore, Civil Societies, broken sovereignty, territoriality, uniformity, supportive political culture, the will to federate, mass consent, balanced intergovernmental cooperation and competition, and a system of separation of powers can be viewed as factors that make management of federalism easy in a polity.

Nonetheless, federalism is not universally accepted without any opposition. There are oppositions that come from two directions. According to Daniel Elazar,[96] the forces that oppose federalism are forces of centralization and of fragmentation. Those who oppose federalism on behalf of centralization tend to be totalitarian with consolidationist trends while those who oppose it on behalf of fragmentation are ethno-nationalist movements seeking secession. From among the two, "ethnic nationalism is probably the strongest force against federalism."[97] Yet contemporary problems of ethnic conflict seem to have brought about a drift into ethnic federations as a situation. But can ethnic nationalism be handled through a federation? The answer from commentators is often skeptical, as we have noted earlier on.[98]. Being egocentric, Elazar maintains, ethnic nationalism is at odds with the principle of federalism. In federalism, consent is the basis of division and sharing of power, not "language, religion, national myths," as is the case in ethnic nationalism.[99] As the elements emphasized in ethnic nationalism are those which breed cleavages among people, multiethnic federal system, Elazar seems to suggest, can succeed only if the basis of state formation is anything other than ethnicity. Thus, ethnic configurations and state borders should not be coterminous if ethnic federalism

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[94] *Ibid*, p. 166.
[95] *Ibid*, p.177. These factors are identified as important elements of a workable federal arrangement in the works of various scholars of federalism such as Alan Seligman (1992), *The Idea of a Civil Society*. (New York: Free Press); Daniel Elazar, *supra* note 72; and Ivo Duchacek (1987), *Comparative Federalism: The Territorial Dimension of Politics*. (Lanham, MD: University Press of America).
[96] Elazar, *supra* note 47, p.167.
[97] *Ibid*.
[98] *Ibid*, p. 93.
[99] *Ibid*, p. 168.

is to succeed. Federalism, for Elazar, is "formulated through covenanting or consent of publics of individuals," and in contrast, "ethnic nationalism tends to subordinate all free government to its uncompromising position."[100] Furthermore, federalism is "a democratic middle way requiring negotiation and compromise. All aspects of society fostering uncompromising positions [such as ethnic nationalism's] make federalism more difficult, if not impossible."[101])

Nonetheless, one can hardly fail to notice the following features of federalism (which have all been hinted at directly or indirectly in the discussion above): allocation of power between federal and state governments; representation at the center; and territoriality.[102] Other commentators see yet other features of federalism such as its importance "as a form of empowerment", i.e., its capability to create "opportunities for regional voices to be heard; and to create regional political elites where they previously did not exist," and to "establish more civil service jobs for local regional groupings."[103] Thus, federalism, being a form of empowerment, creates "more opportunities for negotiating the territorial distribution of power and more representative institutions.[104] Smith further notes that innovation is also an aspect of federalism.[105] This means that federalism lets the states exercise creative politics in meeting local needs thereby serving, in a sense, as "a social laboratory."[106] As such, federalism might be a helpful tool to be used against legitimacy crisis. To this list, one can add the following features as basic to one's description of federalism, namely, the existence of: at least two orders (tiers, or spheres) of government; a written constitution which is legitimate, supreme, rigid, and adjudicable by an impartial body; allocation of legislative powers to states with

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[100] *Ibid*.

[101] *Ibid*. But See also Andrea Eschet-Shwartz (1991), "Can the Swiss Federal Experience Serve as a Model of Federal Integration," in Daniel Elazar, (ed) *Constitutional Design and Powersharing in the Post-Modern Epoch*. (Lanham, MD: Univ. Press of America); Fried Sterbauer, Guy Heraud, and Peter Pernthales (eds,) (1977), *Foderalismus*. (Vienna: Wilhelm Braumuller); Geofferey Sawer (1977), "Constitutional Issues in Australian Federalism," *Publius* 7 No. 3; Anup Chand Kapur(1970), *Constitutional History of India: 1765-1970*. (New Delhi: Niraj Prakashar); Ronald Watts (1989), *Executive Federalism: A Comparative Analysis*. (Kingston: Institute of Intergovernmental Relations).

[102] Preston King (1993), "Federation and Representation" in Michael Burgess and Alain-G Gagnon (eds), *Comparative Federalism and Federation: Competing Traditions and Future Directions*. (London: Harvester Wheatsheaf).

[103] Graham Smith, *supra* note 57, p.16.

[104] *Ibid*.

[105] *Ibid*, p. 17.

[106] Alain-G Gagnon (1993), "The Political uses of Federalism and Federations," in Burgess and Gangnon, *supra* note 102, p. 37.

some genuine autonomy for each order; equal or equitable representation of the constituent units at the center often in an upper house; an umpire and/or procedure (e.g. courts, referendum, or upper house) to rule on constitutional disputes between governments; and a set of processes and institutions for facilitating or conducting relations between governments.[107]

The above mentioned features of federalism also imply some of the values inherent in federalism such as lessening tyranny especially of the executive, being responsive to local public needs, and encouraging innovation. These values of federalism however should not blind one to some of its drawbacks, among which are: complexity and overlapping of state structures, redundancy, potential of local tyranny, and its potential as incentive for secessionist movements.[108]

Federalism not only has drawbacks but also involves ever changing challenges that it has to deal with. Post-cold war times, for example, have presented federalism with three major challenges to confront, namely: a) the challenge of majoritarianism in multi-ethnic societies, b) the challenge of globalization; and c) the challenge of sub-state nationalism.[109] In other words, federalism, being a territorial and non-majoritarian mode of organizing a polity, is exposed to the criticism of majoritarian democracy especially in ethnically pluralized societies.

Moreover, because of globalization i.e., "the internationalization of capital, the greater mobility of labor, the growth of continental trading blocs,"[110] has made the role of the national (and even local) governments grow less and less in intensity or importance. Further, because of contemporary reemergence of local (or sub-state) nationalism, federalism, as a consensual mode of organizing a polity, is facing the challenge of identifying a workable basis of state formation. It is important to recall from our earlier discussion that ethnic nationalism is one of the movements against federalism. So far, federalism's meaning, aspects, values, factors for and against and the challenges posed to it are discussed. This discussion is hoped to have a bearing on the analysis of federalism in Ethiopia later.

2.1.4- Origins and Waves

Depending on how they came to be, federations are often classified into two major categories and a third which is a hybrid of those. These are: a) Coming-together (or better known as those formed through aggregation or integration of

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[107] See Anderson *supra* note 5 on these features.
[108] Smith, *supra* note 57, pp. 2-4.
[109] *Ibid.*
[110] *Ibid*.

pre-existing states); b) holding-together (or famously known as those formed through devolution of a previously centralized system of power in a unitary country); or c) a combination of these two (in case where polities are reconstituted through a double-flanked process of devolving an old centralized polity while being re-associated with another polity—which used be a separate polity-- or a unit that went to a temporary independence from the old unitary polity at the beginning of the devolutionary process. George Anderson identifies some six "waves" of federation namely: 1) classical federations (18th and 19th century federations such as USA, Switzerland); 2) post-colonial Federations (e.g. India, Nigeria, etc); 3) Post-communist federations; 4) post-conflict federations (e.g. Iraq); 5) New Federations (e.g. Belgium, Spain, etc); and 6) Transnational Federations (e.g. EU).[111]

2.1.5- Types: A Taxonomy of Federations?

Federations can also be viewed as falling in one or the other of the following categories either: a. *based on origin*: Aggregative, Devolutionary; Coming together, Holding together[112]; b. *based on operation*: Dual or cooperative (integrated or interlocked); or parallel or administrative/executive; c. *based on the mode of state formation*: Territorial/personal; administrative/ethno-linguistic (or multi-national). In practice, federal systems' operational success depends on the kind of inter-governmental relations that exists in a polity. Thus a federation may be characterized as: a) dual/co-operative; b) Legislative/executive; c) parallel/integrated.

2.1.6- Division of Powers in Federations: Approaches

Division of powers between the federal, the state, and local governments is the hallmark of federal systems. Dispersion of power territorially is (by setting up at least two tiers of government and dividing, often, the legislative but also the judicial and executive powers between them) is one of the key features of federalism. Powers can be allocated to each tier as follows: Federal Powers, State Powers, and Concurrent (alias joint, or shared) powers. The constitutional method used to divide the powers might follow one of the following techniques, namely:

a) Explicitly enumerate distinctly federal, state, and concurrent powers and leave the rest (i.e., the residual powers) to the states—as it is the case, for instance, in the USA; or

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[111] *Ibid*. Note that Anderson, *supra* note 5, does not use the term "transnational federations".

[112] Alfred C. Stepan (1999) uses this distinction between coming-together and holding-together types of federations in "Federalism and Democracy: Beyond the Us Model" *Journal of Democracy*, Vol.10, No.4, pp. 19-34

b) Explicitly enumerate state powers (without enumerating the federal powers) and reserve the rest (i.e., the residual powers) to the Federal government—as it is the case for example in Canada.

When enumerating some powers as either "federal" or "state" and grant it to them explicitly, we also grant them other powers which are either *implicit* in, or *necessary* to exercise, the explicitly granted powers. Implicit and necessary powers come to be visible in the process of exercising the explicitly granted powers.

2.2 Federalism as a Peace-making Tool

As has been hinted at repeatedly in earlier sections, federalism may serve as a tool of peace-making. Such is the case in conflicted and post-conflict societies. The fact that it is a mode of molding a polity through reflection and choice and the consequent fact that central to its formation is consent (agreement, or treaty) makes it a veritable tool of peace. If a polity has been beleaguered by tensions and wars that are fought for the sake of better recognition of diversity, accommodation of difference, equal or fair participation in the political life of a nation, or/and autonomy to govern oneself and one's resources in one's chosen way, federalism can be a way out of the political quagmire. If the wars are fought for the sake of ensuring protection of particular identities within an encompassing bigger polity, then federalism can afford that protection, and it can interest groups to come to negotiation. If the wars are fought to preserve national unity in the face of fragmenting local nationalisms, then federal diversity in unity can offer a solution to the concern of both "national" and local nationalisms. (Often "national" patriotism/nationalism is haunted by fear of disintegration; particular/local nationalists are haunted by fear of oppression.[113] But federalism offers that golden mean sought to keep both fears at bay.)

In such scenarios, federalism can be an incentive for peace. However, it can do so only if both/all groups are willing to compromise having realized that the

[113] By "national" nationalism I mean that expressed by proponents of the bigger encompassing polity often propagated through the instrumentality of the "central" or "national" state (hence, state nationalism). The emphasis of such a nationalism is the "sovereignty and territorial integrity" of the country. The metaphor for the country is often "the Motherland, or the Fatherland". The fear of dismemberment haunts such nationalism whenever the idea of granting greater autonomy to the constituent units is discussed. By "particular/local nationalism" I mean that which is expressed among proponents of greater autonomy for the constituent units often in the name of equality, justice, and freedom to govern oneself. The fear that haunts such nationalism is the fear of oppression. The two nationalisms manifest the tensions between two legitimate political ideals, namely *unity* (of the larger polity) and *equality* (of the units).

military option is not viable any more. It is important that the warring groups, especially the "center", are all exhausted. The guarantee of self-rule at the sub-national level, the security that there will be a meaningful fair participation in decision-making at the "center" (shared rule), the preservation of the bigger encompassing polity, the guarantee against the danger of centralization, etc appetize 'stakeholders' to put their arms down and seek a political/diplomatic solution to their stalemates. Hence, the significance of federalism as a peace-making tool.

2.3. Federalism as a Peace-keeping, Peace-building and Conflict Transformation Tool

In post-conflict societies, where there is a rift and tension among centripetal and centrifugal forces, federalism might serve as a peace-keeping and peace-building tool. The terms of the federal covenant help regulate the relationship between/among the various groups that negotiated the federal dispensation. Old rivalries and competitions which used to have a violent (military) expression will now take a constitutional-legal mode. The legal battle—supported and reinforced by the political (.e.g., electoral) battle—replaces the military strife, and as such help to build and reinforce peace culture.

Conflicts evolve. Their dynamic nature warrants their evolution. A creative use can transform them. Federalism has the potential of transforming conflicts to make them take a trajectory that helps build a nation in a new direction. Articulation of old incompatible interests helps to gather ideas based on which to reconstruct a polity and reconstruct the state in a way that is agreeable to all groups. The transformation of the conflicts might happen by changing the rules of the game, or the field at which to fight them out, or the form they take. National conflicts might be devolved to sub-national and local levels. Tensions between two major groups in a predominantly bi-polar polity might be multiplied to take a multi-polar format so that there will be numerous horizontal conflicts that help keep the equilibrium at the national level. What used to be competition for the "national" cake (of resources, power, and opportunities) becomes a competition for a sub-national one. In this way, by multiplying and fragmenting conflicts, federalism transforms conflicts and makes them available for political maneuvers. One needs to note however that this process needs a strong vibrant legal and political culture infused with hope and optimism rather than frustration and cynicism.

2.4 Enhancing the Lesson: Learning to Live with Conflicts

In transforming conflicts, federalism simply makes us prepare for an important lesson: that a mature polity learns to live with conflicts rather than trying--rather naively—to resolve them mostly by wishing them away. By providing for a normative, institutional, and procedural framework for an effective and efficient

handling of conflicts, federalism makes its peace with conflicts. The *normative framework* is an assemblage of laws, policies, strategies and plans for prevention, management, settlement, and transformation of conflicts. This in turn refers to a body of rules beginning from the constitution to other primary and subordinate laws that help handle incompatibility of interests of the diverse actors in the matrix of actors in a federal arrangement. Once the routes that political and legal actions take are predicted or made fairly predictable, then the escalation and violence of conflicts are avoided. All actors will know the legal and political resources they can mobilize within the ambits of the constitutional framework. The normative framework also provides for an elaborate *legislative frame* which grants specific guidelines on a peaceful settlement of disputes whenever they arise. It will also provide for a rational conflict *policy* that systematically responds to conflicts. Institutions in charge of handling diverse constitutional disputes emanating from federalism also come up with a conflict strategy that is directed, intentional, methodical, rational, effective and efficient in its response to conflicts (overt or covert, latent or manifest).

The *institutional framework* outlines the legal, political, and diplomatic institutions that help the country constructively engage with conflicts. By *legal institutions* we mainly mean the judicial organs and their accompaniments (often known as the law-enforcement agents). Adjudicatory bodies with judicial and/or quasi-judicial authorities are all included. In the context of Ethiopia, institutions such as the ordinary Courts, the House of Federation (HOF), the Council of Constitutional Inquiry (CCI), the National Electoral Board, the Institution of the Ombudsman, or the Human Rights Commission fall within the category of legal institutions. By *political institutions* we mean the legislative bodies such as the House of Peoples' Representatives (HPR), its Committees, the Council of Ministers and Ministries (e.g. the Ministry of Federal Affairs) which, with or without delegation, make serious policy decisions on important matters that concern diverse actors in the federal matrix. Other Executive bodies and political parties that make *political decisions* or even lobbyists that influence the political parties within or outside of government form a part of the institutional frame. By *diplomatic institutions* we mean institutions that tend to offer good offices mainly by virtue of the moral (and at times political) influences that they command over the political and legal institutions. The *Office of the President of the Republic*--being beyond and above the heat of politics--can mediate between conflicting groups/actors and act as one example of such diplomatic institutions which work from the position of moral influence rather than of political or military power. The HoF, too, can have this role in its effort to find amicable solutions to various misunderstandings between/among ethnic groups, regional

states, various organs of government, or dominant political parties.[114] *Religious leaders, elders and traditional leaders* of diverse communities in society, *civic society organizations*, and others might also play a positive role in this diplomatic venture. These and other institutions can form part of the institutional infrastructure for handling conflicts and peace building in societies.

The *procedural framework* for handling conflict is often rooted in the legal framework but it is primarily about the process that the conflict handling endeavors take to prevent, arrest, manage, settle, and transform conflicts. Rules relating the *modus operandi* of courts, the HOF, CCI, the HPR, COM, Ministry of Federal Affairs (MoFA), etc are the major rules that from part of the procedural frame. Specific guidelines laid down by the HOF for, say, referendum on border disputes or identity or other forms of self-determination are examples of such procedural rules.[115] Specific guidelines used by the MoFA, or Regional Security Bureaus, or specific conflict strategies and policies devised by the powers that be, all form part of the procedural infrastructure for handling conflicts.

More importantly, it is imperative that we constantly remind ourselves of the fact that federalism is not a panacea for conflicts. We need to remind ourselves that while federalism solves some kinds of conflicts, it might induce the emergence of other kinds of conflicts. It is therefore important to prepare the federal arrangement for a new breed of conflicts that might arise with the advent of federalism. This helps us enhance our lesson that in federal systems, we learn more how to live with conflicts than how to do away with them.

3. Federalism and Conflicts in Ethiopia: Prospects and Challenges

3.1- Ethiopia: Personalities, Images, Conceptions of Problems

Ethiopia is one of oldest countries in the world, and definitely oldest in sub-Saharan Africa.[116] It is also one of the most actively engaged ones in the politics

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[114] Art 62(6) of the Constitution maintains that one of the responsibilities of the HoF is to offer a diplomatic solution to at least inter-state conflicts. It says that the HoF "shall strive to find solutions to disputes or misunderstandings that may arise between states." It is easy to note that the diplomatic solution is given a chance alongside the legal (adjudicatory) solution.

[115] Such rules are particularly elaborated in Proclamation 251/2001 and Proclamation 250/2001.

[116] See Ali Mazrui (1994), "Ethnicity in Bondage" (Keynote address to the UNRISD/UNDP International Seminar on Ethnic Diversity and Public Policies, NewYork,17-19August,1994, available at: http://www.mtholyoke.edu/acad/intrel/mazrui.htm last accessed in July 2009.

and security of/in the African continent and the East African sub-region.[117] As a polity, it is a country with "multiple personalities."[118] Depending on the historiographic paradigms that project Ethiopia's image, one can have at least six personalities in Ethiopia. Thus, according to Teshale Tibebu, a social historian of Ethiopia, Ethiopia can mean one or more of the following things:

a. ***Christian Ethiopia***. This image is projected by the Aksumite paradigm of Ethiopian historiography. In this paradigm, Ethiopia is "a Christian island surrounded by a heathen sea."

b. ***Semitic Ethiopia***. This image is projected by the Orientalist/Semiticist paradigm. Ethiopia, or more narrowly Abyssinia, is a black-Caucasian, Semitic-Christian nation. It is "the living land of the Bible", a black Canaan.

c. ***The authentic African Ethiopia***. This image is projected by the pan-Africanist paradigm which views Ethiopia as "the spark of African political freedom," the 'rock of black resistance against white invasion", "symbol and incarnation of independence", the "pride of Africans and negroes" everywhere, the "metaphor for Africa wronged by the West", the "concentrated expression of Africa", the "hope and pride of Africa".

d. ***The Black Colonial Power Ethiopia.*** This is the image projected by the ethno-nationalist paradigm of Ethiopian history which postulates that Ethiopia was "the only Black African power that participated in the European Scramble for Africa" by taking control of many peoples of the wider south Ethiopia such as the Somalis, the Oromos, and the other Cushitic, Omotic, and Nilotic peoples of the far flung southern parts of Ethiopia and, in the post WWII times, (re)annexing Eritrea. This paradigm, otherwise known as the *colonial thesis*[119], contends that Eritrea, Oromia, Ogadenia (another name for the ethnic Somalis of Ethiopia who live in

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[117] The fact that it played a role in the formation of the Organization of the African Unity in 1963, steered towards the completion of the decolonization process.(e.g, pushing for liberation of Zimbabwe, Mozambique, etc), the fact that it contributed to the peace keeping efforts of the UN at times in Africa (e.g. Congo), and the more sub-regional engagement in war (with Somalia and Eritrea) and peace (Rwanda, Djibouti, and through IGAD) can be mentioned as evidence of this.

[118] Teshale Tibebu (1995), *The Making of Modern Ethiopia, 1855-1974*. (Lawrenceville, NJ: Red Sea Press). See also Teshale Tibebu (1996) "Ethiopia: The "Anomaly" and "Paradox" of Africa," *Journal of Black Studies*, Vol. 26, No.4.

[119] Merera Gudina, *supra* note 39, 2002 argues that there are three major theses on Ethiopia's historiography, namely the colonial thesis, the national oppression thesis, the nation-building or the national (re)unification thesis the unleashing of which partly contributed to the affairs of competing nationalisms in contemporary Ethiopia.

Ogaden), and other subject peoples of Ethiopia (e.g. the Sidama) are colonized as a consequence of which they deserve to exercise their right to self-determination to stay with or separate from Ethiopia. Self-determination is invoked as a tool of decolonization, and Ethiopia is projected as a colonial power.

e. Ethiopia with its own Triple Heritage. This image is projected in the heritages' paradigm of Ali Mazrui who says that Ethiopia, too, has its own triple heritage within Africa, namely, indigenous, Semitic, and Greco-Roman.[120]

f. Feudal Ethiopia. This is an image projected by a Marxist and/or Modernist paradigm which argues that Ethiopia is a feudal or feudal-like state akin to those in medieval Europe which needs to experience a series of social revolutions in order to fully partake in progress.

It is important to note that the move to a decentralized federal system was motivated by the impulse to overcome the deficits of equality, justice, and democracy that was the hallmark of "feudal", autocratic, and oppressive ("colonial" or otherwise) Ethiopia.[121]

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[120] Ali Mazrui argues that sub-Saharan Africa has a triple heritage, namely: indigenous, Islamic, and Christian. Ethiopia has its own triple heritage: indigenous, Semitic, and Greco-Roman. Mazrui (1993), *The Africans: a Triple Heritage (Documentary)***,** in Teshale Tibebu, *supra* note 118. Mazrui says that Africa has the indigenous, the Islamic, and the Christian heritages. Hence, the "triple heritage".

[121] Scholars who stress the "feudal" personality of Ethiopia insist that there was a national oppression in Ethiopia but it was not in any way one that we can characterize as 'colonial'. These recognize the fairness of the quest for ethnic equality and internal self-determination (i.e. autonomy) but stop short of justifying secession. On the other hand, there are those who, viewing, Ethiopia as but a black, poor, dependent colonial power, justify the use of self-determination (including secession) as a tool of decolonization in Ethiopia. Secessionist movements such as EPLF [Eritrean People's Liberation front], ELF [Eritrean Liberation Front], OLF [Oromo Liberation Front], SLM [Sidama Liberation Movement], ONLF [Ogaden National Liberation Front], are the political parties that are taken to have generally subscribed to the latter view. See Merera Gudina, *supra* note 85 on the distinction between the national (re)unification thesis, the national oppression thesis, and the colonial thesis in Ethiopia's historiography. See also Assefa Jalata (2005), *Oromia and Ethiopia* (2nd ed). (Laurenceville: The Red Sea Press), for an extended elaboration of the colonial thesis.

3.2- Federalism in Ethiopia: Past

The historic Ethiopian state was a unitarist state making the least effort to institutionalize federalism or other forms of decentralization. The commitment to *the ideal of a strong unitary state* had anathematized federalism as a step to the dismemberment of the country. The country was seen as *too united* or *too delicate* to accommodate such an arrangement.

The Ethiopian state constituting the territories that comprise today's Ethiopia was largely a creation of a century ago. The 1931 Constitution, the first written constitution which was promulgated only decades after the completion of the process of Empire-building, did not make any reference to federalism. True to its goal of unification and modernization of the country under an Emperor, it could envisage only a unitary state. The Italian occupation of 1935-41 disrupted the constitutional development.

In 1952, Eritrea was federated to Ethiopia by a Federal Act of the United Nations[122]. Two traits most describe the Ethio-Eritrean Federation: 1) that it was more of an international compromise than an internal 'convenant'; and 2) that it is, as most commentators called it, a marriage between unequals. Bairu Tafla[123] put his finger on this point when he said that the Federation had "two inherent problems" that led to its subsequent failure:

> [I]t was imposed from outside and was tolerated by both Eritrea and Ethiopia on the basis that 'half a loaf is better than nothing'. It was also a marriage between two incompatible beings-the giant and the dwarf, the strong and the weak, the rich and the poor, the autocratic and the democratic.[124]

So delicately constructed was the Ethio-Eritrean federation that it could lapse only for about a decade. The Ethiopian political tradition of the time, being autocratic and centralist, was not accommodative of the pluralism inherent in federalism. Indeed, in Ethiopia "[t]he rulers obviously confused administrative plurality with disintegration and anarchy."[125] Unity was equated with uniformity. Centralism was reinvigorated in the guise of unity and perfected by Emperor Haileselassie I.[126] The trend to centralism was perhaps the cause of mismanagement of the federalism which was subsequently liquidated in favor of unity in 1962.

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[122] United Nations General Assembly Resolution No 390 (V)/1952.

[123] Bairu Tafla (1994), "The Ethio-Eritrean Federation in Retrospect" in *Conflict and the Federal Alternatives in the Horn* (Woodman and Forsyth, eds). (Longman: London), p.7.

[124] *Ibid.*

[125] *Ibid*, p.6.

[126] *Ibid.*

The Eritrean Constitution and the Federal Act, which was passed on 10 July 1952 and came to force as Proc. no 124 of 11 September 1952 (*Negarit Gazeta*), federated Eritrea as an "autonomous unit" of Ethiopia (Art. 3) "under the sovereignty of the Ethiopian crown." The Government of Eritrea had its own legislative assembly representing the people (Art. 39). It had a government with legislative, administrative and judicial powers (Art. 4). The legislature had legislative competence over virtually everything in Eritrea, from criminal law to laws on education and resources, etc (Art. 5). Eritrea had a strong autonomy, with a rather ceremonial Imperial presence represented by his representative (Arts. 10 and 11). This representative of the Emperor formally introduces the Chief Executive after the latter is elected by the Parliament (Art. 12), opens and closes the Parliament's sessions with an address from the throne; and promulgates Eritrean laws passed by the Parliament (Art. 15 and 18). The Eritrean government had also judicial and executive powers to exercise. The executive is composed of the Chief Executive and his "Executive Secretaries" (a term preferred to "Ministers" for obvious reasons) (Art. 68). An Advisory Council, entrusted with economic planning and the drafting of statutes, was established (Art. 84).

Judicial independence was guaranteed (Art. 86). The Supreme Court and other courts as may be formed were vested with the judicial power (Art. 85). The court applies all the laws of Eritrea. Whether it also applies federal laws was not clear. The judges are nominated by the Chief Executive based on the recommendation of the President of the Parliament which in turn is supported by a commission's report (Art. 87). The Supreme Court, in addition to being the highest court of appeal, checks constitutionality of laws issued by the Parliament, decides on conflict between the Eritrean government and other organs and can impeach the Chief Executive (Art. 90).

Membership to the Parliament comes through elections, but as there were no strong political parties, the campaigns were not as strong as one would expect them to be today. The absence of many civic societies is also notable. The relative awareness of the mass was an asset, although to most of them federalism was a queer form of governmental arrangement. Thus there was a clear lack of federal culture as most highlanders sought total unity with Ethiopia while others (most of the lowlanders) sought total independence from Ethiopia or the powers that be.[127]

[127] See Zewdie Retta (2000), *The Eritrean Affair* (*Ye Eritrea Guday*, in Amharic), (Addis Ababa: Mega) for a meticulous presentation of the details of the process that led to the federal compromise first and to the dissolution of the federation later. The book is full of extracts from minutes, exchanges, and letters from and to imminent political actors of the day.

Moreover, the relatively liberal constitution envisaged a democratic system of government which notionally challenged the autocratic Imperial rule in the other parts of the country. The practice in Eritrea was seen as a threat to the legitimacy of the Ethiopian regime. The 1955 Revised constitution was in a sense an attempt to catch up with the development in Eritrea. The 1955 constitution made no reference to the federalism, though. It established the supremacy of the constitution and by implication of federal laws. But it did not spell out the federal powers and state powers as such. This silence created a room for an unnecessary involvement of the imperial representatives in the affairs of Eritrean government which ultimately led to the dissolution of the Federation.

Eritrea became a state forming the federation not because it fit any mode of state formation, but rather because it outlived the Italian colonialism under which it was ruled since the 1880's to 1941 when the Allied Forces (chiefly the British) ousted the Italians and took over the Eritrean territory. After a lengthy debate in the UN on how to dispose of former Italian colonies in Africa, a compromise was reached in 1952 to federate it with Ethiopia. It is plain therefore that because it was an arrangement by the international actors, the Ethio-Eritrean federation defies both categorizations of federalism (i.e. of territorial or ethnic or personal). It was neither territorial nor personal. The boundaries of Eritrea were of colonial making and were as such arbitrary. Because there are the same people groups on both sides of the Ethio-Eritrean border, one cannot say this is an ethnic (=by extension, personal) federalism. Because the Eritrean territory was cut-off from the hinterland Ethiopia since the 1880's, it was not the reordering of the Ethiopian land-mass for the sake of federalizing the country that resulted in an Eritrean and an Ethiopian state. It tends to be an aggregative type of federalism in a sense. It is a queer association of a former colony (Eritrea) with a sovereign state (Ethiopia) who claimed that the colony was part of itself before it was forcefully alienated from it.[128] But the association had similarity to what Daniel Elazar calls federacy.[129]

What was the consequence of this? The major consequence was that the Ethiopian leaders failed to take the federalism seriously. This was manifest in their excessive involvement in the affairs of Eritrea, at times even contrary to the Eritrean constitution.[130] The eagerness to bring Eritrea to complete unity with

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[128] *Ibid.*

[129] See, for example, Elazar, *supra* note 47, for an elaborate distinction between Federations, Federacies, Confederations, Associated Statehoods, and other variants/species of the federal mode of ordering government. See also his other work *supra* note 72 for a more extended discussion of the variants of federalism.

[130] Bairu Tafla, *supra* note 123, p. 7.

Ethiopia led to the revocation of the constitution early in the 1960's by an order of the Emperor. Those who sought independence from the beginning protested against the abolition of the federalism with armed violence. Legal solution to the crisis was not at hand--and was not even sought. The abysmal failure of the federalism left us with hardly any lesson to draw from the experience. Yet in retrospect, one cannot fail to see the fact that the imposed nature of the federalism, the absence of a federal culture, and the absence of civil societies, and excessive emphasis on unity as uniformity, have played a role in leading to its failure.

Since the failure of the Ethiopia-Eritrean federalism, no effort was made to restore it in the subsequent years. A nationalist war started in Eritrea. In the 1960s and 1970's a student movement leaning progressively to the left arrived on the scene. At the same time, centralism continued to be the creed of the system. The Eritrean liberationist movement inspired other ethno-nationalist movements in other parts of the country. An inarticulate Oromo nationalist movement started to be in the subtext of Ethiopian politics. The student movement started to discuss the "National Question" in Ethiopia. The Somalis of the Ogaden were also part of the discussion of the time. Later, the Tigrean Liberationists, inspired by the Eritrean movement joined the league of those who challenged the Ethiopian centralism that was moving on in total ignorance of the self-defining pluralism. Conflated with the issue of class (mainly the farmers' quest for land), ethnic and religious questions came out to demand a benign response.[131] The 1955 Revised Constitution was not of course capable of handling this move. Intensified by other political factors, a popular revolution ensued. The revolution changed the regime. But centralism continued to be the norm. "Ethiopia First" became the motto. Ethno-nationalism was perceived to be a threat to national sovereignty and territorial integrity of Ethiopia. It was even considered counter-revolutionary and reactionary.

The provisional government (the PMAC or the Derg as it is popularly known) did not opt for federalism. On the contrary, it exerted the maximum effort to intensify rigorous centralism. Although it made a concession to the

[131] See Kiflu Tadesse (1993), *The GenerationThe History of the Ethiopian People's Revolutionary Party, (parts I and II).* (Trenton, NJ: Red Sea Press). See also the Amharic version of the same work entitled *That Generation* (*Ya Tiwlid*, Amharic). (Addis Ababa: Shama) for the details on the key issues that exercised the imagination of the left leaning student revolutionaries of the 1960s and 1970s. Their response to the challenge of ethnic diversity was complex. To some, ethnicity was secondary and subordinate to the class question. To others, it was primary and superior. To yet others, it was only an instrument of mobilization against the imperial order.

question of "nationalities" as it recognized the equality of "nationalities" and their languages and while it could admit the fact of diversity, the government did not even change the number and powers of the provinces (except in name, as they were changed *from teklay gezat* to *kiflate hager*). That is to say, there were 14 *teklay gezats* which became the 14 *kiflate hager*, with no substantive devolution of power. The time from 1974 to 1987 was a time during which Ethiopia did not have any formally written (comprehensive, "codified") constitution. When in 1987, the PDRE was established the centralism was maintained except that there were now about 24 provinces and 5 autonomous administrative regions. The recognition of some regions as autonomous was an effort to diffuse the mounting pressure by opposition fighters in what was otherwise a centralist state with "democratic centralism" as its motto.

In reaction to the grip of tough centralism, ethno-nationalist groups mounted opposition against the PDRE regime until it collapsed in 1991 leaving the political space for ethno-nationalist groups who, for a while, appeared to take decentralization seriously. The Transitional Charter was the first legal document to institutionalize decentralization. Being a product of compromise among ethno-nationalist movements, it emphasized "nations, nationalities, and peoples" (roughly ethnic groups) as the units serving as the basis for decentralization. Proclamation no. 7/1992 made this ethnic-based decentralization more articulate and real. The 14 self-governing regions were mainly ethnic in their making although almost none were entirely homogenous. Based on this proclamation, National, Regional (then the equivalents of what are now called States) and Local Governments were formed and an incipient form of self-government was made apparent. Nonetheless, it was only after the promulgation of the FDRE Constitution that federalism as such was formally institutionalized in Ethiopia.

3.3. Ethiopian Federalism: Present

3.3.1-Origins

The origins of the current federal option are in the ethno-nationalist liberationist rhetoric of the post-1991 era of Ethiopian history. Led by the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), a number of ethno-nationalist liberationist fronts came together in a National Peace Conference that led to a Transitional Charter (TC) that served as the interim constitution from 1991 to 1995. It is in the negotiations that led to the TC that for the first time in Ethiopia's history ethnic groups' rights as such are guaranteed a formal legal recognition. Ethnicity was at last "free from bondage"[132] in the oldest of sub-

[132] Ali Mazrui, *supra* note 116 observes that in Ethiopia and South Africa, the oldest and the newest, respectively, of black African nations, ethnicity is free from bondage but asks the questions rhetorically if its freedom is rather premature.

Saharan African countries. Along with this also came the introduction of what was the nucleus of the contemporary federalism. The TC recognized the right of "nations, nationalities, and peoples" to self-determination up to and including secession.[133] A subsequent proclamation, Proclamation No.7/1992 established 14 self-governing regions.[134] It also reinforced the recognition extended to the right to self-determination by the Charter.

In complete departure from the unitary past, the Charter and the Proclamation devolved power from the center to the self-governing regions and signalled the beginning of a 'holding together' federalism.[135] In 1995, this move to a federal system through 'scaling down'[136] was perfected when the explicitly federal (Federal Democratic Republic of Ethiopia's [FDRE] Constitution came into force. While diverse and divergent perspectives have emerged on the merit or wisdom of the federal option in Ethiopia[137], one cannot genuinely gainsay that

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[133] See the Preamble and article 2 of the Transitional Charter.

[134] See Transitional Government of Ethiopia (TGE), Proclamation to Proclaim the Establishment of National Regional Self-Governments, *Negarit Gazeta*, Proc. No. 7/1992

[135] Alfred Stepan, *supra* note 112, makes a distinction between 'coming together' and 'holding together' federalisms by looking at their origin.

[136] I am indebted to Donald Horowitz (2007), "The Many Uses of Federalism" *Drake Law Review*, Vol. 55, pp. 101-113, for this term.

[137] One quickly notes that the literature so far can be summarized as projecting three contending views. There are thus those who support the federal restructuring of Ethiopia considering it as an innovation to address age-old grievances of the marginalized ethnic groups of the country. Alemseged Abay (2004), 'Diversity and State Building in Ethiopia,' *African Affairs*, Vol. 103, No. 413; Andreas Eshete (2003), 'Ethnic Federalism: New Frontiers in Ethiopian Politics' in MOFA and GTZ, *supra* note, 26; Kidane Mengisteab (1997), 'New Approaches to State building in Africa: The case of Ethiopia's ethnic-based federalism', *African Studies Review*, Vol. 40 No.3; and John Young (1998), 'Regionalism and Democracy in Ethiopia,' *Third World Quarterly*, Vol 19, No. 2; are only examples. There are also the sceptics who are uncomfortable with the 'heavy' accent on ethnicity. This includes: Lovise Aalen (2006), 'Ethnic Federalism and Self-determination for nationalities in a Semi-authoritarian State: The Case of Ethiopia' *International Journal on Minority and Group Rights*, vol 13; Jon Abbink (1997), 'Ethnicity and Constitutionalism in Contemporary Ethiopia,' *Journal of African Law*, Vol 41; Bahru Zewde (1994), 'Historical Legacy and Democratization Process in Ethiopia' (paper presented on the *Workshop on Historical Legacy and the Democratization Process in Africa, 26-29 April 1994*, Bamako, Mali); and Terrence Lyons (1996), 'Closing the Transition: The May 1995 Elections in Ethiopia,' *The Journal of Modern African Studies*, vol. 34, No.1. There are yet others who, while agreeing with the federalist project, are critical of the lack of political will on the part of the dominant party (EPRDF) to implement the promises of the constitutional federalist commitment. Asafa Jalata

the federal option was a reaction to what was thought to be an oppressive unitary past, a reaction to a state nationalism that sought to unite the country through, among others, involuntary assimilation and homogenization. One can also say that the federal option was taken due to the exhaustion of centralization and unitary system of government. It came when the long suffering nation-building project (which has been on the political scene from 1855 to 1991) has spectacularly failed. The centralist and unitarist model has little resources with which to flexibly respond to the strains imposed on the state by ethno-national diversity.

3.3.2- The Federal Compact: Negotiating the Federal Idea

Federalism was formally ushered in by the 1995 Constitution. The Constitution constituted the federation and continues to be its compact. Preeminent in the negotiation of the Constitution were ethno-nationalist forces, principally a coalition of ethno-nationalist fronts and movements called collectively the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF). The Constitution was drafted by a Drafting Commission duly established by law.[138] The Commission engaged in teaching the public about constitutions, democracy, human rights, civic participation, etc with a view to raising the constitutional consciousness of the public. After preparing a preliminary draft which it submitted to the Legislature of the Transitional Government (the Council of Representatives), they also organized several events at several levels all over the country on which the draft text of the Constitution was discussed. Although the turnout was low and the level of engagement was modest, there were discussions in which the issue of self-determination, especially secession, and federalism were hotly debated. In the Transitional Legislature, it was very hotly debated even though the single most dominant party in there was the EPRDF. After this rather sporadic and in many ways inconsequential deliberation, the draft was submitted to the Constitutional Assembly in 1994 for further deliberation upon it and for adoption. The Constitutional Assembly was an assembly that was popularly elected in 1994, an election the fairness and free-ness of which was contested by the parties opposed to EPRDF. Even in the EPRDF dominated Constitutional Assembly, the points that were very much at issue were the issue of the federal choice, the mode of state formation, the issue of languages, national symbols (flag and emblem), etc.[139]

(1993), 'Ethiopia and Ethnic Politics: The Case of Oromo Nationalism,' *Dialectical Anthropology*, Vol. 18, falls in this last category.

[138] TGE, Constitutional Commission Establishment Proclamation, *Negarit Gazeta*, Proclamation No. 24/1992.

[139] See the Minutes of the Meetings of Constitutional Assembly now compiled into six volumes (in Amharic). See also the Minutes of the deliberations of the Transitional

Consequently, the federal option, its bases for carving out the constituent units, the constitutional recognition of the unconditional right to secession were among the most contested points as a result of which federalism remains to be a controversial subject in Ethiopia to date. But what does the federal constitution, Ethiopia's federal compact, offer? I now turn to a brief description of the federal constitution.

The Federal Constitution is a compact document made up of a total of 106 articles divided into 11 chapters. As a legal document, it is a well organized document with an enviable degree of simplicity and clarity. It is the legal document that *constituted* the federation. From its preamble, we note that it is a compact agreed upon among the "nations, nationalities, and peoples" of Ethiopia. It is thus a solemn contract, treaty, even a vow, among these groups who reconstituted Ethiopia into a federation of disparate ethno-linguistic groups that aspire to build "one economic community" based on a "common destiny" born out of a shared past.[140]

From the preambles, one can glean such principles with far reaching consequences as the principle of the salience of self-determination, the sanctity of human rights, the sacredness of the principle of inter-personal and inter-group equality, and the primacy of the need to build a democratic order based on the principle of the rule of law for the sake of a sustainable peace. Apart from these, the constitution postulates five basic principles as 'fundamental' pillars of the constitutional order. These principles are that of sovereignty of 'nations, nationalities, and peoples', constitutional supremacy and constitutionalism, sanctity of human rights, secularism, and of transparency and accountability of government.[141]

In its chapter three[142], the Constitution provides for a catalogue of fundamental rights and freedoms. About 31 "kinds" of rights are recognized and granted a constitutional guarantee. The provisions of this chapter are *entrenched*, i.e., they are protected from easy (and often unilateral) tinkering by making the amendment procedure rather rigid.[143] Nevertheless, the absence of an

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Council of Representatives (CoR) (also in Amharic) for a more substantive debate over these issues.

[140] Paragraphs 3-5 of the preamble of the FDRE Constitution.

[141] See arts 8-12 for these principles.

[142] Chapter three, the chapter that can be taken as Ethiopia's Bill of Rights chapter, extends from art 13 to 44 in which all the traditional civil and political rights, economic, social and cultural rights, as well as the rights to peace, development, and environment are enshrined.

[143] According to art 105(1) of the FDRE Constitution, chapter three can be amended only through the consent of all the nine state legislatures and the 2/3rd majority vote

application clause (that indicates whether they have *direct*[144] or *indirect*[145] application), *interpretation*[146] clause (that clearly indicates the principles, methods, and steps to be used in the construction of human rights clauses), *limitation*[147] clause (that regulates the manner in which limitations are imposed when necessary), and the ambiguity with regard to the role of courts to interpret constitutional human rights clauses—owing to the bifurcated division of the

of the Federal Houses (i.e., the House of peoples' Representatives and of the House of the Federation).

144 *Direct application* relates to the situation whereby the provisions of chapter three are invoked in the process of litigation to assert a particular claim hoping to obtain a specific remedy emanating from the self-executing nature of the human rights chapter. It is so invoked when the chapter is viewed as a special law directly applied in the course of litigation to assure the plaintiff a special regime of remedy.

145 *Indirect application* is said to exist when the human rights chapter, by permeating the system from behind, prompts all public decisions (be it in court or otherwise) to be respectful of the rights and freedoms recognized therein. In these circumstances, the human rights chapter serves more as a framework of understanding, a tool of interpretation of other laws, than as a special regime of law applicable directly in its own right. In indirect application, the human rights chapter of the constitution "loses" itself into the other (ordinary) laws and disciplines them thereof. For an elaborate discussion on direct/indirect application, see generally Johan De Waal, Iain Currie, and Gerhard Erasmus (2001), *The Bill of Rights Hand Book* (4th ed). (Lansdowne: Juta & Co. Ltd.).

146 An interpretation clause would clarify to us as to what modes, principles, and techniques ought to be adopted in the course of constructing the provisions of chapter three. In particular, it would clarify issues of procedure (jurisdiction, standing, and justiciability), content (the scope and limitations of a particular right), and remedies (as to the consequences of the decisions of the tribunal that is engaged in the work of 'making sense' of the chapter). It would also hint at the steps and principles (e.g. textual/literal, historical, purposive, etc) to be used in the actual task of interpretation. The reason all these are not self-evident in the 'normal' judicial process in Ethiopia is because, at least since 1991, the courts have had no experience in the hermeneutics of human rights; it is also the result of the fact that the courts' position vis-à-vis the Constitution is ambiguous. See Section 38 of the Constitution of South Africa for how constitutions deal with interpretation of human rights provisions.

147 The Constitution does not set aside a separate provision dealing with limitations to be imposed on the exercise of human rights. But built into specific provisions are some limitative phrases. But absent a general limitation clause, we hardly know how to rule on the (im)propriety of a limitative legislation, decision, or any other measure.

interpretive power between courts and the House of the Federation—have played a role in the diminished implementation of human rights in Ethiopia.[148]

The Constitution establishes a parliamentary system of government with a formally (weak) bicameral legislature at the federal level.[149] The lower house is the supreme legislator and the supreme political organ.[150]The upper house has little legislative role; instead it has interpretive and adjudicatory powers.[151]It is a house in which nations, nationalities and peoples (and, indirectly, states) are represented in proportion to their numbers.[152] The Constitution also establishes an executive made of the Prime Minister, the Council of Ministers and the Ministries.[153]It also provides for a ceremonial executive headed by a President who serves as the non-partisan, non-political Head of State.[154] Furthermore, it provides for a three-tiered, parallel, court system of federal and state judiciary.[155]

A Constitutional Inquiry Council with an advisory power (to send recommendations on constitutional interpretation) that assists the House of the Federation is also provided for.[156]Moreover, the constitution lists down the policy objectives and directive principles that guide government policies, decisions, and activities in its chapter 10. Thus the directives that guide the foreign affairs, defence, political, social, cultural, and environmental policies of the country are specified therein.[157]

3.3.3- The States and the Federal Government

The Ethiopian federation is composed of nine constituent units carved on the basis of "settlement patterns, language, identity, and consent of the people concerned."[158] These nine states, officially called variously as "National

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[148] Art 13 is only partially about application and interpretation. Art 13(1) states that the state—at all levels-- is the duty bearer of obligation emanating from chapter three. Art 13(2) states that interpretation of chapter three must conform to international human rights instruments, but says no more. Art 13(1) is thus about the *reach* of the Human Rights Chapter.

[149] Art 53 of the FDRE.

[150] Arts 54-55 of the FDRE Constitution.

[151] Art 62 of the FDRE Constitution

[152] All nations, nationalities, and peoples are represented by one member having one more additional member for every additional one million. See art 61 of the FDRE Constitution.

[153] Art 72 of the FDRE Constitution

[154] Art 69-71 of the FDRE Constitution

[155] Arts 78-79 of the FDRE Constitution.

[156] Arts 82-84 of the FDRE Constitution.

[157] See arts 85-92 for these policies.

[158] Art 46(2) of the FDRE Constitution

Regional States", "Regional States," "Regions", or simply "States",[159] are: Afar, Amhara, Benishnagul-Gumuz, Gambella, Harari, Oromiya, Southern Nations, Nationalities, and Peoples (SNNPRS), Somalia, and Tigray.[160]Most of these states are ethnically heterogeneous although in most of them there are dominant ethnic groups after whom the states are often named.[161]

The power of the states is provided for in Article 52 of the FDRE Constitution as the "reserved" or 'residual' power that is "not given expressly to the Federal Government alone, or concurrently to the Federal Government and the States."[162] While the Constitution reserves the "plenary" powers to the states, it also makes it clear that states, among other things, have the power to set up their own administration "that best advances self-government, a democratic order based on the rule of law; to protect and defend the federal constitution", to "enact and execute" their own state constitutions, and other laws, to administer land within the framework legislations of the federal government, to levy and collect state taxes on their own revenue sources, to establish and administer their

[159] Throughout this paper, the term used will be "states" at times interchangeably with sub-national entities. This is done only for reasons of convenience.

[160] Art 47 (1) of the FDRE Constitution.

[161] Hence, we have the states of Amhara, Oromia, Somali, Afar, and Tigray, in all of whom we have diverse peoples other than the Amhara in Amhara state (such as the Agaw, the Argoba, the Oromo, etc), other than the Tigrayans in Tigray (such as the Erob and the Kunama), other than the Oromos in Oromia (such as the Zay, and pockets of other peoples living mostly in urban centers all over the state), other than the Afar in Afar State (the urban dwellers who have migrated into the region over the years), the Somalis in the Somalia State (urban dwellers in the cities and towns). The SNNPRS is demographically intensely diverse, and is obviously an exception in this regard, i.e., in the sense that there is not one predominant group that can be associated with the identity of the State. Harari state is composed predominantly of the Oromos, the Harari, and many other people groups who live in the city of Harar. Given the fact that the Harari are numerically small in the state, Harari, too, is an exception in having a political predominance that lets the state be identified with it while it is the smallest in terms of numbers. Harari is also unique in its adoption of a mode of democracy that is more consociational than any of the states or even the federal government can afford. Gambella is composed of the Anywaa, the Nuer, the Mezenger, the Mao, and the Opo peoples but 'Gambella' does not signify a people group. Likewise, Benishangul-Gumuz is composed of the Berta, the Gumuz, the Shinasha, the Mao and Como peoples and the name hardly refers to anyone group in the state. Interestingly, in these latter states of the Western periphery of Ethiopia, there is a distinction made even in the constitutions between 'indigenous nations, nationalities' [of, for example, Berta, Gumuz, Shinasha, Mao and Como in Benishangul-Gumuz State] and 'other peoples residing in the region'. (See for instance Preamble, Paragraph. 3 and Article 2 of the Constitution.)

[162] Art 52(1) of the FDRE Constitution.

own police force, etc.[163] Obviously one can have a fuller picture of the 'residual' powers only after considering the list of federal powers in the preceding provision[164] which includes those powers traditionally known as federal powers (such as foreign affairs, defense, interstate commerce, interstate relations, currency, foreign trade, national security, transportation, postal services, and telecommunication, some natural resources including land, etc). Because the list of federal powers seems to be long, people often reasonably doubt if the residual powers reserved to the states in Ethiopia are really significant. Nevertheless, it is important to note at this juncture that state constitutions play an immense role in articulating these 'plenary' powers so that they can be better exercised by the states in consonance with the principle of self-rule that constitutes an aspect of federalism.

It is interesting to observe that some of the state powers "enumerated" (by way of example) in art 52(2) (a-b) tend to impose an obligation on states. Thus, to an extent, they seem to be determining the key elements of the state constitutions. That is to say, a state constitution that does not recognize the pre-eminence of the principles of self-government, democracy, and rule of law, and is not poised toward protecting and defending the federal constitution cannot be accepted as valid. It stands to reason, then, that all state constitutions, minimally, need to abide by these principles.

In the Ethiopian federation, symmetry is the norm.[165] Thus, states have "equal rights and powers."[166] State legislatures command the supreme political power and are accountable to the people(s) of the states.[167]States are obliged to establish local governments at various administrative levels so that there are possibilities for local people "to participate directly in the administration" of these levels of governments.[168] The state legislatures' powers "to draft, enact, and amend" the state constitutions is also recognized in the federal constitution.[169]Its supreme legislative power is similarly recognized in the same provision. The states' executive and judicial powers—and by extension all the powers that mark sovereignty at the local level—are also recognized in the

[163] See art 52(2) a-g of the FDRE Constitution.
[164] Art 51 of the FDRE Constitution
[165] It is true, though, that in multi-national polities, asymmetry is almost inevitable. See, for instance, Rainer Bauböck (2001), *Multinational Federations: Territorial or Cultural Autonomy?*. (Malmö: Malmo University (Willy Brandt Series of Working Papers in International Migration and Ethnic Relations 2/01)). Bauböck says that "Asymmetry is endemic to multinational federations...." (p.11).
[166] Art 47(4) of the FDRE Constitution.
[167] Art 50(3) of the FDRE Constitution.
[168] Art 50(4) of the FDRE Constitution.
[169] Art 50(5) of the FDRE Constitution

constitution[170]. Although the constitution does not explicitly stipulate the existence of the *principle of federal supremacy*[171] in the Ethiopian federation, it holds, in consonance with the *principle of federal comity*, that "The states shall respect the powers of the Federal Government and the Federal Government shall likewise respect the powers of the States."[172] This provision is indicative, at least in theory, of the dual nature of the Ethiopian federation.

The perusal of this provision in conjunction with the provisions that indirectly (through nations, nationalities, and peoples) grant the right to self-determination[173] to the states, give the impression that the Ethiopian federal system guarantees state sovereignty. As a result, it is incumbent upon the state constitutions to articulate, elaborate, and give institutional expression to this state sovereignty that seems to be regnant in the Constitution.

3.3.4- Ethiopian Federalism: Distinctives

The federation that was born out of the concern for ethno-nationalist groups' right to self-determination (which in turn was a result of an age-old quest for ethno-cultural justice[174]) manifested a number of *unique features*. The recognition of the right of secession[175], the use of ethno-linguistic criteria as a

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[170] Art 50(6-7) of the FDRE Constitution.

[171] The principle of 'federal supremacy' or 'federal paramountcy' maintains that the federal government, its laws, and institutions are supreme, i.e., superior to, and override, the state laws and institutions.

[172] Art 50 (8) of the FDRE Constitution.

[173] Art 39 of the FDRE Constitution.

[174] It is to be noted that the two most important questions that dominated the Ethiopian political terrain since early 1960s, and indeed the predominant preoccupation of the student movements of the age, were the question of land (typified by the slogan, "Land to the Tiller") and the "Question of Nationalities". There is a huge body of literature on this. Balsvik's (1985), *Haile Selassie's Students: The Intellectual and Social Background to Revolution, 1952-1977*. (East Lansing: African Studies Center, Michigan State University); Kiflu Tadesses's, *supra* note 177; Edmond Keller, *supra* note 84; Merera Gudina, *supra* note 85; Assefa Jalata *supra* note 167; Andargatchew Tiruneh's (1993), *The Ethiopian Revolution, 1974-1987: A Transformation from an Aristocratic to a Totalitarian Autocracy*. (Cambridge: Cambridge University Press), are only a few notables among a morass of books and articles on the historic questions of class and ethnicity in Ethiopia. The "question of nationalities" was subordinated to the question of class in the course of the making of the 1974 revolution and its unfolding in the subsequent years, but since 1991 it seems that, on the wake of the collapse of the *Derg*, the former has triumphed as the preeminent question that, if repressed, hardly dies out.

[175] Art 39(1) recognizes the "unconditional right to self-determination, including the right to secession" of every nation, nationality and people.

basis of state formation,[176] the unconventional constitutional interpretation through the upper house of the federal legislature[177], the fact that states are not directly represented in the upper house,[178] the fact that the upper house has little, if any, legislative role,[179] etc, can be mentioned as evidence of its unique features.)

3.4- Ethiopia: Pre-federal and Post-federal Conflicts

The quest for an anatomy of conflicts in pre- and post-federal Ethiopia leads one to the nature of political relations in historic and contemporary Ethiopia. In pre-

[176] See art 46(2) which holds that states are formed "on the basis of settlement patterns, language, identity and consent of the people concerned".

[177] The House of Federation poses formally as the upper house of the federal legislature. See art 53 which says that "There shall be two Federal Houses: the House of Peoples' Representatives and the House of the Federation." This obviates the fact that Ethiopia's legislature is bicameral in form although it is unicameral in actual operation. That aside, Art 62 cum 82-84 indicate that the House of the Federation (with the support of the Council of Constitutional Inquiry) is the ultimate interpreter of the constitution. Subsequent federal legislations, namely Proclamations No. 250/2001 and 251/2001 and confirm and elaborate on the interpretive powers of the House of the Federation and of the Council of Constitutional Inquiry. This makes Ethiopia's system unique compared to other contemporaneous constitutions of its time (such as that of South Africa, Namibia, etc).

[178] The House of the Federation, the upper house of the Ethiopian parliament, is "composed of representatives of Nations, Nationalities, and Peoples" (art 61(1)). The House is thus a representative of the ethno-cultural groups rather than the states. But the states may have their interests aired through the ethnic groups that come out of them. Besides, the fact that the representatives are—in practice so far--selected by the state legislatures (often from within the state legislatures), rather than by direct popular vote, has created the impression that they represent the states. The state legislatures are of course allowed to elect the representatives themselves or to "hold elections to have the representatives elected by the people directly" (Art 61(3)).

[179] In deed the House of Federation has little legislative role. This is evidenced by the fact the list of powers and mandates under article 62 refers only to two matters, among a total of 11, as the ones relating to legislation. These matters are: a) determination of "the division *of revenues* derived from joint Federal and State tax sources and the *subsidies* that the Federal Government may provide to the States" (art 62(7)); and b) determination of "civil matters which require the enactment of laws by the House of Peoples' Representatives." (art 62(8)). One can quickly note that even these are not legislative matters *in stricto sensu*; they are rather directions on what to legislate upon, sort of a license for the HPR to legislate on the matters indicated.

federal Ethiopia, for the large part of the conflicted 20th century,[180] two issues dominated the agenda of those involved in conflicts, namely the issue of class and the issue of ethnicity. The question of economic (class) and status (ethnic) hierarchy were salient. The 1974 revolution dealt with the issue of class hierarchy. The issue of status hierarchy still remained unattended to fully because it was subordinated to and/or conflated with the issue of class hierarchy. It was so subordinated perhaps because the issue posed a direct challenge to the unity of the country by raising the difficult question of who the Ethiopian is,[181] and what the terms of being "in" or "out" of Ethiopia are.

The proponents of the movements that led to the dethronement of Haileselassie and the unleashing of the popular revolution took divergent positions on the articulation of and the response to the "question of nationalities." The articulation endorsed divergent paradigms of Ethiopian history (national reunification thesis, colonial thesis, national oppression thesis, etc). Likewise, the responses took divergent forms (nation-building and/or modernization, self-determination/decolonization, democratic equality and equalization, etc). Multi-ethnic political groupings such as those within the auspices of the Derg seemed to endorse an amalgam of the national unification and national oppression theses. The EPRP, in its earlier version, argued for self-determination rights of Eritreans and Ogadenis but not the remaining groups. The AESM (*Meison* in Amharic) endorsed the national oppression thesis and argued for democratic equality and equalization of hitherto oppressed groups. But the regime which came out victorious after a brief season of confusing militant competition and strife, i.e. the Derg, suppressed all voices and imposed socialist style prioritization of class conflicts thereby subordinating ethnic conflicts to the former. By conflating ethnic conflicts with class conflicts, they sought to resolve the issue through addressing class conflicts head on while also

[180] This refers mainly to the time since the early 1960s when the legitimacy of the regime of Emperor Haile Selassie I began to be questioned among the military and the educated elite. Earlier to this, a peasant protest in Tigray (the First *Woyane* movement) and the protest by the Bale Oromo/Somali (?) Nationalists reared their head as a form of bottom up resistance but were suppressed. It is important to note Haileselassie's regime enjoyed the most peaceful season of Ethiopia's history except for the short-lived Italian occupation from 1936-1941. This peace begun to be 'disrupted' by the sign of dissonance expressed first among the army, then among the students, and later among the general public, especially the farmers.

[181] It comes as no surprise that one of the polemical pamphlets widely distributed among student leaders was the one written by Wallelign Mekonnen entitled "On the Question of Nationalities in Ethiopia" (1969).

recognizing the linguistic and cultural rights of ethnic groups (at least partially).[182]

The subordination of ethnic demands led to a multiplication of groups that are mobilized around the motto of self-determination for, and subsequent liberation of, their particular groups. As a result, ethno-nationalist liberation fronts proliferated in many parts of the country. These groups used the rhetoric of colonialism (EPLF, ELF, OLF, WSLF, SLM, etc), national oppression (TPLF and a host of other groups within the wider south of Ethiopia), and victimization (via genocide, forced assimilation, cultural denigration, etc). Most of these also used the rhetoric of self-determination as they articulated their demand for justice, equality, and self-governance. After a protracted and long-suffering armed struggle, they finally succeeded in forcing the military regime to implode and collapse in 1991. The conflicts in these times were generally vertically postured: the groups versus the state (at times characterized as primarily Amhara). The conflicts looked like ones propelled by resistance to oppression, quest for equality, dignity, cultural and linguistic justice, self-governance, and independence.

These demands were captured in the Transitional Charter which, as an interim constitution, quickly established a *de facto* federal or quasi-federal system. The charter was a response mainly to the quest for ethno-cultural justice: equality and non-discrimination on ethnic and religious basis, the right to one's identity, language, culture, and way of life, the right to one's history (and one's narrative of history), the right to self-administration within one's territory, the right to self-determination including and up to (conditional) secession. Hidden within this quest for ethno-cultural justice was also the general demand for a democratic order which respects human rights under the rule of law. This accent

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[182] A quick glance at the PDRE Constitution (1987) and the National Democratic Revolution (NDR) Program of the PMAC (of April 1976) make this clear. The PDRE Constitution recognizes the rights of nationalities to *equality* (art 2(1-2)), *equalization* (art 2(3)), *autonomy* (art 2(4)), and *language* (art 2(5)). But the ultimate 'owners' of political power were the "*working people"* of Ethiopia" (Art 3). The NDR Program reads in part:

> "The right to self-determination of all nationalities will be recognized and fully respected. No nationality will dominate another one since the history, culture, language, and religion of each nationality will have equal recognition in accordance with the spirit of socialism. …. Each nationality will have regional autonomy to decide on matters concerning its internal affairs. Within its environs, it has the right to determine the contents of its political, economic and social life use its own language and elect its own leader and administration to head its own organs. This right of self-government of nationalities will be implemented in accordance with all democratic procedure and principles."

on ethno-cultural justice was the consequence of the identity of the negotiators (chiefly ethno-nationalist liberation fronts). Moreover, the Charter, as is the constitution that succeeded it, was an expression of the bitterness and sense of resentment of oppressed ethnic groups. The charter as a legal document was also a peace document, a pact among warring factions, who based on a document with a thin content, agreed to a temporary arrangement that they hoped will guarantee that all their fears (of oppression, ethno-cultural injustice, and denigration) are prevented from happening again. One quickly notices how even a tentative (quasi-)federal arrangement can be a tool of truce. One also should note the fact that this was also possible mainly because the "center" (or forces of centralism in general) was exhausted. The Charter, however, by endorsing self-determination and secession, made unity and integrity of Ethiopia vulnerable to the challenge of secession and fragmentation. As a result, there was a latent fear and tension among some circles.

In 1995, with the adoption of the federal constitution, the quest for ethno-cultural justice was elevated to a full-blown constitutional right. Built upon the premise that the nation-building project via assimilation and homogenization has failed, the constitution ventured to reconstruct the Ethiopian state as a multi-cultural multi-national state. In a sense Ethiopia ennobled the ethnicity ('tribe') that was supposed to be killed 'to build the nation'. Hence, Mazrui's comment that, in the oldest nation in sub-Saharan Africa (whose boundaries are formed less arbitrarily than other African nations that lived under colonialism), a 'cultural federation' was established and ethnicity at last was freed from bondage.[183]

So federalism was put in place in 1995. Ethnic groups were made sovereign (art 8). They were the building blocks out of which we build multi-ethnic, multi-national Ethiopia (preamble). They were granted the right to self-determination including secession (art 39(1)). The right to language, culture, and history were guaranteed (art 39(2)). The right to full measure of self-governance at least at the local level was recognized (art 39(3)). The right to fair and equitable representation at the "center" (in the organs of the federal government) was recognized. Thus an upper house in which each ethnic group is represented, HOF, is established (arts 61 et al). Territorially concentrated groups were guaranteed the right to self-administration either within a heterogeneous regional state or within one's own separate state (art 46). A group's right to statehood is also guaranteed (art 47(3)). By doing so, the constitution attempted to of transform an age-old conflict between the center and peripheries of Ethiopia.

[183] Ali Mazrui, *supra* note 116.

Nonetheless, at the foot heel of the federal dispensation were born new conflicts, post-federal conflicts. The following is a brief list of such new conflicts: a) an intensified quest for self-definition and distinct identity intent on securing local self-rule to get more resources, power, and opportunities[184]; b) border disputes between and within states; c) competition for federal grant and subsidy; d) quest for having one's language given a co-equal status as a federal working language; e) competition for access to and authority over federal, state, and local capital cities[185]; f) conflict over mistrust about one's lot with/in a state or in the country[186]; g) the quest for a more robust minority rights regime, especially right to representation; etc.

Owing to the conversion of the old minorities ('nations, nationalities, and peoples') to sovereign entities, there emerged 'new' minorities (minorities within minorities, etc) who are now unattended to in the new federal constitutional dispensation. One might wonder as to who these new minorities are. One can roughly identify at least five categories of new minorities: 1) scattered groups who are children of our legacy. In this category, there are: a) children of empire builders; and b) children of villagization and (re)settlement programs; 2) children of freedom of movement in the new constitutional dispensation; 3) stranded groups, i.e., groups that are caught in between two or more regions when the new mapping of the constituent units of the federation was conducted (e.g. the Yem in SNNPRS and Oromia; the Mezenger in SNNPRS and Gambella; the Argoba in Afar and Amhara; the Guji in Sidama Zone of SNNPRS and Oromia; the Oromo in Gedio Zone of the SNNPRS; the Agaw in Benishangul Gumuz; the Oromos in Benishangul Gumuz; the Opo in Gambella and Benishangul Gumuz; the Oromos in Harari State; the Afar, the Amhara, and the Oromo in Tigray; etc.); 4) Occupational caste groups (e.g., the Fuga, the Enewari, the Hadicho, the Menja, and others); 5) Indigenous groups in the hinterland of rural South Omo or Bench-Maji Zone of SNNPRS who could not exercise their constitutional rights for reasons of historic marginalization. To these, one can add the category of religious minorities, or of the minorities of mixed ethnic origin, Ethiopians of Eritrean origin, etc.

The new minorities seek a diverse array of rights such as recognition; identity; exercise and enjoyment of linguistic rights (in schools, administration, courts, and media, etc); exercise and enjoyment of cultural rights; right to representation in offices of local, sub-national, and national government;

[184] E.g. the Silte case and myriads of similar others.

[185] This is the case of the claim of the Oromos over Addis Ababa/Finfinne, the Sidamas over Hawassa, the Guarge and Qabena over Walkite, etc.

[186] E.g of Oromia, or Somali region vis-à-vis Ethiopia and Sidama or Gamo in the SNNPRS, etc.

participation in decision-making; self-rule; self-law; reassignment in what they consider to be their "home region"; etc[187].

In post-federal Ethiopia, apart from minority claims, there are a host of claims that are mostly expressed in terms of competition for resources (natural endowments as well budgetary resources coming to them in the form of fiscal transfer, i.e., subsidies and grants), opportunities (jobs as well as education), and power (at the local, sub-national, and national levels). Local elites tend to contribute to the escalation of some kind of conflicts for the purpose of securing a better access to coveted resources, opportunities, and powers. One notices that the federal dispensation which was devised to respond to old conflicts which arose out of the quest for ethno-cultural justice did address, more or less, these conflicts. But it triggered a new sort of competition for resources, power and opportunities. Consequently, the threat of fragmentation (of states) has become a challenge. Lack of trust among diverse groups in constant interaction has become another challenge.

In closing this section, it is to be underscored that federalism has the potential to handle these new ethno-national conflicts. Some problems of design (normative, institutional, and procedural) and some problems of practice (lack of implementation of constitutional norms) should not distract us from pursuing the ideal of federalist management of conflicts. A more systematic approach to conflicts and a more robust redemptive constitutional practice should be worked out in order to make us learn to live with conflicts.

3.5- Federalism and Conflicts in Ethiopia: Looking Ahead— Challenges and Prospects

As has been repeatedly hinted at in these pages so far, federalism can be viewed as a tool of handling conflict. There are a number of resources to utilize in order to manage conflicts. Although the kind of conflicts that recur in a federal polity are primarily those that relate to inter-state, inter-governmental, and inter-organ relations, in a multi-ethnic federation, there are more conflicts that federalism can help handle. Such are the ones relating to ethno-cultural justice, minority rights, border disputes, identity-related disputes, disputes over local self-rule (mainly for resources, opportunities, and for power) and others. In Ethiopia, federalism has been opted for primarily to respond to the quest for ethno-cultural justice. Old ethno-national conflicts have been addressed directly and frontally. New conflicts are emerging. Federalism needs to be used more creatively than it has so far been to handle the new conflicts more systematically and institutionally. This requires, among other things, the need for a positive

[187] For example, divergence of opinion over the symbols that signify united shared national ethos (such as flags, emblem, and anthem) feed into other causes of tension.

posturing of conflicts and viewing them as demanding a more deliberate, intentional, directed effort that can prevent, manage, and transform them. Federalism, if equipped with the necessary institutional, procedural, and manpower infrastructure, can be part of the scheme to prevent, manage, and transform conflicts.

As we look ahead, the challenge of more and more demands for better recognition, local self-rule, sub-national autonomy, fair and equitable representation in government at various levels, self-law, separate statehood, a better regime of minority rights, reassignment in another state or Woreda/Zone, etc might confront us. These challenges put a lot of demands and pressure on the meager financial, institutional, infrastructural, and human resources of government. But they need to be met. To meet these challenges, as we look ahead into the future, it is imperative that we develop a full-blown policy and strategy for conflict. We also need to work on the refinement of the norms, institutions, and procedures pertaining to federalism and its experimentation. Constitutional rethinking might be needed at some places (such as in the areas governing the upper houses both at the federal and sub-national levels, constitutional interpretation, mode of representation of ethno-national groups, meeting and voting patterns, electoral systems, rules of power-sharing in the executive, etc). It is also important that we make a more aggressive use of resources that are hitherto underutilized such as the state constitutions. It is also imperative that state constitutions are designed in such a way that they respond to specific local demands and needs. Such responsiveness to realities and diversifying institutional and procedural devices will indeed enrich the federal experiment thereby making the states 'laboratories of democracy'. At all levels, the practice of redemptive constitutionalism (through constitutional fidelity, constitutional reinvention via positive amendment and positive interpretation, responsible legislation that serves as corrective to constitutional problems, and responsible use of new constitutional moments) is imperative. All along, we need to remember that through federalism, we learn to live with conflicts and transform them in such a way that they outlive us into posterity.

Conclusions

In conclusion, let me try to reiterate some brief answers to the questions I set for myself at the beginning of this paper. Conflict and federalism have an interlocked relation as conflict of a specific type might necessitate a federal mode of governance while federalism might also generate its own type of conflicts in the wake of its adoption. The nature of conflict in a polity may color the kind of federalism adopted. The nature of federalism in its turn might trigger types of conflicts that are peculiar to the kind of federalism adopted. The nature of the federal arrangement might also determine the kind of conflict management strategy we seek to adopt.

A federal arrangement does help to prevent or handle some conflicts, but it also generates others. At times, it even multiplies them. Such is more or less the case in Ethiopia. The Ethiopian federalism was both a response to (old) and a cause of (some new) conflicts. It responded chiefly to ethno-national conflicts and the associated quest for ethno-cultural justice. But it failed to comprehensively respond to the quest for a better regime of minority rights protection. As a result, it showed itself to be ill-prepared for new conflicts ignited by the new minorities. It also showed itself to be ill-equipped to respond to conflicts caused by the (local elites') competition for new resources (e.g. state budget), opportunities (education, jobs, network, and other forms of social capital, etc), power (political positions at the local, sub-national, and federal levels).

Furthermore, in its practice so far, it seems to be unprepared for a new type of demand for linguistic justice (e.g. the quest for a coequal status as a working language at the federal, state, or local levels), competition for ownership over a capital city (be it local, sub-national, or federal). All this reinforces the theme that federalism is not a panacea to conflicts. The Ethiopian federal experiment empirically informs the comparativists' argument that federal arrangements do not necessarily eradicate all conflicts. It is thus not proper to demand from federalism—the Ethiopian or otherwise--what it does not promise and can not possibly deliver. The more appropriate approach is to lower one's expectation of the potentials of federalism, to correct our (often negative) view of conflict, and to try to make use of the potentials of both in transforming polities and conflicts respectively. In sum, let it be said once again that we need to learn to live with conflicts *through* and *in* federalism as we also seek and try to maximize the potentials of federalism and its institutional and procedural resources for a better handling of conflicts. ■

REVISITING COMPANY LAW WITH THE ADVENT OF ETHIOPIA COMMODITY EXCHANGE (ECX): AN OVERVIEW

Getahun Seifu [♣]

Abstract

The historical development of the law of companies shows that this area of the law is evolving and continually changing based on the level of economic development. The law directly dealing with companies, the 1960 Commercial Code of Ethiopia, seems to limit the scope of the law of companies only to private limited companies and share companies, save the partnerships included in the Code. This is a very narrow approach as it leaves out public enterprises simply because they are not recognized under the Code. This article examines the salient features of company law and argues in favour of a broader understanding of the concept. As such, the article vets the main features of private limited companies, share companies, public enterprises and The Ethiopia Commodity Exchange) ECX and shows how the advent of the ECX has challenged the frontiers of the existing legal framework of Ethiopian law of companies. The study argues that ECX is a unique "hybrid-model" which can neither be categorized as a registered company nor as a public enterprise (statutory company) thereby enhancing the challenge to the frontiers of company law as envisaged in the 1960 Commercial Code of Ethiopia.

Key words:

Company law, public enterprise, Ethiopia Commodity Exchange (ECX), public-private partnership, hybrid-model company.

Abbreviations

ECX	Ethiopia Commodity Exchange
PLCs	Private Limited Companies
SOEs	State owned enterprises
SRO	Self-regulatory organizations

[♣] LL.B; LL.M; Manager for Compliance Monitoring and Investigation at ECX; and part-time lecturer in law at St. Mary's University College Faculty of Law and the Faculty of Law of Addis Ababa University. The author gratefully acknowledges constructive comments from colleagues and assessors on earlier drafts of this research. Any opinion expressed in the research remains personal opinion of the author and shall not be attributed to the institutions where he works. For comments, he can be contacted via e-mail at: getahunseifu@yahoo.com.

Introduction

The formation of companies in their modern legal structure (which enables engagement in large-scale economic activities with substantial resources) does not have a long history in Ethiopia. Nearly three decades after the promulgation of the Bankruptcy Law and Company Law in 1933,[1] there was a need for a new law in response to the economic expansion and development as well as the increased inflow of foreign investment at the time. This new law, "[t]he Commercial Code of 1960, created a comprehensive law of business organisations"[2] in the country.

Company law is part of the law of business organisations, and refers to the law that deals with the bringing together of large resources/capital to do business for profit in accordance with a certain law(s) of organization or incorporation. It could be established either by private individuals or private individuals in association with the state or through state ownership. According to the Commercial Code (hereafter "the Code"), a business organisation is defined as "any association arising out of a partnership agreement".[3] The Code envisages only the types of companies that are conventionally understood to be encompassed by the law of companies.[4] Apart from defining a business organisation, the Code does not define or describe what is meant by "company".[5] This article argues against the narrow conception of 'company law' as envisaged under the Commercial Code and would support a broader reach beyond privately owned companies, as envisaged in the Commercial Code, and argues that company law ought to include the law of public enterprises.[6] This article makes a modest attempt to inquire into the concept and scope of company law in Ethiopia contrary to the prevailing view.[7]

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[1] See paragraph 3, item number 3 of the preambular recitals of the Commercial Code of 1960, which refers back to this law.

[2] Everett F. Goldberg (1972), 'An Introduction to the Law of Business Organizations', *Journal of Ethiopian Law*, Vol. 8, No.2, at 495.

[3] *Id*.; See also Article 210, Commercial Code.

[4] See Article 212 of the Commercial Code as well as the curricula of law schools in Ethiopia. In our law schools, the law of companies is taught as part of the "Law of Traders and Business Organizations", which covers only the relevant provisions of the Commercial Code and its amendments. The other course that covers State owned enterprises and/or Sate and privately owned companies as well as cooperative societies is taught under the title of "The Law of Public Enterprises and Cooperative Societies."

[5] For the description of the different understandings of what is meant by the term "company", see below.

[6] It is worth noting at this juncture that one can argue solely based on the provisions of the Commercial Code, which provide only narrow description and conception of

Moreover, this research argues that the horizon of company law is still expanding with the advent of "hybrid model" self-regulatory organisations (SROs) such as the Ethiopia Commodity Exchange (ECX). The advent of such new forms of institutions strengthens the view that the scope of company law has to be revisited with a view to enabling it to effectively achieve its purpose.

Accordingly, the first section of this article provides a brief overview of the concept of company law. The second section discusses the bounds of company law in Ethiopia with analysis of the concept in light of various forms of establishment and operation and the broader understanding of companies alluded to above. It also discusses the fundamental elements of the various forms of companies with the intention of showing that they do not have objectives that are really far apart. The third section focuses on the formation, distinctive features and characteristics of the ECX, as a form of company, and explains the need for a wider conception of company law in the country. Finally, the last part of the research contains conclusions and recommendations on the way forward.

1. Meaning and Brief Overview of Company Law

During earlier times, businesses were owned and run by private individuals and some forms of partnerships.[8] Though the reasons for forming such partnerships

company law. However, as will be elaborated in the subsequent sections, such an interpretation would not solve issues that emerge based on some new developments under Ethiopian law.

[7] It is the view of this author that the curricula of law schools also look at the concept of companies very narrowly that would not equip graduates with the concept(s) adequately. Currently, there is no explicit connection between the courses on "Law of Traders and Business Organizations" and "The Law of Public Enterprises and Cooperative Societies". This leads to the conception that they are (completely) separate courses. That holds true for other stakeholders such as policymakers and the business community. And, this is the main reason that motivated this author to conduct research towards clarifying some of the underlying issues. The author also hopes that this research would encourage more discussion on the matter and tighten the gap so that it would be addressed properly.

[8] See H. R Hahlo (1969), *Company Law through the Cases* (Cape Town/ Wynberg/ Johannesburg: Juta & Company Limited), pp. 3-9. It provides an interesting overview of the historical development of the law of companies from the Roman times to the 1960s. See also, in general, John P. Davis (1961), *Corporations* (New York: Capricorn Books), pp. i-xix. Some would argue to trace the idea of partnerships to the very existence of human kind: "The concept of a corporate body [partnership or otherwise] being a different entity from the individuals who collectively form the corporate body is as old as man; it is seen in the family, the tribe and the nation.", P.A

could vary, some obvious reasons for the formation include: a) mobilizing resources for a business venture that could not have been done without pooled resources; and b) averting the risk the associates do not want or would not afford to take individually. Thus, forming partnership "enables people to do things which would be difficult or impossible for them to do alone".[9] However, with changes in time and unfolding challenges, these forms of making business failed to meet the test of time and there arose a need to expand the scope and types of organizations for business. It is noted that:

> The radical changes in the industrial science made it very difficult, if not impossible, for sole proprietorship and partnership forms to meet the requirements of expanding scale of business. The sole proprietorships and partnerships with limited capital and unlimited liability, limited managerial skill and other limitations could not prove equal to the challenges posed by the changing times.[10]

This shows that the development of company law is related with the emergence and development of industrialization. Needless to state, the term *company* ordinarily refers to an association of a number of individuals formed for some common purpose.[11] In law, a company could be defined as a voluntary association of persons formed to achieve some common objectives, having a separate legal entity, independent and separate from its members, with perpetual succession and a common seal, and with capital divisible into transferrable shares.[12] Thus, the law views most business associations as persons in the sense that the business association is a separate entity with legal rights and obligations separate and distinct from the owners and/or managers of the business (the real people involved with the association).[13] The real people involved in any business association are the owners/investors (the people who provide the capital and own the business); the managers (the people who manage the business); and the employees (the people who carry out the tasks necessary to

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Thomas (1969), *Private Enterprise and the East African Company* (Dar es Salaam: Tanzania Publishing House), p. ix.

[9] Goldberg, *supra* note 2, at 495.

[10] D.P Jain (1997), *Company Law* (New Delhi: Konark Publishers Pvt Ltd., 2nd ed.), p. 17.

[11] *Id*.

[12] P.P.S. Gonga (2004), *A Textbook of Company Law* (New Delhi: S. Chand and Company Ltd., 5th ed.), p. 9. It should be underscored that this definition does not capture special types of companies established by governments, as the definition hinges on the volition element of grouping among founders to constitute a company.

[13] Joseph Shade (2006), *Business Associations in Nutshell* (St. Paul, MN: Thompson/West, 2nd ed.), p. 3.

operate the business, from sweeping the floor to serving as the chief executive officer).[14]

Thus a company has a separate legal personality detached from its members with continuous existence irrespective of changes in membership. That means the insolvency of its members, death or transfer of shares to another individual or person would not affect the continuous existence of a company. Moreover, it owns property or capital in its own name which would be divided among the members in terms of shares/contributions based on their contribution. As a legal person, it can freely transfer these shares/contributions and bring suits or be sued independently. In short, a company can be understood as a person which is "artificial, invisible, intangible and existing only in contemplation of the law."[15]

Company law, as a domestic law of a given country, certainly shows variations from country to country.[16] In general, however, the law of companies (the law of business associations) is the field of law concerning companies and other business organisations, and includes corporations, partnerships and other associations which usually carry on some form of economic or charitable activity.[17] There are various types of companies that can be formed in different jurisdictions, but the common forms of company include:[18]

i. *Company limited by guarantee*: This is commonly used where companies are formed for non-commercial purposes such as clubs or charities. The members guarantee the payment of certain (usually nominal) amounts if the company goes into insolvent liquidation, but otherwise they will have no economic rights in relation to the company.

ii. *Company limited by shares:* Being the most common form of company used for business ventures, it is a company in which the liability of each

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[14] *Id*.

[15] Jain, *supra* note 10, p. 18.

[16] See Wolfgang G. Friedman and Richard C. Pugh (eds) (1959), *Legal Aspects of Foreign Investment* (New York: Columbia University International Legal Studies Programme) for an excellent overview of the forms of business organizations and companies in more than forty countries all over the world. Though there are differences from country to country in the forms of companies, it can be observed that there are several similarities as well.

[17] See, for instance, Companies Law, available at:
< http://www.en.wikipedia.org/wiki/Companies_law> visited on March 11, 2010.

[18] See *Id*. See also Keith Walmsley (ed) (2005), *Butterworth's Company Law Handbook* (UK: Lexis Nexis, 9th ed), p. 23; CCH Editions Limited (1995), *British Companies Legislation* (London: CCH Editions Ltd,), p. 122; and J. Ola Orojo (1976), *Nigerian Company Law and Practice* (London: Sweet and Maxwell), pp. 17-18 for related discussion on the types of companies in UK and Nigeria.

shareholder is limited to the amount individually invested by shareholders. Transfer of the shares in such a company to third parties is usually free.

iii. *Company limited by guarantee with share capital*: This is a hybrid entity, usually used where the company is formed for non-commercial purposes, but the activities of the company are partly funded by investors who expect a return.

iv. *Limited liability company*: This is a type of company that is characterized by limited liability, management by members or managers, and limitations on ownership transfer of shares in the company.

v. *Unlimited liability company with or without a share capital:* This is a hybrid entity wherein the liability of members or shareholders for the debts, if any, of the company is not limited to the capital of the company.

vi. *Charter corporations*: Before the emergence of legislation of modern companies, these were the only types of companies. Nowadays, they are relatively rare, except for very old companies that still survive, or modern societies that fulfil a quasi-regulatory function.

vii. *Statutory companies*: These are also relatively rare today, but are established by a statute in accordance with the laws of the relevant jurisdiction.

This demonstrates that different countries establish different types of companies based on their respective legal system, economic policy, political ideology, economic realities etc. Apparently, Ethiopia's company law reflects the country's realities, and in effect, it has features that may vary from or have several similarities with the company laws of other countries. This will be reviewed in the next section.

2. The Bounds of Company Law in Ethiopia

2.1- Classification of Companies under Ethiopian Law

In Ethiopia, company is a form of business organisation as enunciated under Article 210 of the Commercial Code. Article 210(1) defines a business organisation as "any association arising out of a partnership agreement." And the Code defines *partnership agreement* as follows:

> A partnership agreement is a contract whereby two or more persons, who intend to join together and to cooperate undertake to bring together contributions for the purpose of carrying out activities of an economic nature and of participating in the profits and losses, arising out thereof, if any.

It can be easily inferred from this that a business organisation is an "association" of persons, based on a partnership agreement, who bring together their capital to do a business with the objective of obtaining profit.

The terms business organisation, business association, business enterprise, and business structure could be used interchangeably.[19] However, there is a need for caution with the term "association" as it is defined under the Civil Code to mean a "grouping formed between two or more persons with a view to obtaining a result other than the securing or sharing of profits."[20] Goldberg indicates that the term "association" is used in Article 210 of the Commercial Code wrongly as the more accurate translation of the term used in the French text would be "*grouping*".[21] Certainly, the term "association" as used in the Commercial Code should not be confused with the definition proffered in the Civil Code as the Codes have mutually exclusive purposes in using the terms. Hence, the term "grouping" would have been better to resolve the confusion.

Companies can be classified into numerous forms based on different criteria such as basis of incorporation, liability, number of members, control, ownership and origin.[22] These grounds of classification and how they should be understood in the Ethiopian context will be reviewed below.

2.1.1- Classification based on manner of incorporation

In terms of the manner of establishment or incorporation, companies can either be classified as registered companies or as statutory companies.

a) Registered companies

A registered company is a company that acquires its legal personality upon registration. Until it is registered fulfilling the legal requirements, it will not be considered as a company with legal personality.[23] In terms of registration, Article 212 of the Commercial Code covers two types of companies among the forms of business organisation. These are share company[24] and private limited company.[25] It has to be underscored that although Article 211 of the Code defines a business organisation as "any association arising out of a partnership agreement", it does not define or describe what is meant by the term "company" apart from indicating that there are only these two types of companies.[26]

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[19] See Shade, *supra* note 13, p. 2.
[20] Article 404, Civil Code of Ethiopia of 1960.
[21] Goldberg, *supra* note 2, p. 496.
[22] See Jain, *supra* note 10, pp. 37-55, and Wolfgang F and Richard P, *supra* note 16, for instance.
[23] Article 8(1), Commercial Registration and Business Licensing (Amendment) Proclamation No.376/2003.
[24] See Article 212 (e) and Articles 304-509, Commercial Code.
[25] See Article 212 (f) and Articles 510-543, Commercial Code.
[26] See Article 212(1) (e) and (f), Commercial Code.

The phrase "any association arising out of a partnership agreement" seems broad enough at first sight, but closer review shows that it covers only few forms of association or business organisation, as it depends on a partnership agreement, which has to be done in writing apart from joint ventures.[27] In addition to adopting a narrow conception of the term "company", this would categorically exclude the types of business organisations this research argues to include in the realm of business organisations under Ethiopian business laws. This argument will be explored in Section 3.

Registration of companies requires the incorporation of their partnership agreement in the Memorandum of Association and Articles of Association that will govern their operations.[28] Upon registration, they acquire legal personality to enter into the operational stage. Once established and registered, the organ registering them, the Ministry of Trade and Industry or the relevant regional bureau, recognizes their operations according to the registered memorandum and articles of association.

Should there be any need for amendment, any amendment to these establishing documents (Memorandum of Association and Articles of Association) has to be agreed upon by the members/shareholders[29] of the companies and registered at the Ministry of Trade and Industry in the same manner as the original establishing documents.[30] And, in the case of share companies engaged in the financial sector such as banking, insurance and micro-financing, these companies have to be registered by the National Bank of Ethiopia to acquire legal personality.[31]

b) Statutory Companies

Statutory companies (also known as "public enterprises" or "State owned enterprises, SOEs") are companies that are established by law, as opposed to

[27] See Articles 211 and 214, Commercial Code.

[28] See Articles 211, 221(2), 222(2), 313, 314, 516, 517 and 518, Commercial Code.

[29] Note that the term 'shareholders' is used here just for the sake of convenience. Both the definitional provisions of share company (Article 304) and private limited company (Article 510) speak in terms of 'members'. There are several differences between the rights of such members. In the case of a share company, the members have the right to get, *inter alia*, a certificate of shareholding (Article 330 *et seq*.), whereas this is not the case in private limited companies.

[30] Article 8(1), Commercial Registration and Business Licensing (Amendment) Proclamation No. 376/2003.

[31] See Article 5(7), The National Bank of Ethiopia Establishment (as Amended) Proclamation No. 591/2008; and Article 5, Banking Business Proclamation No. 592/2008, for instance.

registered companies which are established by a memorandum of association.[32] Public enterprises are defined as wholly State owned enterprises established to carry on for gain manufacturing, distribution, service rendering or other economic and related activities.[33] These are companies that are "formed to carry out some special public undertakings, for example, railway, waterworks, gas, electricity generation, etc."[34] They have several reasons for their establishment that include (a) national security for areas such as defence industries and public transport; (b) revenue raising in particular in events such as where tax collection is difficult or impossible; (c) economic control and self-reliance; (d) lack of private investment in undertakings where large-scale investment is required; (e) equity considerations when private companies fail to function profitably; and (f) the fear of private monopoly situations.[35] The major characteristics of such public enterprises include public ownership, public control and establishment by a separate law, having distinct legal personality, limited degree of autonomy and public finance.[36]

Public enterprises acquire legal personality upon establishment by the Council of Ministers Regulations to be issued pursuant to Article 6 of Proclamation No.25/1992. This establishment Regulations has to contain, *inter alia*, the name and purpose of the enterprise, authorized and paid up capital,

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[32] The fact that public enterprises could be referred to as companies could be inferred from the cross-reference provided by some provisions of Public Enterprises Proclamation No. 25/1992 to the applicability of the Commercial Code such as relating to the powers and duties of auditors of public enterprises and events of winding up and bankruptcy (*See* for e.g. Article 34 and 46 of this Proclamation). In addition, Article 4 of the Proclamation provides that the relevant provisions of the Commercial Code shall apply where the Proclamation does not provide expressly.

[33] Article 2 (1), Public Enterprises Proclamation No. 25/1992.

[34] See K.C Garg, R.C. Chawla and Vijay Gupta (1998), *Company Law* (New Delhi: Kalyani Publishers, 9th ed.), p. 38. Writing about the Tanzanian public enterprises, Hermaj says, "… the expressions parastatal, public corporation or enterprise [can] be used interchangeably to mean an institution/organisation which is not an integral part of the Government, but which includes an institution, organisation or agency that is wholly or mainly financed and/or owned and controlled by the Government." Mohammed B. Hemraj (2005), 'Formation of Public Enterprises in Tanzania', *Company Lawyer*, Vol. 26, No. 12, p. 379.

[35] See Privatization and Public Enterprises Supervising Agency (July 2008), 'Lessons from Privatization', *Biannual News Magazine*, Addis Ababa, Privatization and Public Enterprises Supervising Agency, Vol. 1, No. 3, p. 34.

[36] Abebe Eshetu (1994), *Organisation and Management of Public Enterprises Autonomy versus Control in the Light of Proclamation No. 25, 1992*, (Addis Ababa University, Faculty of Law, Unpublished), pp. 4-5.

extent of liability and supervising authority.[37] As companies established by Regulations, any change or amendment on the Regulation establishing such statutory companies has to go through the formal procedure of amendment of Regulations by the Council of Ministers.

It can be observed from review of the various Regulations establishing various types of public enterprises in various sectors that statutory companies operate in Ethiopia under three distinct names, i.e., corporations, enterprises and share companies. Prominent examples of corporations include the Ethiopian Telecommunication Corporation,[38] and the Ethiopian Electric Power Corporation;[39] examples of companies established as enterprises include the Ethiopian Airlines Enterprise,[40] Water Works Design and Supervision Enterprise,[41] Ethiopian Seed Enterprise[42] and agricultural development enterprises such as Bale Agricultural Development Enterprise, Arsi Agricultural Development Enterprise, and Awassa Agricultural Development Enterprise.[43] As regards State owned share companies, these are forms of share companies that are 'transitory' in nature as they are in the process of transformation and are waiting for sale to the private sector.[44] It must be underscored that the power to convert a public enterprise into a share company type of business organization resides in the Council of Ministers by virtue of Article 47(2) (a) of Proclamation No. 25/1992. The capitals of these share companies are divided into shares and totally held as government shares.[45]

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[37] See Article 6, 7 and 47 (1) (a), Public Enterprises Proclamation No. 25/1992.

[38] See Council of Ministers Regulation No. 99/2004, Establishing Ethiopian Telecommunication Corporation.

[39] See Council of Ministers Regulation No. 90/2003, Establishing the Ethiopian Electric Power Corporation.

[40] Council of Ministers Regulation No. 92/2003, Establishing the Ethiopian Airlines Enterprise.

[41] Council of Ministers Regulation No. 110/2004, Establishing Water Works Design and Supervision Enterprise.

[42] See Council of Ministers Regulation No. 100/2004, Establishing the Ethiopian Seed Enterprise.

[43] Privatization and Public Enterprises Supervising Agency, *supra* note 33, pp. 17-27.

[44] See Article 5, Privatization of Public Enterprises Proclamation No. 146/1998.

[45] See Article 5(2), Proclamation No. 146/1998. Note that Article 2(3) of Privatization and Public Enterprises Supervising Authority [Agency] Establishment Proclamation No.412/2004 defines share company to mean a company partially owned by the State but excluding those share companies in which the State owns shares through public enterprises. This definition amends the total ownership provision under Proclamation No. 146/1998 and Proclamation No. 277/2002 and introduces the possibility of joint ventures with the government in the event of partial privatization. It is also notable

Turning to a short historical synopsis of public enterprises in Ethiopia, the institutional framework under which economic enterprises operated prior to 1974 was a free enterprise system with an open policy in the sense that no minimum requirement was imposed on the establishment and operation of enterprises.[46] With the taking of power by the Dergue in 1974 and owing to the Marxist-Leninist political ideology that influenced policies and laws, many privately owned companies were nationalised and became public enterprises[47] through series of laws. The situation of public enterprises and the economy during this regime is well captured as follows:

> Since the middle of the seventies, public enterprises became one of the significant facets of the Ethiopian economy. Pursuing its economic and political policy of centralism, the Dergue regime expropriated private owners and nationalized large and medium scale enterprises in the productive, service and financial sectors… At the end of the seventies, the economy to a large extent was under the dominance of the socialist state and over 200 large public enterprises were operational. These enterprises accounted for over 20 per cent of Ethiopia's GDP. In some sectors, like manufacturing, mining, power and transport, the share of public enterprises added up to over 50 per cent of the total production.[48]

With the demise of the Dergue regime, the incumbent government adopted a market oriented economic policy that gives prevalence to the ownership of property by the private sector. This policy also opened the public enterprises that were in the hands of the government to private sector ownership. That is to say, the public enterprises are being privatised with a view to increasing private sector participation in the market and improving their performance.

In terms of modes of privatization, it should be noted that the types and processes of privatization could differ from one country to another. There are three types of privatization: political privatization, fiscal privatization and economic privatization. In political privatization, all the citizens are provided with share vouchers of state enterprises regardless of their economic viability,

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that the Ministry of Finance and Economic Development, among the organs of the government, actually owns such shares.

[46] Jesiah Selvam (2007), 'Privatisation Programme in Ethiopia: Is the Cause Justified?' *African Renaissance*, Vol.4, No.1, 1st Quarter, p. 2, available at <http://ssrn.com/abstract=987606>, visited on October 21, 2008.

[47] Such laws include Proclamation No. 20/75, Proclamation No. 13/77, Proclamation No. 163/79, Proclamation No. 60/78/ and Proclamation No. 156/78. See Abebe E., *supra* note 36, p. 55.

[48] See Forbes Global Magazine, July 26, 1999 Issue, available at: <http://www.winne.com/ethiopia/to07.html>, visited on July 7, 2009.

their capital stock and their management while in fiscal privatization, the enterprises are sold to the highest bidder that increases public revenue.[49] On the other hand, in economic privatization, the government or one of its agencies would manage the restructuring of privatized enterprises and negotiates clauses on employment, social benefits, training and redundancies with other private entrepreneurs.[50]

Just as the reasons for the creation of public enterprises are varied, the reasons for their privatization are also varied. In addition to the failure to meet the original objectives, diminishing profits to the State or continual increase of losses on the State, privatizations of public enterprises are also caused by other internal and external factors. These are (a) higher fiscal pressure on governments (high budgetary deficit, large domestic public debt, and large external debt), (b) higher dependency on loans from international organizations (WB and IMF), (c) a large share of SOEs in total investment, (d) inferior and poor performance of SOEs in production and profitability, and (e) lower long term growth.[51]

Although the incumbent government started with the privatization of some 224 public enterprises inherited from the previous regime,[52] the number of public enterprises increased for some time but is diminishing at present due to the privatization schemes. Since 1995 alone, "tenders of 308 enterprises and their branches have been floated so as to transfer them to the private sector. Among these enterprises 276 (89.6%) of them have been transferred to the private sector"[53] in the manufacturing, agro-industry, mining, hotels and tourism and trading.[54]

The process of preparing public enterprises for (private) market and competition takes different stages through what is known as commercialization

[49] Privatization and Public Enterprises Supervising Agency, *supra* note 33, p. 33.
[50] *Ibid*, p. 34.
[51] Selvam, *supra* note 46, p. 3.
[52] *Ibid*, p. 4.
[53] Privatization and Public Enterprises Supervising Agency (March 2008), '*Investment Opportunities in the Ethiopian Privatization Programme'*, Privatization and Public Enterprises Supervising Agency, Addis Ababa, p. 13.
[54] Note that some 84 public enterprises are also slated for privatization in the coming 3 to 4 years through equity participation (competitive bidding or joint venture) and non-equity participation (management contract or lease of existing facilities). See *Ibid*, pp. 15-20.

and corporatization.[55] The stage of *commercialization* refers to a process directed at establishing private sector management principles, values, practices and policies within public sector organization without involving the private sector at all.[56] *Corporatization*, on the other hand, refers to the legal process of converting an entity into a company although initially the State is the sole 'shareholder'.[57] Relating to this, Article 1(2) of the Privatization of Public Enterprises (Amendment) Proclamation No. 182/1999 provides that an enterprise converted into a share company shall cease to exist upon registration as share company and be replaced by the company.[58]

It is plain to conclude from this that once a public enterprise is converted into a share company and is registered as such, the Commercial Code should normally apply to the company. This is affirmed by Article 5(4) (c) of Proclamation No. 146/1998 where it is stated that the Commercial Code is *mutatis mutandis* applicable.[59] Such State owned share companies include the companies engaged in beverages industry (e.g. Awash Winery S.C and Bedele Brewery S.C), food industry (e.g. Faffa Food S.C and Kality Food S.C) and textiles such as Akaki Textiles S.C.[60]

2.1.2- Classification based on extent of liability

The liability of companies could be limited or unlimited. In unlimited companies, the members are also personally liable for the payment of the companies' liabilities.[61] Thus when the asset/capital of the company might not

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[55] See Stephen Greenberg (2006), *The State, Privatization and the Public Sector in South Africa* (Cape Town: Southern African People's Solidarity Network and Alternative Information and Development Centre), p. 3.

[56] *Id*.

[57] *Id*.

[58] Note, however, that such a share company is regarded still as a form of public enterprise. *See* the definition of "public enterprise" under Proclamation No. 277/2002 (Public Enterprises Supervising Authority and the Industrial Development Fund Establishment Proclamation) which defines an enterprise to mean an enterprise as defined under Article 2(1) of the Public Enterprises Proclamation No. 25/1992, or a wholly State owned share company.

[59] However, sub-Articles 3 and 4 of Article 5 of this Proclamation dictate that some provisions of the Code such as valuation of contributions in kind, shareholders meetings, appointment of directors, requirement of minimum number of shareholders and deposition of directors' shares as security with the company shall not be applicable to a share company corporatized from a public enterprise, as this form of company is somewhere between public enterprises and a full-fledged share company.

[60] Privatization and Public Enterprises Supervising Agency, supra note 53, pp. 15-20.

[61] See Gonga, *supra* note 12, p. 27.

be adequate to meet its liabilities, its creditors could resort to the personal property of the members/shareholders of the company to redeem their claim. It is worth noting that all companies in Ethiopia, be them registered or statutory, are limited liability companies.[62]

It is important to provide at this juncture an overview of the type of liability of business organizations in the Commercial Code. As stated above, Article 210(1) defines a business organisation as any association arising out of a partnership agreement. According to Article 212, only six different forms of business organizations are recognized. These are ordinary partnership, joint venture, general partnership, limited partnership, share company and private limited company.[63] It has to be noted, however, that Article 213(2) of the Code leaves room for special provisions that would be applicable to cooperative organizations. This would invite the issue of whether cooperative societies should be considered as traders or not. Obviously, cooperative societies are forms of business organizations established with lesser capital investment and slightly varying objectives such as consumer protection and housing construction. Essentially, they are profit-making companies but that is not their sole objective as they would also have objectives of assisting their members socially, economically and culturally. However, Article 6(2) of the Code provides that cooperative undertakings engaged in agricultural or forestry activities are not traders. However, in fact, cooperative societies could engage in several other activities than agriculture and forestry and possibly fall under the ambit of the Code.[64]

The business organizations under the Code could be further classified as commercial business organizations and non-commercial business organizations. Ordinary partnerships are non-commercial business organizations, while the rest are commercial in their nature.[65] It has to be underscored that Article 213 is permissive and the other forms of business organizations could also be formed as non-commercial business organizations except share companies and private limited companies, which are bound to be always commercial in nature.[66] This argument could be buttressed by Art 10 (1) which provides that business

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[62] See Article 304 and 510 of the Commercial Code and Article 7(2) of Proclamation No. 25/1992.

[63] Note that although a joint venture is mentioned as one form of business organization, it is not required to be formed in writing, though it needs to be formed by a contract of partnership as per Article 211 of the Commercial Code and hence does not have legal personality. See Article 272 (3), 210(2) and 214, Commercial Code.

[64] See Cooperative Societies Proclamation No. 147/1998 and Cooperative Societies (Amendment) Proclamation No. 402/2004 for further details.

[65] Article 213, Commercial Code.

[66] See Article 10(2), Commercial Code.

organisations shall be deemed to be of a commercial nature where their objects under the memorandum of association or in fact are to carry on any of the activities specified as trade in Article 5. That means, if the object of the business organisation does not fall under the activities specified under Article 5 of the Commercial Code, then the business organization is not of a commercial nature.

In terms of liability, these business organizations could be classified into three categories comprising *unlimited* liability, *limited* liability and *mixed* liability business organizations. Ordinary partnerships and general partnerships are unlimited liability business organizations[67]. That is to say, the liability of their members is not limited to the total capital of the organization but could extend to the personal property of its members. Share companies and private limited companies entail limited liability.[68] The liability of members of these business organizations is limited to the extent of their contribution, and does not extend to the personal property of their members. The last category is the one with mixed liability wherein some of the members bear unlimited liability while others bear limited liability. A limited partnership comprises two types of partners pursuant to Article 296 of the Commercial Code. These are the general partners who are in full liable personally, jointly and severally and limited partners who are only liable to the extent of their contributions. In the event of joint venture, the partners of a joint venture could bear unlimited or limited liability depending on their role in the venture. The manager of a joint venture who is partner is fully responsible for the liabilities of the joint venture as per Article 276(1); but the other partners who are not managers would be liable only to the extent agreed in the memorandum of association.[69]

In sum, members of companies are liable only up to the limited capital amount and they cannot be held liable beyond their share in the company. In the same fashion, the State, as owner of statutory companies, will not be liable beyond the total assets of the company. In other words, in the event that the assets of the company fail to meet the obligations of the company, the (personal) property of the State (and sometimes the State and other shareholders) cannot be utilized to settle the company's liabilities.

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[67] See Articles 255 and 280, Commercial Code.

[68] See Articles 304 and 510, Commercial Code.

[69] Article 276 (2), Commercial Code. Note that partners of a commercial joint venture who are not managers but act as managers will be jointly and severally liable as between themselves and the manager pursuant to Article 276(3).

2.1.3- Classification in relation with range of minimum membership and capital

Companies can be classified based on the minimum number of membership and minimum capital. In share companies, the requirement is to have at least five members with a contributed capital of not less than 50,000 Birr.[70] In the case of private limited companies (PLCs), the number of members cannot be less than two and more than fifty with a capital of not less than 15,000 Birr.[71]

It should be pointed out that in the light of the objectives of establishment of companies, PLCs would be very appropriate for family and small group of friends while share companies would be more appropriate for an expanded participation well beyond friendship or familial ties or connections. That is so because there is no requirement of publicizing the shares in PLCs, through instruments such as prospectus, and the members can easily pool their resources for investment. In the case of PLCs, as the minimum requirement of membership is small, a single individual could hold substantially all the shares and still remain legal in what is commonly referred to as 'one-man company':

> One man company is that company where one man holds practically the whole of the capital of the company and in order to meet the statutory requirement of minimum number of members, some dummy names are added. The dummy names which are added are mostly the relatives or friends of the principal shareholder.[72]

Although the one-man company is not a legally allowed form of PLC in Ethiopia, as provided under Article 512(2) of the Commercial Code, it is stated that the value of a share in a PLC could be as low as 10 Birr and a member can hold more than one share.[73] Thus, if two individuals agree to form a PLC with a capital worth 50 million Birr with value of each share at 10 Birr and one of them owns only one share, then it can be said that the PLC is nearly fully owned and controlled *for all practical purposes* by a single person. In addition, sometimes a person establishes a PLC (e.g. X and His Family PLC) and controls the whole company as he contributes a lion's share of the capital of the PLC in his name and the remaining part in the name of his children and the children happen to be

[70] Articles 306(1) and 307(1), Commercial Code.
[71] Articles 510(2) and 512(1), Commercial Code.
[72] Jain, *supra* note 10, p. 56. It should also be noted that there are, in fact, countries that allow a single individual to establish a company (though it is a complete misnomer to call a single individual's business a company or association) and legally hold/own all its shares. Though such a company is not recognized by the Commercial Code, one-man forms of PLCs exist, *de facto*, as explained below.
[73] See Article 512(2) and (3), Commercial Code.

incapable. This form of one-man PLC is bound to happen in particular in family businesses.

In relation to statutory companies (public enterprises), they are wholly owned by the State as provided for under Article 2(1) of Proclamation No.25/1992.[74] However, this may not be the case where they are converted into share company(ies) and partially privatized. In such an instance, the number of shareholders could be two or any number more than that: the government and the private shareholder(s). It should also be underscored that one cannot rule out the possibility of one-man *de facto* share companies that would be formed in the same way as the PLCs, with several dummy names included as shareholders.

2.1.4- Classification based on extent of control: Holding companies and subsidiary companies

In terms of the extent of control of one company over the other, companies can be classified into holding companies and subsidiary companies. Although this concept of control is covered in the Commercial Code, it is not dealt with in detail. What is meant by holding companies and subsidiary companies and their distinctions can be discussed in light of the provisions of the Commercial Code.

a) Holding Companies

A holding company, as the name implies, is a company which has control over another company.[75] A holding company is also known as a parent company. A holding could be determined based on the control the holder plays in terms of capital or the control the holder plays in decision-making through majority in the board of directors.[76] Under the Commercial Code, the concept of holding is hardly dealt with but there are few provisions on joint holding. This is provided for under Article 344 to prohibit passage of a certain capital limit. It determines the holding of share companies in terms of control on the capital and sub-Article 1 provides "[w]here ten per cent or more of the capital of one company is held by a second company, the first company may not hold shares in the second company".[77] This implies that a holding company can have as much a capital as possible but cross-holding is not allowed if one of them holds 10% or more of the capital of the other company. But if the share is less than 10%, it appears

[74] Note that these forms of companies could be taken as good examples of *de jure* one-man companies in Ethiopia.

[75] See Gonga, *supra* note 12, p. 32.

[76] See *Ibid*, pp. 32-33.

[77] See also Article 379 (Audit of the accounts of a holding company), Article 384 (Investigations on the affairs of holding companies and subsidiaries), and article 451 (Accounts of holding companies) of the Commercial Code as the relevant provisions on holdings companies.

that both of them can cross-hold capital in each other. In the event that their holding capitals exceed the 10% limit, they will be required to reduce their shares to less than the limit[78] under the conditions embodied under Article 344(4).

Some economic sectors such as the banking sector, for instance, require extra prudence in their operations. This has compelled Ethiopia to adopt additional laws on top of the Commercial Code to deal with their special nature.[79] The Banking Business Proclamation No. 592/2008 is such law issued to govern the banking sector more stringently than the other forms of share companies. Article 11 of this Proclamation provides for the limitation on acquisition of shares in banks as follows:

> "1) No person, other than the Federal Government of Ethiopia, may hold more than five percent of a bank's total shares either on his own or jointly with his spouse or with a person who is below the age of 18 related to him by consanguinity to the first degree .[…]
>
> 3) The amount of shares that may be held in a bank by a company, which is partially or fully owned by persons who have share in the bank, shall be determined by the National Bank.
>
> 4) An influential shareholder of any bank may not acquire shares in other banks."

Thus, a person other than the Federal Government may not hold more than 5% of a bank's share. In addition, Article 2(11) of this Proclamation introduces the concept of an "influential shareholder", who is a person who holds directly or indirectly two percent or more of the total subscribed capital of a bank, and prohibits him from acquiring shares in another bank. Moreover, a company fully or partially owned by persons cannot have a share that exceeds the amount of shares to be determined by the National Bank of Ethiopia. Therefore, the extent of cross-holding is tightly regulated, which makes the role of one (person) bank in another bank reduced.

According to the Commercial Code, a share company is required to keep at its head office a register showing the number and value of shares or debentures held by each director in any holding company of which the company is a subsidiary.[80] It should further be noted that there are several PLCs established

[78] See Article 344(2) and (3), Commercial Code.
[79] Compare Article 513, commercial Code.
[80] Article 360(1) (c), Commercial Code.

as holding companies to other PLCs in Ethiopia.[81] However, the Commercial Code does not have provisions on the status of holding companies in the form of PLCs. All the sparse provisions in the Commercial Code are in the part of the Code dealing with share companies. Further, the Commercial Code does not provide how events of cross-holding should be administered in the case of PLCs.

b) Subsidiary Companies

A subsidiary company refers to a situation whereby a company would be auxiliary to another company which would in turn be its holding or parent company. This makes the concepts of holding and subsidiary companies relative concepts as they are interdependent. Just like the holding companies, the Commercial Code does not provide detailed provisions on the concept of subsidiary companies, be them public or private, apart from mentioning them in certain provisions.[82] Besides, it should be noted here that a subsidiary company to, say, company X could itself be a holding company to company Y and such chain has to be clearly catered for in the Code in the future. This will definitely have a large bearing on issues of good corporate governance which is critical to advance private investment and attract foreign investment.

2.1.5- Classification based on type of ownership and reporting obligations

From the point of view of ownership, companies can be classified as government or State owned and non-government owned. Government owned companies are statutory companies, and the non-government companies refer to companies owned by persons other than the government such as individuals and other legal persons. Non-government companies can further be divided into public and private companies. In this sense, public company refers to share companies that are open for the general public to invest in while private companies refers to private limited companies that are open to a smaller circle such as family members or friends.[83]

With regard to regulatory power that emanates from ownership, public companies present their financial and annual reports to the general assembly of their members/shareholders as their superior organ,[84] while statutory companies,

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[81] This is the state of play in particular in those political party affiliated companies, which are also referred to as "endowments". This will not be dealt with in this research, as it would be beyond the scope of the research.

[82] See, for e.g., Articles 360 (1) (b) and (c), 384 and 556, Commercial Code for the details.

[83] See Gonga, *supra* note 12, pp. 30-33.

[84] See, for e.g., Articles 419(1) and 446, Commercial Code.

on the other hand, present their financial and annual performance reports to the Privatization and Public Enterprises Supervising Agency[85] and through it to the Ministry of Trade and Industry.[86] This will also have a lot of bearing on the manner in which the different forms of companies have to be administered with the view to promoting the interests of the State in general and the members/shareholders in particular.

2.1.6- Classification based on place of establishment: Local and foreign companies

Companies can further be classified as local and foreign based on their place of establishment.[87] While companies that are established according to Ethiopian law are known as local companies, whether they operate inside or outside their country of incorporation,[88] others incorporated abroad are called foreign companies. Foreign companies could operate having their principal place of business in Ethiopia or the subsidiary office (of the parent company) based in Ethiopia. Consequently, those companies that are incorporated abroad and whose head office or principal place of business is located in Ethiopia are subject to the provisions of the Commercial Code.[89] In addition, those companies that are incorporated abroad and which have subsidiary offices or branches in Ethiopia, with permanent representation, shall be subject in respect of each office or branch to the provisions of the Commercial Code. [90]

The Commercial Code requires under Article 557 that if the form of incorporation of a firm/business organization is different from those it recognises, i.e., which differs from those provided for and covered by the Commercial Code, the foreign business organization must be governed by the law of share companies. This would mean that the foreign firm/company shall fulfil the minimum capital requirement; and the governing bodies such as the board of directors, the management, shareholders' meetings etc. This could be

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[85] See Article 6(2) (g) and (h), Proclamation No.412/2004 and Article 6, Financial Public Enterprises Agency Establishment Council of Ministers Regulation No 98/2004.

[86] See Article 2(5) of Proclamation No. 412/2004 and Article 15(10) of the Definitions of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 471/2005

[87] See Goldberg, *supra* note 2, p. 508, for instance.

[88] See Article 559, Commercial Code.

[89] See Article 555, Commercial Code. Note that the Amharic version speaks in terms of principal 'purpose' of the business instead of the principal 'place' of business.

[90] See Article 556(1), Commercial Code. Note that the Commercial Code applies to all other forms of business organizations that correspond with the forms of business organization in Ethiopia.

seen as evidence that the Code appreciates the existence of different forms of companies abroad, but still declines to recognise that. This could be an area that requires closer attention as it could be seen as a discouraging factor for entities who want to come and invest in Ethiopia with different forms of establishment. In relation to foreign investment, it should be underlined that the areas under which such foreign companies can invest are restricted only to areas that are open to investment by foreigners.[91]

2.2- Main Features of Companies in Relation with Profit

As can be concluded from the foregoing discussion, companies are established to do some form of business. According to Article 10(2) of the Commercial Code, (registered) companies shall always be deemed to be of a commercial nature whatever their objects. In other words, they are always to be deemed as traders and operate a business.[92]

A business is defined as an incorporeal movable consisting of all movable property brought together and organised for the purpose of carrying out any of the commercial activities specified under the Code.[93] It consists of corporeal elements such as equipment or goods and incorporeal elements such as the goodwill of the business, its trade name, industrial design, patents and copyrights.[94] As traders, companies are professionally engaged in business activity with the motive of making profit,[95] which will basically be shared by the members/shareholders.

Statutory companies (enterprises) are also established with the motive of making profit. However, State owned enterprises are primarily needed to serve public interest, and, in principle, the private sector is not believed to have much interest in certain sectors or owing to the public utility of particular sectors. Be that as it may, statutory companies are established with an express motive of making a particular sector more efficient, productive and profitable competing with the private sector.[96] In the same manner as members/shareholders of a

[91] See Article 560 of the Commercial Code. See also Article 8 of the Investment Proclamation No. 280/2002 and Article 3 of the Investment Incentives and Areas Reserved for Domestic Investors Council of Ministers Regulation No. 84/2003 for areas that are open to foreign investment (and foreign companies) and those that are reserved for domestic investment.

[92] Articles 5 and 125(1), Commercial Code.

[93] Article 124, Commercial Code.

[94] Articles 127 and 128, Commercial Code.

[95] See the chapeau of Article 5, Commercial Code.

[96] See the second paragraph of the preamble, Proclamation No. 25/1992.

registered company, the State, as owner of these companies, receives dividend at the end of every financial year.[97]

It is pretty clear that registered companies have a profit motive behind their establishment and operation. They are established by private individuals, and in some cases, with certain participation of government through its enterprises.[98] Normally, a government in its capacity as the representative political entity of the public is not expected to make profit at the expense of its public. However, as discussed above, governments engage in profit making ventures and, to that extent, they play the role of the private sector. But the final gain will be for the public as a government is not expected to have a separate coffer from that of its public. Therefore, from the point of view of private nature, the difference that one can observe is mainly the form of ownership.

3. Characterization of Ethiopia Commodity Exchange as Company

It is obvious from the foregoing discussion that the frontiers of company law in Ethiopia shall not be determined based on the provisions of the Commercial Code alone. The law of public enterprises would also be within the bounds of the law of companies. It appears that the scope of the law of companies is expanding further with the advent of new forms such as Ethiopia Commodity Exchange ("ECX" or "the Exchange" hereinafter). It is worthwhile to briefly examine what ECX is; how it is established; how it operates; and how it is similar and/or different from the types of companies discussed thus far with the view to introducing the ECX and highlighting the issue of whether the Exchange could be referred to as a company under the existing laws of the country.

3.1- Meaning of commodity exchange

Commodity Exchange could be defined as a "central place where sellers and buyers meet to transact in an organised fashion, with certain clearly specified and transparent 'rules of the game'. In its wider sense, a commodity exchange is any organised market place where trade, with or without the physical commodities, is funnelled through a single mechanism, allowing for maximum effective competition among buyers and among sellers." [99]

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[97] See Article 2(9) and 31, Proclamation 25/1992.

[98] See, for e.g., Article 2(1) (a), Proclamation 146/2004.

[99] Eleni Z. Gabre-Madhin and Ian Goggin (November 2005), "Does Ethiopia Need a Commodity Exchange?: An Integrated Approach to Market Development: Concept Note", p. 6, available at: <http://www.ecx.com.et/KnowledgeCneter.aspx>, visited on March 12,2010.

Article 2(5) of Proclamation No. 550/2007 defines a commodity exchange to mean an exchange [place] where standardised commodity-linked contracts are traded.[100] The contract to be traded at the Exchange is in turn defined as "a standardised agreement to buy or sell a specified commodity, detailing the amount, grade and price of the commodity and the date on which the contract will mature and become deliverable for purposes of trading on the Exchange."[101] The ECX, therefore, is established by law to set forth "the rules of the game" for sellers and buyers as well as intermediary actors so that they all compete effectively in a transparent manner in a centralised market.

3.2- The Core Purposes of ECX: Information Revolution, Social Good...?

ECX is an institution established with the main objective of providing a fair and equitable marketplace for agricultural commodities,[102] which are the mainstay and backbone of Ethiopia's economy. The old agricultural marketing system in Ethiopia is fraught with numerous problems, which could be well described as follows:

> Ethiopia's marketing system is characterised by high costs and high risks of transacting. These conditions result in only one third of total agricultural output reaching the market and commodity buyers and sellers tend to trade only with those they know, to avoid the risk of being cheated or default. Trade is done on the basis of visual inspection because there is no assurance of product quality or quantity, which drives up marketing costs, leading to high consumer prices. For their part, small-scale farmers, who produce 95 per cent of Ethiopia's output, come to the market with little information and

[100] Note Article 2(4), Ethiopia Commodity Exchange Authority Proclamation No. 551/2007 ("Authority Proclamation No. 551/2007" hereinafter), which repeats this definition word for word.

[101] Article 2(6), Ethiopia Commodity Exchange Proclamation No. 550/2007.

[102] The term "commodity" is defined to mean a product which is interchangeable with another product of the same kind (*See* Article 2(4) of Proclamation No. 550/2007). As a general rule, however, all commodities are defined by three characteristics. The first characteristic is standardization. This means that one can take one unit of a commodity and replace it with another unit of the same commodity. Thus, commodities are said to be *interchangeable*. The second characteristic is *tradability*, which refers to two distinct features: the existence of a robust market place consisting of many buyers and sellers and the unique futures market, a trading structure not found in traditional investments. The third characteristic is *deliverability*, which refers to the actual physical exchange of a commodity between the seller and buyer. Scott Frush (2008), *Commodities Demystified* (New York: McGraw Hill), p. 6.

> at the mercy of the merchants in their nearest and only market, unable to negotiate better prices or reduce their market risk.[103]

With the view to curbing this problem, ECX creates an efficient, transparent and orderly marketing system, which serves the needs of buyers, sellers and intermediary actors and promotes the increased participation of small-scale agricultural producers, such as farmers and cooperative societies, by providing them with up-to-date market information that will enable them negotiate better prices for their produce.[104] The Exchange is a marketing system that will coordinate better, that will link faster, and that will protect the interests of both sides of the trade.[105]

This is expected to fundamentally change the traditional agricultural products trading system into a modern and centralized trading system with grade-specific *standardized contracts* and with *coordinated* offers (to sell) and bids (to buy) through a physical trading floor, with face-to-face open outcry bidding, or an electronic order matching system or both.[106] In terms of economics, it is said that "[t]he fact of having a single market mechanism to bring together the myriad of buyers and sellers at any point in time effectively results in the greatest concentration of trading for a given good.… This market mechanism … results in what is known as '*price discovery'*, that is, the emergence of true market-clearing price for a good at a particular point in time due to the highest possible concentration and competition among buyers and among sellers."[107] This would mean that the market will be competitive, products will get their true prices as a result of the competition and at the end of the day pave the way for the producers to get the price they deserve for their produce. The market, rather than varioius actors who strive to obtain their own advantage, will determine what should be paid for a commodity.

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[103] "Brief Introduction to the Proclamation Establishing the Ethiopia Commodity Exchange" (prepared as an explanatory memorandum for the adoption of the Proclamation), on file with the author, p. 1.

[104] See Article 6(1) and the preamble, Proclamation No. 550/2007.

[105] Brief Introduction to the Proclamation Establishing the Ethiopia Commodity Exchange, *supra* note 103, p. 1.

[106] Articles 20(3), 22(1) and 6((2) and (4)), Proclamation No. 550/2007. So far the Exchange is providing the market place for the face-to-face type of outcry bidding but will introduce the electronic order matching system in the future. Note that in the electronic order matching system the persons concluding the contract would not be expected to meet in person. They will do the trade electronically through the Exchange coordinated trading system from wherever they are in the country using their personal identity numbers and related passwords.

[107] Eleni G. and Ian Goggin, *supra* note 99, p. 6.

Immediately after trade is executed, the Exchange has the duty to disseminate the price information to the general public through various outlets on a timely basis and may not withhold or delay such information for any reason.[108] To facilitate this important and market revolutionizing information sharing, ECX has the obligation to operate a public electronic price dissemination system.[109] Certainly, this will strengthen the price discovery mechanism discussed above. Currently, dissemination of market price information is mainly done on real time basis in spite of the challenges on the part of telecommunication. Certainly, such dissemination will also have positive impact on enabling all actors in the society in general and the poor farmers in particular to make informed decision in price negotiations for their produce.

In general terms, the Exchange aims to provide *market integrity* (by guaranteeing the product grade and quantity and operating a system of clearing and settling of payments and goods); enhance *market efficiency* (by operating a trading system where buyers and sellers can coordinate smoothly at minimal costs); create *market transparency* (by disseminating market information in real time to all market players); and allow *risk management* (by offering its contracts for future delivery, providing sellers and buyers a way to lock-in prices for delivery of the physical goods at a pre-specified price).[110] It also provides an additional layer of protection for *compliance* with its laws by setting up compliance and alternative dispute settlement mechanisms in its structure.[111]

In is clear, therefore, that on top of revolutionizing the agricultural marketing information exchange system, the ECX carries mammoth *social-good* inspiration with it in favour of those parties that are negatively influenced by the existing market and attempts to mitigate the abject poverty prevailing in the country. In other words, ECX aims at creating a fair market by informing the market and the society about the price movement and related issues on a regular basis and by regulating the conduct of its actors thereby enabling the commodity marketing system to contribute to the country's development.

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[108] See Article 21 and Article 6 (8) and (3), Proclamation No. 550/2007.
[109] Article 21 (3), Proclamation No. 550/2007.
[110] Brief Introduction to the Proclamation Establishing the Ethiopia Commodity Exchange, *supra* note 103, p. 1
[111] See Article 3.5.8, the Revised Rules of the Exchange No.2/2009, and Article 28 and Article 6(7), Proclamation No. 550/2007.

3.3- Functional and Legal Aspects of the ECX

3.3.1- Demutualized[112] ownership, membership and management structure

a) Ownership and control mechanisms

ECX is an institution established by specific legislation and owned by the government. According to Article 3(1) of Proclamation No. 550/2007, ECX is a wholly State owned market institution, which commenced operation with a government authorised capital of 250 million Birr having its own legal personality.[113] As a government owned entity, it is *supervised* by the Ministry of Agriculture and Rural Development ("Ministry" hereinafter) and *regulated* by the Ethiopia Commodity Exchange Authority ("Authority" hereinafter).

In exercising its supervisory authority, the Ministry has the power to appoint and remove Government representative board directors; fix the allowances to be paid to board directors; appoint external auditors; cause the allocation of the authorized capital of the Exchange; approve audited financial reports of the Exchange; approve capital injection and net profit re-investment plan of the Exchange; evaluate the overall performance of the Exchange and submit studies, to the Council of Ministers, regarding the participation of the private sector in its ownership[114]; approve, in consultation with the board, the annual and long-term corporate targets of the Exchange and follow up their implementation; approve the salary structure of the Exchange without prejudice to the powers and duties given to the board; and perform other functions necessary for the protection of the ownership rights of the State.[115]

The Authority, on the other hand, regulates the day-to-day activities of the Exchange beginning from its establishment. It formulates directives concerning the regulation of the ECX and ensures fair competition among market participants.[116] As stated under Article 5 of the Authority Proclamation No.

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[112] The Proclamation establishing ECX does not define what is exactly meant by the term "demutualized", but explains its meaning by stating the roles of the owner of ECX (i.e., the government), of the members of the ECX (i.e., the private sector), and of the management of the ECX, that is drawn neither from the government, the owner, nor from the private sector, the businesspersons at the Exchange.

[113] Article 7, Proclamation No. 550/2007

[114] Please, note that the government does not intend to be the perpetual owner of the Exchange. Rather, the law leaves the doors open for the transfer of the ownership of the Exchange if and when the private sector is ready to succeed. The law requires a study to be conducted by the Ministry in this regard. Nonetheless, the Proclamation does not set any timeframe for the said study or the transfer of the ownership to the private sector.

[115] Articles 4, 15 and 18(2), Proclamation No. 550/2007.

[116] See Articles 6(3) and 5(1), Proclamation No. 551/2007.

551/2007, "[t]he general objective of the Authority is to ensure the development of an efficient modern trading system, and to regulate and control the secure, transparent and stable functioning of a Commodity Exchange and to protect the rights and benefits of sellers, buyers, intermediaries and the general public." According to Article 6 of the same Proclamation, which sets out the detailed powers and duties of the Authority as a governmental regulatory organ, the Authority has the power to recognize and regulate commodity exchanges, members of the Exchange and their associations, designated clearing institutions, designated warehouses and other Exchange actors to promote and protect public interest. In addition, the Authority has the power to prescribe and amend rules of the Exchange, requirements regarding membership, clearing and settlement and contracts to be traded on the Exchange.[117] Further, the Authority has the power to approve changes in the operations of the Exchange with respect to fees, the trading system, market information dissemination, dispute resolution and security.[118]

A point worth emphasis is that while the Ministry supervises the Exchange only as long as the government investment and ownership is not transferred to the private sector, the Authority regulates the Exchange in as long as the Exchange is alive. It is in the nature of the market that it needs to be regulated irrespective of the ownership of the Exchange. That is simply because the Exchange cannot effectively regulate itself and achieve the desired objectives as will be discussed further later.

b) Membership: Requirements, rights and obligations

The actual business activity of the Exchange is left to the members to be drawn from the private sector. The Exchange is established for the benefit of members, with permanent seats, to be recruited by the Exchange itself based on criteria to be set by its internal rules and regulations.[119] According to Article 4(2) of the Revised Rules of the Exchange, individuals, business organizations, public

[117] Article 12(10), Proclamation No. 550/2007.
[118] Article 30, Proclamation No. 550/2007.
[119] See Articles 3(2) and 8, Proclamation No. 550/2007. It worth noting that the Exchange has developed such criteria through the Revised Rules of the Exchange No. 2/2009, which defines a member, under Article 2.1.17, to mean any person recognised as an Exchange actor by the Authority fulfilling the requirements of the Exchange. The Rules of the Exchange are also available at the Exchange's website: <http://www.ecx.com.et/CompanyProfile.aspx#LR>, visited on March 17, 2010.

enterprises and cooperatives engaged in trading of commodities[120] are eligible to become members of the Exchange.

These persons/entities would generally be allowed to acquire a single permanent membership seat[121] by, *inter alia*, paying a membership seat price, annual membership maintenance fee and security deposit depending on the applicable membership type; providing necessary documents such as valid business license, value added tax registration certificate and tax identification number; passing a certification exam; and signing an undertaking in which they vow to abide by the laws and rules of the Exchange.[122] Once a membership applicant passes the review for fulfilment of such requirements, it will be issued with an approval letter, which will be communicated to the Authority for the purpose of recognition.[123]

Upon receipt of the approval letter from the Exchange, the Authority requires the person desiring to be recognised to, among others, provide valid business license, fulfil the minimum financial requirements, prove the minimum educational or business qualification, provide information about the business one is engaged in, submit names and addresses of managers of all its branches, show that the applicant has a well established business and risk management system and prove that the person has never been convicted of any financial offence or any offence which undermines his/her/its integrity.[124] Verifying these requirements, the Authority issues the applicant with a membership recognition certificate.

As noted above, membership grants a member with the permanent, freely transferrable and exclusive right to trade on the Exchange as well as the

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[120] See Article 8(1) (b), Proclamation No. 550/2007, for the limitation on the types of traders allowed to become members of the Exchange. The Proclamation shows that it is only commodity trades, and processors of same, that can be members of the Exchange.

[121] A membership seat is a permanent, freely transferrable and exclusive right to trade on the Exchange as per Article 2.1.18 of the Revised Rules of the Exchange No. 2/2009. These seats of members can be seen as counterparts of shares in a share company, but the members in the case of the Exchange do not have any stake in the profits of the Exchange apart from using the Exchange as a platform for their trade.

[122] See Articles 4.2.2, 4.6.2.3, 4.6.2.4 and 4.6.2.5 of the Revise Rules of the Exchange cum Article 8(2) and (3) of Proclamation No. 550/2007.

[123] See Article 8(1) (a), Proclamation No. 550/2007, cum Article 4.6.4.4, Revised Rules of the Exchange No. 2/2009.

[124] See Article 17, Proclamation No. 551/2007, cum Part 6, Directives of Ethiopia Commodity Exchange Authority, adopted on March 10, 2008. It should be noted that a similar process is used to approve authorised representatives or recognised agents of members as well.

privilege to participate in the governance of the Exchange through election of member representatives to the board of directors of the Exchange.[125] Membership also grants members to have their disputes relating to trading at the Exchange resolved through the Exchange Arbitration Tribunal.[126] As the Exchange operates based on membership, it is unlawful for a person who is not recognised as a member or as a recognised agent of a member to solicit or accept orders for the purchase or sale of any Exchange traded contract on the Exchange.[127]

Moreover, members have numerous obligations towards the Exchange. These obligations include depositing the commodity they want to sell at a warehouse designated by the Exchange;[128] maintaining accounts with any of the affiliated recognised Exchange clearing institutions and deposit funds before trade day;[129] granting written notice of power of attorney to the Exchange authorising the Exchange to issue debit and credit instructions to affiliated recognised Exchange clearing institutions for the purposes of clearing and settlement;[130] liability for non-performance of Exchange traded contracts in accordance with the relevant law;[131] liability for acts, omissions and failures of any agent acting on their behalf; [132] and complying with the Rules of the Exchange and other relevant laws.[133]

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[125] Article 8(2), (3), (5), (6), Proclamation No. 550/2007, cum Article 4.4.1 and 4.4.2, Revised Rules of the Exchange No.2/2009. Note that there are exceptional categories of members that are called limited members, whose rights are limited as they will be recognised on a transitional basis only for one year and their membership is not transferrable to third party. They will be given limited membership simply because they would not be able to fulfil the financial requirements of membership at the Exchange. These limited members are expected to transition to full membership at the end of the one year of their recognition. This has been implemented by the Exchange on coffee traders hitherto. See Article 4.4.3, 4.4.4 and 4.4.5, Revised Rules of the Exchange No.2/2009.

[126] Article 20(1), Proclamation No. 550/2007, cum Article 15, Revised Rules of the Exchange No. 2/2009.

[127] Article 20(1), Proclamation No. 550/2007, cum Article 16, Proclamation No. 551/2007.

[128] Article 8.2.1, Revised Rules of the Exchange No. 2/2009.

[129] Article 25(2), Proclamation No. 550/2007.

[130] Article 25(3), Proclamation No. 550/2007.

[131] Article 9(3), Proclamation No. 550/2007.

[132] Article 9(4), Proclamation No. 550/2007.

[133] See Articles 4.5.1- 4.5.15 and 4.11, Revised Rules of the Exchange No. 2/2009.

c) Operational management

The operational management of ECX is left for an autonomous and professional management.[134] In its organisational structure, the Exchange has a board of directors, a chief executive officer, officers in charge of departments and the necessary staff.[135] As an autonomous and professionally managed institution, neither the government nor the members have the right to assign employees to the Exchange.

Thus, in the words of the establishing law, the ownership, the membership and the management aspects of the Exchange are segregated and demutualized.[136] Put differently, the government is the owner of the Exchange; the Exchange actually operates for members who could be traders or producers; and the Exchange is managed by autonomous professionals, which come neither from the government nor the members. This demonstrates that the three actors are planned to be mutually exclusive in their respective areas of operation. This is despite the shared board of directors' representation, which will definitely have impact on the autonomy of the management of the Exchange.

3.3.2- The issue of characterization

In view of the ownership, membership and management of the institution demutualized as such, the question that arises at this point would be how to characterize the ECX in terms of Ethiopian law. Could it be regarded as a registered company according to the Commercial Code? Is it a statutory company (enterprise) according to the law of public enterprises? Or, is it neither of these, with distinct identity? These issues need some discussion and analysis.

a) ECX as a commercial entity

ECX itself does not buy or sell commodities, but provides the platform for persons who want to trade or buy and sell commodities. In other words, it facilitates trading activity by other (private) persons who have become members.[137] In the process, it receives the commodity, after due grading, from a

[134] See Article 18, Proclamation No. 550/2007.

[135] See Article 10, Proclamation No. 550/2007 and Articles 3.5, 3.6 and 3.7, Revised Rules of the Exchange No. 2/2009.

[136] See Article 3(3), Proclamation No. 550/2007.

[137] Note that the class of members known as intermediary members can trade for themselves as well as for and on behalf of others (see Article 8(1)(b) of Proclamation No. 550/2007 for example) such as producers who cannot fulfill the criteria of membership. Those people who get represented by intermediary members are called clients. The ECX attempts to reach the poor farmers in this way; for example, the

seller into its (designated) warehouses as well as the money for the purchase by a buyer into its designated banks. Upon execution of transaction, it clears the transaction to identify who owes what, to whom and settles the transaction by paying the seller its money and delivering the buyer its commodities.[138] In facilitating trade by paying money to the seller and delivering grade certified commodities to the buyer, the Exchange assures both parties as to the proper performance of the contract and guarantees or insures same. As such, it addresses the problem of defaults and introduces the concept of "zero default" [139] into the spot contracts traded at the Exchange.[140] In doing so, the Exchange only acts as an intermediary between buyers and sellers or as a commercial broker. According to Article 56(1) of the Commercial Code:

> A commercial broker is a person or business organisation who, independently, professionally and for gain, brings parties together for the

farmers can form a cooperative union and supply their products in an organised form as members or as clients of members at the Exchange.

[138] See Articles 24 and 25, Proclamation No. 550/2007 and Articles 24-26 of the Authority Proclamation No. 551/2007.

[139] It is worth noting that Article 6(6) of this Proclamation talks in terms of "minimized default risk", which seems to be the case when the Exchange starts trading in futures contracts.

[140] Pursuant to Article 22(1) of Proclamation No. 550/2007, there are two types of contracts for agricultural commodities to be traded at the Exchange. These are spot contracts and futures contracts. As per Article 2(15) of Proclamation 550/2007, a *spot contract* is an Exchange traded contract for immediate delivery of and payment for the commodity. This provision is further clarified by Article 2.1.38 of the Revised Rules of the Exchange to mean an Exchange traded contract for payment on the same day and physical delivery within a maximum of 10 working days from the date of transaction. What essentially makes this a "spot" contract is the fact that the commodity is already deposited at one of the Exchange warehouses and the funds for the transaction had been deposited at one of the Exchange affiliated banks before the transaction. On the other hand, a *futures contract* is an Exchange traded contract to buy or sell a commodity for delivery of the physical good or commodity at a specified future date (Article 2(10), Proclamation No. 550/2007). Unlike spot contracts, futures contracts do not require the deposition of the commodity to be traded at the Exchange warehouses before trade date. The contract will be concluded with a seller who promises to deliver the commodity within 30 days, 45 days, 60 days, or 90 days terms or even more time. The buyer buys the commodity paying the future price of the commodity, but the Exchange guarantees the delivery of the commodity at the agreed time. In this connection, Article 22(2) of Proclamation No. 550/2007 empowers the Exchange to develop the grade basis, date and place of delivery of the commodities as well as other contractual terms for each contract. It is worth noting that the Exchange has not started trading in futures contracts yet.

> purpose of their entering into an agreement such as a contract of sale, lease, insurance or carriage.

The Exchange is a legal person established to bring together buyers and sellers as well as intermediaries[141] to enable them negotiate and enter into a contract of sale of goods (commodities)[142] with the purpose of gaining profit.[143] This makes the Exchange a commercial broker, and in effect, a trader.[144] However, while in practice brokerage can take place either at the place of the broker or the buyer or the seller, Article 6(2) of the Exchange Proclamation requires that the transaction take place at the place of the broker in the case of the Exchange. According to this sub-Article, the Exchange is established to provide a *centralised* trading mechanism in which buyers and sellers are coordinated through a *physical trading floor* with open outcry bidding or an *electronic order matching system* or both. Thus, whether the transaction takes place face-to-face or electronically, it has to be conducted via the system of the ECX through its centralised trading mechanism.

As an organization with legal personality established by law to engage in brokerage, it also appears that the Exchange is a type of organization with a commercial nature according to Article 10 of the Commercial Code. However, it is arguable that the Exchange cannot fall under Article 10 of the Commercial Code, as it does not fulfil the language "… objects under memorandum of association or in fact". Looking at the issue from the point of the meaning of business organizations under the Commercial Code strengthens this argument. In this regard, Article 210 requires a business organization to be established by a partnership agreement. Obviously, ECX would not satisfy this legal requirement to qualify as a business organization as per the Commercial Code. It is established by the government as the sole owner, and there is not any sort of

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[141] See Article 6(1), Proclamation No. 550/2007.

[142] See Article 22, Proclamation No. 550/2007

[143] See Article 15(6), Proclamation No. 550/2007, which talks about the re-investment of net profit. But there is no explicit provision that elaborates the profit motive as opposed to its social good motive. This being so, one cannot think of "net profit" without that being the objective of the institution. Also as indicated elsewhere, the Exchange collects membership maintenance fee, security deposit, which is interest free but investable by the Exchange for profit, warehouse storage fee, warehouse handling fee, transaction fee and penalty fees, in the event of breaches. See Article 8(4) and Article 30(3) of Proclamation No. 550/2007 and the Revised Rules of the Exchange No. 2/2009 for the detailed rules on these sources of revenues.

[144] See Articles 56(2) and 5(19) and (20), Commercial Code. It should also be underlined that as the Commercial Code characterizes "stock" brokers to be traders under Article 5(19) and Article 62, there is no reason not to characterize "commodity" brokers as traders.

partnership agreement for the allocated capital by the government. It is rather established, unlike public enterprises which get established by Regulations,[145] by a Proclamation that stands on its own. But this cannot deny the Exchange of acquiring the status of trader as explained above.

b) Non-transfer of profits/dividend to the State

In addition to being a limited liability institution bearing liabilities only to the extent of its capital,[146] ECX is a profit-oriented institution. This evokes a question as to who owns the profit. Is it the government, who is the owner of the Exchange, or the Exchange itself, as an independent/autonomous institution? As the Exchange Proclamation does not answer this question directly, there arises a need to interpret its provisions. As discussed above, the government provides a (initial) capital for start up with the possibility of capital injection at a later stage.[147] However, there is no provision that requires the Exchange to channel/share profits with the State in the form of dividend or otherwise. Buttressing this view, the Proclamation authorizes the Exchange to re-invest its profits and other funds such as the settlement guarantee fund upon the approval of its board of directors and the Ministry.[148]

Unlike public enterprises, there is no provision in the Proclamation that envisages the accrual of dividend to the State from profits that may be obtained by the Exchange. Seen in light of these, the Exchange does not qualify to be called a public enterprise as provided for in Proclamation No. 25/1992, but seems to be a different form of business organization as will be discussed below.

c) Unique public-private shared board of directors' structure

Structurally viewed, share companies have, among others, board of directors drawn from members/shareholders of the company;[149] appointed auditors;[150] and shareholders' meetings[151] in their management structure. [152] Public enterprises

[145] In fact, it could also be argued that the Council of Ministers establishes public enterprises by Regulations based on the express authority granted to it by the parliament via Article 6 of Proclamation No. 25/1992.
[146] Article 9(3), Proclamation No. 550/2007.
[147] See Article 15(6), Proclamation No. 550/2007.
[148] See Article 12(5) and 15(6) respectively, Proclamation 550/2007.
[149] See Article 347 *et seq*, Commercial Code.
[150] See Article 368 *et seq*, Commercial Code.
[151] See Article 388 *et seq*, Commercial Code.
[152] In most jurisdictions, incorporated companies are identified by five basic characteristics: (a) recognition of the company as entity distinct from all its shareholders (legal personality); (b) the flexibility and adaptability of the company form; (c) ease of transferability of investor interest; (d) limited liability for investors;

(statutory companies), on their part, have an Agency and government appointed boards of management, which includes the board of directors of share companies wholly owned by the State, to follow up their proper operation to meet their establishment objectives.[153]

ECX, as elaborated above, is *regulated* by the Authority established for that purpose and *supervised* by the Ministry as the supervising authority. Within its structure, however, it has a board of directors drawn from government representatives, appointed to safeguard the government's capital investment, and representatives of members of the Exchange, appointed to represent and safeguard the interests of the private sector participating in the Exchange. According to Article 11(1) of Proclamation No. 550/2007, the board of directors consists of eleven members, of whom six, including the chairperson, are appointed by the Ministry[154] and five are elected by the members of the Exchange among themselves. This is another factor that prevents the Exchange from being characterised as either a public enterprise or a share company.

d) ECX as a self-regulatory organisation (SRO)

The regulatory mechanisms of the Exchange can be divided into two: internal and external. As mentioned above, externally ECX is *regulated* by the Authority and *supervised* by the Ministry. These external control mechanisms aim at promoting the public interest and ensuring that the objectives of the Exchange as set out by the owner, government, are achieved.

In terms of internal regulatory mechanisms, in the event where a member of the Exchange or his legal representative fails to observe its obligations, the Exchange has a mechanism for ensuring compliance with applicable laws by

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and (e) specialised management, separate from ownership. See J.J. Du Plessis, 'Some International Developments in Company Law: a South African Perspective', *Company Lawyer* (1993), Vol. 14, No. 11, p. 228. Among these key characteristics, ECX would not easily fulfil the flexibility and adaptability as well as ease of transferability of investor interest characteristics of an incorporated company.

[153] See Articles 8, 9 and 2(4) of Privatization and Public Enterprises Supervising [Agency] Establishment Proclamation No. 412/2004 and Article 6, Financial Public Enterprises Agency Establishment Council of Ministers Regulation No 98/2004 in particular.

[154] One may raise the question, if the government has such representation in the policy making organ of the Exchange, i.e., the board of directors, then how demutualised the ownership is and how autonomous the professional management could be. These are legitimate questions but the joint representation in the board of directors is necessitated chiefly due to the shared nature of the ownership and benefits from the Exchange between the State/government and the private sector as well as its hybrid features that emanate from this.

investigating and taking disciplinary actions. This compliance mechanism is further equipped with a full-fledged in-house arbitral dispute settlement tribunal.[155] This makes the Exchange a full-fledged SRO that regulates itself before external regulators intervene in its internal affairs. It is obvious to observe from this that there are at least *three layers* of regulations in the Exchange: (a) the Exchange itself as an SRO, (b) the Authority, and (c) the Ministry. In the spectrum of powers of the Authority, of the Ministry and of the Exchange, one would wonder where the powers of one begins and ends and how possible conflicts of authority could be resolved.

In any event, if the Exchange has the power to regulate itself in this manner, then why is the external control mechanism put in place? The answer is short and simple: the external control mechanisms are necessary because of the inherent conflict of interest issues that would arise if all the control is left to the Exchange alone. This will become very important when the control is viewed from the point of view of the protection of the public interest at stake. In other words, such 'multiple' layers of regulations are needed to avoid conflict of interest, to effectively ensure the integrity of the market and to build the confidence of its stakeholders.

Although one would observe a degree of external and internal control in share companies as well as public enterprises, the extent of the control to be established by using articles of association (in the case of share companies) and possible directives (in the case of public enterprises) would not go as far as conducting investigations proper and taking disciplinary measures on lawbreakers to ensure compliance. Rather, they will rely on the regular law enforcement authorities including the police and the office of the Public Prosecutor. Moreover, they do not have an established legally supported in-house arbitral mechanism to resolve disputes relating to business transactions and to expedite dispute resolution.

[155] See Article 28 and Article 6(7), Proclamation No. 550/2007. It is worth a remark that ECX is an institution that is legally bestowed with the power to conduct in-house arbitration and resolve disputes between members *inter se* and members and clients as per Article 15.1 of the Revised Rules of the Exchange No. 2/2009. Unless the Exchange is a party to a dispute, all Exchange traded contracts related disputes have to be handled through the Exchange facilitated arbitration tribunal. This surely will facilitate the resolution of business disputes in an expeditious manner and save the precious times of businessmen that would have been spent by taking their case to the regular courts, which are overly congested by cases, or by going to other arbitral institutions.

e) ECX as a hybrid-model company

In light of the discussion above, the Exchange shares some features of registered companies (at least some features of share companies) and other features of statutory companies, but does not wholly fulfill the legal criteria for either of the two. It can thus be characterized as a "*hybrid-model*" of company in Ethiopia. It could be referred to as a "hybrid-model" because it has some features of public enterprises (at least due to ownership) as well as that of registered companies (at least due to some aspects of its private membership and part of its management structure). But it cannot be characterised as one or the other as it does not meet the full criteria for share companies or public enterprises. In a manner that seems to be in keeping with this, the Exchange characterises itself as 'public-private partnership enterprise'[156] demonstrating the fact that it has both the private and public elements and that the investment obtained from the government upon its establishment is solely meant for the operation of the Exchange and use by the private sector.

In developing countries, the private sector does not seem to have the strength, readiness and volition to establish and run a commodity exchange that can relieve the market from the age-old commodity marketing system.[157] In fact, in countries likes Ethiopia, the private sector in charge of the exchange transactions is not expected to be in favour of the establishment of a commodity exchange simply because the existence of a commodity exchange would level the playing field between producers/suppliers, which are by and large the poor farmers, and certain traders, who get unfairly large profits as compared to the farmers who work hard for seasons to produce a given commodity. That is to say, a certain part of the business community will lose part of its established profits if it introduces such a fair and transparent commodity marketing system.[158]

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[156] See Company Profile, available at:
< http://www.ecx.com.et/CompanyProfile.aspx#AAU>, visited on August 12, 2009.

[157] Please, note, however, that there are several commodity exchanges in the developing world, which are established by the private sector in the form of companies though mostly they prove to be unsuccessful. See, for example, the Kenya Agricultural Commodity Exchange Ltd., available at:
<http://www.kacekenya.com>, visited on March 11, 2010; the Multi-Commodity Exchange of India Ltd., available at:
<http://www.mcxindia.com/aboutus/aboutus.htm>, visited on March 11, 2010; and Uganda Commodity Exchange, available at: <http://www.uce.co.ug>, visited on March 11, 2010.

[158] Note that, as mentioned above, the fundamental *raison d'être* of ECX is creating an efficient, transparent and orderly marketing system, which serves the needs of

A commodity exchange is needed because the commodities market was, and still is, fraught with numerous problems including middlemen who do not usually add any value but rather hinder the market from operating efficiently towards fair benefits to the producers. Such middlemen, who are commonly referred to as *delalas* (brokers), simply complicate the transaction process by acts such as hoarding products, withholding market information, misinforming the producers about the real market situation, using some cartels etc and make the producers lose benefits they would actually be entitled to had the market been competitive, open and orderly. Moreover, such long chains of transaction, that would not add any value apart from transferring the same commodity in an unfairly broker-dominated manner, would contribute to the deterioration and lower quality of commodities. The ECX mainly aims to, among others, improve such unbalanced relationships in the commodities markets and improve the quality of commodities by shortening the transaction chain and by using standardized grading specifications.[159]

On the other hand, the government could establish a commodity exchange in the form of a public enterprise proper and operate it, but it would not attract the private sector or the business community and achieve the desired goals of a commodity exchange, which are creating a fair, transparent, orderly and efficient marketing system. It would also be difficult to think how the government can involve the private sector in a manner that would bring about these much-desired results.[160]

Without the effective participation of the private sector, a commodity exchange in the form of public enterprise *per se* would not make sense. Therefore, a joint-pursuit towards *public-private partnership* would make a good compromise in Ethiopia for two main reasons: (a) it will enable the

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buyers, sellers and intermediaries and promoting the increased market participation of Ethiopian small-scale producers. See Article 6(1) and paragraph 2 of the preamble, Proclamation No. 550/2007.

[159] Such objectives are being expressly used in subsequent commodity laws such as the Coffee Quality Control and Marketing Proclamation No. 602/2008. While laying down the objectives of the Proclamation, the preamble of the Proclamation expressly states: "… it has been found necessary to make the coffee marketing system fast and cost effective, in order to enable coffee producers to earn better income from coffee transactions; and …in order to efficiently supply quality and competitive coffee to the global market, it has become necessary to establish an improved system for coffee quality control and marketing".

[160] A case in point is the failure to liberalise the coffee transaction from such unfair marketing system using the defunct Coffee Auction Centre, which was operating under the Ministry of Agriculture and Rural Development until coffee transaction was fully transferred to the ECX by Proclamation No. 602/2008.

government to create a joint venture with the private sector and achieve its goal of improving and modernizing the traditional marketing system prevailing in the country, and (b) it will ease the fear and suspicion of the private sector to actually invest in such ventures thereby reducing the extent of the risk to be incurred by the private sector and enabling it rather to take advantage of, at a minimal expense, the modern marketing system established by the government. As discussed above, this is exactly what the ECX does. This makes it certain that the ECX cannot be characterised as a public enterprise. If it cannot be a public enterprise, then what can it be? The remaining option in our legal system is share company, among the list of companies, but as discussed above, ECX does not meet the requirements of a share company as well.[161]

The partnership between the public and private sectors indeed is a unique innovation in the country, which would not have happened had it not been for the new legal framework establishing the ECX. The ECX has established an exchange that is considered as "the first of its kind in Africa".[162] Soon after its establishment, the unique public-private partnership model of ECX is commended by the international community including African States. Subsequently, representatives of several African countries visited the ECX and conferred with the Exchange with the view to sharing experience and trying to adopt the same model in their respective jurisdictions.

In sum, the mutual representation of the government and the private sector, the 'demutualised' ownership, membership and management aspects, the non-transfer of profits of the Exchange as dividend to the State, the SRO nature of the Exchange, the membership recruitment and recognition requirement, and its establishment by a Proclamation as opposed to the establishment of public enterprises by Regulations*, inter alia*, show that ECX is not a public enterprise proper. And on the other hand, the fact that it is established by the government, the public-private participation in the board of management and the private nature of its membership, among others, show that it is not a company under the 1960 Commercial Code. Nor does ECX share the features of share companies solely owned by the government. The author of this article thus holds that the form of legislation that established the ECX can be regarded as a new variety of company law which widens the horizon of the traditional conception of the company law in Ethiopia, and this warrants revisiting the mainstream conception of the scope of the law of companies in the country.

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[161] This is one of the main reasons that inspired this research.

[162] See Company Profile, available at: <http://www.ecx.com.et/CompanyProfile.aspx> visited on March 12, 2010.

Conclusion

There are two different approaches of understanding the scope of company law. The first pursues a narrower and *literal* interpretation of company law purely based on the terminology used in the Commercial Code, i.e., the description given to 'business organisation' and which depends on the existence of a partnership agreement. The other approach can be a broader definition and understanding of the term "company" in pursuance of *purposive* and *logical* interpretation thereby taking the events after the promulgation of the 1960 Commercial Code into account. In the latter conception the term company could also cover entities in the public domain such as public enterprises. Even after adopting the broader understanding of the term company law, it may still become difficult to characterise the ECX as a company under Ethiopian laws.

In terms of merit, the ECX is an institution established by Proclamation to engage in and enhance the traditional commodity trading system by serving as a *warehouse*, a *centralised trading place and trading system*, an *institution to engage in partial banking services* (as it clears and settles transactions via designated banks), *medium for real time information dissemination* (via an advanced IT system) and a legally recognized *alternative dispute resolution (ADR) institution* for its members and their clients. Moreover, it is authorised by law to act as a *broker* between buyers and sellers at its own trading floor. It is not difficult to see, from this range of powers, how much responsibility and importance is given to the ECX to break the age-old traditional trading system of the country that is fraught with abundant precarious problems.

These rewards remaining right, the advent of the ECX has, nevertheless, introduced real challenges to the frontiers of company law in the Commercial Code as well as in the Public Enterprises Proclamation. The requirement of partnership agreement single-handedly excludes the ECX model from the list of business organizations envisaged under the 1960 Commercial Code, as ECX is solely established and owned by the government. This seems to make the traditional classification of companies under the Commercial Code outdated. As such, the ECX model fits neither with the elements of share companies nor with the elements of the law of public enterprises.

In this regard, while elements such as the fact that it is established by the government, with a shared public-private board of management, through the instrumentality of a Proclamation and private membership show that the ECX model does not squarely fit with the features of company under the Commercial Code; elements such as the mutual representation of the government and the private sector; the 'demutualised' ownership, membership and management; the non-transfer of profits/dividend to the State; and establishment by a Proclamation, in contrast to Regulations, show that the ECX model does not squarely fit with the features of a public enterprise. Therefore, ECX is a unique

"*hybrid-model*" of company, which borrows some elements from public enterprises and others from registered companies. Even more so, it sounds logical to envisage that this frontier of company law is to be challenged further by the foreseeable introduction of a stock exchange if it is not going to be established in one of the existing forms.

As observed above, statutory companies and registered companies (and even the ECX, to a large extent) share several commonalities including purpose, structure of management and nature of operations with the former carrying more of a public orientation. But the law of companies seems to be heavily fragmented into several laws, among others, the Commercial Code of 1960 and the Commercial Registration and Business Licensing Proclamation No. 67/1997 and its Amendment Proclamation No. 376/2003 as well as regulations issued pursuant to it; the Public Enterprises Proclamation No. 25/1992 and amendments and regulations issued pursuant to it; the Cooperative Societies Proclamation No. 147/1998 and its Amendment Proclamation No. 402/2004; and the ECX Establishment Proclamation No. 550/2007. This research concludes that share companies, private limited companies, public enterprises, cooperative societies and the ECX are various forms of companies existing in Ethiopia although they do not squarely fit into the meaning of business organisations as enunciated in the Commercial Code.

This fragmentation can be rectified through integration and harmonisation in the course of amending the Commercial Code. One way of doing this could be the "constitutional approach" in which the Code recognizes the various forms of companies discussed above and leaves the detailed provisions to other subsidiary or parallel legislation. In such a case, the Code would have to lay the basic common features of what constitutes a company and leave the details to the other legislation. In particular, the definitional provisions dealing with business organisation need to be revisited and broadened. In addition, the amendment process of the Commercial Code is expected to look into the deficiencies in the areas such as the regulation and administration of holding companies and subsidiary companies to share companies and PLCs. This could also be important in bringing about good corporate governance in Ethiopia as it would create more harmony and clarity in responsibilities. ■

BOOK REVIEW

THE MEMORY OF JUDGMENT:

MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST

Author: **Lawrence Douglas**

Publication: Yale University Press: New Haven: 2001 (318 pages)

Book Review: Awol K. Allo ♣

Lawrence Douglas' book[1], *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* is a meticulously written and powerfully argued intellectual work on a pedagogic function and performance of a trial. Cutting through the major trials of the Holocaust from the Nuremberg, to the Eichmann and Demjanjuk trials in Jerusalem and to the Barbie and Zundel trials in France and Canada respectively, Douglas brings to life the behind-the-scene political struggles and melodramatic representation of traumatic history. With great erudition and industry, he exposes the disruptive strategies deployed by the prosecution and the defense to perform certain functions and therefore achieve purposes extraneous to the law. He examines the relevance of different forms of testimonials from unburdening survivor narratives to the screening of a film —a film that is not amenable to cross-examination— in a manner that advances his conception of the trial both as a tool of 'normative re-construction and historical instruction'.

The Memory of Judgment explores two categories of trials. The first category of trials, the Nuremburg, Eichmann, Demjanjuk and Barbie trials, deal with major Nazi criminals who perpetrated the crimes named under the Nuremberg Charter, the laws of France and Israel. The second category of trials is a trial aimed at policing institutionally-sanctioned memory through the criminal law by prosecuting those accused of publicly denying the 'truth' of the Holocaust—a 'truth' and memory the facticity of which is established and guarded by a law.

♣ LL. B (Addis Ababa University), LL. M (Notre Dame Law School, the University of Notre Dame, USA), PhD Student, (The School of Law, University of Glasgow, UK); Lecturer in Law, St. Mary's University College, Faculty of Law (Currently on study leave).

[1] Lawrence Douglas (2001), *The Memory of Judgment*: Making Law and History in the Trials of the Holocaust (New Haven: Yale University Press).

In this seminal scholarship that seeks to explore the ability of the law to comprehend incomprehensible atrocities through a legal judgment, Douglas unveils his conception of the criminal trial as a tool of didactic legality. At the heart of his conception of didactic legality lies the idea that calls for the use of the trial forum both for strictly juridical and broadly pedagogic purposes.[2] While the juridical use of the trial pertains to the conventional use of the trial as a tool of accountability and 'normative-reconstruction', the pedagogic end seeks to advance an innovative vision of a trial as a tool of 'historical instruction'. Although Douglas recognizes the inherent incompatibility between the interests of didactic pedagogy and the pursuit of rule-based criminal justice, he nevertheless contends that the trials of the Holocaust—the Nuremberg, Eichmann, Demjanjuk, Barbie and the Zundel trials—have succeeded in securing justice to the accused on the one hand and to the history and memory of the Holocaust on the other.[3] His in-depth analysis of the trial and his conceptual understanding of the law's obsession with its own 'complex normativity and discursive neutrality' notwithstanding, Douglas insists and posits the normative and performative purposes of the trial as mutually-reinforcing imperatives.

The Nuremberg and Eichmann Trials: From Modest to Radical Didacticism

In the Nuremburg Trial, the Jewish catastrophe was not singled out as an independent juridical problem although the 'greatest crime committed during the last [century] had been against the Jews".[4] However, the argument that the Jewish were only 'bystanders' in Nuremberg, as Arendt argues, is 'at best, a half truth'.[5] There is no doubt that the gruesome images captured in *Nazi Concentration Camps* played a central part in the innovative architecture of crimes against humanity. In fact, the fact that crimes against humanity in the Nuremberg Charter was tied to other crimes named under the Charter seems to have detracted attention from excavating the true character of the project of Judeo-cleansing already underway in Nazi Germany occupied countries.[6] A Roman historian, Taci, once wrote that "The worst crimes are dared by a few,

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[2] *Id* at 257.
[3] *Id* at 3.
[4] Hannah Ardent (1963), *Eichmann in Jerusalem*: A Report on the Banality of Evil (New York: Oxford University Press), p. 258. [Emphasis added]
[5] *Id*.
[6] See Eric Epstein, *The Legal Path to Judeocide*, available at: <http://www.millersville.edu/holocon/files/THE%20LEGAL%20PATH%20TO%20JUDEOCIDE.pdf>, (Last accessed 17 March 2010).

willed by more, and tolerated by all".[7] Although the height of the war culminated into the Final Solution (1941-1945) — extermination, the institutionalization of systematic cleansing of the Jewish have started with the tacit acquiescence of many. Although the Nuremberg Trial and especially the architecture of crimes against humanity is surely a response to the Holocaust, the Jewish tragedy was not dealt with as uniquely potent legal enterprise deserving a separate punishment.[8]

Overall, Nuremberg was staged as a demonstration of the potency of the rule of law, the justness of the cause of the Allies and the worth of their sacrifice. It was also meant to try those 'major war criminals' who perpetrated atrocities beyond 'territorial limitations' and therefore whose responsibilities "cannot be localized'.[9] Although this trial has played a substantial role in illuminating the true character of Nazi atrocities and edifying the historical record, it was designed and staged with the view to shaping the future project of a neo-liberal legalist world order envisioned by those who designed the 'show'.

In spite of the problem of legality that occasioned the post-war punishment program of the Allies, the theater staged before the International Military Tribunal played a central role in redirecting the progressive development of international criminal law. Although the Nuremberg trial did not focus on the pedagogic end that advanced the political interests of the Jewish People as such, it certainly had a modest pedagogic agenda behind it. The American administration at the time believed that "The use of the judicial method will . . . make available for all mankind to study in future years an authentic record of Nazi crimes and criminality."[10] However, as Justice Robert Jackson famously noted, 'establishing incredible events with credible evidence' required the exclusion of testimonies, narratives and procedures repugnant to the rule of law and the administration of criminal justice. Although Douglas considers the Nuremberg as a didactic exercise in ways that are different from Eichmann's [below], he does not seem as enthusiastic about the didactic functions of the Nuremberg Trial as that of Eichmann's.

Douglas does not deny the fact that these trials were 'show trials'— although he so refers to them in a positive sense within the liberal legalist understanding of a 'show trial'. In distinguishing his capacious understanding of a 'show trial' from such critiques as Hannah Arendt's, he wrote:

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[7] Tacitus, in Eric Epstein, *Ibid*.
[8] Only one of the 22 Nazi defendants, Julius Streicher, was convicted of crimes against humanity in Nuremberg.
[9] Hannah Arendt, *supra* note 4 at 258.
[10] See Douglas, *supra* note 1 at 18.

> Thus to call Holocaust trials show trials—the term used by Arendt to disparage the Eichmann proceeding—is to state the obvious. After all, that is what these trials were—orchestration designed to show the world the facts of astonishing crimes and to demonstrate the power of law to reintroduce order into a space evacuated of legal and moral sense. As dramas of didactic legality, the trials of the Holocaust blurred, then, the very boundary between the legal and extralegal upon which Arendt's critique was based.[11]

The Eichmann and Demjanjuk trials (hereinafter the Jerusalem Trials), were staged with an eye towards serving a uniquely "Jewish" agenda. The Eichmann trial is by far the most dramatic in terms of its significance to national and international justice and the pursuit of didactic legality. From the prosecution's point of view, the Eichmann trial was staged not only as strictly juridical business, but also as a proceeding meant to serve a broader 'pedagogic end'. From the Court's perspective, although the trial was understood in a conventional juridical sense, the prosecution's tenacious insistence for a different understanding of the trial—"as a tool of historical instruction and normative re-construction"[12] — placed the court in a political limbo. For the Eichmann Court, survivor-narrative, though captivating and informative as a tool of historical instruction, remained a central source of contention between the prosecution's didactic aim and the Court's 'rule-based-formalism'. Indeed, as Douglas notes, "no where was this disparity more visible than in the clash that erupted over the relevance and meaning of the testimony of survivors of the holocaust". While the Nuremberg sought to serve a modest pedagogic ends without fundamentally departing from the traditional administration of criminal justice, the Eichmann trial reflected a deliberate and radical undertaking in pedagogy—the use of the medium of the court as a tool of 'historical instruction'.

Trial Narratives: A Reflection on the Juridical Value of Testimonies

From a juridical perspective, testimonies serve the end of clarifying the guilt or innocence of the accused and nothing more. On a grander scheme of things, when the trial deals with crimes beyond human imagination—a crime that lie beyond the law's ability of comprehension—the trial will become a historical treasure. The task of recording the past for posterity and preserving memory would become a fundamental task of the state as "societies look back to understand how they lost their moral and political compass, failing to contain

[11] *Id*.
[12] *Id*. at 134.

violence and uphold the values of tolerance and peace."[13] In this sense, therefore, the relevance of survivor testimony, to the extent that it relates to the facts on trial and assists in clarifying the question under scrutiny, cannot be questioned. The 'relevance' and 'reliability' of a testimony in a juridical sense is governed by tight evidentiary rules. According to those rules, only what is relevant, competent and pertinent to the clarification of the record about the innocence or guilt of the accused should be admitted as evidence in the court of law.[14] Though survivor narrative and eyewitness testimonies can be seen as "living embodiments of the truth of the holocaust" or "offer a human dimension to the suffering caused by Nazi atrocity", the admission of irrelevant and impertinent evidence in the courtroom interferes with the fairness of the proceeding and considerably implicates the integrity of the process. For Douglas, the pursuit of such a broad pedagogic enterprise through a criminal trial neither jeopardizes nor detracts attention from the central—the juridical—purpose of the trial. It is on this point that I will try to take issue and present a humble critique of his radical view of didactic legality.

Challenging the views of those who resent the dubious legality of the Nuremburg and the Eichmann trial, Douglas makes a powerful and passionate defense of the Holocaust trials. Responding to one of the ardent critics of an aspect of the Eichmann trial, Hannah Arendt, who labeled the Eichmann trial a 'show trial', Douglas speaks of 'a crabbed and needlessly restrictive vision of the trial as legal form".[15] Although he furnishes compelling material evidence to support his call for a broader construction of the purposes of a criminal trial predicated on the theory of narrative jurisprudence, he did not offer a nuanced normative theory of a trial or effectively rebut the strongest arguments against his vision of didactic legality at the systemic level. For the most part, he relies on the exceptional character of Nazi atrocity to justify a deviation from the conventional purposes of the criminal trial.

In what has become one of the most iconic and frequently cited statements of her book, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Arendt writes:

> The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes— 'the making of a record of the Hitler regime which would withstand the test of history' . . . can only detract from the

[13] Alexandra Barahona de Brito, Carmen Gonzalez-Enriquez, and Paloma Aguilar , Editors (2001), *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford: Oxford university Press).
[14] See Arendt, *supra* note 4.
[15] *Id* at 2.

> law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.[16]

This emblematic statement not only lucidly, although arguably insufficiently, captures what the function of a criminal trial is ought to be, but it also underpins her characterization of the Eichmann trial as a 'show trial'. Despite the presiding judge's effort, Arendt writes, the prosecution's urge for "showmanship" militated against the fairness of the trial and turned this historic trial, for complicity in what the Nazis called "The Final Solution", into a 'show trial'. As a Jew, Arendt understands incredibly well the Jewish mindset and the debates surrounding Jewish resistance and complicity in the Final Solution. However, it is this idea of bringing all that looked politically compelling into the trial of an individual, 'a man of blood and flesh" in the glass-booth, that contradicted with her conception of what justice demands and what a just trial ought to epitomize. She emphatically argues:

> Justice demands that the accused be prosecuted, defended, and judged, and that all the other questions of seemingly greater import—of "How could it happen?" and "why did it happen?", of "why the Jews?" and "why the Germans?", of "what was the role of other nations?", "what was the extent of co-responsibility on the side of the Allies?", of "How could the Jews through their own leaders cooperate in their own destruction?" and "why did they go to their death like lambs to the slaughter?"—be left in abeyance.[17]

Countering Arendt's dismissive approach to the Eichmann trial, Douglas contends that making "the sober authority of the rule of law" visible to the general public is itself one such pedagogic aim of a criminal trial insofar as the trial is staged "justly". [18] However, Arendt is not in disagreement with Douglas on this point for this is precisely what she conceives to be a normative foundation of a trial. She departs from Douglas's conception of a trial generally and the prosecution's case more specifically due to the prosecutor's deliberate and belligerent undertaking to engage in historical edification in the courtroom—a thesis that Douglas calls 'didactic'. So, the question here are two: (a) Is the juridical and pedagogic ends of the trial really not incompatible as Douglas suggests; and (b) Does the criminal trial and the canonical set of rules internal to the courtroom capable of simultaneously delivering on the promises of the juridical and pedagogic functions of a trial?

First, the primary purpose of the criminal trial is to provide a fact-finding forum that assists in the assessment of the question of guilt or innocence in an

[16] Hannah Arendt, *supra* note 4 at 252.
[17] I*d* at 13.
[18] Lawrence Douglass, *supra* note 1 at 3.

open court of law. It is intended to require the state to prove its claims beyond a reasonable doubt in an open court while allowing the accused the right to contest any allegations of wrongdoing.[19] The idea of public trial, open justice, right of examination and cross-examination, the equality of arms between the parties etc are fundamental elements of fair trial standards essential to the conventional purpose of the trial—unveiling the truth and dispensing justice.[20] Douglas's didactic thesis, however, makes the case for the criminal trial that serves purposes more robust and profound—the edification of history and memory—than the narrow pursuit of clarifying the guilt or innocence of the accused.

Though he recognizes the "potential tension" between the fundamental interests of criminal justice and his notion of "didactic legality", he nevertheless debunks what he views as a monolithic conception of a criminal trial as 'needlessly restrictive' and "crucially flawed"[21]. In his article entitled: *Between Impunity and Show Trials*, Martti Koskenniemi, asks whether Arendt should have the final word on what constitutes the proper terrain of a criminal trial.[22] Although the wealth of archival and material evidence Douglas parades to advance his argument provides a degree of persuasion, Douglas stops short of delving into doctrinal or theoretical reflections to make a compelling case for his view of a trial that goes beyond establishing the guilt of the accused to the edification of traumatic history for all: "victors, the vanquished and posterity".[23] For him, the extraordinary barbarity of the crimes and the limits of the criminal trial to comprehend traumatic history of such a magnitude legitimized deviation from the normal judicial process. Although this thesis could partly explain certain forms of trials conducted within a certain historical and political frame, it does not seem to explore and gauge complex political, cultural and legal questions that the quest for transition pivots.

At the factual level, this conception draws inspiration from typical trials such as the Nuremberg Trial in which "the record of the [perpetrators] may be so clear cut that the image produced in court could not but appear a reasonably

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[19] Andrew Ashworth (1995), *The Criminal Process: An Evaluative Study* (Oxford: Clarendon Press), p. 51.

[20] David Bentley and Richard Thomas "Fair Trial", in Madeleine Colvin and Jonathan Cooper (2009), (ed.), *Human Rights in the Investigation and Prosecution of Crime* (Oxford University Press), p. 251.

[21] *Id* at 3.

[22] Martti Koskenniemi (2002), "Between Impunity and Show Trials", 2 *Max Planck Year Book of United Nations Law*: 1, 7.

[23] Donald Bloxham (2005), *Genocide on Trial*: War Crimes Trials and the Formation of Holocaust History and Memory (Oxford University Press), p. vii.

truthful replica of reality".[24] On those terms, such a specific genius of a trial is simply unrepresentative and whatever didactic functions it served, it is not necessarily due to the criminal trial's inherent ability to support a didactic paradigm but rather from the self-evident, astonishing crimes that constituted the facts of the Holocaust trials. If the validity of the didactic thesis of a trial is contingent on the agonizing and traumatizing nature of the crimes in the case, its utility as a general normative theory of the trial will be questionable at best.

Although Douglas fully endorses, and even radically advocates, the relevance of using the authority of a court and its space to stage a drama intended to commemorate victims of the Holocaust through 'survivor narratives', he seems to have a differing view of the trials of Holocaust deniers. Indeed, he considers the Zundel trial, brought against a Holocaust negationist in Canada, as destabilizing an affair and overwhelming to the official historical record. In his analysis of the Zundel trial, Douglas writes that "the interests of pedagogy and commemoration are overwhelming the pedagogy"[25], due to the rebellious contestation by the defense counsel of the notion of didactic legality and commemoration before the court of law. Indeed, unlike the defense counsels of the Jerusalem trials, Zundel's counsel, Christi, vigorously protested against the use of the trial as a forum for the clarification of history and the memorialization of survivors and Nazi atrocities against European Jewry.

In Douglas' own words, Christie "succeeded in desecrating the courtroom as a space in which to defend claims of history and honor the memory of survivors".[26] Douglas defies Zundel's defense counsel, Christie, condemning her position as "peculiarly self-defeating" for "relying on the criminal law to insulate historical facts from profane infotainment industries".[27] While he radically advocates the use of a criminal trial as a tool of historical instruction to establish "inviolate historical facts" in his discussion of the Jerusalem Trials, he seems to adopt a completely different standard when he comes to the trial of a Holocaust negationist (the Zundel trial).

On its own premises, and this is my second claim, the didactic proposition could not apply to the defendant's side. Indeed, Douglas rejects the didactic use of a trial by the defendant because of the "destabilizing" consequences of such a partisan account for the official record, thus ignoring the very rationale that

[24] Otto Kirchheimer (1961), *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press), p. 423.
[25] *Id* at 207.
[26] *Id* at 241.
[27] *Id* at 243.

sought to maintain the equality of arms between unequal protagonists.[28] The state commands a considerable organizational and coercive power at its disposal. Some of the most settled principles of fair trial are there to protect the accused from this coercive authority of the state and limit the discretion of the state vis-à-vis citizens. For didactic legality to be an ethical theory of a criminal trial, it must justify its claims not only with reference to one side of the adversarial battle—the party cloaked with the authority of the state, but also with reference to the defendant's side. A claim that is justified only with reference to the benefit it renders to one of the adversarial protagonists while ignoring the other cannot be sustained as a valid proposition of a trial. If one believes in the ability of criminal trials to establish what Douglas called "inviolate historical facts", he cannot reasonably protest against certain forms of trials for deconstructing such "inviolate historical fact" for what is at stake is the 'truth'[29] and "inviolate" truths, whether historical or otherwise, should always remain inviolate. Indeed, to argue that certain criminal trials can help to comprehend an atrocious past by establishing historical truths while some trials cannot is a remarkable piece of scholarly double standard at best, and a contradiction at worst.

Redressing Historical Wrongs in the Courtroom: Legal Truth and Historical Truth

One of the central preoccupation of Douglas's thesis of didactic legality concerns redressing historical wrongs by fixing history in a legal judgment. This is a problematic thesis not least because it raises several complex questions on the relationship between law and politics but also on our understanding of the relationship between law, a legal judgment and history. The attempt at 'fixation'

[28] Douglas seriously struggles to make sense of how the didactic use of the trial by the defendant can be prevented. "Dictating the terms of memory through an act of legal will is destined to fail' argues Douglas referring to legislations that proscribe the denial of the Holocaust, ...because trials of the deniers will fail to do justice to the memory of the Holocaust because the law ultimately will remain less interested in safeguarding history than preserving" its own integrity. In situations where the trial deals with Holocaust denier, the role of the trial participants will automatically change. In these trials, it is the defendant that seeks to hijack the proceeding to clarify and elucidate his own account of the Holocaust that is in contradistinction to the official record. As Douglas repeatedly argued, this is indeed a destabilizing affair for the established memory. However, his insistence for a didactic end only when it suits the end of the prosecution but a tenacious protest when the same strategy is deployed by the defense, severely ignores the idea that underpins the principle of equality of arms.

[29] *Id* at 242.

of history in a legal judgment seeks to create a deliberate and politically-charged collective memory, an historical lens, upon which the nation's self-understanding for the future will be predicated. On this point, the argument against didactic legality turns not on the fact that the trial itself will have a historical significance of settling history, but rather on the deliberate undertaking and orchestration of the trial with the view to fixing or re-writing history.

A deliberate undertaking at fixing or re-writing history through communications that occur between trial participants and the attendant judgment is a very destabilizing affair for reckoning with the legacies of repression and brutality. It is destabilizing because first and foremost, legal truth is distinct from historical truth. As no human institution can claim to be error-free, the possibility of convicting and punishing innocent people and acquitting guilty criminals makes it all the more fitting that society maintains a distinction between legal truth and historical truth. Since legal truth is predicated on probabilities of evidence measured against subjective standards, legal truth may not be the equivalent of factual, personal or narrative truth. To the extent that historical truth must represent the facts of what actually happened, rather than what the court found to be legally true, the use of the trial forum to fix history seems to have a destabilizing ramification for history. In effect, whatever memory was established on the basis of partisan and counterfeit statements told at trial with the view to advancing a political agenda remains to be a selective memory that recognizes one truth while it ignores the other. Recognizing the inability of the legal judgment to do justice to wrongs beyond human understanding, the Eichmann Court asked itself, "Who are we to give it an adequate expression?" and transferred responsibility for the task of a complete excavation to "the great writers and poets".[30]

The trial of Radovan Karadžić, recently underway at The Hague, provides a captivating account of the partisan nature of trial narratives and their implication on the historical truth. The founder of Republika Srpska, now accused of acts of genocide and crimes against humanity before the ICTY, told that Tribunal that the war in which he was accused of bearing responsibility for the most violent crimes of international concern, was 'holy and just'.[31] For the accused, what many referred to as a siege (illegal under international humanitarian law) was a blockade (possibly justified on grounds of military necessity). He denies that

[30] *Id* at 148.

[31] Al Jazeera News, Karadzic calls war 'just and holy', available <http://english.aljazeera.net/news/europe/2010/03/20103194824561962.html>, 01 March 2010, (accessed 13 March 2009).

Srebrenica had been the United Nations Safe Heaven Zone, and contested the number of causalities and the causes behind the ethnic cleansing at Srebrenica.[32] The man at the center of the 'theatre' denied every major allegations of wrongdoing which his victims and the rest of the world struggling to confront and settle the haunting ones and for all.

In terms of 'truth games', this is Karadžić's side of the story, his truth which is truly partisan and political to the core. He made a pure nationalist and political rhetoric that was powerfully-appealing to his constituency—Serb nationalists in Serbia and Republika Srpska. He told the Tribunal: "I stand here before you not to defend the mere mortal that I am, but to defend the greatness of a small nation in Bosnia Herzegovina, which for 500 years has had to suffer and has demonstrated a great deal of modesty and perseverance to survive in freedom."[33] In this catastrophic war that claimed the lives of over 100,000 persons, the prosecution's allegations and the defense's account of the truth are the anti-thesis of one another.

At the end of the day, the Tribunal will have two options—a binary option which the criminal trial presents—of either acquitting or convicting the defendant on the basis of evidence. From the 'stage battle of partisans committed to distortion' such as this one, didactic legality seeks to create history and memory upon which the nation's history will be predicated. The question then is: should history be founded, fixed and closed by a legal judgment deductively derived from a legal battle between political foes with conflicting political agendas? Should a legal judgment which operates on different assumptions and understandings of 'truth' be allowed to frame and close a political dispute in the sense of fixing history and memory? Even worse, should history be extrapolated from courtroom communications between trial participants with antithetical and irreconcilable differences about the past? If we have to accept the Court's version of the truth, as Douglas seems to say, on what terms can we automatically subscribe to the judicial version of the truth when in fact legal truth is far from an absolute certainty?

There is an important parallel between the trials of the Holocaust perpetrators and the Holocaust negationists which potentially implicates the coherence of Douglas's thesis of didactic legality. He argues that the trial of the perpetrators reached both the national and international audience and played a significant role not only in clarifying the true character of Nazi atrocity against European Jewry but also in commemorating the heroic resistance of the dead. Although one could argue that the atrocities committed against the European

[32] *Id*.
[33] *Id*.

Jewry are so dreadful as to shock the conscience of human imagination so that they do have to be clarified in a court of law, one could certainly agree with Douglas that the trials played a significant role in educating the general public about the Holocaust. As Justice Jackson famously put it, "Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. We must establish incredible events with credible evidence".[34] However, the question that still begs an answer is this: did the Eichmann trial achieve the didactic ends it achieved because of the peculiarity of the Holocaust and the relaxed evidentiary rules that governed it or because all perpetrator proceedings, in principle, are capable of producing that same result?

If some criminal trials have the capacity to question the veracity of these "inviolate historical facts", the facts themselves cease to be inviolate. If their inviolability can be challenged before a court of law and a criminal trial has the capacity to set a different record of the past, the memory established in the first place was made possible by the existence of certain set of conditions that made it possible. Simply put, if a criminal trial can deconstruct "inviolate historical facts", the inviolability of those facts and the integrity of the trial which in the first place established those facts, is questionable at best.

Douglas draws a contrast between the courts before which these dramas (trials) are staged. In the Zundel trial, he argues, "the gallery was filled with a sizable contingent of supporters of the defendant" whereas in the Jerusalem Trials, a court of law was made to serve as "sacred commemorative space" where the "spectators came prepared to draw the proper lessen from the legal drama" staged before their own court, in their own country by their own judges against foreign perpetrators of atrocity crimes. The expectation which the Trial of Eichmann epitomized in domestic Israeli political setting tested the Court's ability to intervene in the grotesque narrative even in the face of their dubious legal potency. As one witness noted, the narrative of heroic memory by survivors brought to light "a version of Holocaust reality more necessary than true"[35]. Although Douglas points to these unique circumstances that clouded the legal proceedings, he stops short of affirming whether these spectacle-trials have achieved their intended pedagogic purpose because they were staged in defined political settings—before an audience that came prepared to observe the courtroom as a classroom—or because trials, of themselves, have the potential to serve such a radical end in pedagogy.

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[34] Telford Taylor (1992), *The Anatomy of the Nuremberg Trials* (New York: Little, Brown & Co.), p. 54.

[35] See Langer in Douglass, *supra* note 1 at 128.

Concluding Remarks

The failure of the Zundel trial as a pedagogic spectacle stands as an overwhelming testament to the inherent inability of classical criminal trials to serve the ends of radical pedagogy. Had it not been for the relaxed evidentiary rules and the venue where the trials were staged, the Eichmann Trial could not have produced an official record of such a commemorative and instructional value. The role of the survivors to narrate their traumatic past was limited by the dictate of standard procedural rules. The Eichmann trial has created a very emotive sense of vindication for Israel because it offered the State an opportunity to tell the rest of the world that they have been subjected to atrocities unparalleled in human history.

The urge to educate posterity, counter tales of Jewish complicity in the Holocaust and establish an institutionally sanctioned heroic memory, created an overwhelming legal and political moment for all who participated in the trial process (judges, prosecutors, defense, the accused, witnesses and the State). It is not merely a judgment according to a new law (in violation of the principle against retroactivity) that is the identifying mark of these trials, but also the unparalleled anguish and shock they caused, the venues in which they were staged and the purposes attributed to them. They were extraordinary in the sense that they were judgments on *ex post facto* legislations.[36] They were also extraordinary in the sense that the trials moved beyond the juridical to assess, validate and ritualize the extralegal—the political. Indeed, the Court itself held in its judgment, "We are charged with the duty to determine . . . historical truth" through the medium of a courtroom".

The Memory of Judgment also illuminates on the normative grounding of the trials and the role played by those who had a leading role in staging the trial. However, it does not particularly ask the question of how the portrayal of the acts of the tried by those who presided over the trial, affected the outcome of these trials. If the accuser who judges the accused for genocide or crimes against humanity is also its perpetrator, "its legitimacy to judge them is withdrawn and its attempt to monopolise them can be nothing but a political-ideological move".[37] For example, the criminal responsibility of the USSR during the war

[36] In defense of the retroactive application of the Nuremberg and Israeli laws, Arendt writes: "Its retroactivity, one may add, violates only formally, not substantially, the principle *nullum crimen, nulla poena sine lege*, since this applies meaningfully only to acts known to the legislator; if a crime unknown before, such as genocide, suddenly makes its appearance, justice itself demands a judgment according to a new law", at 254.

[37] Emilios Christodoulidis, The Strategies of Rupture, 20(3) Law Critique (2009), (2 December 2008), p. 8.

for massive crimes against humanity and its previous convergence with the Nazi aggression was simply ignored, not even publicly regretted, at Nuremberg. Despite all these, Douglas agrees with Justice Jackson—that the Nuremberg trial 'unveiled incredible events with credible evidence'—ignoring the *tu-quoque* argument and the relaxed evidentiary rules that governed it. Nuremberg was governed by tighter evidentiary rules than the Jerusalem Trials. In the Eichmann trial, the radical pedagogic end pursued by Israel through the trial of a Nazi bureaucrat—"a man of blood and flesh"—through whom the entire history of anti-Semitism from the Dispersion to the Final Solution were to be comprehended, significantly deviated from Nuremberg.

If trials, of themselves, can intrinsically achieve a purpose of extrapolating factual truth, as opposed to legal truth, which Douglas strongly contends they do, the trial of the Holocaust negationists should have equally unraveled a factual truth that buttresses the already established memory—the 'inviolate historical facts' rather than bulldoze them. If there is any 'truth' that can coexist with the adjective 'inviolate', it seems that it cannot be easily demolished through the trial of negationists unless the truth in question is a different kind of truth, dictated by extralegal considerations. Douglas is right in his analysis of the inability of the law in safeguarding memory. At the same time, the claim to competing 'truths', the nature of trial narratives and the urge for political performativity in the court of public opinion inevitably renders the criminal trial not only an inadequate but also a dangerous tool for establishing and safeguarding memory. ■

NOTES ON ADMINISTRATIVE LAW: FRENCH AND ENGLISH EXPERIENCE

Fasil Abebe ♣

Introduction

Administrative law is the branch of the law governing the relationship between the individual and the executive branch of the government when the latter acts in its administrative capacity. The theme discussed in the following pages is administrative litigation and not general administrative law dealing with relations between agencies of the administration. The notes will deal with judicial review of administrative action. This paper is limited to a comparative exposition of the manner in which judicial review is treated in England and France. The purpose is to assist the reader (and in particular law students) to acquire knowledge of foreign systems.

1. Administrative Law - the French experience

1.1- Scope

France is today governed under the Constitution of the Fifth Republic of 1958. The Constitution has established a parliamentary regime and meanwhile adopts a separation between executive and legislative powers. The Constitution gives the executive competence to regulate many areas by decree. The respective powers of the executive and the legislative are controlled by the Constitutional Council which is the organ empowered in France to ensure respect for the Constitution. The ordinary courts are not involved in this function. In the course of its decisions, the Council consistently upholds constitutional principles and focuses on the protection of the fundamental rights and liberties. This has enabled the Council to become the partner of administrative courts whose activity has often relied on the decisions of the Council.

The state employs thousands of persons, owing to the fact that it not only conducts public administration but also owns a great deal of property and administers social welfare. Independent agencies have also been created to regulate certain policies and conduct various activities related to the regulation of monopolies, broadcasting, consumer protection, elections etc. The most notable control of the administration is provided by the administrative courts.

♣ LL. B (Addis Ababa University), LL. M (University of Grenoble, France), Lecturer in law, St. Mary's University College.

France has a separate hierarchy of administrative courts of general jurisdiction. These are not administrative tribunals designed to deal with specific government functions but are courts of general competence. These courts of general jurisdiction are always competent to deal even with those special cases handled by special tribunals. The few administrative tribunals that exist outside this system have been created only in very specialized areas such as social security administration. Like in many other countries conciliation procedures as well as the Ombudsman (*Mediateur*) also exist.

The administrative courts have three levels of courts at the head of which is found the "*Conseil d'Etat*". The administrative courts were created as a separate hierarchy of courts in order to stop the ordinary courts from interfering with the executive. In the political history of France there were events when courts played a negative role by going against reforms initiated by the executive.

The citizen complaining against the administration was given the right to lodge a complaint with the *Conseil d'Etat* which was part of the executive. In the course of the 19thC, the Council assumed full independence from the administration in rendering judicial decisions. The judicial function became the most important role of the Council. Subordinate courts were also created to deal with complaints ranging from taxation to torts and state social and economic regulations and they adjudicated tens of thousands of cases every year.

A complaint by an individual will normally state the facts and the legal grounds in which the complaint is based as well as the particular relief sought, such as – a pecuniary claim or the annulment of an administrative decision. The court takes steps to examine the case by consulting both parties, and the judgment is given in public. The decisions are enforced without any constraint because it is a tradition to obey the decision. Complaints are brought to the administrative courts when they involve a public service conducted while the administration acts in the course of satisfying public need. The scope of the public services that might evoke administrative complaints is wide and it can include sporting federations. However, such special regimes can be excluded by statute.

1.2- Role of Ordinary Courts in Complaints against Administrative Agencies

In acts undertaken by the state that are analogous to activities of private persons, private law usually applies and redress is sought in the civil law courts. The ordinary courts also have a longstanding exclusive jurisdiction in the protection of personal liberties such as the ones protected by criminal law, criminal procedural law, property law and other laws. Property rights that arise in the context of expropriation, for example, fall under the jurisdiction of ordinary

courts. Moreover, cases such as liability for accidents caused by motor vehicles or accidents at work are reserved to the civil courts.

1.3- Grounds of review

The general principle under which review is made is based on the principle of administrative legality. The meaning of this principle has been largely influenced by the case law of the administrative courts. This is an area of French law that is based on case law rather than on code law as would be typical of a civil law country. Basically, legality involves the exercise of administrative power under the empowering legislation, observance of rules of procedural fairness and adherence to general principles of law. As stated above, the administrative courts have relied on a category called general principles of law to define the extent of legality. This has permitted the courts to review an administrative decision on any ground which they consider proper for the protection of the individual. They can be compared to the English rule that courts have an inherent power to ensure that the rule of law is respected.

In a civil law country like France, this power of the courts is more restricted but in the area of administrative law the courts have managed to have a wider power. These general principles have their basis in general constitutional provisions (liberty, equality) or general private law and procedural law (e.g. right to a hearing).

The principles have been applied to a number of different cases on such grounds as the right to freedom of movement. For example, an administrative decision forbidding camping at a certain site was considered illegal because it violates freedom of movement. Other examples include the annulment of a decision forbidding the entry into France of family members of immigrant workers (which is regarded as violation of the right to normal family life), or the right of a political refugee against deportation to his country of origin.

The courts have also expanded the general principles of law to be observed by the administration (in economic matters) such as the right of an administrative employee to receive the minimum wage granted to private employees. This power of the court could include a revision of an administrative decision on the existence of a public interest sufficient to permit expropriation or the existence of an environment impact assessment before any investment permit is granted.

Equality of employment in the public service as well as equal access to the public service to all (e.g., radio, TV) and the equality to benefit from government grants have all been applied as general principles of law. France has a highly developed case law dealing with all forms of inequality which the administration engages in and which the courts have been correcting under their power of judicial review.

A case in point is the right to an impartial decision whereby French courts uphold a similar principle embodied in English law that there should be no bias in reaching an administrative decision. Under the same title of general principles of law, the administration in France has been ordered often to be impartial in its process of decision making. Similarly, the right to a hearing is also recognized like in English law.

1.4- Categories of review

Violations of general principles of law or administrative decisions that are *ultra-vires* (i.e. performed in contravention of the scope of authority of an administrative body) are subject to judicial review. Procedural failure can also be a ground of judicial review. For example, non-observance of prior publication of a slum clearance order involves a procedural error (*vice de forme*). Infringement of the right to a fair hearing falls under this category.

The actual content of an administrative act is also reviewed under what is known as "*violation de la loi*" (violation of the law) which is related to the application of the particular statute in conformity with the purpose for which it was enacted. A disciplinary action not prescribed by the law would be an example, or a refusal to grant a trade license when the law says it should be granted would be subject to judicial review.

When there has been an abuse of power (*detournement de pouvoir*) that administrative power is considered to have been exercised for purposes outside the empowering legislation. This is a great power of the courts because it will permit them to use what they consider is the necessary purpose of the legislation in question. Traffic regulations issued not to regulate traffic but instead for the convenience of an official would be considered abusive.

1.5- Types of remedies

The remedies available under judicial review are the following:

a) *Annulment of an administrative decision*: This is a remedy that annuls an administrative decision on grounds of illegality (*recours en annulation*), on grounds of being *ultra-vires* (*excès de pouvoir*) or being in violation of basic principles of law (*principes généraux du droit*).
b) Declaration of the rights of persons called full jurisdiction (*pleine jurisdiction)* in areas such as elections, taxes as well as contractual or extra-contractual liability.
c) Giving interpretations of administrative law in the course of civil litigation.
d) Punishment of administrative crimes e.g. abuse of public property such as roads, ports.

Most decisions deal with the first two claims and a special body of law has evolved. The two principles guiding the courts are the *principles of legality* meaning administrative decisions must be guided by the rule of law and the *principle of responsibility* (or liability) which means the administration must pay damages to an individual who is harmed by an administrative decision.

In the case of *responsibility* (liability) the rules governing the liability of the administration are different from the rules of liability enunciated by the civil law in matters among individuals. French law thus involves separate administrative torts and administrative contracts, specially created to accommodate the rights of the state and the rights of the individual and handled by the administrative courts, not the civil courts. The administrative torts arise in the course of operation of a public service and apply fault and no fault criteria peculiar to the administration. Administrative contracts are also governed by special administrative rules and are adjudicated by the special administrative courts. A contract falls under this category if it deals with the provision of a public service and contains clauses which are not found in ordinary contracts. Such cases are considered as regulatory rather than purely contractual and they are, in effect, subjected to special rules entitling the administration to a greater degree of protection such as the power to a unilateral termination of a contract.

2. Administrative Law - the English experience

2.1-Scope

Under English Law government activities can be controlled through many means. The control by the courts is the area of concern of administrative law. Judicial review has helped in developing the concepts that control government action. Judicial review involves an array of diverse administrative decisions such as refusing a trading license, refusing entry to a foreigner into the country, the refusal of a building permit etc. These judicial review decisions are public law decisions as opposed to private law decisions because the review is done on the basis of rules which have evolved to deal with the public law function of the administration. The court acts to annul an administrative decision on the grounds of its illegality, not on grounds of rightness or wrongness of the decision. A typical example of an illegal decision is for the administration to act beyond the powers given to it by statute.

In England focus is given to the public law/private law distinction. Public law regulates the relations between individuals and government agencies and between government agencies. Private law regulates the relations of private persons. The distinction is necessary because it has been felt necessary to subject the government to a special regime of laws which can either give it greater freedom or restrain this freedom. In private law the role of the courts is essentially only to apply the law. Some government activities (contracts and

torts) are of course also regulated by the private law regime. The public law nature of the activity does not depend solely on whether it is being exercised by a public authority but also on whether it was being exercised in the interest of a public function.

2.2-Grounds of review

A case that involves judicial review arises when the applicant alleges that a particular administrative decision has caused some prejudice to her/him. The decision can be challenged where the administration did not have the authority to make the decision, or the decision was not consistent with the law, or where the proper procedure was not followed. The action is available because the administration is considered as having powers limited by law and that the courts are legitimate interpreters of the extent of the powers granted to the administration as a matter of constitutional division of powers. The nature of the dispute usually determines how much the court will be willing to interfere to correct a decision and there are very few general principles. The court usually restricts itself to a policy principle that is considered as part of the legislation. The course taken by the court will depend largely on the clarity of the controversial legislation. English courts apply (as far as possible) the intention of the legislator in contrast with the French administrative courts which in the name of general principles of law have widened the scope of judicial review.

2.3-Categories of review

The grounds of review are based on abuse of discretionary power. It is referred to as the *ultra- vires* rule and contains the following categories.

a) Errors related to the substance of the decision: *Errors of fact and Errors of law*

The administration has to determine the facts before making the decision. For example there might be the need to determine whether a person is single or married so that a particular statute can apply to him/her. In this exercise the administration may commit an error of fact by assuming the existence of facts that are not actually present or not taking account of a fact which actually exists. Decisions around facts are usually particular to specific cases and the courts deal with this type of problem on a case by case basis.

An authority which is given with some discretion is expected to be practiced properly or the decision will be declared invalid. Inappropriate usage of discretionary authority is graver than mere mistake in the interpretation of the law. It would include decisions made without proper evidence (e.g. in town planning). This falls under the general category of illegal use of power.

There will also be an error of law based on the courts' interpretation of the best manner of achieving the policy of the law. The concern is to prevent the administration from unnecessarily extending the powers given to it by law. The courts have traditionally assumed the responsibility to have the last word in stating what the law is in a particular case. The courts control decisions which are made outside the limits set by legislation. This can mean exceeding or abusing the powers given to the authority as in cases of either stepping outside the reasonable limits of power or basing a decision on irrelevant considerations.

The power given must also be exercised by the person authorized by law. Unauthorized delegation is considered illegal. The power of the public authority to issue directives and standards are limited although they are made in the interest of clarity. This is called rule making as opposed to adjudication. But these forms of self regulation must not limit the entitlements of the individual under the parent legislation.

The authority is also not allowed to fetter the power given to it by legislation, e.g. adopting a rule that certain applications will be refused instead of examining each application. Failure to give reasons or to maintain proportionality between the action taken and the purposes of the statute can also serve as a ground of review.

b) Errors related to the process and purpose of decision making

In addition to the result of an administrative decision, the process used in reaching the decision may also be subject to judicial review. In this regard the concern usually pertains to the differential treatment of persons who are entitled to equal treatment. Error related to the decision making process may also result from the failure to take into consideration proper distinction between different cases. The result in both situations contravenes the policy of the legislation under consideration and will lead to its annulment.

The purpose of the authority in exercising its powers may also be a ground for review. Power is usually conferred for a certain purpose and cannot be used for other purposes. For example, a grant of permit or licence cannot be denied merely because a given administrative authority had/has been involved in previous or pending litigation with the permit seeker.

c) Errors related to procedure

Certain statutes may impose procedures before a decision is made. These rules of procedure are called rules of natural justice and are divided into *rules against bias* and *rules for fair hearing*. Bias means deciding a case in which the decision maker has an interest in the matter. Fair hearing requires that a person affected by a decision should be given the opportunity to present her/his side of

the story. The nature of the case will determine how much hearing will be required.

2.4-Types of Remedies

a) The first group of remedies which have been operational for a long period are:
   - *Certiorari* (annulling an illegal decision);
   - *Prohibition* (ordering that some act not be done by the administration); or
   - *Mandamus* (ordering that something be performed by the administration).

b) The second group of remedies were originally used in the private law context but have gradually been adopted in administrative law. This category of remedies consists of:
   - *Declaration* in which the court limits itself to declaring the law on a particular subject;
   - *Injunction*, by way of a temporary relief until final decision is rendered;
   - *Entitlement to damages through an award of* compensation for harm caused to the complainant.

The court that hears administrative dispute litigation is the Queen's Bench division (high court). It has supervisory jurisdiction in contrast to its powers to hear all other disputes called original jurisdiction. Appeals to the high court are possible from the decisions of administrative entities. There will be a right of appeal to the ordinary courts of appeal i.e. the *Privy Council* or the *House of Lords*. So there is no separate hierarchy of administrative courts as in France.

It is to be noted that the principles that resolve administrative law disputes are public law remedies and cannot be regarded as private law remedies. Remedies that are of a purely public law nature cannot be exercised in the context of pure private relationships which give greater power to courts. ■

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Non-Trade Concerns in Interpreting General Exception Clauses of WTO Agreements

Firehiwot Wujira ♣

Abbreviations

AB	Appellate Body
DSB	Dispute Settlement Body
GATT	General Agreement on Tariff and Trade
GATS	General Agreement on Trade in Services
LTRA	Least trade alternative
WTO	World Trade Organization

Introduction

According to the preamble of the WTO[1] Agreement, its principal objective is the promotion of a liberalized non-discriminatory multilateral trading regime that enables member countries to spur their economic growth, enhance their standard of living and reach full employment level.[2] Many have criticized that this institution gives little concern for other social policies such as the environment. This has been reflected by the protests and demonstrations of anti-globalization and by environmental activists such as the 1999 WTO meeting in Seattle.[3]

It is true that, there is a high possibility for a trading regime that promotes only pro-trade interests to jeopardize regulatory autonomy of states in sensitive fields like social polices and environmental protection.[4] Pursuits towards the aversion of such dangers seem to require the incorporation of the General exception clauses in the trade agreements to exceptionally allow members to pursue other non-economic values that may be in contradiction with the international trade obligations under the WTO legal regime. However, the mere existence of the provision without proper interpretation does not guarantee the

♣ Assistant Lecturer, Bahir Dar University, Faculty of law, (LL.B, Jimma University , LLM student: University of Warwick, Law in development Programme)

[1] See the paragraph before the comment for abbreviations.

[2] *Marrakesh Agreement Establishing the World Trade Organization,* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) ('*Marrakesh Agreement* '), p 9.

[3] M. Weinstein (2001), "The Greening of the WTO", *Foreign Affairs*. 80(6), 147.

[4] S. Thomas (2004), The *"*necessity of trade-restrictive measures aimed at protecting the environment" Masters Thesis, R.U.G, p.3.

recognition of non-trade policy concerns. For the surprise of many, in recent cases decided by WTO, the DSB seems to have given fair interpretation for the general exception clauses of GATT and GATS.

From the reading of the General exception clauses we can infer that the WTO legal framework allows member states to entertain only specific policy exceptions and these exhaustive exceptions are listed in sub-paragraphs (a) to (j) of Article XX of GATT and Article XIV of GATS. Article XX permits measures that are:

a) Necessary to protect public morals;
b) Necessary to protect human, animal or plant life or health;
c) Relating to the importation or exportation of gold or silver;
d) Necessary to secure compliance with laws or regulations which are not inconsistent with the GATT;
e) relating to the products of prison labour;
f) imposed for the protection of national treasures of artistic, historic or archaeological value;
g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to certain criteria;
i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during certain periods; and
j) essential to the acquisition or distribution of products in general or local short supply.

The General Exception clauses verify that free trade cannot always be above other policy concerns.[5]

This comment focuses on analyzing and evaluating whether the interpretation of the General Exception clauses by the DSB have allowed governments to promote legitimate policy concerns. Emphasis is given to the analysis of the interpretations given on Article XIV (a) of GATS, Article XX (b),(d) and (g) of GATT due to the availability of trade disputes on these areas.

[5] *Ibid.*

1. General Sequence of Interpretation of Article XX and XIV of GATT and GATS

Before dealing with the general sequence of interpretation of the exception clauses, it is necessary to have a brief look into who bears the burden of proof if a member State attempts to justify its measure which is inconsistent with its WTO obligation. The burden of proof is borne by the party who invokes the specific sub-paragraphs of the exception clauses. Such party must demonstrate that the measure is compatible with all the criteria set in the general exception clause.[6]

According to the existing dispute settlement practice, any measure which needs justification under the General exception clauses of the goods and services agreements must pass the so-called 'two-tier' test[7] to enable a responding state to successfully justify its measure under the exception clauses. Primarily, the objective of the measure must fall within the scope of any of the listed exceptions.[8] In the second step of tier one the measure must meet the criteria set by the sub clause set in question.[9] In tier two the measure taken must pass the requirements of the introductory clause or 'chapeau'.[10]

The failure of panels to properly implement the sequence of steps in interpreting Article XX of GATT and XIV of GATS can lead to an erroneous conclusion as demonstrated in the *Shrimp/Turtle*[11] case. Here the panel reversed

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[6] L. Simon, and B. Mercurio (2008), *World Trade Law Text, Materials and Commentary* (Oxford and Portland, Oregon: Hart publishing) p. 382.

[7] Nicolas F. Diebold (2007), "The Morals and Order Exceptions in WTO law: Balancing the Toothless Tiger and the Undermining Mole", *Journal of International Economic Law*. 11(1), p, 44.

[8] N. Gehi Working Paper No. *Evaluating the WTO'S Two Step Test for Environmental Measure under Article* XX. Available from World Wide Web: <http://.Law.gmu.edu/pubs/papers/06-4806-48:> p.19.

[9] J. Harrison (2007), *The Human Rights Impact of the World Trade Organization* (Portland: Hart Publishing), p. 216.

[10] *Ibid.*

"***Chapeau****"* refers to the introductory clause or heading of the exception clauses in WTO and lays down the requirement that measures taken by WTO members as exceptions to their WTO obligations must not be applied in such a way that they would be arbitrarily or unjustifiably discriminatory between countries where similar condition prevails or be a disguised restriction on international trade in goods and services.

[11] US-Shrimp, at issue were US regulations under the endangered species Act that imposed an import ban on imports of shrimp from countries that did not meet unilaterally imposed US Standards for the protection of migratory sea turtles. J Condon, B. (2005). Working paper series. *The existence of the duty to negotiate in the*

the usual way of interpretation and investigated the fulfilment of the chapeau first and rejected the shrimp ban of US.[12] On Appeal, the Appellate Body stated that the panel's decision to invert the analysis of Article XX led it to err in its examination of the chapeau. It was expected to examine the application of the measure rather than the design and purpose of the measure which led to the decision that the measure is in conflict with the entire WTO system.[13]

Failure to examine the validity of a measure first by investigating it in light of the detailed sub-paragraphs of the exception clauses can adversely interfere in the achievement of the desired objectives of the exception clauses. Checking the fair applicability of a measure without first checking the validity of the measure itself is not a logical procedure. If we follow the sequence of interpretation adopted by the *Shrimp/Turtle* panel, it might hinder members from effectively utilizing their rights under the exception clauses since it can inhibit adjudicating bodies from properly interpreting the introductory clause.

2. Interpretation of the scopes of the sub-clauses in the General exception clauses of the WTO

The question that arises at this point is whether the interpretation of DSB concerning the scope of the specific sub-clauses of the General exception clauses has allowed members to uphold their genuine policy interests. One may argue that that WTO adjudicatory bodies have (in different cases) generously broadened the scope of the sub paragraphs in the General exception clauses so as to allow members to pursue different national policy goals.

This argument can be substantiated by examining the interpretation given in the *US-Gambling* case concerning the scope of Art XIV (a) of GATS. This particular sub-clause allows members to take trade-restriction measures so as to protect public morals and this clause has been applied in the *US-Gambling* case.

Here the US imposed a ban on internet gambling justifying its measure by raising the public moral exception and the panel was burdened with a huge task of defining the terms 'public moral and order'.[14] Through its interpretation the panel gave a wider discretion for member states to define and apply their own

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genera exception of GATT and GATS. Available from World Wide Web: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=704749> p 11.

[12] K. Trish (2007), *The Impact of the WTO: the Environment, Public health and Sovereignty* (Edward Elgar Pub.) p 43

[13] *Ibid*, p 44.

[14] Harrison, *supra note* 9, p. 208.

concepts of public morals and public order according to their system and scale of value.[15]

This is an acceptable interpretation seen in light of Art 31 of the 1969 Vienna Convention on the Law of Treaties which permits the interpretation of treaty terms according to the object and purpose of a treaty.[16] The purpose of Article XIV of GATS is to tolerate members when they violate their obligations to pursue their national policy objectives which are within the scope of the provision. Due to the evolutionary nature and subjectivity of public morals and orders, setting a fixed morality standard could have highly restricted members from justifying their measures according to their domestic moral and public order and this would be contrary to the object and purpose of Articles XIV (a) and XX (a) of GATT.[17]

The Appellate Body (hereinafter referred to as AB) *has* in the *Hormone case* clarified that if the meaning of a treaty is ambiguous, the meaning to be preferred is the one "which is less onerous to the party assuming an obligation or which interferes less with the territorial and personal supremacy of a party, or involves less obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties". This guideline of interpretation seems to have widened the opportunity of states to utilize the General exception clauses.[18]

The panel's interpretation of the scope of the term 'public moral and order' is broad enough to allow a member to raise the public moral defence as long as it has concrete evidence for the existence of the public morals that it claims to exist in its territory. Such interpretation has allowed the measures taken by the US to be under the public moral exception of GATS. Moreover, since the panel adopted the evolutionary interpretation of treaty terms there is a possibility of justifying trade related human rights measures under Article XX (a) and XIV (a) of GATT and GATS respectively.[19]

The issue of whose morals are protected under Article XIV (a), does not seem to be a subject of ambiguity. Looking at the preamble of GATS, the territorial effect of the measure is limited.[20] Members are allowed to regulate or

[15] Diebold, *supra note* 7, p. 55.
[16] Harrison, *supra note* 9, p. 54.
[17] *Ibid.*
[18] C. Steve (1998), "The Moral Exception in Trade Policy", *Virginia Journal of International Law Association*, 38(689), p. 6.
[19] Harrison, *supra note* 9, p. 211.
[20] Gehi, *supra note* 8, p. 70.

introduce regulation of supply of services within their territory to protect national policy objectives.[21]

Moreover, the DSB'S interpretation of the scope of Article XX (g) of the GATT in *Shrimp/Turtle* that, allows wide interpretation that has positive implication concerning the weight given to environment.[22] This sub-clause allows members to take trade restrictive measures to conserve 'exhaustible natural resources'.

In the *Shrimp/Turtle case* the measure was taken to conserve sea turtles and the US here argued that sea turtles are 'exhaustible natural resources'. The AB in the *Shrimp case* took in to consideration the progress of environmental laws and concerns; as a result it adopted the 'evolutionary approach' of treaty interpretation in classifying renewable living things like Turtles as exhaustible natural resources.[23] It asserted that though living organisms are capable of reproduction, just like minerals and non-living resources they are capable of depletion and extinction and rejected the argument of the complainants.[24] Moreover, they stated that the preamble of the WTO agreement recognizes the need of sustainable development and it reflects the importance of keeping and conserving the environment. Hence, the AB decided to broaden the interpretation of the term 'exhaustible natural resources'.

This evolutionary way of interpreting treaty terms is strong evidence that confirms that other non-trade policy concerns like the environment are given due weight in the WTO trading system. Had the AB interpreted the term 'exhaustible' natural resources from a static perspective taking into account the intended meaning of the word in the GATT agreement which was constructed 50 years ago, it would have barred members from properly promoting their current existing genuine policy interests because it is argued that in the GATT agreement 'exhaustible' natural resources was intended to refer to non-living resources like minerals.[25] The other major theme we can observe from the interpretation of the AB in the *Shrimp/Turtle* case is that member States in some circumstances can take measures that do have extra-territorial effect.

In the *US-Tuna* case, the panel addressed the issue of whether extraterritorial measures aimed at protecting the environment were legally justifiable under the GATT and particularly under Article XX (g) and (b).[26]

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[21] *Ibid.*
[22] Simon & Mercurio, *supra* note 6, p. 404.
[23] Trish, *supra note* 12, p.207.
[24] *Ibid*, p. 45.
[25] *Ibid.*
[26] Sebastian, *supra note* 4, p. 17.

Investigating the intention of the drafters, the panel decided that Article XX does not authorize such interpretation.[27] However, looking at the shrimp/turtle case the DSBs have to some extent allowed the justification of measures that have extraterritorial effect if at least the extra-territorial objective of the policy has impact on the domestic territory.[28] This seems to indicate a significant step in the recognition of other policy concerns like the environment in the international trading regime.

From the analysis of the interpretation given in the above cases, the DSB of the WTO seems to widely interpret the scope of the sub-clauses of Article XX and XIV of GATT and GATS respectively and this has a positive implication concerning the weight given to other non-trade concerns and has allowed genuine national policy concerns to pass the first step of tier one test. Yet, there is the need to briefly analyze how the DSB interprets the other sequence of tests before deciding disputes addressing the General exception clauses.

3. Analysis of the DSBs interpretation of the criteria set in the Sub-clauses of the General exceptions

Where the measure of a member State that is challenged by a complaint is found to fall within the scope of the public policies of Article XX (a), (b), and (d), the next issue becomes whether the measure is 'necessary'. Where the challenged measure is within the scope of Article XX (g), the measure has to be 'related to' the conservation of natural resources[29]and it is argued that the interpretation of this test raises a fundamental pro-trade bias which mitigates legitimate decision-making.[30] One may observe that until the decisions rendered in the *Korea-Beef* case, *Asbestos* case and *US-Gambling case* this requirement was narrowly interpreted by adjudicatory bodies in a manner that mitigated legitimate policy concerns.

In the 'Thailand-Cigarette' case, where the 'necessary' requirement was scrutinized for the first time under Article XX (b) of GATT, Thailand justified its import restrictions on cigarettes on the ground that it aimed to protect the public from harmful ingredients in imported cigarettes.[31] Here, the panel concluded that "the import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX (b) only if there were no alternative measures consistent with the General agreement, or less inconsistent with it,

[27] *Ibid.*
[28] Gehi, *supra note* 8, p. 68.
[29] Trish, *supra note* 12, p.5.
[30] *Ibid.*
[31] *Ibid.*

which Thailand could reasonably be, expected to employ to achieve its health policy objectives."[32] In other words, the measure is expected to be indispensable to meet the necessity criteria. The panel decided that the measure was not 'necessary' since it wrongly applied the facts of the case to the least-trade alternative (LTRA) criteria of necessity. It was required to take into account the level of protection chosen by the government and the effectiveness of the alternative measures when it analyzed the 'necessity' of the measure based on the existence of alternative measures. .[33] One may doubt whether the decision of this case would be similar if it was entertained in line of the current WTO DSBs interpretation of the necessity test.

If there is reasonably available LTRA that is equally effective and that has the capacity to achieve the desired policy goal, one can see no reason for permitting member States to take more trade restrictive measures. However, environmentalists argue that rigid application of the LTRA test will highly inhibit members from passing this test since there will often be some alternative measure that could have been taken, and specially justifying measures like imposition of total ban will be very difficult.[34]

Looking at the interpretation of the necessity test in the *Korea-Beef* case, *Asbestos* case and *US-Gambling* case, we can perceive that the DSBs of the WTO have introduced a flexible way of interpretation that reflects the concern given to other policy spaces. In the *Korea-Beef case*[35] where the necessity test is entertained under Article XX (d), the AB stated that the interpretation of 'necessary' is located closer to the pole of indispensable than to the opposite pole of simply making contribution to.[36] This interpretation is reiterated in the *Asbestos case* and it was developed further in the *US-Gambling* case. The AB in the above cases stated that "the definition of necessary involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue and the importance of the protected value." [37] In the *US-Gambling* case it was decided that an alternative measure is not a reasonable one if it brings an undue burden on the responding member or if it fails to allow the

[32] Trish, *supra note* 12, p.14.
[33] *Ibid.*
[34] Nicholas, *supra note* 7, p.384.
[35] The dispute involved a difference in treatment of domestic and imported beef, which Korea alleged was 'necessary' to protect consumers against fraudulent practices condemned by Korea's Unfair Competition Act. BernascolI, N. (2005). *Environment and Trade: A Guide to WTO Jurisprudence*. Earthscan Publications Ltd. P.149.
[36] Trish, *supra note* 12, p. 32.
[37] Trish, *supra note* 12, p. 7.

responding country its desired level of protection concerning the interest pursued.[38]

Based on such interpretation it acknowledged France's ban of Asbestos and its products asserting that Canada's restricted use alternative cannot be a reasonable one since it fails to achieve same end with the contested measure[39] and Korea's measure was not justified since it failed to demonstrate that alternative measure was an unreasonable one.[40]

In light of the foregoing, the latest interpretation of the 'necessity' test seems to be flexible and has allowed measures that promote genuine policy concerns to be justified and, in effect, pass this level of test. A good example is the *Asbestos case*.

4. Interpretation of the chapeau

The purpose of the chapeau is protection of abuse of the General exception clauses. Though member states are allowed to pursue non-trade policy goals listed in the exception clauses, there is a significant risk for abuse if they are left uncontrolled. With the view of safeguarding the integrity of the multilateral trading regime, the introductory clause ensures the fair and proper applicability of the measure at issue. The chapeau does not address the substantive element of the measure but rather deals with the application or implementation of it. To pass this last test the application of the measure should not cause an arbitrary discrimination, unjustifiable discrimination or disguised restriction of trade where similar conditions prevail.[41]

Some scholars contend that though the AB's interpretation of the chapeau in the *Shrimp/Turtle* case has validated and recognized the role of unilateral environmental measures, the condition attached to it somehow creates impediment for state parties to exercise their right. They support their argument by stating that, careful reading of the General exception clause reveals that there is lack of clarity concerning the measure that needs justification, and whether it refers to a unilateral, multilateral or regional measure.[42] However, from the

[38] *Ibid.*
[39] *Ibid.*
[40] Bernascol, *supra note* 35. p,150.
[41] General Agreement on Tariffs and Trade 1994, Apr. 15, (1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 17 (1999), 1867 U.N.T.S 187,33I.L.M, 187, 33 i.L.M. 1153, Article XX .
[42] E.gaines, S. (2002). Working paper series. *The WTO'S Reading of the GATT Article XX Chapeau: a disguised Restriction on Environmental Measures*. Available from

ruling of the *Shrimp/Turtle* case the WTO seems to order countries taking unilateral environmental measure to make multilateral negotiation before qualifying their action under the chapeau so as not to make unjustifiable discrimination. [43]

They argue that it is not feasible to negotiate with all interested members, the extent of negotiation is not clear and such request of negotiation establishes an unpredictable threshold for access to Art XX.[44] This was demonstrated with the AB's rejection of the original US measure in the Shrimp/Turtle case.

On the other side of the argument other scholars disagree and argue that the way the AB interpreted the chapeau in the Shrimp/Turtle case is a balanced one which took into account both the substantive trade rights guaranteed in the WTO and also the interests of the environmental community.[45] The AB appropriately created a balance between the right of a member to invoke the general exception clause and pursue its policy interests and the obligation of this party to respect its stated trade obligations in WTO agreements.[46]

I think examining the facts of the case and the reasoning of the AB allows us to support those scholars who argue that the AB has made somehow a balanced interpretation.

> As the facts of the case indicate, "the United States issued regulations that required shrimp exporting countries to use turtle excluder devices 'TED'. TED is a grid trapdoor installed inside a trawling net that allows shrimp to pass to the back of the net while directing sea turtle and other unintentionally caught large objects out of the net. The congress passed a law that imposed an import ban on shrimp from particular countries unless the foreign government at issue has a programme in place to protect sea turtles during shrimp trawling in a manner similar to the programme applied to US shrimpers."[47]

After critically looking the facts of the case, the AB reversed the interpretation of the panel and found out that the US measure falls within Article XX (g) but struck down the measure since it fails to meet the chapeau criteria. The AB stated that the US measure required complainant governments to adopt exactly

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World Wide Web:< http://papers.ssrm.com/so13/papers.cfm?abstract_id=301404> p. 803.

[43] Chimini, B.S. (2002). WTO and Environment: Legitimisation of Unilateral Trade Sanctions. *Economic and Political Weekly*. 37(2), p.135.

[44] *Ibid.*

[45] E. Appleton. 1999 Shrimp/Turtle: Untangling the Nets. *Journal of International Economic Law*. 2(3) p 478.

[46] *Ibid.*

[47] Simon & Mercurio, *supra note* 6, p. 403.

similar policy with that of the US without taking in to account different conditions of the countries.[48] I think the way the AB interpreted discrimination is proper because from the *à contrario* reading of the chapeau it is possible to understand that discrimination occurs not only when we treat countries with similar conditions differently but also when we treat countries with different conditions similarly.[49] As long as the objective of the measure can be met through equivalent but different measure, there seems to be no reason why states are allowed to require others to adopt similar policies. Otherwise some countries can use this gap to create disguised restriction on international trade, and developed countries can request LDCs and developing countries to adopt costly unilateral environmental measures which are hardly affordable. Thus, a rigid measure that applies to all without taking the circumstances of each member into account should not pass the chapeau test since it amounts to disguised trade restriction.[50]

The second measure which forced the AB to declare that the US measure as 'unjustifiable discrimination' is the fact that US conducted negotiation with some countries like the Caribbean and even gave them more time to implement the measure whereas it did not attempt to do the same thing with other countries like the complainants. Moreover, they were given shorter time for implementation.[51] This is clearly an 'unjustifiable discrimination'. The US measure also prohibited imports of shrimp caught using TED if they are from a non-certified countries.[52] However, if the sole purpose of the US measure was to effectively protect sea turtles from danger then as long as exporting countries are using TED, the mere fact that they are uncertified should not impede them from exporting shrimp to the US. Hence, this requirement was completely unnecessary and the AB's determination of this criterion as 'unjustifiable discrimination' is proper.

In sum, the AB's interpretation of the chapeau in the Shrimp/Turtle case is a good one that attempted to balance environmental and trade issues. I want to reiterate that the task of creating this balance is not an easy one and in the Shrimp case US desire to protect sea turtles was recognized by WTO in a manner that took in to consideration the substantive rights of the complainants in the WTO agreements.

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[48] *Ibid.*
[49] Chimini, s*upra note* 43, p. 781.
[50] Chimini, s*upra note* 43, p. 781.
[51] Simon, *supra note* 6. p. 410.
[52] *Ibid.*

Conclusion

In light of the brief discussion here-above, the interpretation made by the DSB of the WTO with regard to the General exception clause indicates that it has started to take other policy concerns into account and is attempting to create a balance between international trade and other social policies.

The interpretations given for the terms 'public moral and order' and 'exhaustible' natural resources in the *US-Gambling* case and *Shrimp/Turtle* case have respectively widened the scope of public policies that can be justified under the General exception clauses. Due to this interpretation, the US's public moral policy and Turtle protection has been found within the domain of Article XIV (a) of GATS and Article XX (g) of GATT. In the *Shrimp/Turtle* case the interpretation of the AB has recognized to some extent measures with extra-territorial effect although the GATT panels underlined that such measures are not recognized within the WTO.

The new necessity test introduced in the *Korea/Beef* case has given some flexibility to this so as to allow the entertainment of other policy concerns in the WTO trading regime. This interpretation seems to have balanced trade and other equivalent social policies. Because of such interpretation the WTO in the *Asbestos* case for the first time justified trade restrictive measure taken to promote health policy. Moreover, the AB also recognized members' autonomy of determining their own level of protection in areas of health. Hence, it permitted France to continue with the import ban.

In order to further allow states promote their policy interests within the General exception clause the WTO DSBs, there is the need for a careful interpretation of the chapeau. If the AB is going to make bilateral or multilateral negotiation a mandatory requirement to qualify a measure to pass the test of the chapeau, then it can create impediments for members who seek to take genuine unilateral environmental measures. And on the other hand, it is not possible to totally exclude negotiation from serving as a requirement to fulfil the criteria of the chapeau. It is also difficult to conclude that the AB is making some kind of negotiation mandatory by merely looking at the decision of the *Shrimp/Turtle* case.

The negotiation element should thus be determined case by case taking into account different factors and circumstances. Finally, there seems to be the need to reiterate that the current interpretation of the General exception clause is an encouraging progress and it has indeed, to some extent, allowed members to have some policy space as can be observed from the *Shrimp/Turtle* case and *Asbestos* case. ■

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ቤዛ ደሳለኝ *

መግቢያ

የጉዳዩ አመጣጥ በአጭሩ አቶ ዋለልኝ ... (1ኛ ተጠሪ) የፍርድ ባለመብት ሆነው በወ/ሮ ለመች ... (2ኛ ተጠሪ) ላይ በምዕራብ ጎጃም መስተዳደር ዞን በከፍተኛው ፍ/ቤት ባቀረቡት የአፈፃፀም አቤቱታ መነሻነት ሲሆን ክርክር የተነሳበትን የ2ኛ ተጠሪን ንብረት እንዲረከቡ ፍ/ቤቱ ትዕዛዝ ይሰጣል፡፡ የኢትዮጵያ ንግድ ባንክ (አመልካች) በዚሁ ትዕዛዝ ላይ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 418 መሠረት ጣልቃ በመግባት አቤቱታውን ያቀርባል፡፡ ይዘቱም 1ኛ ተጠሪ እንዲረከብ ትዕዛዝ የተሰጠበትን የ2ኛ ተጠሪ ንብረት አስቀድሜ ያስከበርኩት ስለሆነና ባለዕዳ በተባለችው 2ኛ ተጠሪ ላይ በዋስትና ግዴታ ምክንያት ክስሼ ፍርድ ያሰጠሁ በመሆኑ ቤቱን 1ኛ ተጠሪ እንዲረከብና ስመንብረትነቱም እንዲዛወርለት የተሰጠው ትዕዛዝ ቀሪ እንዲሆን ይታዘዝልኝ የሚል ነው፡፡ ፍ/ቤቱም የግራ ቀኙን ክርክር መርምሮ አመልካች ክርክር ባስነሳው ንብረት ላይ የማስከበሪያ ትዕዛዝ ያሰጠበት መሆኑ ቢረጋገጥም ማስከበር ብቻውን የቀዳሚነት መብት የሚያሰጥ አይደለም፤ ስለሆነም የቀረበው የአፈፃፀም ክስ ይቋረጥልኝ አቤቱታ ውድቅ ነው ሲል ብይን ሰጥቷል፡፡

አመልካችም በዚህ ብይን ቅር በመሰኘት ቅሬታውን ለክልሉ ጠቅላይ ፍ/ቤት ያቀርባል፡፡ ፍ/ቤቱ ክርክር ባስነሳው ቤት ላይ *የቀዳሚነት መብት ያለው ወገን ማን ነው?* የሚለውን ጭብጥ በዋነኛነት በመያዝ ምንም እንኳ አመልካች በ2ኛ ተጠሪ ላይ አስቀድሞ ክስ ያቀረበ እና አስወስኖ የአፈፃፀም ክስ የመሠረተ መሆኑ ቢረጋገጥም፤ 1ኛ ተጠሪ በ2ኛ ተጠሪ ላይ ክስ አቅርበው በ2ኛ ተጠሪ ስም በፍኖተሰላም ከተማ ቀበሌ 02 በቁጥር መ/1/1984 ተመዝግቦ የሚኘውን ቤት እንዲረከቡ የሚል ውሳኔ ከተሰጠ በኋላ በመሆኑ እና በቀጥታ ክሱ ጊዜ ይኸው ንብረት ታግዶ እንዲቆይ ማስደረጉም 1ኛ ተጠሪ በአከራካሪው ንብረት ላይ ያገኘውን መብት የሚያሳጣ ሆኖ ባለመገኘቱ የአመልካች ቅሬታ ተቀባይነት ያለው አይደለም፡፡ ይልቁንም አንድ ንብረት በፍርድ ቤት ተከብሮ የመያዙ እውነታ ንብረቱ ከመያዙ በፊት ገንዘብ እንዲከፈላቸው በባለሀብቱ ላይ ያስፈረዱ ወገኖች የተያዘውን ንብረት ለመውሰድ እንዳይከለከሉ እንጂ አመልካች ቤቱን በመያዣነት ባልያዘበት ሁኔታ ቀድሞ ክስ ማቅረብ የ1ኛ ተጠሪን መብት የሚያስቀር ባለመሆኑ የአመልካችን ቅሬታ ሳይቀበል የሥር ፍ/ቤት ውሳኔን አጽንቷል፡፡

አመልካች በዚህ ውሳኔ በድጋሚ ቅር በመሰኘት አቤቱታውን ለፌደራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት አቅርቧል፡፡ ችሎቱም፤ 1ኛ ተጠሪ በ2ኛ ተጠሪ ላይ ክስ ከማቅረቡና ከማስወሰኑ በፊት አመልካች በ2ኛ ተጠሪ ስም የሚገኘውንና አከራካሪውን ንብረት በማናቸውም መንገድ ቢሆን ወደ ሦስተኛ ወገን እንዳይተላለፍ አሳግዶታል፤ ይህም ማለት አመልካች እንደ ክሱ ቢያስፈርድ ፍርዱ ወጤት ያገኝ ዘንድ የተከሳሽ ንብረት ወደ ሦስተኛ ወገን እንዳይተላለፍ ተከብሮ ይቆይ የሚል በመሆኑ በፍ/ብ/ሕ/ቁ 3044 እንደተመለከተው ይህ የማሳገድ ተግባር ከፍርድ የመነጨ የመያዣ መብትን የሚያቋቁም ነው የሚል ውሳኔ ሰጥቷል፡፡ ይኸው ፍ/ቤቱ

* ኤል.ኤል.ቢ. ኤል.ኤል.ኤም

የሰጠው ፍርድ ተፈፃሚነት እንዲያገኝ ለማረጋገጥ አንዱ ወገን በሌላው ወገን የማይንቀሳቀስ ንብረት ላይ ከሚያሰጠው የማስከበሪያ ትዕዛዝ አንዱ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 154 መሠረት ግራቀኙ በክርክር ላይ እያሉ ከፍርድ በፊት በንብረት ላይ የሚሰጠው የማገጃ ትዕዛዝ ነው፤ ስለሆነም አመልካች የ2ኛ ተጠሪ ንብረት በማናቸውም መንገድ ቢሆን ወደ ሦስተኛ ወገን እንዳይተላለፍ ተከብሮ እንዲቆይ ያስደረገ በመሆኑ በዚሁ ንብረት ላይ የመያዣ መብት ለማግኘቱ አረጋገጭ ነው፤ ይህ ከሆነ ደግሞ ይህ በመያዣ የተያዘውን ንብረት ከንብረቱ ዋጋ ላይ የሚጠይቀውን ገንዘብ ከሌሎች ገንዘብ ጠያቂዎች በፊት ለእርሱ በቀዳሚነት እንዲከፈለው ለመጠየቅ እንደሚችል በፍ/ብ/ሕ/ቁ 3059/1/ የተደነገገ በመሆኑ 1ኛ ተጠሪ በአከራካሪው ንብረት ለይ ውሳኔ በማሰጠቱ ብቻ የቀዳሚነት መብት እንዲኖረው በማድረግ የሥር ፍ/ቤቶች የሰጡት ውሳኔ መሠረታዊ የሕግ ስህተት ያለበት ነው ሲል በማተት የሥር ፍ/ቤት ውሳኔዎችን ሽሯል፡፡ በአንፃሩ አመልካች የፍርድ መያዣ በአከራካሪው ንብረት ላይ ያለው በመሆኑ ይኸው ንብረት ለሚፈለገው ዕዳ በቅድሚያ ለአመልካች ሊውል ይገባል ሲል ውሳኔ ሰጥቷል፡፡

ምልከታ

ከላይ የተመለከተው የፍርድ ውሳኔ የመያዣ (mortgage) ሕግን መሠረት አድርጎ የተሰጠ በመሆኑ በቅድሚያ በፍትሐብሔር ሕጋችን የተካተተው የሞርጌጅ ሕግ ዓላማው ምን እንደሆነና ሊያሳካ የፈለገውን ግብም ምንነት በመጀመሪያ ጠቅለል ባለ መልኩ መረዳት አግባብነት ይኖረዋል፡፡

ውል ውስጥ የሚገቡ ሰዎች አንድን ንብረት መያዣ በማድረግ የገበያ ውጣ ውረድ፣ የሰዎች ቃልአባይነት፣ ወዘተ... ሊያደርስባቸው የሚችለውን አደጋ በመቀነስ በልበ ሙሉነት ገበያ ውስጥ እንዲገቡ ማድረግ የዋስትናዎች (Security devices) ዋነኛና መሠረታዊ ዓላማቸው ነው፡፡[1] ይህም ገንዘቡን የሚሰጥ ባለገንዘብ የባለዕዳውን ንብረት በማፈላለግ፣ በፍርድ ቤት ውሳኔ ማስያዝ ወይም ማስከበር ሊወስድበት የሚችለውን የተራዘመ የፍርድ ሂደት በማስወገድ ዕዳን ለማስከፈል በተጨማሪም በባለገንዘቦች መካከል የሚነሳን የቀደምትነት ክርክር በማስቀረት በንብረት ላይ የመያዣ መብት ያለው ወገን የቀደምትነት የዋስትና መብቱ ተጠብቆለት የገበያው እንቀስቃሴ በተሳካና በተቀላጠፈ ሁኔታ እንዲከናውን ማድረግ ሊያሳካ የሚፈልገው ግብ ነው፡፡

በፍትሐብሔር ሕጋችን መሠረት ሞርጌጅ ከተለያዩ ሦስት ሁኔታዎች ሊመነጭ ይችላል፡፡ እነዚህም ከሕግ የሚመነጭ መያዣ፣ በፍርድ የሚሰጥ የማይንቀሳቀስ ንብረት መያዣ እና ከውል የሚመነጭ የመያዣ መብት ናቸው፡፡[2]

ከላይ የተመለከቱት የመያዣ ዓይነቶች አንደተጠበቁ ሆነው፣ በሕግ ፊት የሚፀና መያዣ ተፈፃሚነት እንዲኖረው ደግሞ አራት የተለያዩ ቅድመ ሁኔታዎች መሟላት አለባቸው፡፡ የመጀመሪያው የፎርማሊቲዎች መሟላት ሲሆን፣ ይህም የዋስትና ስምምነቱ በጽሁፍ እንዲደረግ ከመደንገጉ ባሻገር በውል አዋዋይ ወይም በፍ/ቤት ፊት መደረግን የግድ ይላል፡፡ ይኸው በጽሁፍ የተደረገ ስምምነትም በሁለት ምስክሮች ፊት ሊረጋገጥ ይገባዋል፡፡[3] ሁለተኛው ዋስትና የተገባለት የገንዘብ መጠን መገለፅ አስፈላጊ መሆኑ ነው፡፡ ይህም ማለት የማይንቀሳቀስ

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[1] መንበረፀሐይ ታደሰ፣ ሞርጌጅ፣ ዋስትና የተነፈገው የዋስትና ሕግ፣ (መጋቢት 1998 ያልታተመ) ገጽ 1

[2] የፍ/ብ/ሕ/ቁ 3042፣ 3043፣ 3044 እና 3045

[3] የፍ/ብ/ሕ/ቁ 3045፣ 1723 እና 1725ን እንደየቅደም ተከተላቸው ይመልከቱ፡፡ ሆኖም እዚህ ጋር ግንዛቤ ሊወሰድበት የሚገባው ጉዳይ በፍ/ብ/ሕ ቁ 1723 የተቀመጠው መስፈርት በአዋጅ ቁጥር 639/2001 አንቀፅ 2 መሰረት ለባንክ ወይም ለአነስተኛ የፋይናንስ ተቋም የብድር መያዣነት የተሰጠ የማይንቀሳቀስ ንብረትን የሚመለከት ውል በፍርድ ቤት መዝገብ ወይም ሥልጣን በተሰጠው አዋዋይ ፊት መፈረም አያስፈልገውም

ንብረት የመያዣ ውል መዕናት ከላይ ከተቀመጠው መስፈርት በተጨማሪ ዋስትና የተገባለት የገንዘብ መጠንን መግለፅ ይጠይቃል። ይህ ሁኔታ ካልተሟላ የዋስትና ውል ምንም የሕግ ውጤት እንደማይኖረው የፍትሐብሔር ሕጋችን ይደነግጋል።[4]

ሦስተኛው የዋስትናው የመመዝገብ አስፈላጊነት ነው። ይህም ቢሆን በሕግ ፊት የሚፀና የመያዣ ውል ለማቋቋም የግድ የሚል ነው።[5] ምክንያቱም የመመዝገብ አስፈላጊነት ከመያዣ ውል በሕግ ፊት መጽናት ጋር የተያያዘ በመሆኑ ከላይ የተጠቀሱት ሦስት ዐይነት መያዣዎች በሕግ ፊት ተፈፃሚነት እንዲኖራቸው መመዝገባቸው ግዴታ ነው። ይህ ካልተሟላ ግን በሕግ ፊት ውጤት ያለው የመያዣ ውል ተመስርቷል ለማለት አይቻልም።

አራተኛውና የመጨረሻው አስፈላጊ ነገር ደግሞ መያዣው የሚመዘገብበት ጊዜ ነው። ይህም ሲባል ሞርጌጅን አስመልክቶ የምዝገባ መከናወን ውጤት ሊያስከትል የሚችለው በመያዣነት የተያዘው ሀብት ወደ ሌላ ሰው ከመተላለፉ በፊት የተደረገ እንደሆነ [6] ወይም በዚሁ ንብረት ላይ የመያዝ ትዕዛዝ (attachment order) ከመስጠቱ በፊት ከተከናወነ ብቻ ነው። [7] ይህ አንቀፅ መነሻ ሀሳቡን መሠረት የሚያደርገው የመያዣ መብት በዋነኛነት ንብረቱን የመከተል (right in rem) መብት በመሆኑ ምዝገባው የሚከናወነው የዚሁ ንብረት ባለቤትነት ወደ ሌላ ሰው ከመተላለፉ በፊት ወይም በንብረቱ ላይ የመያዝ ትዕዛዝ ከመሰጠቱ በፊት ካልሆነ ውጤት ሊያስከትል ባለመቻሉ ነው። ምክንያቱም የመያዣ ውል ተዋዋይ የሆነ ወገን ንብረቱን በሚያስይዝበት ወቅት በንብረቱ ላይ የባለቤትነት መብት የሌለው ከሆነ ወይም ንብረቱ ላይ የመያዝ ትዕዛዝ ተሰጥቶበት ከሆነ ከዚህ በኋላ የሚደረግ የመያዣ ምዝገባ ምንም ውጤት ሊያስከትል ባለመቻሉ ነው።

ወደ ተያዘው ጉዳይ ስንመለስ በዋነኛነት በሰበር ሰሚ ችሎቱ የፍርድ ሀተታ ላይ እንደተገለፀው የፍ/ብ/ሥ/ሥ/ሕ/ቁ 154 ን መሠረት አድርጎ የሚሰጥ የእግድ ትዕዛዝ (ንብረቱ በማናቸውም መንገድ ቢሆን ወደ ሦስተኛ ወገን እንዳይተላለፍ ተከብሮ እንዲቆይ መደረጉ) በዚሁ ትዕዛዝ በተሰጠበት ንብረት ላይ የመያዣ መብት እንዲቋቋም ያደርጋል የሚል ነው። ሆኖም ይኸው ነጥብ ከሕጉ ጋር ተገናዝቦ በአግባቡ መፈተሽ አለበት የሚል እምነት አለኝ።

በመሠረቱ ፍርድ ቤት የሚሰጣቸው የመያዝ ትዕዛዞች (attachments) ትዕዛዝ ላሰጠው ወገን የመያዣ (mortgage) መብት ሊሰጡ የሚችሉ መሆኑ ብዙም አከራካሪ አይደለም።[8] ይልቁንም አከራካሪ የሚሆነውና ተገቢው ምላሽ ሊሰጠው የሚገባው ጭብጥ *ዖትኞቹ በፍርድ የሚሰጡ የመያዝ ትዕዛዞች የመያዣ መብትን ያቋቁማሉ? ይህንንስ ለማድረግ ሊከተሉ የሚገባቸው የሕግ አካሄድ ምን መምሰል አለበት?* የሚለው ነው። ለእነዚህ ነጥቦች ምላሽ ለመስጠት ደግሞ በመጀመሪያ የመያዝ ትዕዛዞችን ዐይነትና የሚያስከትሉትን ሕጋዊ ውጤት መፈተሽ አስፈላጊነት ይኖረዋል።

የመጀመሪያው ዓይነት የመያዝ ትዕዛዝ ከፍርድ በፊት ንብረት እንዲከበር በማድረግ የሚሰጥ ነው።[9] ይህም የሚፈፀመው ክርክሩ በማናቸውም ደረጃ በሚገኝበት ጊዜ ከሳሽ ክሱን ለማሰናከል ያቀደ መሆኑን ወይም የተሰጠው ትዕዛዝ እንዳይፈፀም ማድረጉን በመጥቀስ ለፍርድ ቤቱ ሲያስረዳና ፍ/ቤቱም በፍ/ብ/ሥ/ሥ/ሕ/ቁ 151(1)(ሀ) እና (ለ) ሥር የተዘረዘሩት ሁኔታዎች መኖራቸውን መርምሮ እውነት መሆኑን ካረጋገጠ ተከሳሹ ዋስትና እንዲሰጥ ወይም ለክርክሩ መነሻ የሆነው ንብረት ወይም ግምቱ እንዲቀርብ በወሰነው ጊዜ እንዲያመጣ ወይም ደግሞ ከሚያዘው ገንዘብ ወይም ንብረት ላይ ለሚሰጠው ፍርድ ተመዛኝ የሚሆን መጠን ያለው

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[4] የፍ/ብ/ሕ/ቁ 3045(2)
[5] የፍ/ብ/ሕ/ቁ 3052
[6] የፍ/ብ/ሕ/ቁ 3057(1)
[7] የፍ/ብ/ሐ/ቁ 3057(2)
[8] የፍ/ብ/ሕ/ቁ 3044 ይህንን አስመልክቶ መያዣ ከፍርድ ሊመነጭ አንደሚችል በግልፅ ደንግጓል።
[9] የፍ/ብ/ሥ/ሥ/ሕ/ቁ 151-153 ይመለከቷል።

ገንዘብ ወይም ንብረት በፍ/ቤቱ እንዲቀመጥ ወይም ይህን መያዣ የማይሰጥበትን ምክንያት ቀርቦ እንዲያስረዳ በቅድሚያ ያዛል።[10]

ተከሳሹ ዋስ የማይጠራበትን ምክንያት ፍርድ ቤቱ በወሰነው ጊዜ ቀርቦ ያላስረዳ እንደሆነ ወይም እንዲያስይዝ የታዘዘውን ገንዘብ ሳያስቀምጥ የቀረ እንደሆነ በዝርዝር ከታወቀው ንብረቱ ውስጥ ለሚወስንበት ፍርድ ተመዛዛኝ የሆነ ሀብቱ በሙሉ ወይም በከፊል እንዲያዝ ወይም ተከብሮ እንዲቆይ ትዕዛዝ ይሰጣል።[11]

በዋነኛነት በዚህ መልኩ ከፍርድ በፊት ንብረትን በማስከበር የሚሰጥ የመያዝ ትዕዛዝ የሚያነጥላረው ለዋናው ክርክር መሠረት በሆነው ገንዘብ መጠን ከሳሽ ቢያስፈርድ ለፍርዱ ማስፈፀሚያ የሚሆን ንብረት እንዳይጠፋ ከወዲሁ መድህን ለማዘጋጀት እንጂ የክርክሩ መሠረት ያልሆነውን የተከሳሹን ንብረት ከውሳኔ በኋላ ተከሳሽ ለከሳሽ እንዲያስረክብ ለማድረግ አይደለም። ምክንያቱም ተከሳሹ ዋስ ያልጠራበትን ምክንያት በሚገባ ያስረዳ እንደሆነ ወይም የሚፈለግበትን መያዣ የሰጠ እንደሆነ የተያዘበት ንብረት በሙሉ ወይም በከፊል እንዲለቀቅለት ፍርድ ቤት የማዘዝ ሥልጣን ያለው በመሆኑ ነው።[12]

ሁለተኛው ዐይነት የመያዝ ትዕዛዝ በክርክር ወቅት ለጊዜው በሚሰጥ የማገድ ትዕዛዝ ወይም እግድ መሠረት የሚፈፀም ነው።[13] ይህም የሚሆነው ለክርክሩ መነሻና ምክንያት የሆነው ንብረት የሚጠፋ፣ የሚበላሽ ወይም ተከሳሹ ለሌላ ሰው አሳልፎ ለመስጠት ለመሸጥ ወይም በሌላ ዘንድ በተሰጠ ውሳኔ ንብረቱን ያለአግባብ አዛውሮ ለመስጠት ወይም ለመሸጥ ያቀደ መሆኑ የታወቀ እንደሆነ፣ ወይም ተከሳሹ የባለመብቶችን ጥቅም ለመጉዳት ሲል ንብረቱን ለማጥፋት ለሌላ ሰው አሳልፎ ለመስጠት ያቀደ የዛተ ወይም ያሰበ መሆኑ የተረጋገጠ እንደሆነ ነገሩ በፍርድ እስኪወሰን ወይም ሌላ ትዕዛዝ እስኪሰጥ ድረስ ንብረቱ እንዳለ እንዲቆይ፣ ከመጥፋት እንዲድን፣ እንዳይበላሽ ለሌላ ሰው ተላልፎ እንዳይሰጥ፣ ወደ ሌላ ሥፍራ እንዳይዘዋወር፣ እንዳይባክን ወይም ከዚህ በላይ ባሉት ኃይለቃሎች የተዘረዘሩት ነገሮች እንዳይፈፀሙ ፍርድ ቤቱ ትዕዛዝ የሚሰጥበት ሁኔታ ነው።[14]

ከዚህም መረዳት የሚቻለው በዚህ መልኩ ንብረት እንዲያዝ ትዕዛዝ ሊሰጥ የሚችለው ንብረቱ የክርክሩ መነሻና ምክንያት በሆነበት ጊዜ ብቻ ነው። ከዚህ ውጭ የክርክሩ መሠረት የንብረቱ ባለሀብትነት፣ ስመንብረት ማዛወር ወይም የንብረቱ ተካፋይነት እና ሌሎችም ተያያዥነት ያላቸው ክርክሮች ባልሆነበት ጊዜ ንብረቱ እንዳይሸጥ፣ እንዳይለወጥ ወይም በማናቸው መልኩም ወደ ሌላ ሦስተኛ ወገን ንብረቱ እንዳይተላለፍ የእግድ ትዕዛዝ ሊሰጥ አይችልም። ምክንያቱም ንብረቱ የክርክሩ መንስኤ ባልሆነበት ሁኔታ ንብረቱን በፍ/ብ/ሥ/ሥ/ሕ/ቁ 154 መሠረት ማገድ ይህንኑ ንብረት ከገበያ ውጭ ከማድረግ ባሻገር የሚኖረው ፋይዳ የለም። ከጅምሩም ቢሆን ንብረቱን አስመልክቶ የቀረበ ክስ የለምና።

ከላይ የተመለከቱት ነጥቦች በአጭሩ ሲጠቃለሉ፣ ንብረትን አስመልክቶ በፍርድ የሚሰጡ የመያዝ ትዕዛዞችን በሁለት መልኩ ከፍለን ልናያቸው የሚቻል ሲሆን፣ የመጀመሪያው አካሄድ ከሳሽ ለዋናው ክርክር መሠረት በሆነው ገንዘብ መጠን ልክ ቢያስፈርድ ለፍርድ ማስፈፀሚያ የሚሆን የተከሳሹ ወይም የባለዕዳው ንብረት እንዳይጠፋ በክርክሩ ገንዘብ መጠን ልክ ይኸው ንብረት የሚከበርበት ወይም የሚያዝበት ነው፤ ሁለተኛው ደግሞ ንብረቱ የክርክሩ መሠረት በሆነበት ጊዜና ይኸው ንብረትም ክርክሩ ፍፃሜ ከማግኘቱ በፊት ቢሸጥ፣ ቢለወጥ ወይም ለሌላ ሶስተኛ ወገን ቢተላለፍ ክርክሩን ዋጋ አልባ የሚያደርገው በመሆኑ ይኸው ንብረት እንዳይሸጥ

[10] የፍ/ብ/ሥ/ሥ/ሕ/ቁ 151(1)(ለ)
[11] የፍ/ብ/ሥ/ሥ/ሕ/ቁ 152(1)(ለ)
[12] የፍ/ብ/ሥ/ሥ/ሕ/ቁ 152(2)
[13] የፍ/ብ/ሥ/ሥ/ሕ/ቁ 154-159 ይመለከቷል።
[14] የፍ/ብ/ሥ/ሥ/ሕ/ቁ 154(ሀ) እና (ለ)

እንዳይለወጥ ወይም በማናቸውም መልኩ ለሌላ ሦስተኛ ወገን እንዳይተላለፍ የሚሰጥ የማስከበር ወይም የመያዝ ትዕዛዝ ነው፡፡

ንብረትን የመያዝ ትዕዛዝ ከላይ በተመለከትነው ሁኔታ በሁለት መልኩ ተከፍሎ የሚታይ ሲሆን ቀጥሎ የምናጤነው እነዚሁ ትዕዛዞች የፍርድ መያዣን (Judicial mortgage) ሊያቋቁሙ ስለሚችሉበት የሕግ አግባብ ነው፡፡

የፍርድ መያዣ (Judicial mortgage) ከስያሜው ለመረዳት እንደሚቻለው ሊመነጭ የሚችለው ከፍርድ ቤት ወይም ከሽምግልና ዳኝነት (arbitration tribunal) ነው፡፡[15] በፍርድ የሚሰጥ የማይንቀሳቀስ ሀብት መያዣ የዋስትናው ምክንያት የፍርድ ቤት ትዕዛዝ ከመሆኑ በስተቀር በፅንሰ ሀሳቡ ከሌሎች በማይንቀሳቀስ ንብረት ላይ ከሚሰጡ ዋስትናዎች የተለየ አይደለም፡፡ ይህም ሲባል በተለይ ዋስትና የተገባለት የገንዘብ መጠን መገለፅ እና የዚሁ በፍርድ የመያዝ ትዕዛዝ የመመዝገብ አስፈላጊነት በዋነኛነት የሚጠቀሱት ናቸው፡፡ የማይንቀሳቀስ ንብረት መያዣ የተሰጠበት ገንዘብ ልክ በኢትዮጵያ ገንዘብ ካልተመለከተ በቀር መያዣው ፈራሽ ነው[16] ከሚለው ጠቅላላ ድንጋጌ በተጨማሪ በፍርድ የሚሰጥ የማይንቀሳቀስ ንብረት መያዣ መያዣው የተሰጠበትን ዕዳ ልክና ስለዚህም ዕዳ በመያዣ የተሰጠውን ንብረት ወይም ንብረቶች ማመልከት አለበት የሚሉት ድንጋጌዎች ይህንኑ አባባል የሚያጠናክሩ ናቸው፡፡[17]

በተጨማሪም በማናቸውም መልኩ የተቋቋመ የማይንቀሳቀስ ንብረት መያዣ ከተፃፈበት ቀን አንስቶ የማይንቀሳቀሰው ንብረት በሚገኝበት አገር ባለው በማይንቀሳቀስ ርስት መዝገብ ውስጥ ካልተፃፈ በቀር ማንኛውንም ዐይነት ውጤት እንደማያስገኝ ተመልክቷል፡፡[18] እነዚህ ጠቅለል ባለ መልኩ ሲታዩ በፍርድ የሚሰጥ የማይንቀሳቀስ ሀብት መያዣ በትዕዛዙ ላይ ንብረቱ ለምን ያህል ገንዘብ እንደተያዘ ከማመልከት ባሻገር ይኸው ትዕዛዝ በሚመለከተው አካል ርስት መዝገብ ውስጥ ካልተፃፈ በሕግ ፊት ውጤት የሚያስገኝ ካለመሆኑ ባሻገር እነዚህ ነጥቦች ከመያዣው መፅናት ጋር የተያያዙ በመሆናቸው እስካልተሟሉ ድረስ የፍርድ መያዣ በንብረቱ ላይ ተቋቁሟል ለማለት አይቻልም፡፡

ስለሆነም በፍርድ ቤት ትዕዛዝ የሚሰጥ የማይንቀሳቀስ ንብረት መያዣ ዋስትና ይኸው ዋስትና ይሆናል የተባለውን ንብረት እንዳይሸጥ እንዳይለወጥ ወይም ወደሌላ ሰው እንዳይተላለፍ ትዕዛዝ በመስጠት የሚከናወን አይደለም፡፡ ይልቁንም በማይንቀሳቀስ ንብረት ላይ የሚሰጥ የፍርድ መያዣ ንብረቱ በተመዘገበበት ቦታ ፍርድ ቤቱ በግልፅ ለሚጠቅሰው የገንዘብ መጠን በዋስትና መያዙን በመግለፅ ብቻ የሚከናወን ነው፡፡

በአንፃሩ የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በውሳኔው ላይ እንዳመለከተው ተከራካሪ ወገኖች ከፍርድ በፊት በፍ/ብ/ሥ/ሥ/ሕ/ቁ 154 መሠረት በንብረት ላይ የሚያሰጡት የማገጃ ትዕዛዝ የፍርድ መያዣን ያቋቁማል ሲል የሰጠው ትርጉሜ በተለይ የሞርጌጅን መሠረታዊ ድንጋጌዎችን የሚያፋልስ ነው፡፡

በመጀመሪያ ከላይ እንዳተመለከትነው መያዣ (mortgage) እና መያዝ (attachment) ፍፁም የተለያዩ ፅንሰ ሀሳቦች ናቸው፡፡ ይህም በመሆኑ ለምሳሌ ንብረቱን በመያዣነት የሰጠ ወገን (ዕዳውን የመክፈል ግዴታው እንደተጠበቀ ሆኖ) ንብረቱን ለመሸጥ ለመለወጥ መብት አለው፡፡[19] በአንፃሩ ንብረቱ በፍ/ብ/ሥ/ሥ/ቁ 154 የታገደበት ወገን ግን ይህንኑ ንብረት ለመሸጥ ለመለወጥ መብት የለውም፡፡ ስለሆነም በፍ/ብ/ሥ/ሥ/ሕ/ቁ 154 መሠረት የሚሰጥ የማገጃ ትዕዛዝ የፍርድ መያዣ መብትን ያቋቁማል ካልን እርስ በርሱ የሚጋጭ ነገር ነው የሚሆነው፡፡ ምክንያቱም አንድ የማይንቀሳቀስ ንብረት እንዲያዝ በፍርድ ሥነ ሥርዓት መታዘዙ ከተገለፀ

[15] የፍ/ብ/ሥ/ሥ/ሕ/ቁ 3044(1)
[16] የፍ/ብ/ሕ/ቁ 3045(2)
[17] የፍ/ብ/ሕ/ቁ 3044(2)
[18] የፍ/ብ/ሕ/ቁ 3052
[19] የፍ/ብ/ሕ/ቁ 3084(1)

በኋላ የሚደረግ የማይንቀሳቀስ ንብረት መያዣ መፃፍ ዋጋ የሌለው መሆኑ ተመልክቷል።[20] ይህም ማለት በንብረቱ ላይ የመያዣ ወይም የማገጃ ትዕዛዝ ከተሰጠበት በኋላ በዚሁ ንብረት ላይ የማይንቀሳቀስ ንብረት መያዣ ሊቋቋምበት የማይችል መሆኑን፣ ተደርጐ ቢገኝ እንኳ ውጤቱ ዋጋ አልባ እንደሚሆን ከዚሁ ድንጋጌ መረዳት ይቻላል።

ሆኖም የሰበር ሰሚው ችሎት የሰጠው ውሳኔ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 154 አማካኝነት የማገጃ ትዕዛዝ የተሰጠበት ንብረት ላይ ተጨማሪ የመያዣ ስምምነት ሊደረግበት ይችላል ወደሚለው የተሳሳተ ትርጓሜ ሊወስደን ይችላል። ምክንያቱም አንድ የማይንቀሳቀስ ንብረት ለተለያዩ ባለገንዘቦች በመያዣነት ሊሰጥ የሚችል በመሆኑ[21] በፍ/ብ/ሥ/ሥ/ሕ/ቁ 154 የሚሰጥ እግድ ደግሞ እንደ ፍርድ መያዣነት የሚቆጠር ከሆነ ተጨማሪ መያዣ በንብረቱ ላይ እንዳይመዘገብ ሊከለክል የሚችል ባለመሆኑ ነው። ይህ አሳሄድ ደግሞ ለክርክሩ መነሻና መንስኤ የሆነው ንብረት እንዳይሸጥ እንዳይለወጥ ወይም በማናቸውም መልኩ ለሌላ ሦስተኛ ወገን እንዳይተላለፍ የሚያሳግዱ ተከራካሪዎችን መብት በእጅጉ የሚጐዳ ይሆናል። ምክንያቱም ክርክሩ እልባት አግኝቶ ንብረቱን በሚረከቡበት ወቅት በንብረቱ ላይ ያልተፈለጉ ግዴታዎች (encumbrances) ተመዝግበው ሊገኙበት የሚችሉ በመሆኑ ነው።

በጥቅሉ በፍ/ብ/ሥ/ሥ/ሕ/ቁ[154 መሠረት የሚሰጥ የመያዝ ወይም የማገጃ ትዕዛዝ በዋነኛነት ንብረቱ በዋስትና የተያዘበትን ገንዘብ መጠን ስለማያመለክት፣ ይኸው ንብረት እንዲሸጥ እንዲለወጥ ወይም በሌላ መልኩ እንዲተላለፍ የሚፈቅድ ባለመሆኑ እና ይኸው የእግድ ትዕዛዝ በተሰጠበት ንብረት ላይ የመያዣ መብት ሊቋቋምበት የሚችል ባለመሆኑ ይህን ድንጋጌ መሠረት አድርጐ የሚሰጥ ትዕዛዝ የፍርድ መያዣን በንብረቱ ላይ ያቋቁማል ሲል የሰበር ሰሚ ችሎት የሰጠው ትርጓሜ አግባብነት ያለው አይመስልም።

ይልቁንም በፍርድ ከሚሰጥ የመያዣ ትዕዛዝ የፍርድ መያዣን ለማቋቋም የተለየ አግባብነት ሊኖራቸው የሚችሉት በፍትሐብሔር ሥነ-ሥርዓት ሕጉ ንብረት እንዲከበር ስለማድረግ በሚለው ርዕስ ሥር የተመለከቱት ድንጋጌዎች ናቸው።[22] በተለይ ክርክሩ የሚመለከተው በተከራካሪዎች መካከል ያለን የገንዘብ ግንኙነት እንጂ ንብረቱ የክርክሩ መነሻና ምክንያት ባልሆነበት ሁኔታ ፍ/ቤቱ የተከሳሹን ንብረት ለሚወስንበት ፍርድ ተመዛዛኝ የሆነው ሀብቱ በሙሉ ወይም በከፊል እንዲያዝ ወይም ተከብሮ እንዲቆይ ትዕዛዝ በሚሰጥበት ጊዜ ነው።

ይህም ቢሆን ግን ዋስትና የተሰጠበት ገንዘብ ልክና የማይንቀሳቀሰው ንብረት ዐይነት በግልፅ ካልተመለከቱና ይህንኑ የፍርድ ቤቱ ትዕዛዝ በሚመለከተው አካል እንዲመዘገብ ካልተደረገ ዋጋ የሚኖረው አይሆንም። ለምሳሌ ያህል 'ሀ' እና 'ለ' ከሳሽና ተከሳሽ ሆነው 'ሀ' ባቀረበው ክስ ያበደርኩትን ብር 50,000.00 በብድር ውሉ መሠረት 'ለ' ይክፈለኝ በሚል ጥያቄ መነሻነት ፍ/ቤቱ በ'ለ' ስም ተመዝግቦ የሚገኝ ቤት ለብር 50,000.00 ያህል ታግዷል በሚል በፍ/ብ/ሥ/ሥ/ሕ/ቁ 152(1) መሠረት እግድ ሊሰጥበት ይችላል። 'ሀ' በበኩሉ ይህንን ትዕዛዝ ለሚመለከተው መዝጋቢ አካል ወስዶ ካስመዘገበው የማይንቀሳቀስ ንብረት የፍርድ መያዣ ተቋቁሟል ልንል እንችላለን። ይህ ካልሆነ ግን በንብረቱ ላይ የመያዣም ሆነ የቀዳሚነት መብት ሊያስገኝ የሚችል ነገር አይኖርም።

ማጠቃለያ

የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት አምስት ዳኞች በተሰየሙበት ችሎት የሚሰጠው የሕግ ትርጉም የአስገዳጅነት ውጤት ያላቸው ከመሆኑ[23] ባሻገር በተለይ እነዚህ ውሳኔዎች ከመሰጠታቸው በፊት የተለየና ጥንቃቄ በሚያሻ መልኩ ጉዳዩ መመርመር ያለበት

[20] የፍ/ብ/ሕ/ቁ 3057(2)
[21] የፍ/ብ/ሕ/ቁ 3081(1)
[22] የፍ/ብ/ሥ/ሥ/ሕ/ቁ 151-153
[23] አዋጅ ቁጥር 454/1997 አንቀጽ አንቀጽ 4

መሆኑ ብዙ አካራካሪ ጉዳይ አይመስልም። በተለይ እነዚህ ውሳኔዎች በሀገሪቱ የፍትህ አስተዳደር ላይ ከሚያሳድሩት ተፅእኖ አኳያ ውሳኔዎቹ አሳማኝነት እንዲኖራቸው ከማስፈለጉ ባሻገር ውጤቱም ሆነ ወደ ውጤቱ ለመድረስ የተጓዙበት ትርጓሜ መንገድ ሕጋዊ ሊሆን ይገባል። እንዲህ ሲሆን የሁሉንም እርካታና አመኔታ ያተርፋል። ከእነዚህ አንዱ ከተጓደለ ግን እርካታውና አመኔታው የተሟላ አይሆንም።[24]

ሰበር ሰሚ ችሎቱ በተመለከትነው ጉዳይ ላይ ወደ ውሳኔው ለመድረስ መንደርደሪያ ያደረገው የፍርድ መያዣ ከእግድ ትዕዛዝ ሊመነጭ ይችላል የሚለው የሕግ ትርጓሜ የተሳሰተ በመሆኑ ውጤቱም በተከራካሪ ወገኖቹ ላይ አግባብነት የሌለው የመብት መቀዳደምን አስከትሏል። በዚህም ምክንያት የመያዣ መብት ሊኖረው የማይገባ አመልካች፣ የፍርድ ውሳኔ አግኝቶ አፈፃፀም ላይ ከደረሰ ተከራካሪ በቀደምትነት ገንዘቡን እንዲወስድ ተደርጓል። ይህም ተከራካሪ ወገኖች በተለይ በፍርድ ቤቶች ላይ ያላቸውን አመኔታ በእጅጉ እንዲመናመን የሚያደረግ ነው። ስለሆነም ሰበር ሰሚ ችሎቱ አስገዳጅ የሕግ ትርጉም ከመስጠት ባሻገር አስቀድሞ በሰጣቸው ትርጓሜዎች እስከመጨረሻው ሳይታሰር በተመሳሳይ ጉዳይ ላይ ሌላ የሕግ ትርጉም የመስጠት መብት የተሰጠው በመሆኑና የዚሁ ድንጋጌ ዓላማም በጊዜ ሂደት በሰበር ውሳኔዎች ላይ የሚታዩ ጉድለቶችን ማረም በመሆኑ የእርምት እርምጃ ሊወሰድ ይገባል የሚል እምነት አለኝ።

[24] መሀሪ ረዳኢ፣ በሰበር መዝገብ ቁጥር 23021 በተሰጠ ውሳኔ ላይ የቀረበ ችችት፣ (Mizan Law Review, Vol. 2 No. 2, 2008) ገፅ 379

ትኩረት- የማይንቀሳቀስ ንብረት ሽያጭ ውል በፍ/ቤት ስለማስመዝገብ

Focus: Registration of Contract of Immovable Property in court)

ማስታወሻ- የተከራካሪዎች የአባት ስም አልተገለፀም። (Patronymics of parties are omitted)

Cassation File No. 24554
Federal Supreme Court Cassation Division
Ginbot 28/2000 E.C

Petitioner: Ato Aysheshum …

Respondents: Sergeant Moghes … *et al*

Whether a contract of sale of a house approved by a court as per Art. 1723 (1) of the Civil Code (after public notice) can be challenged on the ground that it is partly owned by the intervenor (former spouse of the deceased); and whether such intervention is admissible in a suit instituted to seek delivery of the house.

The present petitioner started the action at the Federal First Instance Court stating that he has concluded a contract of sale of a house with Sergeant Moghes … and sought the registration of the contract and the transfer of ownership. The seller appeared after being summoned by the court and agreed to the registration of the contract. The court then through written media announced that anyone opposing the registration of the contract has the right to appear and present opposition but no person appeared. The court decided that the contract of sale was approved and that the ownership should be transferred to the buyer. On the basis of this decision the buyer received the title deed of the house from the Ministry of Works and Urban Development.

Because the seller had not yet delivered the house to the buyer, action was brought against the present respondents seeking delivery of the house after the seller's death. The former wife of the deceased intervened in the pending second action, and she along with the other heirs of the deceased argued that the contract was invalid because the contract was made without the consent of the wife.

The court decided that the contract is invalid because it did not receive the consent of the spouse and because, under Arts. 1196 and 2266 of the Civil Code, a contract of sale is complete only when the house is delivered and this has not been done in the present case. The Federal High court to which appeal was taken rejected the appeal. The present petition was brought from this decision.

Decision

1. The contract of sale was approved by the competent court at the request of the petitioner due to failure of any party to appear and contest the sale after public notice in a newspaper and after the seller confirmed to the court about the conclusion of the contract.

2. The wife who wished to contest the approval of the contract should have appeared during the suit that approved the contract but has no right to intervene in the suit that was brought to seek the delivery of the house as the ownership rights of the buyer has already been determined in the previous suit.
3. The heirs are claiming that the contract of sale should be invalidated because their mother who is the wife of the deceased did not give her consent and because they are entitled to half of the property as heirs of the deceased. However, as the contract has already been approved by the court under Article 1723(1) of the Civil Code and because the court had ordered the transfer of title to the buyer, the property ceases to be owned by the father of the heirs.
4. The Federal First Instance Court committed error of law by allowing the wife of the deceased to intervene as a party and by invalidating the contract that has been approved by a court of the same level.
5. The decisions of the lower courts are reversed and the respondents are ordered to deliver the house to the petitioner.

* * *

የሰ/መ/ቁ/ 24554
የፌ.ጠ/ፍ/ቤት ሰ/ሰሚ ችሎት
ግንቦት 28 ቀን 2000 ዓ.ም

አመልካች ..... አቶ እይሸሹም ...

ተጠሪዎች ..... እነ ፱ አለቃ ዐገስ ...

በፍ.ብ/ሕ/ቁ/ 1723(1) መሠረት በፍ/ቤት የፀደቀ የቤት ሽያጭ ውል የሻጭ ሚስት በተቃዋሚነት ቀርበው ውሉ እንዲሻር ማድረግ ይችሉ እንደሆነ፤ ይህ ጥያቄ ቤቱን ለመረከብ በቀረበው ክስ ጊዜ ሊቀርብ የሚችል መሆን አለመሆኑ።

የአሁን አመልካች በፌ/መ/ደ/ፍ/ቤት ባቀረቡት ማመልከቻ ከተከሳሾች አውራሽ ጋር የቤት ሽያጭ ውል ስምምነት አድርገው ውሉ እንዲፀድቅ ለፍ/ቤት አመልክተው ሻጩ በጋዜጣ በተደረገ ጥሪ መሠረት ቀርበው ቤቱን መሸጣቸውን አምነው ስሙ በአመልካች ስም ቢዛወር እንደማይቃወሙ አረጋግጠዋል። ፍ/ቤቱም ተቃዋሚ ቢኖር እንዲቀርብ በጋዜጣ ማስታወቂያ አውጥቶ ተቃዋሚ ስላልቀረበ ውሉን አፅድቆ የቤቱ ስም ወደ አመልካች እንዲዛወር ወስኗል። በዚህ መሠረት የሥራና ከተማ ልማት ሚኒስቴር ካርታ ሰጥታቸዋል። ቢሆንም ሻጩ ከሞቱ በኋላ አመልካች ቤቱን እንዲያስረክቧቸው ተከሳሾችን ክሰዋል። የተከሳሾች እናት እና የሟች ባለቤት በጣልቃ ገብነት ቀርበው ከወራሾች ጋር በመሆን የተሸጠው ቤት በጋብቻ ውስጥ የተገኘ የጋራ ሀብት ስለሆነ ያለ ሚስት ፈቃድ የተደረገው የቤት ሽያጭ ውል ውድቅ እንዲደረግ አመለከቱ፤ ፍ/ቤቱም የሻጭ ሚስት ስምምነታቸውን ያልገለፁ በመሆኑ እና አመልካችም ቤቱን ያልተረከቡት ስለሆነ በፍ/ብ/ሕ/ቁ. 1196 እና 2266 መሠረት ሽያጩ ተፈፅሟል ለማለት አይቻልም በማለት ተከሳሾች ቤቱን ሊያስረክቡ አይገባም ሲል ወሰነ። የፌ/ከ/ፍ/ቤትም የቀረበለትን ይግባኝ አልተቀበለውም። አመልካች የሰበር አቤቱታ ያቀረቡት እነዚህን ውሳኔዎች በመቃወም ነው።

ውሣኔ

1. ገዢ የሽያጭን ውሉን ለማስመዝገብ እና የባለቤትነት ስም ለማዛወር ካመለከቱ በኋላ ሻጭ ቀርበው ውሉን አምነዋል፡፡ ፍ/ቤቱም ተቃዋሚ እንዳለ በጋዜጣ እንዲጠራ አድርጐ የመጣ ተቃዋሚ አለመኖሩን በማረጋገጥ ውሉ እንዲጸድቅ እንዲሁም የባለቤትነት ስም ከሻጭ ወደ ገዢ እንዲዛወር ወስኗል፡፡
2. ሚስት ጣልቃ ገብተው መከራከር የነበረባቸው ውሉ በጸደቀበት ፍ/ቤት እንጂ ውሉ ከጸደቀ በኋላ ቤቱን ለመረከብ ከሳሽ በተከሳሾች ላይ በመሠረቱት ክስ ጊዜ አይደለም፤ ምክንያቱም ቤቱን የተመለከተ መብት ውሉ በፍ/ቤት በጸደቀበት ወቅት ተረጋግጧል፡፡
3. ወራሾችም ያነሱት የመከራከሪያ ነጥብ ቤቱ የአባታችንና የእናታችን የጋራ ሀብት ስለሆነ እናታችን ፈቃዷን ሳትሰጥ የተደረገው ውል ሕጋዊ ስላልሆነ ሊጸና ስለማይገባ ያባታችን ድርሻ ይገባናል በማለት ነው፡፡ የውርስ ንብረት የተባለውን ቤት ሽያጭ ገዢው በፍ/ብ/ሕ/ቁ. 1723(1) መሠረት እንዲጸድቅላቸው አመልክተው ሻጩም ፍ/ቤት ቀርበው መስማማታቸውን በመግለፃቸው ውሉ የተረጋገጠና የቤቱ ባለቤትነት ለአመልካች እንዲዛወር የተወሰነ በመሆኑ ይህ ንብረት የወራሾች አባት ንብረት መሆኑ የቀረ ስለሆነ ወራሾች የንብረት ጥያቄ የሚያነሱበት አይደለም፡፡
4. የፌ/መ/ደ/ፍ/ቤት የተከሳሾችን ጥያቄ ውድቅ ማድረግ ሲገባው ጣልቃ እንደገቡ ፈቅዶ በተመሳሳይ ደረጃ ያለ ፍ/ቤት የሰጠውን ውሳኔ በመሻር ውሉ ሊፈርስ ይገባል ያለው መሠረታዊ የሕግ ስህተት ነው፡፡
5. የሥር ፍ/ቤቶች ውሳኔዎች የተሻሩ ስለሆነ ተጠሪዎች ቤቱን ለአመልካች እንዲያስረክቡ ተወስኗል፡፡

Cassation File No.18380
Federal Supreme CourtCassation Division
Tikimt 5/2000 E.C

Petitioner …… Ato Mammo …

Respondents …….. 1. Ato Ayalew …
2. W/ro Tayetch …

Whether a contract for the sale of an immovable is required to be approved by a court other than the requirement to satisfy the elements of a valid contract under Article 1678 of the Civil Code

The case started with the petition brought to the Harar Awraja Court by the petitioner requesting the approval of the contract of sale of a house made between the petitioner and the first respondent. The court gave a decision approving the contract.

The respondents appealed to the Federal High Court opposing the approval of the contract by the lower court. The High Court remanded the case to the Awraja Court so that it can hear the opposition against the previous decision in accordance with Article 358 of the Civil Procedure Code. The Awraja Court decided that the second respondent had not given consent to the sale as required under Article 658 of the Civil Code. Appeal by the present petitioner to the Regional High Court and Supreme Court did not alter the decision of the Awraja Court. The cassation petition was brought from these decisions.

Decision

1. A contract fulfilling the requirements enumerated under Art. 1678 of the Civil Code is valid and there is no requirement for approval by a court.
2. As the substantive law does not require approval of the contract by a court, any suit brought seeking approval should be rejected under Article 231(1)(a) of the Civil Procedure Code for lack of cause of action.
3. The decisions of the Awraja Court of Harar and the Regional High Court and Supreme Court have committed a basic error of law by accepting the petitioner's request for the approval of the contract.
4. The lower courts need not have adjudicated and decided on the wife's opposition to the contract.
5. The decisions of the lower courts have been reversed.

* * *

የሰ/መ/ቁ/18380
የፌጠ/ፍ/ቤት ሰ/ሰሚ ችሎት
ጥቅምት 5 ቀን 2000 ዓ.ም

አመልካች ..... አቶ ማሞ ...
ተጠሪዎች ..... 1ኛ/ አቶ አያሌው ...
2ኛ/ ወ/ሮ ታየች ...

የቤት ሽያጭ ውል በፍ/ቤት ማጽደቅ አስፈላጊነት ፣ በፍ/ብ/ሕ/ቁ. 1678 መሠረት ማንኛውም ውል በዚህ ቁጥር የተገለጹትን መርሆዎች ካሟላ በፍ/ቤት እንዲጸድቅ አስፈላጊ መሆን አለመሆኑ፡፡

ጉዳዩ የተጀመረው አመልካች ከአንደኛ ተጠሪ ጋር ያደረጉት የቤት ሽያጭ ውል እንዲጸድቅላቸው ለሐረር አውራጃ ፍ/ቤት ሲያመለክቱ ሲሆን ፍ/ቤቱም ውሉን ተቀብሎ አጽድቆታል፡፡ ተጠሪዎች ውሉ መጽደቅ አይገባውም በማለት በከፍተኛ ፍ/ቤት ይግባኝ አቀረቡ፡፡ ፍ/ቤቱ በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 358 መሠረት ተጠሪዎች ጣልቃ ገብተው ጉዳዩ እንደገና እንዲወሰን መዝገቡን ለአውራጃ ፍ/ቤት መለሰው፡፡ ፍ/ቤቱም ተጠሪዎች ጣልቃ እንዲገቡ አድርጐ ሁለተኛ ተጠሪ ሚስት ስለሆኑ በሽያጩ ጊዜ ፈቃዳቸውን ያልሰጡ በመሆኑ ውሉ በፍ/ብ/ሕ/ቁ 658 መሠረት ፈራሽ ነው በማለት ውሳኔ ሰጠ፡፡ አመልካች ለክልሉ ከፍተኛ ፍርድ ቤትና ጠቅላይ ፍርድ ቤት ይግባኝ ቢሉም የሥር ፍርድ ቤት ውሳኔ አልተቀየረም፡፡ ይኸ የሰበር አቤቱታ የቀረበው ከዚህ ውሳኔ በመነሳት ነው፡፡

<u>ውሳኔ</u>

1. ማንኛውም ውል በፍ/ብ/ሕ/ቁ. 1678 የተመለከቱትን መርሆዎች እስካሟላ ድረስ ከዚህ አልፎ በፍ/ቤት እንዲጸድቅ የሚያስገድድ ሕግ የለም፡፡
2. ሕጉ ውል እንዲጸድቅ የማያስገድድ ከሆነ ይህን ጥያቄ ማቅረብ የመክሰስ መብት ሳይኖር እንደመክሰስ ስለሚቆጠር በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 231/1/ መሠረት ተቀባይነት ሊኖረው አይገባም፡፡
3. የሐረር አውራጃ ፍ/ቤት እና የክልሉ ከፍተኛ ፍ/ቤት እና ጠቅላይ ፍ/ቤት አመልካቹ ውሉ እንዲጸድቅለት ያቀረበውን ጥያቄ መቀበላቸው መሠረታዊ የሕግ ስህተት ነው፡፡
4. የሥር ፍ/ቤቶች ውሉ መጽደቅ አይገባውም በማለት ሚስት ያቀረቡትን መቃወሚያ ተቀብሎ መወሰን አይገባውም ነበር፡፡
5. የሥር ፍ/ቤቶች ውሳኔዎች ተሽረዋል፡፡ ...

* * *

Issues for Reflection

1. Does the validity of a contract of sale (under Ethiopian law) depend upon the payment of full price to the seller and the delivery of the thing sold to the buyer? According to the decision of the Federal First Instance Court (as cited in the decision of the Cassation Bench):

   > በፍ/ብ/ሕ/ቁ. 2266 ጀምሮ በተደነገጉት መሠረት የሽያጭ ውል ተፈፀመ የሚባለው ገዢው ገንዘብ በውሉ መሠረት ሲከፍልና የገዛውን ነገር ሲረከብ ሻጭም የሸጠውን ነገር ከደጋፊ ማስረጃዎች ጋር ለገዢው ሲያስረክብ ነው፡፡ በዚህ ጉዳይ ከሳሽ የሆኑት አቶ አይሸሹም … ግን ከተከሳሾች አውራሽ ገዛሁ ያሉትን ቤት እንደውሉ አላፃፍ አልተረከቡም፡፡
   >
   > According to Article 2266 *ff* a contract of sale is deemed to be concluded where the buyer pays price in accordance with the contract and the seller delivers the thing sold together with supporting documents. In the case at hand, the buyer has not taken delivery of the house he claims to have bought. …

   Article 2266 of the Civil Code regards the respective obligations of the buyer and the seller as undertaking (**ግዴታ መግባት**) to pay the price and deliver the thing sold. This clearly shows that that conclusion of a contract is different from performance of obligations. Is Article 2266 of the Civil Code applicable in *Aysheshum vs. Moghes*?

2. Article 1723 requires a contact of sale of an immovable to be "in writing and registered with a court or notary."
   a) What does "registered with a court" mean? Does it mean registration of the contract at the Court's Registrar? Or, does it envisage a situation whereby the parties would appear before a judge to have their contract 'registered'? Assume that there is an office at the compound of the Federal High Court which is designated as "*Contracts Registration Department*" (**የውል ምዝገባ ዋና ክፍል**) and assume further that the Head of the Department is Ato Lulseged Minas whose seal reads "High Court Judge and Head of the Contracts Registration Department." If a contract is concluded and registered at this Office with Ato Lulseged's Signature and seal, would it be considered as registration with a court?
   b) On the same day that a contract of sale of an immovable was made under the circumstances stated under 2(b) above, let us assume that two parties appeared before a court due to a suit which sought transfer of ownership of an immovable and judicial approval of the contract that was made in writing at the residence of the seller in the presence of witnesses. The seller admitted that s/he has sold the house, and her/his words have been recorded in the file. Does it amount to registration of the contract with a court as envisaged under Article 1723? If not, what is the significance of the words "registered with a court" in Article 1723?

c) Assume on the other hand that the respondent mentioned in case 2(b) has not appeared despite public notice. Can the court approve the contract of sale of an immovable? If it does so, does the decision violate Article 1723 which requires registration with a court or notary? In case the court decides that the respondent has failed to appear after public notice and that it has approved the contract of sale of the house, can the decision be regarded as registration as envisaged under Article 1723?

3. When a party seeks delivey of an immovable what is the remedy available for a person who claims to have a better right? In *Aysheshum versus Moghes et al* the intervenor claims to be co-owner of the house which the deceased has sold without her consent. Was it possible for her to use another procedure after having failed to appear after the public notice, rather than intervening in the case litigated under Cassation File No. 24554? Or, should the court have considered the merits of her claim rather than quashing it on procedural grounds? Does failure to appear upon notice to oppose a certain transaction irrevocably extinguish the right over property?

4. Can a court "approve" a contract of an immovable in the absence of a contracting party? According to the Cassation decision in *Mammo vs. Ayalew & Tayech*, a contract that fulfuls the requirements enumerated under Art. 1678 of the Civil Code does not need approval by a court. One of the requirements embodied under Article 1678 relates to the form in which a contract is concluded. This will inevitably raise the issue of Article 1723 and other provisions. Should courts invariably reject cases on the ground that the the suit presented involves the issue of approval by court? What if two parties agree to appear to the court and seek approval of a contract (that was not registered with a court or notary) after some years have passed since the conclusion of a written contract for the sale of an immovable?

* * *

የሰበር መዝገብ ቁጥር 24554

የሰ/መ/ቁ. 24554
ግንቦት 28 ቀን 2000 ዓ.ም.

ዳኞች ፦ ዓብዱልቃድር መሐመድ፣ ተገኔ ጌታነህ፣ ታፈሰ ይርጋ፣ መድሕን ኪሮስ፣ ሱልጣን አባተማም

አመልካች ..... አቶ እይሸሹም ...
ተጠሪዎች ..... እነ ፱ አለቃ ዐገስ ...

መዝገቡን መርምረን የሚከተለውን ፍርድ ሰጥተናል፡፡

ፍ ር ድ

ክርክሩ የተጀመረው የፌ/መ/ደ/ፍ/ቤት ሲሆን አመጣጡን በተመለከተም የአሁኑ አመልካች ሐምሌ 25 ቀን 1994 ዓ.ም. ጽፈው ባቀረቡት የክስ ማመልከቻ የተከሳcች አውራሽ የ፱ አለቃ ሞገስ ... ነሐሴ 24 ቀን 1985 ዓ.ም. በተፃፈ የቤት ሽያጭ ውል ስምምነት አድርገን በወረዳ 12 ቀበሌ 11 የሚገኘው ቁጥሩ 1408 የሆነውንና በስማቸው ተመዝግቦ የሚኘውን የግል ቤታቸው በብር 15.000 /አስራ አምስት ሺህ ብር/ ሸጠውልኝ ከዚሁ ሽያጭ ገንዘብ ብር 10.000 ተቀብለው ቀሪውን ብር 5000 /አምስት ሺህ ብር/ ስም ሲዞርልኝ ሊቀበሉ ተስማምተው በእማኞች ፊት ፈርመዋል፡፡ በዚሁ መሠረትም ውሉ እንዲፀድልን ለዞን 4 ወረዳ 12 ፍ/ቤት መዝገብ ከፍቼ የተከሳሾች አውራሽ ከመሞታቸው በፊት መጥሪያ ደርሶአቸው ቤቱን የሸጡ በመሆኑ ስሙ በከሣሽ ስም ቢዞር ተቃውሞ እንደሌላቸው የወረዳው ፍ/ቤት ቀርበው አመልክተዋል፡፡ ፍ/ቤቱም ተቃዋሚ ቢኖር እንዲቀርብ በአዲስ ዘመን ጋዜጣ ማስታወቂያ እንዲወጣ አዝዞ ተቃዋሚ ባለመቅረቡ መጋቢት 15 ቀን 1987 ዓ.ም. በሰጠው ውሳኔ ውሉን አጽድቆ የቤቱን ባለቤትነት ስም በከሳሽ ስም እንዲዘዋወር ትዕዛዝ ሰጥቶአል፡፡

በዚህ መሠረትም የሥራና ከተማ ልማት በስሜ ካርታ ሠርቶ ሰጥቶኛል፡፡ ነገር ግን ሟች የ፱ አለቃ ሞገስ ... ቤቱን ሲሸጡልኝ ስለቤቱ ርክክብ ሳይፈፀም ከዚህ ዓለም በሞት ተለይተዋል፡፡ በመሆኑም ፍ/ቤቱ ባለቤት የሆንኩለትን ቤት ተከሣሳሾች ያለአግባብ እየተጠቀሙበት በመሆኑ መብቴን ጠብቄ ቤቱን እንዲያስረክበኝ ክስ ካቀረብኩበት ጊዜ ጀምሮ ያለውን ተከሣሾች የተጠቀሙበት የቤት ኪራይ ሂሳብ ተምኜ የመካስ መብቱ ይጠበቅልኝ በማለት ክስ አቅርበዋል፡፡

ተከሳሾች ከሆኑት የ፱ አለቃ ሞገስ ... ወራሾች መካከል 2ኛ ተከሣሽ ... እና 5ኛ ተከሳሽ ... ታህሳስ 12 ቀን 88 ዓ.ም. የተፃፈ መልስ በማቅረብ ክርክር የቀረበበት ቤት የ፱ አለቃ ሞገስ ... እና ወ/ሮ ፋናዬ ... በጋብቻ ያፈሩት ስለሆነ እናታችን ወ/ሮ ፋናዬ ... ሳታውቅ የተደረገው የሽያጭ ውል በሕግ ፊት ተቀባይነት የለውም በማለት የተከራከሩ ሲሆን 1ኛ፣ 3ኛ እና 4ኛ ተከሳሾች በተገቢው ሁኔታ ተጠርተው ያልቀረቡ ስለሆነ ክሱ በሌሉበት እንዲታይ ፍ/ቤቱ ታህሳስ 23 ቀን 1993 ዓ.ም በዋለው ችሎት ብይን ሰጥቷል፡፡ ጣልቃ ገብ አመልካች ወ/ሮ ፋናዬ ... የተከሳሽ እናት በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 41/1/ መሠረት በክርክሩ ጣልቃ እንዲገቡ ጠይቀው ፍ/ቤቱ ፈቅዶላቸው መጋቢት 3 ቀን 1993 ዓ.ም ጽፈው ባቀረቡት መልስ ክስ የቀረበበት ቤት የጣልቃ ገብና የሟች የ፱ አለቃ ሞገስ ... የጋራ ሀብት ስለሆነ ከሳሽና ሟች የተዋዋሉት የቤት ሽያጭ ውል ሕጋዊ ሊሆን አይችልም በማለት ተከራክረዋል፡፡

ፍርድ ቤቱም የግራ ቀኙን ክርክርና ማስረጃ ካዳመጠ በኋላ በፍ/ብ/ሕ/ቁ. 2266 ጀምሮ በተደነገጉት መሠረት የሽያጭ ውል ተፈፀመ የሚባለው ገዢው ገንዘብ በውሉ መሠረት ሲከፍልና የገዛውን ነገር ሲረከብ ሻጭም የሸጠውን ነገር ከደጋፊ ማስረጃዎች ጋር ለገዢው ሲያስረክብ ነው፡፡ በዚህ ጉዳይ ከሳሽ የሆኑት አቶ አይሸሹም ... ግን ከተከሳሾች አውራሽ ገዛሁ ያሉትን ቤት እንደውሉ አፃፃፍ አልተረከቡም፡፡ ባለመረከባቸውም ስም እንዲዛወር ክስ አቅርበው ውሉን በፍ/ቤት አስመዝግበው ቤቱን እንዲረከቡ አሁን የተያዘው ክርክር ያስነሳውን መዝገብ

ከፍተዋል፡፡ ከመረከብ ጥያቄያቸው በመረዳትም ነሐሴ 24 ቀን 1985 ዓ.ም የተደረገው ውልና በፍ/ቤት ተመዝግቦ ስም እንዲዛወር ተወስኖ በስማቸው የባለቤትነት ማረጋገጫ ያገኙበት ምክንያት የሽያጩ ውል የተደረገው የ፱ አለቃ ሞገስ … ሚስት የሆኑት ወ/ሮ ፋናዬ … ሳያውቁና ስምምነታቸውን ሳይገልፁ በመሆኑና የማይንቀሳቀስ ሀብቱንም በእጃቸው ከማድረጋቸውና ባለ ይዞታ ከመሆናቸው በፊት በመሆኑ በፍ/ብ/ሕ/ቁ. 1196 ድንጋጌ መሠረት ውጤት የሚኖረው አይደለም፡፡ በመሆኑም ተከሳሾች ቤቱን ለከሳሽ የማስረከብ ግዴታ የለባቸውም በማለት ውሳኔ ሰጥቷል፡፡

የፌ/ከ/ፍ/ቤትም የቀረበለትን ይግባኝ ተመልክቶ ይግባኙን በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 337 መሠረት ሰርዞታል፡፡

አመልካች የሰበር አቤቱታ ያቀረቡት የሥር ፍ/ቤቶች የሰጡትን ውሳኔ ለማስለወጥ ሲሆን ቅሬታውም የቤቱን ሽያጭ የሚቃወም ካለ በአዲስ ዘመን ጋዜጣ እንዲቀርብ ማስታወቂያ ወጥቶ ወ/ሮ ፋናዬ … ቀርበው አልተቃወሙም፡፡ የሽያጩን ገንዘብ ባለቤቱ ናቸው ከሚሉዋቸው የ፱ አለቃ ሞገስ … ከሚካፈሉ በስተቀር በአግባቡ የተደረገውን የሽያጭ ውል ሊያፈርሱ የሚችሉበት የሕግ ምክንያት የለም፡፡ ሚስት ነኝ የሚሉት ተቃዋሚ ቤቱ በተሸጠበት ጊዜ ከባላቸው ተለይተው ወደናዝሬት በመሄድ ሌላ ባል አግብተው ይኖሩ ስለነበር በቤቱ ላይ ምንም መብት የላቸውም፡፡ ሽያጩ ከተደረገ 13 ዓመት ሆኖታል፡፡ ከአስራ ሦስት ዓመት በኋላ መጥተው የሽያጭ ውሉ እንዲፈርስ በማለት ያቀረቡት ጥያቄም ተቀባይነት የለውም፡፡ የሽያጭ ውሉ ሥልጣን ባለው ፍ/ቤት የፀደቀና ማረጋገጫ የተሰጠበት ነው፡፡ ሚስት መብት ነበራቸው የሚባሉም ከሆኑ የሽያጭ ውሉን የሚቃወም ካለ እንዲቀርብ ተብሎ በጋዜጣ ጥሪ ተደርጎ ሳይቀርቡ ፍ/ቤቱ የሽያጭ ውሉን ካጸደቀና ማረጋገጫ ከተሰጠበት በኋላ ባቀረቡት ጥያቄ የሽያጭ ውሉን ሊያፈርስ የሚችልበት ምክንያት የለም፡፡ ስለሆነም የሥር ፍ/ቤቶች የሽያጭ ውሉ ተፈፃሚነት የለውም ተከሳሾች ቤቱን ለገዢው እንዲያስረክቡ አይገድዱም በማለት የሰጡት ውሳኔ መሠረታዊ የሕግ ስህተት ያለበት በመሆኑ ይሻርልኝ ቤቱንም እንዲሰጡኝ እንዲወሰንልኝ የሚል ነው፡፡

ተጠሪዎች ደግሞ በሰጡት መልስ የ፱ አለቃ ሞገስ … የሸጡት ቤት የግላቸው አይደለም፡፡ የሽያጭ ውሉን በፍ/ቤት ያፀደቁትም በሀሰተኛ መንገድ ነው፡፡ የ፱ አለቃ ሞገስ … ሚስት የሆንኩት መልስ ሰጭ መፃፍ ማንበብ ስለማልችል በአዲስ ዘመን ጋዜጣ ወጣ የተባለውን ማስታወቂያ አላየሁትም፡፡ ቀሪዎቻችን ቤቱን ከአባታችን በውርስ ያገኘነው ነው፡፡ የሥር ፍ/ቤቶቹ የሽያጭ ውሉ ተቀባይነት የለውም ተከሳሾች ቤቱን ለከሳሽ ማስረከብ የለባቸውም በማለት የሰጡት ውሳኔ የሕግ ስህተት ስለሌለበት ሊጸድቅልን ይገባል በማለት ተከራክረዋል፡፡

በበኩላችን ደግሞ የ፱ አለቃ ሞገስ … ወራሾች ክርክር ያስነሳውን ቤት ለአመልካች የማያስረክቡበት ምክንያት አለ ወይስ የለም? ወ/ሮ ፋናዬ … የሸያጩን ውል በመቃወም ጣልቃ መግባት የነበረባቸው በመ/ቁ. 2643 ነው ወይስ በመ/ቁ. 561/86? የሚሉትን ጭብጦች በመያዝ መዝገቡን መርምረናል፡፡

መዝገቡን እንደመረመርነው የ፱ አለቃ ሞገስ … ወራሾች የሆኑት ተጠሪዎች የሚያቀርቡት መከራከሪያ ነጥብ ክርክር ያስነሳው ቤት የአባታችን የ፱ አለቃ ሞገስ … እና የእናታችን ወ/ሮ ፋናዬ … [ነው፤] የተሸጠውም እናታችን ሳታውቅና ስምምነቷን ሳትሰጥ ነው፣ ቤቱ የተሸጠው በአግባቡ አይደለም፤ እኛ ደግሞ የአባታችን ወራሾች በመሆናችን የቤቱ ግማሽ ይገባናል፤ በመሆኑም ቤቱን ለሥር ከሣሽ ለአሁኑ ተጠሪ ልናሰረክብ አይገባም የሚል ነው፡፡ ይህን የወራሾች ክርክር ከሕጉ ጋር በማገናዘብ ስንመለከተው የውርስ ንብረት ነው የሚሉት ቤት አባታቸው የ፱ አለቃ ሞገስ … በሕይወት እያሉ በ1985 ዓ.ም. ለአመልካች የሸጡትና የሸያጭ ውሉም በፍ/ብ/ሕ/ቁ. 2877 መሠረት በጽሑፍ የተደረገና በፍ/ብ/ሕ/ቁ. 1723 መሠረት ደግሞ የሸያጭ ውሉ በመጋቢት 15 ቀን 1987 ዓ.ም. በፍ/ቤት የተረጋገጠና የቤት ባለቤትነቱንም ለአመልካች እንዲዛወርላቸው የተወሰነ በመሆኑ ይህ ቤት የ፱ አለቃ ሞገስ … ሀብት መሆኑ በዚያን ጊዜ ያበቃለት ሆኗል፡፡ ቤቱ የ፱ አለቃ ሞገስ … ማለት የወራሾቹ አባት የሆኑት ሰው

ንብረት ካልሆነ ደግሞ ወራሾቹ ንብረትነት ጥያቄ የሚያነሱበት ምክንያት አይኖርም፡፡ እንደዚሁም ወራሾቹ ቤቱን ለአመልካች አናስረክብም ለማለት የሚያስችላቸው መብት የሌላቸው በመሆኑ ክርክራቸው ተቀባይነት ያለው ሆኖ አላገኘነውም፡፡ ቤቱ የተሸጠው የ፱ አለቃ ሞገስ ... ሚስት የሆነች እናታችን ሳታውቅና ስምምነቷን ሳትሰጥበት በመሆኑ የሽያጭ ውሉ ሊፈርስ ይገባል በማለት የሚያቀርቡትን ክርክር በተመለከተም ይህን ክርክር መነሻ በማድረግ የ፱ አለቃ ሞገስ ...ሚስት የሆኑት ወ/ሮ ፋናዬ ... ራሳቸው በመቃወም አመልካችነት ጣልቃ ገብተው እየተከራከሩ የሚገኙ በመሆኑ ክርክሩ በወራሾቹ የሚነሳበትና የሚቀጥልበት ምክንያት የለም፡፡ በመሆኑም የሥር ፍ/ቤት የ፱ አለቃ ሞገስ ... ወራሾች ቤቱን ለአመልካች የማስረከብ ግዴታ የለባቸውም በማለት የሰጠው ውሳኔ በአግባቡ ያለመሆኑን ለመረዳት ተችሏል፡፡

ሁለተኛውን ጭብጥ በተመለከተ ደግሞ የ፱ አለቃ ሞገስ ... ቤቱን ነሐሴ 24 ቀን 1985 ዓ.ም ለአመልካች መሸጣቸውንና የሽያጭ ውሉም በጽሑፍ መደረጉን፣ ይህን የሽያጭ ውል በመያዝ ገዢና ሻጭ ሽያጩን ለማስመዝገብና የባለቤትነቱን ስም ለማዛወር ፍ/ቤት ዘንድ መቅረባቸውን፣ ፍ/ቤቱም ተቃዋሚ ካለ እንዲቀርብ በአዲስ ዘመን ጋዜጣ እንዲጠራ ካደረገ በኋላ የመጣ ተቃዋሚ ያለመኖሩን በማረጋገጥና የግራ ቀኙን ስምምነትንም በመረዳት ውሉ እንዲፀቅ፣ የባለቤትነት ስምም ከሻጭ ወደ ገዢ እንዲዛወር በማለት መወሰኑን በመ/ቁ. 561/86 መጋቢት 15 ቀን 1987 ዓ.ም. ከተሰጠው ውሳኔ ለመረዳት ችለናል፡፡ ወ/ሮ ፋናዬ ... በወቅቱ በጋዜጣው ጥሪ መሠረት ወይም በሌላ መንገድ ሰምተው፣ በሰሙበትና ባወቁበት ጊዜ መቃወሚያ በማቅረብና ጣልቃ በመግባት መከራከር የነበረባቸው የሽያጭ ውሉ በፀደቀበትና የቤቱ ባለቤትነት ስም ለገዢው እንዲዛወር ተብሎ በተወሰነበት የመዝገብ ቁ. 561/86 በተደረገው ክርክርና በተሰጠው ውሳኔ ላይ እንጂ ቤቱን ያስረክቡን ተብሎ በቀረበው ክስ ጣልቃ ገብተው ሊከራከሩ የሚችሉበት በሕግ ምክንያት የለም፡፡ ምክንያቱም አመልካች ቤቱን አስረክቡኝ እያሉ ያሉት በፀደቀው የሽያጭ ውልና ስም እንዲዛወር ተብሎ በፍ/ቤት በሌላ መዝገብ ተወስኖ ባደረ ጉዳይ በመሆኑ ቤቱን የተመለከተ መብት የሽያጭ ውሉ በፍርድ ቤት በፀደቀበትና የባለቤትነት መብት ለገዢው እንዲዛወር ተብሎ በተወሰነበት ጊዜ የታየና ያለቀለት ጉዳይ በመሆኑ ተጠሪዋ ይህ ውሣኔ በተሰጠበት የመ/ቁ. 561/86 ጣልቃ ገብተው መከራከር ነበረባቸው፡፡ ክሱ በፀደቀልኝ የሽያጭ ውልና ስም እንዲዛወርልኝ በተወሰነልኝ መሠረት ቤቱን ያስረክቡኝ የሚል እንጂ የሽያጭ ውሉ ይፅደቀልኝ የሚል ባለመሆኑ በፀደቀው የሽያጭ ውልና ስም እንዲዛወር ተብሎ አስቀድሞ በሌላ መዝገብ በፍ/ቤት ተወስኖ ባደረው ጉዳይ ጣልቃ ገብተው የሽያጭ ውሉን በዛን ጊዜ ያልተቃወሙት አመልካች በዚሁ ቤቱን ያስረክቡኝ በሚለው ክስ ላይ ጣልቃ መግባት አይችሉም፡፡

የፌ/መ/ደ/ፍ/ቤትም ቤቱን ያስረክቡኝ በማለት በአመልካች ኋላ የቀረበውን ክስ መነሻ በማድረግ ግራ ቀኙን ባከራከረበት ጊዜ ጣልቃ ልግባ በማለት የአሁን ተጠሪ ሲያመለክቱ ጣልቃ መግባት ያለባቸው ቀደም ብሎ የሽያጭ ውሉ ይፅደቅልኝ የባለቤትነት ስምም እንዲዛወርልኝ በማለት አመልካች ባቀረቡት ጥያቄ መሠረት ግራ ቀኙን አከራክሮ ሌላው የመጀመሪያ ደረጃ ፍ/ቤት ውሳኔ በሰጠበት የመ/ቁ. 561/86 እንጂ ኋላ በቀረበው በዚሁ የቤት ያስረክቡኝ ክስ አይደለም በማለት ጥያቄውን ውድቅ ሊያደርገው ሲገባ ጣልቃ እንዲገቡ በመፍቀድ አከራክሮ በተመሳሳይ ደረጃ ላይ በነበረው ፍ/ቤት የሰጠውን ውሳኔ በሚሽር መልኩ የሽያጭ ውሉ በአግባቡ የተደረገ ባለመሆኑ ሊፈርስ ይገባል፤ ተከሳሾች ቤቱን የማስረከብ ግዴታ የለባቸውም በማለት የሰጠውን ውሳኔ ከፍ/ብ/ሥ/ሥ/ሕ/ቁ. 5 እና 41 ጋር በማገናዘብ ስንመለከተው ውሳኔው ተገቢ ሆኖ አላገኘነውም፡፡

በመሆኑም የፌ/መ/ደ/ፍ/ቤትና የፌ/ከ/ፍ/ቤት የሰጡት ውሳኔ መሠረታዊ የሕግ ስህተት ያለበትና መታረም የሚገባው ሆኖ ስለተገኘ የሚከተለውን ውሳኔ ሰጥተናል፡፡

ው ሣ ኔ

1. የፌ/መ/ደ/ፍ/ቤት በመ/ቁ. 2643 ሰኔ 3 ቀን 1995 ዓ.ም የሰጠው ውሳኔና የፌ/ከ/ፍ/ቤት በመ/ቁ. 23795 የካቲት 1 ቀን 1998 ዓ.ም. የሰጠው ትዕዛዝ በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 348/1/ መሠረት ተሽረዋል፡፡

2. የቤት ሽያጭ ውሉ በፍ/ቤት የፀደቀና የቤቱ ባለቤትነት መብትም ወደ አመልካች እንዲዞር ተብሎ የተወሰነ በመሆኑ ቤቱ የውርስ ንብረት አይደለም፡፡ የ፱ አለቃ ሞገስ ... ወራሾችም ቤቱን የመውረስ መብት የላቸውም፡፡ የ፱ አለቃ ሞገስ ... ሚስትም ጣልቃ በመግባት መከራከር የነበረባቸው የሽያጭ ውሉ በፀደቀበትና የባለቤትነት ስም ለገዢው /አመልካች/ እንዲዛወር ተብሎ ውሳኔ በተሰጠበት ክርክር እንጂ ቤቱን ለመረከብ በቀረበው ክስ መሆን የለበትም፡፡ ተጠሪዎች በወረዳ 12 ቀበሌ 11 የሚገኘውንና ቁጥሩ 1408 የሆነውን ቤት ለአመልካች በውሉ መሠረት እንዲያስረክቡ በማለት ወስነናል፡፡ ...

የሰበር መዝገብ ቁጥር 18380

የሰ/መ/ቁ. 18380

ጥቅምት 5 ቀን 2000 ዓ.ም

ዳኞች፡ - ፍስሐ ወርቅነህ፤ ዳኜ መላኩ፤ ደሰታ ገብሩ፤ አማረ አሞኜ፤ ታፈሰ ይርጋ

አመልካች ..... አቶ ማሞ ...

ተጠሪዎች ..... 1ኛ/ አቶ አያሌው ...

2ኛ/ ወ/ሮ ታየች ...

መዝገቡ ተመርምሮ ቀጥሉ የተመለከተው ፍርድ ተሰጥቷል፡፡

ፍ ር ድ

ይህ የሰበር አቤቱታ ሊቀርብ የቻለው የሐረር አውራጃ ፍ/ቤት በአመልካችና በ1ኛ ተጠሪ መካከል የተደረገው የቤት ሽያጭ ውል የ1ኛ ተጠሪ ባለቤት የሆኑት የ2ኛ ተጠሪ ስምምነት ሳይኖርበት የፍ/ብ/ሕ/ቁጥር 658ን በሚፃረር ሁኔታ ስለሆነ ውሉ ፈራሽ ነው በማለት ውሳኔ በመስጠቱና ይሄው ውሳኔ በክልሉ ከፍተኛና ጠቅላይ ፍ/ቤቶች በመጽናቱ መሠረታዊ የሕግ ስህተት ተፈጽሟል በማለት አመልካች ቅሬታ በማቅረባቸው ነው፡፡

የጉዳዩ አመጣጥ ባጭሩ ሲታይ አሁን አመልካች ከ1ኛ ተጠሪ ጋር ተደርጓል የሚሉት የቤት ሽያጭ ውል ይጽደቅልኝ በማለት ለሐረር አውራጃ ፍ/ቤት አቤቱታ አቅርበው ፍ/ቤቱም ሰኔ 27 ቀን 1983 ዓ.ም. በዋለው ችሎት ውሉ ፀድቋል በማለት ውሳኔ ሰጥቶ ተጠሪዎች ይህንኑ ውሳኔ በመቃወም ለክልሉ ከፍተኛ ፍ/ቤት የይግባኝ አቤቱታ አቅርበው የይግባኝ ሰሚው ፍ/ቤትም የፍ/ብ/ሕ/ሥ/ሥ/358 በሚፈቅደው መሠረት ይግባኝ ባዮች ወደ ክርክሩ ገብተው ጉዳዩ በድጋሚ እንዲታይ በማለት ጉዳዩን ወደ አውራጃው ፍ/ቤት መመለሱን የመዝገቡ ግልባጭ ያስረዳል፡፡

ከዚህ በኋላም በአውራጃው ፍ/ቤት 2ኛ ተጠሪ ባቀረቡት አቤቱታ ከ1ኛ ተጠሪ ጋር ሕጋዊ ባልና ሚስት መሆናቸውን ገልጸው ለክርክሩ ምክንያት የሆነውና በሐረር ከተማ ከፍተኛ 2 ቀበሌ 14 ክልል የሚገኘው ቁጥር 707 የሆነው ቤት ከ1ኛ ተጠሪ ጋር በጋብቻ ዘመን በጋራ እንደሠሩት ሆኖም ይህንኑ ቤት 1ኛ ተጠሪ ያለ እሳቸው ስምምነት ለአመልካች እንደሸጡትና ይህም የፍ/ብ/ሕ/ቁ. 658ን የሚፃረር ስለሆነ የሽያጩ ውለ እንዲጸድቅ አስቀድሞ በፍ/ቤቱ የተሰጠው ውሳኔ መብቴን የነካ ስለሆነ ይሄው ውሳኔ ይሰረዝልኝ በማለት ተከራክረዋል፡፡

1ኛ. ተጠሪም በይዙቱ ከ2ኛ ተጠሪ ጋር ተመሳሳይ የሆነ የሕግና የፍሬ ነገር ክርክር በማቅረብ አስቀድሞ የተሰጠው ውሳኔ ሊሰረዝ ይገባል ብለዋል፡፡

አመልካች በበኩላቸው አቤቱታው መሠረት የሌለው መሆኑን በመዘርዘር ውድቅ ሊደረግ ይገባል በማለት የተከራከሩ ሲሆን በሌላ በኩልም ወ/ሮ ከበቡሽ በጅጋ የተባሉት በክርክሩ ጣልቃ እንዲገቡ ተፈቅዶላቸው ለክርክር ምክንያት የሆነውን ቤት ሰኔ 17 ቀን 1984 ዓ.ም. በተጻፈ ውል ከባልና ሚስቱ ከተጠሪዎች በመግዛት የቤቱ ካርታና ቁልፍ በእጃቸው እንደሚገኝ ገልፀው አመልካች ከ1ኛ ተጠሪ ጋር

በዚሁ ቤት ላይ ያደረጉት ውል ሕገ ወጥ ስለሆነ ፍ/ቤቱ ውድቅ ሊያደርገው ይገባል በማለት የበኩላቸውን ክርክር አቅርበዋል፡፡

ክርክሩ በዚህ መልኩ የቀረበለትም የአውራጃው ፍ/ቤት የተጋቢዎች የጋራ የሆነን የማይንቀሳቀስ ንብረት ለመሸጥ የተጋቢዎች ስምምነት አስፈላጊ ስለመሆኑ በፍ/ብ/ሕ/ቁ. 658/ሀ/ ላይ የተመለከተ ስለሆነና በተያዘው ጉዳይ 1ኛ ተጠሪ ቤቱን ለአመልካች የሸጡት ያለ ባለቤታቸው 2ኛ ተጠሪ ስምምነት ስለሆነ ይሄው ውል ፈራሽ ነው በማለት ውሳኔ ሰጥቷል፡፡

ጉዳዩን በይግባኝ የተመለከቱትም የክልሉ ከፍተኛና ጠቅላይ ፍ/ቤቶች ይህንኑ ውሳኔ አጽንተዋል፡፡

የሰበር አቤቱታውም የቀረበው ይህንኑ በመቃወም ሲሆን ይህ ሰበር ችሎት የቀረበውን አቤቱታ መርምሮ ግራ ቀኙ ያደረጉት የቤት ሽያጭ ውል ይፈርሳል ተብሎ ውሳኔ መሰጠቱ ለሰበር ችሎት ቀርቦ ሊመረመር እንደሚባው በማመን ተጠሪዎች ቀርበው መልስ እንዲሰጡ ትዕዛዝ ሠጥቷል፡፡

ይሁንና 1ኛ ተጠሪና የ2ኛ ተጠሪ ወራሾች በጋዜጣ እንዲጠሩ ትዕዛዝ ተሰጥቶ በዚሁ መሠረት በጋዜጣ ቢጠሩም አልቀረቡም፡፡

በአጠቃላይ የክርክሩ ይዘት ከላይ የተመለከተው ሲሆን የሰበር አቤቱታውም እንደሚከተለው ተመርምሯል፡፡

ከላይ እንደተጠቀሰው የአሁን አመልካች በሐረር አውራጃ ፍ/ቤት አቤቱታ ያቀረቡት ከ1ኛ ተጠሪ ጋር ተደርጓል የሚሉት ውል ይጽደቅልኝ በማለት ነው፡፡

ለፍርድ ቤት የሚቀርብ ማናቸውም አቤቱታ ተመርምሮ ውሳኔ (remedy) ሊሰጠው የሚችለው የቀረበው አቤቱታ ለፍ/ቤት ሊቀርብ የሚችል (justiciable) ሆኖ በሚገኝበት ጊዜና እንደዚሁም አቤቱታው የክስ ምክንያት ያለው ሆኖ በሚገኝበት ጊዜ ነው፡፡

በተያዘው ጉዳይ አመልካች ያቀረቡት አቤቱታ የቤት ሽያጭ ውል ይጽደቅልኝ በማለት እንደመሆኑ መጠን ማናቸውም ውል በፍ/ብ/ሕ/ቁ. 1678 ላይ የተመለከቱትን የውል አመሠራረት መርሆችን /elements of contracts/ መሠረት አድርጎ ውሉ እስከተቋቋመ ድረስ በሕግ አግባብነት ተቋቁሟል ለማለት የሚቻል ሲሆን ከዚህ አልፎ ውሉ በፍ/ቤት እንዲጸድቅ የሚያስገድድ የሕግ ማዕቀፍ የለም፡፡ በመሠረታዊ ሕጉ /substantive law/ ላይ የዚህ ዓይነቱ ግዴታ ከሌለ ደግሞ የሥነ-ሥርዓት ሕጉ በመሠረታዊ ሕግ የተሰጠን መብትና ግዴታን ማስፈጸሚያ እንጂ በእራሱ የመብትና ግዴታ ምንጭ ሊሆን አይችልም፡፡

ስለሆነም የቤት ሽያጭ ውል ይፅደቅልኝ በማለት አቤቱታ ማቅረብ ለፍ/ቤት በማይቀርብና የክስ ምክንያትም በሌለው ነገር አቤቱታ እንደማቅረብ የሚቆጠር በመሆኑ የአውራጃው ፍ/ቤት ይህንኑ አቤቱታ በፍ/ብ/ሕ/ሥ/ሥ/ቁ. 231 (1) (ሀ) መሠረት ተቀባይነት የለውም ማለት ሲገባው ውሳኔ መሰጠቱ እንደዚሁም ጉዳዩን በይግባኝ የተመለከተው የክልሉ ከፍተኛ ፍ/ቤት በዚሁ መሠረት ማረም ሲገባው ተጠሪዎች በተቃዋሚነት ገብተው ጉዳዩ በድጋሚ እንዲታይ መወሰኑና ከዚህም በኋላ ጉዳዩን በይግባኝ የተመለከተው የክልሉ ጠቅላይ ፍ/ቤት አቤቱታው የክስ ምክንያት የለውም ማለት ሲገባው በዚህ ሁኔታ የተሰጠውን ውሳኔ ማጽናቱ ያለአግባብ ሆኖ ተገኝቷል፡፡

<u>ው ሳ ኔ</u>

1. የሐረር አውራጃ ፍ/ቤት ታህሳስ 30 ቀን 1985 ዓ.ም በመ.ቁ. የሰጠው ውሳኔ የሐረሪ ክልል ከፍተኛ ፍ/ቤት ግንቦት 18 ቀን 1987 ዓ.ም በመ.ቁ. 31/86 የሰጠው ውሳኔ እንደዚሁም የሐረሪ ክልል ጠቅላይ ፍ/ቤት ጎንደር 27 ቀን 1997 ዓ.ም በመ.ቁ. ዐዐዐ1 የሰጠው ውሳኔ መሠረታዊ የሕግ ስህተት ያለበት ሆኖ ስለተገኘ በፍ/ብ/ሕ/ሥ/ሥ/ቁ. 348/1/ መሠረት ተሽሯል፡፡ …
2. አመልካች ለሐረር አውራጃ ፍ/ቤት የቤት ሽያጭ ውል ይፅደቅልኝ በማለት ያቀረቡት ለፍ/ቤት የማይቀርብና የክስ ምክንያት የሌለው ነው ተብሎ ተወስኗል፡፡ …

…

Clips from the launching event of Mizan Law Review (Volume 1. No. 1)

19 August 2007

Distinguished guests
Colleagues
Student representatives

Welcome to this launching event of Mizan Law Review.

We thank contributors of the submissions that have been published in the various columns of Mizan Law Review, Volume I, Number 1. …We express our gratitude to the Embassy of Finland for their financial assistance that covered printing cost and a portion of other expenses. …

Publishing a journal mainly involves facilitating the birth of a brainchild. Authors are the parents, whle editors and publishers are facilitators in the process. Upon publication, the piece is out there for its audience, and its quality and standards would depend on the extent to which it caters for the needs, expectations and interests of its target audience.

We thank external assessors for their comments, suggestions and feedback regarding the articles they evaluated. SMUC Faculty of Law thus invites Mizan's honorary patron Gash Selamu Bekele to award the certificates of appreciation for assessors whose comments and feedback have indeed enhanced the quality and standards of the submissions published in the column titled "Articles."

I would also like to take this opportunity to invite Gash Selamu Bekele to make some impromptu reflections. We would also invite participants of this event to forward further impromptu reflections.

Thank you all, and Mizan belongs to every one of us.

I invite our honorary patron to declare Mizan Launched as of 2007.

Selamu Bekele

"It is indeed a remarkable beginning. "እንደ ስማችሁ ሚዛን ሁኑ::" *Be Mizan* in balancing every issue and perspective in comformity with the name of the journal."

Menberetsehai Tadesse

"The standard of the journal is indeed exemplary, and its content and form is up to the standard of law journals published in various countries. I hope you will keep up your efforts to ensure its continuity and sustainability which is more important than the publication of the first issue."

Yohannes Heroui

"The first issue of the journal is excellent. But the most important thing is a journal's viability and continuity. Thus, I would like to reserve my impression in this regard for about four years or at least until about four issues are published without interrupton."

SMUC POLICY AND GUIDELINES ON JOURNAL REPUTABILITY

ST. MARY'S UNIVERSITY COLLEGE

Policy on Journal Reputability

Considering that research and publications are among the key activities that are pursued at SMUC;

In recognition of the need for professional journals and their distribution to the academia, public and private organizations, various individuals and the business community as well;

Desiring to encourage the development of professional journals that are published by the SMUC to the status of reputability;

Believing that SMUC Senate and management ought to provide the necessary inputs and close monitoring so that SMUC's professional journals could attain reputability status;

Having consulted national and international experience and good practices in the determination of reputability of journals; and after having conducted the necessary investigation and deliberations on setting criteria to the status of reputability to professional journals published by SMUC;

The Senate of St. Mary's University College has, on this 6th day of March 2010, duly issued this Policy for the Assessment and Award of Reputability of Professional Journals published by the University College.

1. General Procedures

a) The Editor-in-Chief of a journal shall submit to the pertinent faculty a request towards the grant of the status of reputability.
b) Upon endorsement of the request, the Faculty shall present the request to the SMUC Senate.
c) Having ensured the legitimacy of the request and when it finds that the

journal meets the criteria here-below the Senate shall award the status of reputability to a journal.

2. Editorial Organ

a) A journal shall have an Editorial Committee or an Editorial Board composed of all Editors including the Editorial–in-Chief.
b) The Editor-in- Chief shall be a staff member of SMUC or from outside the University College.
c) The journal shall have at least five Editors the majority of which shall be from SMUC.
d) In case there are foreign nationals among the Editors, they shall not constitute the majority.
e) Editors shall hold a minimum of a Masters degree or a comparable academic rank; plus teaching and research or related experience of at least 5 years.
f) Editors should have published research papers/ project works/ a book or two chapters in a book in their fields of specialization.

3. Advisory Organ

a) A reputable journal shall have an advisory organ which shall be designated as Advisory Board or other nomenclature approved by the Senate.
b) Members of the advisory organ shall have qualification and experience comparable to or higher than that of members of the editorial organ.
c) Members of the advisory organ shall represent the spectrum of fields of specialization covered by the journal concerned, and with diverse backgrounds drawn from but not limited to the academia.
d) Journals that did not have an advisory board, but have made use of peer-reviewers/assessors prior to the issuance of this policy are exempted from this criterion of having an advisory board for their period of existence until March 2010.

4. Editorial Policy

a) A journal shall have an Editorial Policy.
b) The Editorial Policy shall, at least, incorporate the following requirements:
    i. Focus on specialization of the journal;
    ii. Peer-review of articles;
    iii. Anonymity of authors and reviewers until final decision of selection;
    iv. Inclusion of at least four articles for any issue of the journal;
    v. Regularity, continuity and maintenance of the standards and publication of the journal according to its predetermined annual publication plan;
    vi. Specification of the duties and responsibilities of the editorial and advisory organs;
    vii. Specification of the task of peer-reviewers;

viii. Statement that the journal shall only contain professionally related commercial publicity; and;
ix. Submission guidelines which informs authors to follow specific styles on matters such as font (type-face) and formatting of articles with a view to maintaining standards and consistency.

5. Peer Review of Articles and Periodic Assessment of Journals

a) In order to be accepted for publication an article shall have the support of two peer-reviewers and a simple majority of members of the editorial organ.
b) A journal shall be assessed every three years by external assessors to ensure maintenance of quality.

6. Uninterrupted Publication, ISSN, Circulation, and Management

a) A journal is required to have been published uninterruptedly for at least 3 (three) years.
b) A journal shall have ISSN number.
c) A journal shall have a reasonable number of regular subscribers and circulation depending on predetermined plan of the journal.
d) A journal shall have the administrative structure and facilities necessary for carrying out its activities.

7. Guidelines and Effective Date

a) The Senate shall issue Guidelines necessary for the implementation of this Policy.
b) This policy shall be effective from this 6th day of March 2010.

ST. MARY'S UNIVERSITY COLLEGE

Draft Guidelines on Journal Reputability

The following Draft Guidelines are prepared by a working group formed by SMUC Senate so that organs in charge of examining reputability can use them as mimimum thresholds in the course of implementing the Policy on Journal Reputability:

1. General Procedures

a) A request submitted to the SMUC Senate towards the grant of the status of reputability according to the Policy on Reputability of Journals shall be referred to the Research and Publications Standing Committee.
b) The Research and Publications Standing Committee shall ensure the fulfillment of the criteria for reputability and submit its report and opinion to the Senate within three weeks.
c) The Senate shall examine the request made by the Faculty and the opinion rendered by the Research and Publications Standing Committee, and it shall

award the status of reputability after having looked into the legitimacy of the request as stipulated under Article 1(c) of the Policy.

2. Editorial Organ and Advisory Organ

a) Academic freedom of authors shall be respected, and the editorial and advisory organs shall not impose opinions other than ensuring standards, relevance, requisite research, validity, appropriate structure and form.
b) The editorial organ shall perform the tasks entrusted upon it in the Editorial Policy.
c) The Editor-in-chief shall chair the editorial organ and ensure the implementation of the Editorial Policy.
d) The Editor-in-chief or the Managing Editor shall maintain the anonymity of authors in the drafts submitted to editors and assessors so that authors can remain anonymous during editing, editorial organ meetings and peer review.
e) Anonymity shall be secured by omitting author's name and other information from the article that indicate identity until the final decision of publishability is rendered.
f) Members of the editorial organ shall examine submitted articles for originality, substantive interest, completeness, and quality of scholarship.
g) After an article has undergone internal review process, it passes on to the external assessment stage of peer review.
h) The advisory organ shall offer advice on general thematic directions, policies and standards related to the journal.
i) The advisory organ shall seek report on the evaluation of the journal every three years, recommending areas of focus, and offering feedback on the overall content and structure of publications in the journal.
j) The tasks and responsibilities of members of the Editorial and Advisory organs of a journal shall be stated in Editorial Policy.

3. Indicative Standards of Peer Review for the Evaluation of Content

External reviewers may, but are not limited to, apply the criteria whether:
a) the article contains novel research, scholarship, or a fresh perspective on an issue;
b) the author has thoroughly researched the various issues and concepts contained in the article (including primary source materials);
c) the author demonstrates a comprehensive knowledge of the subject matter being discussed;
d) the article addresses the author's thesis;
e) the author has sufficiently supported his/her arguments and whether any part of the article is purely speculative; and
f) whether an empirical (field) research has employed sound scientific research methodologies.

4. Indicative Standards of Peer Review for the Evaluation of Structure and Form

External reviewers may, but are not limited to, apply the criteria whether:

a) the article is written clearly and organized logically;
b) the article addresses each issue in turn as it is presented in the Introduction;
c) the author provides sufficient evidence to support her/his thesis;
d) the evidence provided is accurate and consistent;
e) the author presents sufficient background information to illustrate his/her argument;
f) the author clearly and accurately conveys the situation, theme or issue/s being discussed; and whether the author provides sufficient detail;
g) the title clearly reflects the subject matter of the article;
h) the author provides sufficient ancillary information in her/his footnotes/endnotes;
i) the article has the appropriate length for the theme addressed without the need for the text to be expanded or condensed.

5. Interruption of Publication

a) The publication of a journal shall be required to be un-interrupted for three consecutive years before the award of reputability.
b) The period stated in the preceding sub-Article envisages journals that are published at least twice a year, and the Senate shall determine the period required for the reputability of annually published journals.
c) Under exceptional circumstances, the award of reputability shall not be affected by interruption of publication for the period of one issue.
d) In case the interruption envisaged under the preceding sub-Article occurs before the award of reputability, the minimum period required for reputability shall be extended by the duration of interruption.
e) Reputability shall be deemed to be revoked in the event of interruption of publication for two or more issues.
f) Where a journal whose reputability is revoked resumes publication within three years after the revocation, the duration of uninterrupted publication required for the re-award of reputability shall be a minimum of two years.

6. Applicability of the Policy for articles published before the award of reputability

The provisions of the Policy on Journal Reputability shall apply to articles published in a journal prior to the award of its reputability provided that the journal in which the article is published fulfills the criteria embodied in the Policy on Journal Reputability.

DECISION OF SMUC SENATE ON MIZAN'S REPUTABILITY

Date: March 31, 2010

…

"… Mizan Law Review has satisfied all criteria [for journal reputability]. … [T]he journal has editorial policy and focuses on the area of laws. Regarding peer review and periodic assessment of the journal, … 'Mizan' is peer reviewed by external assessors. … [T]he journal publication has not been interrupted, has ISSN number and regular subscribers/distribution list, administrative structure and facilities necessary for carrying out its activities. …

[A]fter having examined Mizan Law Review based on the reputability criteria, the Senate has endorsed that the journal 'Mizan Law Review' is reputable."

INDICATIVE STANDARDS: PEER REVIEWED ARTICLES

Indicative Standards of Peer Review for the Evaluation of Content

External reviewers may, but are not required to, apply the criteria whether:

a) the article contains novel research, scholarship, or a fresh perspective on an issue;
b) the author has thoroughly researched the various issues and concepts contained in the article (Including primary source materials);
c) the author demonstrates a comprehensive knowledge of the subject matter being discussed;
d) the article addresses the author's thesis;
e) the author has sufficiently supported his/her arguments and whether any part of the article is purely speculative; and
f) whether an empirical (field) research has employed sound scientific research methodologies.

Indicative Standards of Peer Review for the Evaluation of Structure and Form

External reviewers may, but are not required to, apply the criteria whether:

a) the article is written clearly and organized logically;
b) the article addresses each issue in turn as it is presented in the Introduction;
c) the author provides sufficient evidence to support her/his thesis;
d) the evidence provided is accurate and consistent;
e) the author presents sufficient background information to illustrate his/her argument;
f) the author clearly and accurately conveys the situation, theme or issue/s being discussed; and whether the author provides sufficient detail;
g) the title clearly reflects the subject matter of the article;
h) the author provides sufficient ancillary information in her/his footnotes/endnotes;
i) the article has the appropriate length for the theme addressed without the need for the text to be expanded or condensed.

MIZAN LAW REVIEW

ST. MARY'S UNIVERSITY COLLEGE
FACULTY OF LAW

Cultural Problems in Research and Publications

Source:
Reform Document on Legal Education and Training in Ethiopia (June 2006) § 2.4.1/A

1. Lack of research, reading, and writing culture
   - Complacence with our work merely as teachers.
   - No sense of urgency about the need to engage in research and turn up research products.
   - No '*publish or perish*' attitude.
   - No attempt to work beyond the positive laws.
2. Lack of Institutional Commitment
   - In terms of budget, time, and resource allocation for R&P
   - In terms of reduction of teaching load or granting (Research Leave).
3. Lack of team spirit for Research and Publications
   - Among staff members;
   - Between staff and students;
   - Lack of collaboration among institutions.
4. Lack of innovation in diversification of publications, and problems regarding spheres of focus in research.
5. Raising the stakes too high in assessing the quality of publishable manuscripts (despite) shortage of (such) manuscripts.
6. Lack of tradition of salvaging "distressed" manuscripts through sympathetic editing without compromising quality.
7.. Weak consumption of research products in the legal professional community and in government institutions, and poor state of constructive feedback.
8. Inadequate attention to relevance of research to the real life or actual problems of the society.

Vision of law schools

Law schools shall have vision towards elevating the standard and quality of legal education to the level of leading law schools in other countries, and towards preparing graduates who will have optimum impact in Ethiopia's development, democracy, good governance and social justice.

Mission of law schools

Law schools shall promote the intellectual and social conditions of Ethiopia by providing equitably accessible quality legal education and training programs through teaching, research and service to prepare competent and responsible members of the legal profession who actively contribute towards rule of law, democracy, human rights, good governance, social justice, equality, tolerance and development.

Source: **Ethiopian Legal Education and Training Reform Document (June 2006)**

Address:
Mizan Law Review
St. Mary's University College, Faculty of Law
P. O. Box: 18490 (or 1211), Addis Ababa, Ethiopia

"We plan each issue as if it were a new book."

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