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FACULTY OF LAW

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የአቶ ጌታቸው አበራ ወንዴ አጭር የህይወት ታሪክ

አቶ ጌታቸው አበራ ወንዴ ከእናታቸው ከወይዘሮ አዱኛ ኮከብ እና ከአባታቸው ከአቶ አበራ ወንዴ በቀድሞው የጎንደር ክፍለ ሀገር ደብረታቦር አውራጃ ልዩ ስሙ አትከና ጊዮርጊስ በተባለ አካባቢ ሐምሌ 20 ቀን 1939 ዓ.ም ተወለዱ። ዕድሜያቸው ለትምህርት ሲደርስ ደብረ ታቦር ከተማ በሚገኘው የዳግማዊ ቴዎድሮስ ትምህርት ቤት የአንደኛ ደረጃ ትምህርታቸውን ከ1950ዓ.ም እስከ 1954 ዓ.ም የተከታተሉ ሲሆን በ1955 ዓ.ም ወደ አዲስ አበባ መጥተው በሽመልስ ሀብቴ ሁለተኛ ደረጃ ትምህርት ቤት የመለስተኛና የከፍተኛ ሁለተኛ ደረጃ ትምህርታቸውን ከ1955 እስከ 1961 ዓ.ም ባለው ጊዜ አጠናቀዋል።

አቶ ጌታቸው በመስከረም ወር 1961 ዓ.ም በቀድሞው የቀዳማዊ ኃይለ ሥላሴ ዩኒቨርሲቲ (አሁን አዲስ አበባ ዩኒቨርሲቲ) ገብተው በ1970 ዓ.ም በሕግ ትምህርት በኤል ኤል ቢ ዲግሪ ተመርቀዋል።ከዚያም በመቀጠል በተለያዩ የመንግሥት መሥሪያ ቤቶች በህግ ባለሙያነት አገልግሎት በማበርከት ከቆዩ በኋላ በ1976 ዓ.ም ለከፍተኛ ትምህርት ወደ ውጭ ሀገር ሄደው እንግሊዝ አገር በሚገኘው የለንደን ስኩል ኦፍ ኤኮኖሚክስ በ1977 ዓ.ም በህግ የኤል ኤል ኤም (ማስተርስ) ዲግሪ አግኝተዋል።

በሥራ ዓለም ደግሞ አቶ ጌታቸው አበራ ከ1968 ዓ.ም እስከ 1978 ዓ.ም ባሉት ጊዜያት በሚኒስትሮች ምክር ቤት በህግ ኤክስፐርትነት፣ በህግ አማካሪነት እንዲሁም በህግ ጉዳይ መምሪያ ሃላፊነት በተለያዩ ደረጃዎች አገልግለዋል። ከዚያም በመቀጠል ከ1980 ዓ.ም እስከ 1983 ዓ.ም በቀድሞው የመንግሥት ምክር ቤት በዋና ኤክስፐርትነት ሰርተዋል። ከ1983 ዓ.ም እስከ 1988 ዓ.ም ባለው ጊዜ ደግሞ በተወካዮች ምክር ቤት የህግ አገልግሎት መምሪያ ሃላፊ በመሆን አገራቸውን አገልግለዋል። አቶ ጌታቸው አበራ ከዚህ ሃላፊነታቸው በተጨማሪ ከ1974 ዓ.ም እስከ 1988 ዓ.ም ባሉት ዓመታት በአዲስ አበባ ዩኒቨርሲቲ በትርፍ ጊዜ መምህርነት የውል ህግ፣ የዓለም አቀፍ ንግድ ህግ፣ የዓለም አቀፍ የአየርና የህዋ ህግ፣ የመንግሥት የልማት ድርጅቶች ህግ የተሰኙ የህግ ኮርሶችን ሲያስተምሩ ቆይተዋል።

አቶ ጌታቸው አበራ ከመስከረም 1 ቀን 1988 ዓ.ም ጀምሮ ወደ አዲስ አበባ ዩኒቨርሲቲ በቋሚነት ተዛውረው በመጀመሪያ ረዳት ፕሮፌሰርነት የአካዳሚክ ማዕረግ በመቀጠል ደግሞ በተባባሪ ፕሮፌሰርነት እሰከ ዕለተ ሞታቸው ድረስ በህግ መምህርነት በህግ ተመራማሪነት ሃላፊነታቸውን ሲወጡ ቆይተዋል። እንደዚሁም ለሁለት ዓመታት ያህል የአዲስ አበባ ዩኒቨርሲቲ የህግ ፋኩልቲ ዲን የዩኒቨርሲቲው ሴኔትና የሴኔቱ የሥራ አስፈፃሚ ኮሚቴ ፀሃፊ በመሆን አገልግለዋል። ከዚህ በተጨማሪ የኢትዮጵያ የህግ መጽሔት ዋና አዘጋጅና ጽሁፍ አቅራቢ በመሆን በርከት ያሉ የህግ ምርምርና ጥናታዊ ጽሁፎችን ለህትመት በማብቃት ለአገራችን የህግ ሙያ ዕድገት ጉልህ አስተዋፅያ አድርገዋል። ከእነዚህ መሀልም "ያገቡ ሴቶች ዜግነት ጉዳይ በኢትዮጵያ ህግ "የፍርድ ተቺዎች ሚና በዳኝነት ህግ (Amicus Curiae) እና "የወል ክስን የማሰማት አሰራር በኢትዮጵያ (Class Action) በሚል ርዕስ በአማርኛና በእንግሊዝኛ ቋንቋዎች የታተሙ ጽሁፎቻቸው ይገኙበታል። በአሁኑ ጊዜ ደግሞ በዓለም አቀፍ ህግ ለማስተማሪያነት የሚያገለግል መጽሀፍ ለመድረስ በከፍተኛ ዝግጅት ላይ ነበሩ።

ከመደበኛ ሥራቸው በተጨማሪ አቶ ጌታቸው አበራ በበርካታ አገር አቀፍና ዓለም አቀፍ የሙያ ሥራዎች፣ የሥልጠና መርሀ ግብሮች፣ ዐውደ ጥናቶችና የምክክር ስብሰባዎች ላይ በንቃት በመሳተፍና ልዩ ልዩ ጥናታዊ ጽሁፎች በማቅረብ ሙያዊና አገራዊ ግዴታቸውን ተወጥተዋል። ከነዚህም መካከል በኢትዮጵያ ፌደራላዊ ዲሞክራሲያዊ ሪፑብሊክ ህገ መንግሥት ሲረቀቅ ያበረከቱት ሙያዊ አስተዋጽዖ፣ አሜሪካን አገር በቴክሳስ ክፍለ ግዛት አውስቲን ዩኒቨርሲቲ የፉልብራይት ተመራማሪ በመሆን የቆዩባቸው ጊዜያትና በዓለም አቀፍ የሰብዓዊነት ህግ (International Humanitarian Law) ዐውደ ጥናት በጀኔቫስዊትዘርላንድ ያደረጉት ተሳትፎ ለአብነት ያህል የሚጠቀሱ ናቸው።

ከመደበኛ የአካዳሚክ ሥራቸው በተጓዳኝ አቶ ጌታቸው አበራ የህግ አማካሪና ጠበቃ በመሆን እንዲሁም በግልግል ዳኝነት በመሥራት ለበርካታ የህብረተሰባችን ክፍሎች ሙያዊ አገልግሎት ሰጥተዋል።

አቶ ጌታቸው አበራ በሙያቸው የተከበሩ፣ በሥራ ቦታቸውና በመኖሪያ አካባቢያቸው በሚያሳዩት መልካም ሥነ ምግባር የታወቁና ከፍተኛ የወገንና የአገር ፍቅር ስሜት የነበራቸው ኢትዮጵያዊ ምሁር ነበሩ። አቶ ጌታቸው አበራ ባለትዳርና የሁለት ወንዶች አባት የነበሩ ሲሆን ባደረባቸው ህመም በህክምና ሲረዱ ቆይተው ታህሳስ 11 ቀን 2000 ዓ.ም ከምሽቱ 12:20 ደቂቃ ላይ ከዚህ ዓለም በሞት ተለይተዋል። የአዲስ አበባ ዩኒቨርሲቲ ህግ ፋኩልቲ ማህበረሰብ ለባለቤታቸው ለልጆቻቸውና ለወዳጅ ዘመዶቻቸው መጽናናትን እንዲሰጥ ይመኛል።

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ለዚህ ክስ ልዩ ዐቃቢ ሕግ በማስረጃነት ያቀረበው ይግባኝ ባይ ለአለቃው/ክሱ ላይ አንደኛ ተከሳሽ የነበረ/ ጀርመን ሀገር ሆኖ የፃፋቸውን ደብዳቤዎች ነው፡፡ የሥር ፍ/ቤት ማስረጃዎችን መርምሮ ተከሳሽ /ይግባኝ ባይ/ እንዲከላከል በይኗል፣ መከላከያውን ከመረመረ በኋላም ይግባኝ ባይን በተከሰሰበት አንቀጽ ሥር ጥፋተኛ በማድረግ በዕድሜ ልክ ፅኑ እስራት እንዲቀጣ ወስኖበታል፡፡

ይግባኝ ባዩ በዚህ ውሳኔ ቅር በመሰኘት በጠበቃው አማካኝነት ጳጉሜ 3 ቀን 1995 ዓ.ም. ፅፎ ባቀረበው የይግባኝ ማመልከቻ የዐቃቤ ሕጉ ማስረጃዎች ሁለት ስማቸው ያልተጠቀሱ ፈንጅ የሚያጠምዱ ግለሰቦች በማናቸውም ጊዜ ሀሰል ብላንት ቤተ መጻሕፍትም ሆነ ቢሮ ጨርሶ መሄዳቸውን አያሳይም፣ ድርጊቱን እንዲፈጽሙ የተመደቡት ሰዎች በሆቴል ክፍላቸው ውስጥ ዝግጅት ሲያደርጉ በጥንቃቄ ጉድለት ፈንጂው መፈንዳቱንና በራሳቸው ላይ ጉዳት መድረሱን ያሳያል፡፡ ታየ ተፈራና ሚስቱ ሀሰል ብላንት በዚያን ዕለትና ሰዓት ፍንዳታው በደረሰበት ሆቴል ውስጥ ስለመኖራቸውም ሆነ ወደዚያ የሚመጡ ስለመሆኑም ማስረጃ አልቀረበም፣ «ደምስ»

የተባለው ሆቴል ከሀሰል ብላንት መጻሕፍት ቤትና ቢሮ ምን ያህል እንደሚርቅ አልታወቀም፣ በፍንዳታው ጊዜ እነ ታየ ተፈራም የት እንደነበሩ የሚጠቁም ማስረጃ አልቀረበም፡፡ ፍርድ ቤቱ እርግጠኛ አድርጐ የተቀበለውና «የጥቃቱ ሰለባዎች ከሚገኙበት ሆቴል ድረስ ሄደው» የሚለው መደምደሚያ ስህተትና መሠረት የሌለው ነው፣ ይግባኝ ባይ ድርጊቱን መፈጸሙን አልካደም የተባለው ስህተት ነው፡፡ ይግባኝ ባይ ሪፖርቱን ማስተላለፉን አይክድም፣ ሪፖርቱ ደግሞ በልዩ ዐቃቤ ሕግ ክስ የተገለጸው ድርጊት መፈፀሙን አያሳይም፣ በክስ ማመልከቻው በተገለፀው መልክ ፍሬ ነገሩ እንደተረጋገጠ ተቆጥሮ ጥፋተኛ መደረጉ ያላግባብ ነው፡፡ ፈንጅ አጥማጆቹ ዝግጅታቸውን አጠናቀዋል ሊባል ይቻል የነበረው የጐደለውን አሚልተው ፍተሻቸውን ጨርሰው ፈንጂዎቹን ለማስቀመጥ ወደታቀደው የሀሰል ብላንት ቤተመፅሀፍትና ቢሮ ለመሄድ ቢነሱ ነበር፡፡ የወንጀል ሥራ እንደተጀመረ ያህል ይቆጠራል የሚያሰኝ ሁኔታ አልነበረም፡፡ ይህ ካልሆነ ደግሞ በወ/መ/ሕ/ቁ 27/1 መንፈስ ሙከራ የለም፡፡ ስለዚህ ይግባኝ ባይ ጥፋተኛ የተደረገው ድርጊቱ በማስረጃ ሳይረጋገጥበትና በዝግጅት ደረጃ በነበረበት ሁኔታ ስለሆነ የሥር ፍ/ቤት ውሳኔ ተሽሮ በነፃ ሊሰናበት ይገባል፡፡ ይህ ቢታለፍ ደግሞ የተከሳሹ የጤንነትና የግል ሁኔታዎች እንዲሁም ተፈፀመ በተባለው ድርጊት የነበረው ተሳትፎ ከግምት ገብቶ ዝቅተኛ ቅጣት እንዲወሰንበትና ይኸው ቅጣት እንዲገደብለት ጠይቋል፡፡

ልዩ ዐቃቤ ሕግ በ13/5/96 ዓ.ም በሰጠው መልስ ይግባኝ ባይ ተበዳዩችን የመለየት፣ የጦር መሳሪያዎችን የማስገባትና ወንጀሉን በቀጥታ የሚፈፀሙ አባላት የመስጠት፣ ወንጀሉ ከተፈፀመ በኋላ ወንጀል ፈፃሚዎችን ከለላ በመስጠት ማስመለጥ ዋና ዋና ተሳትፎዎቹ ነበሩ፣ በዚሁ መሠረት ይግባኝ ባይ አስፈላጊ የሆነ የዝግጅት ሥራ አጠናቋል፡፡የወንጀሉን ተግባር ለመፈፀም ይግባኝ ባይ ከምሥራቅ ጀርመን ወደ ምዕራብ ጀርመን ተጉዟል፡፡ ይግባኝ ባይ ብቻ ሳይሆን ወንጀል ፈፃሚዎች ለወንጀሉ ተግባር የሚውሉ መሳሪያዎች በይግባኝ ባይ አማካይነት አስፈላጊው ቦታ ድረስ ደርሰዋል፡፡ ተበዳዩች ይገኙበታል ተብሎ የታሰበው ቦታ ተመርጦ ይህም ቦታ በይግባኝ ባዩ ጭምር ተረጋግጦ ይግባኝ ባዩ ድርጊቱ እንዲፈፀም በቦታው ላይ በመገኘት ክትትል ያደርግ የነበረ መሆኑ በዐቃቤ ሕግ የሰነድ ማስረጃዎች ተረጋግጧል፡፡ በወ/መ/ሕ/ቁጥር 26 መሠረት የመሰናዶ ተግባሮች የተባሉት መሣሪያ መሰብሰብ ወይም ስለአፈፃፀሙ ሁኔታዎችን የማከናወን ተግባራት ብቻ ናቸው፡፡ ሆኖም በዐቃቤ ሕግ ማስረጃ የተረጋገጡት የይግባኝ ባይ የወንጀል ተግባራት ሚኾቹን ከመለየት ጀምሮ የት እንደሚገኙ እስከማረጋገጥ፣ ተበዳዩች ይገኛሉ የተባሉበት ቦታ ድረስ ለወንጀል መፈፀሚያ የሚሆነውን ፈንጅ አስገብቶ እስከማስተካከል የደረሰ ተግባር መሆኑ ሲታይ ይግባኝ ባይ የሚችለውን ሁሉ ካከናወነ በኋላ እስከመጨረሻው የወንጀሉን ተግባራት ተከታትሎ አስፈላጊውን ውጤት አለማግኙቱን የሚያመለክት ነው፡፡ በወቅቱ የተበዳዩች በቦታው አለመኖር የሚያመጣው ለውጥ የለም፡፡ ድርጊቱ ከመሠናዳት ተግባር ያለፈ እና ሙከራ ደረጃ የደረሰ ስለሆነ የጥፋተኝነት ውሳኔው የሚነቀፍ አይደለም፡፡ ቅጣትን በሚመለከትም የይግባኝ ባይ የወንጀል ተሳትፎ አብይ በመሆኑና አደገኛነቱንም ስለሚያመለክት በቂ ቅጣት ከሚባል በቀር ስለማይነቀፍ የሥር ፍ/ቤት ውሳኔ ይፅናልን ብሏል፡፡

ጥር 27 ቀን 1996 ዓ.ም በተጻፈ ማመልከቻ የይግባኝ ባይ ጠበቃ የመልስ መልስ በመስጠት የይግባኝ ቅሬታውን በማጠናከር ተከራክሯል፡፡

ክሱ የሥር ፍ/ቤት ውሳኔና የግራ ቀኙ የይግባኝ ክርክር በአጭሩ ከዚህ በላይ የተገለፀው ሲሆን ምላሽ የሚሹት ነጥቦች ከፍተኛው ፍ/ቤት በዐቃቤ ሕግ ማስረጃ ተረጋግጠዋል ያላቸው ፍሬ ነገሮች በቀረቡት ሰነዶች የተደገፉ መሆን ያለመሆናቸው እና ድርጊቱ የሙከራ ወንጀል ሊባል የሚችል መሆን ያለመሆኑ ናቸው፡፡

የመጀመሪያውን ነጥብ በሚመለከት 1ኛ ለግድያው ተግባር ሊውል የነበረው ፈንጂ ተጠምዶ የነበረ መሆን ያለመሆኑንና 2ኛ ፈንጂው የፈነዳው በክሱ እንደተጠቀሰው ፈንጂው ሊጠመድ በተፈለገበት ቦታ መሆን ያለመሆኑን እንመለከታለን፡፡

በክሱ እንደተመለከተው ፈንጂ ተጠምዶ የመግደል ሙከራ ተፈጽሟል የተባለው ሰዎቹ ይገኛሉ በተባለበት ሀሰል ብላንት ቤተ መጻሕፍትና ቢሮ ውስጥ ነው፡፡ ዐቃቤ ሕግ ይህን ክስ ለማስረዳት የሰነድ ማስረጃዎችን ማለትም ይግባኝ ባይ በወቅቱ አለቃው ለነበረውና አብሮት ለተከሰሰው ግለሰብ የፃፋቸውን ደብዳቤዎች ያቀረበ ሲሆን አግባብነት ያለውን የሰነዱን ይዘት እንደሚከተለው አስፍረናል፡፡

ይግባኝ ባይ መጋቢት 13 ቀን 1974 ዓ.ም ለጓድ ተስፋዬ ወ/ሥላሴ (በወቅቱ አለቃው የነበረ) በፃፈው ደብዳቤ «..... ለኦፕሬሽን ውልፍ ጋንግ ተልከው የነበሩት ጓዶች ሀሰል ብላንት መጻሕፈት ቤትና ቢሮ ውስጥ ለማስቀመጥ ታስቦ በነበረው የመፅሐፍ ፈንጂ ላይ የመጨረሻ ማስተካከል እንደሚያደርግ ገልፀው አርፈውበት የነበረው የሆቴል ክፍል ውስጥ በመስራት ላይ እንዳሉ ፈንድቶ ከፍተኛ የመቁሰል አደጋ ደርሶባቸው የሚያሳዝን ሁኔታ ተፈጥሯል፡፡ በሀሰል ብላንት ቤተመጻሕፍት ውስጥ ሊቀመጥና በሰዓት እንዲፈነዳ ታስቦ የነበረው ፈንጂ በሁለት መጻሕፍት ውስጥ ያለ ሲሆን ዛሬ መጋቢት 13/74 ዓ.ም. በመጻሕፍት ቤት ውስጥ እንዲቀመጥና ከተቻለም ደግሞ የኦሮሞ ነፃ አውጪ ነኝ የሚለው ቡድን መሪ በታየ ተፈራ መኪና ላይ ማታ ፈንጂ ታስሮ ዛሬውኑ ሌሊት በኢንተርፍሎግ አውሮፕላን በርረው አዲስ አበባ እንዲገቡ ነበር» ያለ ሲሆን ይኸው ይግባኝ ባይ መጋቢት 20/74 ዓ.ም ለጓድ ተስፋዬ ወ/ሥላሴ (አለቃው) በፃፈው ሌላ ደብዳቤ«በድንገት በደረሰው ሁኔታ ውስጥ የኢትዩጵያ እጅ እንዳለበት በምዕራብ በርሊን ፖሊሶች መገመቱንና ፈንጂውም ሊላክ ታስቦ የነበረው ለሀሰል ብላንት መሆኑን ጥርጣሬ እንዳለ ተናግረዋል» ይልና «.... ቀደም ብሎ በታሰበው መሠረት ፈንጂውን ለማስቀመጥ የታቀደው በሀሰል ብላንት መጻሕፍት ቤት ውስጥ ሲሆን ቢሮውም በዚሁ መጻሕፍት ቤት 1ኛ ፎቅ ላይ በመሆኑ ያመቻል ተብሎ ታስቦ ነበር» ካለ በኋላ በመቀጠልም «ፈንጂ ሊቀመጥባቸው የነበሩ» ካለ በኋላ በመቀጠልም «ፈንጂ ሊቀመጥባቸው የነበሩ መጻሕፍት ሆቴል ድረስ ይገፍላቸው ሄድሁ! .... አንዱ ጓድ ከሆቴሉ ወጥቶ ሄደ፣ ወዲያውኑ ተመልሶ ... ሥጠይቀው ሰዓት ልገዛ ነበር ሱቅ ዝግ ነው፣ አንዱ ሰዓት የቆመ ይመስላል አለኝ .... እናስተካክለዋለን ብሎኝ እንደገና ወደ ክፍሉ ተመልሶ ገባ ከጥቂት ደቂቃዎች በኋላ የፈንጂ ድምፅ ... ተሰማ» ሲል በመዘርዘር ፅፏል፡፡ በዚሁ ደብዳቤ «..... ጓዶቹ ለመኪና ማጥመጃ ያዘጋጁት ፈንጂ እዚህ ስለሚገኝና ስለሁኔታውም ስለማላውቅ በእንዴት ያለ ሁኔታ መቀመጥ እንዳለበት፣ ምን ዓይነት ጥንቃቄ እንደሚያስፈልገው መመሪያ ቢደርሰኝ መልካም ነው» ማለቱም ተመልክቷል፡፡ ለውልፍ ጋንግ ኘሮጀክት ሽጉጥ ሳይለንሰር ጥይት ለይግባኝ ባይ የተላከ መሆኑን የሚገልጽ ፅሑፍም ቀርቧል፡፡

የዐቃቤ ሕግ የሰነድ ማስረጃዎች ከያዟቸው ፍሬ ነገሮች ውስጥ ከዚህ በላይ የተጠቀሱት ሲገኙ ከፍተኛው ፍ/ቤት ይግባኝ ባይና አብረውት የተከሰሱትን ሰዎች ግድያ ለመፈፀም ጀርመን ሀገር ድረስ መሄዳቸውን ጠቅሶ፣ « ... ድርጊቱ ሳይፈፀም የቀረው ... የጥቃቱ ሰለባዎች የተባሉት ከሚገኙበት ሆቴል ድረስ ሄደው መሳሪያውን በመገጣጠም ላይ እንዳሉ መሳሪያው ፈንድቶ» እንደሆነ ገልጿል፡፡

ከዐቃቤ ሕጉ የሰነድ ማስረጃዎች ይዘት መረዳት የተቻለው በክሱ ላይ ስማቸው በተበዳይነት የተዘረዘሩትን ግለሰቦች ሀሰል ብላንት ቤተ መጻሕፍትና እዚያው ቤት 1ኛ ፎቅ ላይ በሚገኘው ቢሮ ውስጥ ፈንጂ በማጥመድ ለመግደል መታቀዱን፣ ፈንጂው በሁለት መፃሕፍት ውስጥ ሊደረግ መታሰቡን፣ ፈንጂው ሰዓት ጠብቆ የሚፈነዳ በመሆኑ ፈንጂውን የሚያስቀምጡት (የሚያጠምዱት) ሁለት ግለሰቦች ካረፉበት ሆቴል ውስጥ ሆነው በፈንጂዎቹ ላይ አስፈላጊ ነው የሚሉትን ማስተካከል በሚያደርጉበት ጊዜ አንዱ ሰዓት ባለመሥራቱ አንደኛው ግለሰብ ሰዓት ሊገዛ ከሆቴሉ ወጥቶ ሱቅ በመዘጋቱ ወደ ሆቴሉ መመለሱን እና ወዲያው ከሆቴሉ ውስጥ እንዳሉ ፈንጂው መፈንዳቱን ነው፡፡ ፈንጂው ገና መስተካከል እየተደረገበት የነበረ እንጂ የተጠመደ መሆኑን ማስረጃዎቹ አያሳዩም፡፡ ፈንጂው የፈነዳውም ፈንጂውን የሚያጠምዱት ሰዎች ካረፉበት ሆቴል ውስጥ እንጂ ሰዎቹን ለመግደል ሊጠመድበት በታቀደለት ሀሰን ብላንት ቤተ መጻሕፍት ውስጥ አይደለም፡፡

ሊገደሉ የነበሩት ሰዎች ይገኛሉ ተብሎ የተገመተው በቤተ መጻሕፍት ውስጥ እንጂ ፍንዳታው በደረሰበት ሆቴል ውስጥ አይደለም፡፡ በፈንጂው ላይ እየተደረገ የነበረው ማስተካከል ተከናውኖ ሊጠመድ ወደተፈለገበት ሀሰል ብላንት ቤተ መጻሕፍት ከመወሰዱ በፊት ፈንጂው ከሆቴሉ እንዳሉ የፈነዳ በመሆኑ በክሱ ላይ ፈንጂ በሀሰል ብላንት ቤተ መጻሕፍት ውስጥ ጠምደው አፈንድተዋል የተባለው በማስረጃ የተደገፈ አይደለም፡፡ ከዚህም ሌላ የሥር ፍ/ቤት «.... የጥቃቱ ሰለባዎች ከሚገኙበት ሆቴል ድረስ ሄደው...» በማለት በውሳኔው ላይ ያስፈረውም በዐቃቤ ሕግ ክስ ያልተገለፀውንና በማስረጃውም ያልተረጋገጠውን ነው፡፡ ክሱ ይገደላሉ የተባሉት ሰዎች በሆቴሉ እንደነበሩ አይገልፅም፡፡ በዚህ ረገድ የቀረበ ማስረጃም የለም፡፡ የሰነድ ማስረጃው ሰዎቹን በሆቴሉ ውስጥ ለመግደል ስለመታሰቡም ሆነ ፈንጂ ስለመጠመዱ አይገልፅም፡፡

ፈንጂው ሊቀመጥ /ሊጠመድ/ የታሰበው በሀሰል ብላንት ቤተ መጻሕፍትና ቢሮ መሆኑን መረጃው ስለሚያሳይ ፈንጂው የተጠመደና ተበዳዩች የተባሉት ሰዎች ይገኙበታል የተባለው በተጠቀሰው ሆቴል ይመስል «የጥቃቱ ሰለባዎች ከሚገኙበት ሆቴል ድረስ ሄደው አፈንድተዋል» መባሉ ማስረጃውን ያላገናዘበና በፍሬ ነገር ደረጃ የተሳሳተ ነው፡፡

ከፍተኛው ፍ/ቤት ይግባኝ ባይን በመግደል ሙከራ ወንጀል ጥፋተኛ ያደረገው በክሱ ያልተጠቀሰውንና በማስረጃም ያልተደገፈውን ፍሬ ነገር መሠረት በማድረግ ሰዎቹን በሆቴሉ ውስጥ ለመግደል ፈንጂ አጥምደው አፈንድተዋል በማለት መሆኑን ተመልክተናል፡፡ ፈንጂው ሊገደሉ የተፈለጉት ሰዎች ይገኙበታል በተባለው ሀሰል ብላንት ቤተመጻሕፍትና ቢሮ ውስጥ ያልተጠመደና እዚያም ያልፈነዳ ከሆነ በቀጣይ ሊመለስ የሚገባው ጥያቄ በፈንጂው ላይ መስተካከል እየተደረገበት እያለ የፈንጂው

አጥማጆች በነበሩበት ሆቴል ውስጥ መፈንዳቱ ይግባኝ ባይን በመግደል ሙከራ ወንጀል ተጠያቂ ሊያደርገው ይችላልን? የሚለው ነው።።

ስለሙከራ በወ/መ/ሕ/ቁጥር 27/1 የተደነገገው «....የወንጀሉ ሥራ እንደተጀመረ ያህል የሚቆጠረው የተፈፀመው ተግባር በማያጠራጥር ሁኔታ በቀጥታ ወንጀሉን ለመፈፀም ወደታሰበበት ግብ ለማድረስ የተሠራ በሆነበት ጊዜ ነው» በማለት ነው።።

በክሱ ስማቸው የተዘረዘሩትን ሰዎች ለመግደል ሲባል የተለያዩ ድርጊቶች ተፈጽመዋል፣ መሳሪያና ፈንጂ አጥማጆች ከኢትዩጵያ ወደ ጀርመን ተልከዋል ፈንጂው የሚጠመድበት ሥፍራ ተመርጧል፣ ፈንጂውን ለማስቀመጫ የሚሆኑ መጻሕፍት ተዘጋጅተዋል እነዚህ ተግባራት ወንጀሉን ለመፈፀም ከሚወስደው ወሳኝ የሆነ እርምጃ በፊት የተከናወኑ ተግባራት ናቸው።። ፈንጂው ቀሪ ተግባራት ተከናውነው ወደ ሀሰል ብላንት ቤተ መፃሕፍት ከመወሰዱ በፊት ሳይታሰብ ፈንድቷል።።

አንድ ድርጊት የሙከራ ወንጀል ነው ለማለት ሕጉ በግልፅ ዝግጅት ያስቀጣል ካላለ በቀር ከዝግጅት ደረጃ ማለፍ ይኖርበታል።። የዝግጅት ደረጃን የሚያልፈው ማለትም የወንጀሉ አፈፃፀም (Execution) የሚጀምረው ደግሞ የዝግጅቱ የመጨረሻ ተግባር ሲከናወን ነው።። ይህ ማለት ወንጀሉን ለመፈፀም የሚያስፈልጉ ነገሮች ሁሉ ተጠናቅቀው ቀሪው መተግበር ብቻ ሲሆን ወይም ወንጀል ፈፃሚው በእርሱ በኩል ወንጀሉን ለመፈፀም የሚያስችሉኝን/የሚያበቁኝን ነገሮች ፈፃሜአለሁ በሚልበት ጊዜ ሊሆን ይገባል።።

በያዝነው ጉዳይ ይግባኝ ባይና ግብረ አበሮቹ የግድያ ወንጀሉን ለመፈጸም መወሰናቸው ተረጋግጧል፣ ይህ ፍላጉታቸው ማለትም የአእምሮ ሁኔታ (mental element) ብቻውን በወንጀል ተጠያቂ ሊያደርጋቸው እንደማይችል ሁሉ (የወ/መ/ሕ/ቁጥር 23 ይመለከቷል) በሕግ ተለይቶ ካልተቀመጠ በቀር አንድን ወንጀል ለመፈፀም የሚደረግ ዝግጅትም ስለማያስቀጣ ይግባኝ ባይ የፈፀማቸው ተግባራት ከዚህ አኳያ ሊመረመሩ ይገባል።።

ከላይ እንደተገለፀው ፈንጂ አጥማጆቹ ፈንጂ ወደሚያጠምዱበትና ይገደላሉ የተባሉት ስዎች ይገኛሉ ወደተባለበት ሀሰል ብላንት ቤተ መፃሕፍት ከመሄዳቸው በፊት ካረፉበት ሆቴል ሳይወጡ ፈንጂው ፈንድቶባቸዋል።።የተበላሸ ይመስላል የተባለው የፈንጂ ሰዓት እንዲሰራ ስለመደረጉ ወይም ሌላ ስለመቀየሩ አልተረጋገጠም።። የታወቀው ነገር ስዓቱ የተበላሸ ይመስላል ተብሎ ሌላ መግዛት ተፈልጐ ሱቅ ዝግ በመሆኑ ያለመቻሉ ነው።። ሰዓቱ ያስፈለገው ፈንጂው ሰዓት ጠብቆ የሚፈነዳ እንደመሆኑ መጠን የተበላሸው ሰዓት እንዲሰራ ሳይደረግ ወይም ሌላ ሳይቀየር እንዲሁም በፈንጂው ላይ ይደረግ የነበረው ማስተካከል ለመጠናቀቁ ሳይታወቅ እስከፈነዳ ድረስ የተፈፀሙት ተግባራት ከዝግጅት ያለፉ ናቸው ለማለት አያስችልም።።

በወ/መ/ሕ/ቁጥር 27/1 ሥር «የተፈፀመው ተግባር በማያጠራጥር ሁኔታና በቀጥታ ወንጀሉን ለመፈፀም ወደታሰበበት ግብ ለማድረስ የተሠራ በሆነ ጊዜ የወንጀል ሥራ

እንደተጀመረ እንደሚቆጠር ይገልፃል፡፡ ከዚህ አንጻር የተፈፀሙት ተግባራት ምንድናቸው ቢባል ከአዲስ አበባ የተጀመረው እንቅስቃሴ የፈነዳው ሰዓት ባለመስራቱ ሰዓት ተፈልጐ ሱቅ ዝግ በመሆኑ ከአጥማጆቹ አንዱ ወዳረፋበት ሆቴል ተመልሶ ከጥቂት ደቂቃዎች በኋላ ፍንዳታ በመድረሱ ማብቃቱን እንረዳለን፡፡ እስከፍንዳታው ድረስ የተካሔዱት ተግባራት ሁሉም ግድያውን ለመፈፀም የተሠሩ ናቸው ቢባልም በወንጀል ተጠያቂነት የሚያስከትለው ግን በሀሰል ብላንት ቢሮና ቤተ መፃሕፍት ውስጥ ሊደረግ ታቅዶ ለነበረው ግድያ ግብ በማያጠራጥርና በቀጥታ ለማድረስ የተሰራው ተግባር ነው፡፡ የተከናወኑት ተግባራት ሲታዩ ቀሪ ዋና ተግባራት እንደነበሩ መገንዘብ ይቻላል፡፡ በፈንጂው ላይ ሊደረግ የነበረው መስተካከል ሊጠናቀቅ የተበላሸው ሰዓትም ሊሰራ ወይም ሊለወጥ ይገባው ነበር፡፡ ይህ ብቻም አይደለም በፈንጂው ላይ የሚደረገው ሥራ ተጠናቅቆም ግድያው ሊፈፀም ወደታቀደበት ሀሰል ብላንት ቤተ መፃሕፍት መወሰድ ነበረበት፡፡ እነዚህ ተግባራት ከመከናወናቸው በፊት ፈንጂው አጥማጆቹ ካረፋበት ሆቴል እንዳሉ ፈንድቷል፡፡

ግድያውን ለመፈፀም ፈንጂውና ሰዓቱ በአግባቡ መስራታቸውን ማረጋገጥ ብቻ ሳይሆን ፈንጂው መጠመድም ይገባው ነበር፡፡ ይህ ለወንጀሉ ተግባር ወሳኝ የሆነ እርምጃ ከመወሰዱ በፊት የተከናወኑ ተግባራት በሙሉ ለወንጀሉ የተደረጉ የዝግጅት ድርጊቶች እንጂ ለግድያው ግብ በሚያጠራጥርና በቀጥታ ለማድረስ የተሠሩ ናቸው ለማለት አላስቻለንም፡፡»

ይግባኝ ባይን በመግደል ሙከራ ወንጀል ተጠያቂ ለማድረግ ሙከራው ሊፈፀም በበቂና ወሳኝ መጠን የተቃረበ (material proximity) እና በማያሻማ መንገድ (unequivocally) ሊፈፀም ይችል እንደነበር ሊረጋገጥ ይገባዋል፡፡ ፍንዳታው እስከተከሰተበት ጊዜ ድረስ የተፈፀሙት ተግባራት ከቀሪ ወሳኝ የሆኑ ተግባራት አኳያ ሲታዩ ወንጀሉ ሊፈፀም በበቂ ሁኔታ የተቃረበ መሆኑን በእርግጠኝነት የሚያሳዩ ሆነው አላገኘናቸውም፡፡ ይህ እስከሆነ ድረስ ድርጊቶቹ ከዝግጅት ያለፉ ናቸው ማለት የሚቻል አይደለም፡፡

ይህ ማለት ግን የሙከራ ወንጀል ተፈጽሟል ለማለት የመጨረሻው እርምጃ እስኪወሰድ መጠበቅ ይገባል ሳይሆን ወንጀሉ ይፈፀም እንደነበር አጠራጣሪ ባልሆነ መንገድ ሊያሳይ የሚችል ወሳኝ ደረጃ ላይ መድረሱ ሊረጋገጥ ይገባዋል ነው፡፡

አንድ ማስረጃ የቀረበውን ክስ ሳይሆን ሌላ ወንጀል መሠራቱን ካረጋገጠ እና ወንጀሉ ከቀረበው የወንጀል ክስ አነስተኛ ከሆነ ክስ ባይቀርብም ማስረጃው ባረጋገጠው ወንጀል መፍረድ እንደሚቻል የወ/መ/ሕ/ሥ/ሥ/ቁጥር 113/2 ይደነግጋል፡፡ ይህንኑ መሠረት በማድረግ ይግባኝ ባይ ለሕገ ወጥ ዓላማ የጦር መሳሪያ ይዞ መገኘቱን የልዩ ዐቃቤ ሕግ የሰነድ ማስረጃዎች ስለሚያሳዩ በሥር ፍ/ቤት ጥፋተኛ የተባለበትን የወ/መ/ሕ/ቁጥር 32/27 /522/1/ሀ በወ/መ/ሕ/ሥ/ሥ/ቁጥር 113/2 መሠረት ለውጠን በአዋጅ ቁጥር 214/1974 አንቀጽ 41/1 ስር የጥፍተኝነት ውሳኔ ሰጥተንበታል፡፡

በዚህ አንቀጽ ስር ጥፋተኛ የተደረገ ተከሳሽ ከ5 እስከ 25 ዓመት ፅኑ እስራት ሊቀጣ እንደሚችል ተደንግጓል፡፡ ይህን የመነሻና የመድረሻ ቅጣት ተመልክተን ስለቅጣት ግራ ቀኝ በሥር ፍ/ቤት የሰጡትን አስተያየትና በወ/መ/ሕ/ቁጥር 86 የተዘረዘሩትን

የቅጣት አወሳሰን ነጥቦች አገናዝበን ይግባኝ ባይ ሻምበል መላኩ ሩፋኤል በዚህ ጉዳይ ከታሰረበት ጊዜ ጀምሮ እየታሰበለት በ12 ዓመት /አስራ ሁለት ዓመት/ ፅኑ እስራት እንዲቀጣ ወስነናል፡፡

ትዕዛዝ

1. ከፍተኛው ፍ/ቤት የሰጠው ውሳኔ መሻሻሉን እንዲያውቀው የዚህ ውሳኔ ቅጂ ይድረሰው፣
2. የቃሊቲ ማረሚያ ቤት ተሻሽሎ በተወሰነው መሠረት እንዲፈፅም ታዟል፡፡ የውሳኔው ቅጂ ይተላለፍለት፡፡

መዝገቡን ዘግተን መልሰናል፡፡
የዳኞች ፊርማ፡- ተገኔ ጌታነህ
ደስታ ገብሩ
አሰግድ ጋሻው

Federal Supreme Court of Ethiopia

Judges: Tegene Getanehe
Desta Gebru
Aseged Gashaw

Appellant: Captain Melaku Rufael
Respondent: Special Public Prosecutor
Criminal File No. 13241
August 2, 2004

Criminal Law-Preparation and attempt: -Arts. 26 and 27 of the 1957 Penal Code. Criminal Procedure- Conviction of a defendant for an offence not charged: -Art. 113 of the Criminal Procedure Code.

Held: Judgment of the Federal High Court reversed; appellant convicted for an offence not charged with.

Summary of the Judgment

The Special Public Prosecutor charged four persons, including the appellant, before the Federal High Court under article 32(1)(a) or (b) and articles 27(1), 523(1)(a) of the 1957 Penal Code, for attempting to kill some identified members of EPRP, OLF and TPLF (hereinafter to be referred as victims) who were residing in Germany. The charge indicated that the accused persons organized an operation known by the name 'Wolfgang' to carry out the killing by planting a time bomb in an office and a library located in West Berlin at Hasselblant, a place where the victims were suspected to be found.

In support of the charge, the prosecutor produced two letters, which were written by the appellant to his superior reporting the progress of the operation. The trial court was satisfied by the evidence to find the appellant guilty and sentenced him to a life imprisonment.

Dissatisfied by the trial court's judgment, Captain Melaku filed an appeal before the Federal Supreme Court. His ground of appeal is the inadequacy of the prosecution's evidence to support the charge and to warrant his conviction. The appellant does not deny that he wrote the letters, the only evidence of the Prosecutor. He objected the judgment of the trial court on the following grounds: the reports do not show the commission of the acts alleged in the charge; nor do the letters show that the time bomb was placed in a position at Hasselblant; rather the items of evidence indicate that the bomb exploded at the hotel where those who were assigned to plant the time bomb were staying and hurt them; nor does the evidence show that any of the victims were at the hotel where the explosion occurred; none of the activities or their totality constitutes an attempt to commit homicide as defined under Article 27(1) of the 1957 Penal Code. The accused persons were merely preparing things to commit the crime which are not punishable under Ethiopian law. The appellant requested the Supreme Court to quash the judgment of the lower court.

The Special Public Prosecutor, on his part, argued as follows: The major roles of the appellant in the commission of the crime were to identify persons against whom the crime was to be committed, to provide weapons to those who would directly commit the crime, and to facilitate their escape after the commission of the crime. To accomplish those things, the appellant traveled from East Germany to West Germany; the weapons were transported to the place where the crime was to be committed and the appellant, by being at the place where the crime was to be committed, was supervising the operation. These activities are more than preparatory acts as he has already done everything that he could with a view to accomplish the commission of the crime though he failed to complete the crime, which is a clear case of attempt. The public prosecutor requested the appellate court to confirm the judgment of the trial court and dismiss the appeal.

The appellate court framed two issues, namely, whether or not the facts that the lower court believed to have been supported by the evidence of the prosecutor are proved. And whether or not the acts that the evidence of the prosecutor proved constitute an attempt. The court approached the first issue by framing two questions: whether or not the bomb intended to kill the persons was planted. And whether or not the bomb explosion occurred at the place where it was intended to.

The evidence of the prosecution show that there was a plan to kill the victims at the library and the office in Hasselblant; that there was a plan to place the bomb in books and put them in the library; that one of the persons who were in charge of planting the bomb made unsuccessful attempt to buy a new clock as one of the clocks of the time bomb was not functioning; and that the bomb blasted at the hotel they were staying. Furthermore, the evidence shows that the victims were suspected to be found at the library but not at the hotel where the explosion occurred. The evidence does not show that the bomb was placed in position at Hasselblant; rather, it shows that the bomb exploded at the hotel where the accused persons were staying.

Based on its own appreciation of the allegations and evidence of the prosecutor, the appellate court found part of the lower court's judgment which indicate that the convicted persons went and caused the explosion of the bomb at the hotel where the victims were suspected to be found" and which state that " though the accused persons went to the hotel where victims were to be found, the crime was not completed for the bomb blasted while it was planted" to be factually wrong, not alleged in the charge and not supported by evidence. Accordingly, the Court observed that the lower court convicted the appellant for attempted homicide based on a fact not stated in the charge and not supported by evidence.

The court proceeded to the second issue: whether the explosion of the bomb, while it was being checked at the hotel where the convicted persons were staying, constitutes an attempt to kill those victims who were suspected to be found at Hasselblant.

Different activities aimed at the killing of the victims, such as transporting experts from Ethiopia to Germany and identifying the place where the time bomb was to be planted, have been performed. The prosecutor's evidence established the determination of the convicted persons to commit the crime. There are other several critical steps that should have been taken if the convicted persons were to be found guilty of attempted homicide.

That is, every step necessary to commit the crime, short of execution, must have been taken. Most importantly, the clock should have been made to function properly or a new one should have been affixed onto the time bomb and the bomb should have been taken to and placed at Hasselblant to detonate it there. In the case at hand, the bomb blew up at the hotel before it was taken to and planted at Hasselblant and the evidence does not show that the clock was made to function properly or a new one was fixed. In short of these critical steps, the activities performed by the convicted persons with a view to cause the death of the victims were mere preparations.

Under article 27(1) of the 1957 Penal Code an act or combination of acts constitutes attempt where the act or the acts are unequivocally targeted at the intended result. The court found it hardly possible to conclude that the performed activities were unequivocally targeted at the killing of the victims and to hold the appellant criminally responsible for attempted homicide.

Where the evidence proves a crime that is not disclosed in the charge, article 113(2) of the Criminal Procedure Code allows the court to convict the accused for the disclosed crime provided that such offence is of a lesser gravity than the offence charged. The court convicted the appellant, who is found in possession of weapons for an unlawful purpose, under article 41(1) of Proclamation number 214/1981 and sentenced him to twelve years rigorous imprisonment setting aside the lower court's judgment.

የፍ/ብ/ይ/መ/ቁ.13263

የካቲት 22 ቀን 1996 ዓ.ም

ዳኞች፡- መንበረፀሐይ ታደሠ
ዳኜ መላኩ
ጌታቸው ምህረቱ

ይግባኝ ባይ፡- የኢትዩጵያ መድን ድርጅት ነገረ ፈጅ
አቶ ጊዩን ፋንታ - ቀረቡ
መልስ ሰጭ፡- አቶ በዙ አበበ - ቀረቡ
መዝገቡን መርምረን የሚከተለውን ወስነናል፡፡

<u>ውሣኔ</u>

በዚህ መዝገብ ይግባኝ የተባለበትን ውሣኔ የሰጠው ድሬዳዋ የሚያስችለው የፌዴራል ከፍተኛ ፍ/ቤት ነው፡፡ ፍ/ቤቱ ቁጥሩ 403 በሆነው የፍትሐብሔር ክስ መዝገብ ከሣሽ ለሆነው በአቶ በዙ አበበ እና በተከሣሽነት በቀረበዉ በኢትዩጵያ መድን ድርጅት መካከል ኢንሹራንስ ተገብቶለት በግጭት አደጋ ሊደርስበት ችሏል ከተባለው የሰሌዳ ቁጥሩ 3 — 26482 አ.አ ከሆነው አይሱዙ መለስተኛ የጭነት መኪና ገቢ ተቋርጦ መቆየት ጋር በተያያዘ የተደረጉትን ክርክሮች ሐምሌ 1 1995 ዓ.ም በዋለው ችሎት መርምሮ ከሣሽ ደርሶብኛል ላለው የጉዳት ኪሣራ ተከሳሹ ኃላፊ ነው በማለት በርትዕ ብር 586,666.66 ለከሣሽ እንዲከፍለው ከመወሰኑም በተጨማሪ ከሣሽ በክሱ ምክንያት ለዳኝነት እና ለጠበቃ አበል ያወጣቸውን ወጪዎች ተከሣሹ እንዲተካለት እንዲሁም ሌሎች ወጪዎችን በሚመለከት በቁርጥ ብር 1,000 በማከል እንዲከፍለው ብሏል፡፡

በሥር ተከሣሽ የሆነው የአሁኑ ይግባኝ ባይ ይህንኑ ከፍተኛው ፍ/ቤት የሰጠውን ውሣኔ በካሣው መጠን ብቻ ሣይሆን በኃላፊነቱ ጭምር የሚቃወምባቸውን ምክንያቶች ነሐሴ 22 ቀን 1995ዓ.ም በተጻፈ የይግባኝ ማመልከቻ አንድ በአንድ በመዘርዘር አብራርቶ አቅርቧል፡፡ ፍሬ ሃሳቡም በአጭሩ ተጠቃሎ ሲታይ ይግባኝ ባይ የሥር ከሣሽ የሆነው የአሁኑ መልስ ሰጭ ተቋርጦብኛል ለሚለው የመኪና ገቢ በውልም ሆነ በሕግ ኃላፊ የሚሆንበት ምክንያት አለመኖሩንና ከፍተኛው ፍ/ቤት ይግባኝ ባይ ኃላፊ ሊሆን የሚችልበት በቂ ምክንያት መኖሩ ሣይረጋገጥ አልፎ በርትዕ ብር 586,666.66 የጉዳት ኪሣራ ለአሁኑ መልስ ሰጭ መክፈል አለበት በማለት የወሰነው የሕግም ሆነ የማስረጃ መሠረት በሌለው መንገድ መሆኑን የሚገልፅ ነው፡፡

ይህ ፍ/ቤት በበኩሉ የቀረበውን የይግባኝ ቅሬታ ይግባኝ ከተባለበት ውሣኔ፣ በሁለቱ ወገኖች መካከል ስላለው የውል ግንኙነት ያስረዳል ተብሎ በአስረጂነት ከቀረበው የኢንሹራንስ ውል ሰነድ እና ከእንዲህ አይነቱ ጉዳይ ጋር ተዛማጅነት ካለው ሕግ አንፃር መርምሮ የኃላፊነቱ ጉዳይም ሆነ የካሣው መጠን እንደገና ተጣርቶ መወሰን የሚያስፈልገው ሆኖ ስላገኘው ይግባኙ ያስቀርባል በማለት የይግባኝ ማመልከቻው

ከመጥሪያው ጋር ለመልስ ሰጭ ተልኮ ቀርቦ መልስ እንዲሰጥበት በማድረግ በጉዳዩ ላይ አከራክሯል፡፡

በዚህም መሠረት የአሁኑ መልስ ሰጭ በወኪሉ አማካኝነት ህዳር 28 ቀን 1996 ዓ.ም ተጽፎ እንዲቀርብ ባደረገው መልስ፣

ይግባኝ ባይ በኢንሹራንሱ ውል መሠረት በግጭት ጉዳት የደረሰበትን መኪና በተገቢው ጊዜ ውስጥ በማስጠገን ለኢንሹራንስ ገቢው የማስረከብ ግዴታ ያለበት መሆኑን አምኖ መኪናውን ለማስጠገን ወስዶ ሣይዘገይ በተገቢው ጊዜ ውስጥ አሰርቶ ማስረከብ ሲገባው አዘግይቶ በመፈጸም ኢንሹራንስ ገቢው ላይ የጉዳት ኪሣራ አድርሷል፡፡ አዘግይቶ መፈጸሙ ከተረጋገጠ ደግሞ በመዘግየቱ ምክንያት በመልስ ሰጭ ላይ ሊደርስ የቻለውን የጉዳት ኪሣራ በሕጉ የመክፈል ግዴታ አለበት፡፡

ይግባኝ ባይ በኢንሹራንሱ ውል በመኪናው ገቢ መቋረጥ ምክንያት መልስ ሰጭ ደርሶብኛል ለሚለው የጉዳት ኪሣራ ኃላፊነት የለብኝም የሚል ክርክር ሊያነሣ የቻለ ቢሆንም ግዴታው ከውል ብቻ ሣይሆን ከሕግም የሚመነጭ በመሆኑ በክሱ የተጠየቀውን ካሣ የመክፈል ግዴታ አለበት፡፡ መኪናውን አሰርቼ በማስረከብ ግዴታዬን ተወጥቻለው በሚል ምክንያት አዘግይቶ ግዴታውን በመፈጸሙ የተነሣ የተጠየቀውን የጉዳት ኪሣራ አልከፍልም ሊል አይችልም፡፡ ይግባኝ ባይ በመኪናው ላይ አደጋ በደረሰ 40 ቀናት ጊዜ ውስጥ መኪናውን አሰርቶ ለመልስ ሰጭ ለማስረከብ ተስማምቷል፡፡ መኪናው ለጥገና ቆሞ በሚቆይበት 40 ቀናት ውስጥ መልስ ሰጭ ያጣውን ጥቅም ይግባኝ ባይ መክፈል ይገባዋል፡፡

ይግባኝ ባይ በውሉ መሠረት መኪናውን አስጠግኖ እንዲያስረክብ በተደጋጋሚ ተጠይቆ ሣይፈጽም የቀረ መሆኑ በማስረጃ ሊረጋገጥ ችሏል፡፡ መኪናውን ለማስጠገን ከተረከበ የጥገናውን ሥራ እንዲያከናውንለት የተዋዋለውን ጋራዥ ክትትል በማድረግ በተወሰነው ጊዜ ውስጥ አሰርቶ ለመልስ ሰጪ የመመለስ ኃላፊነት አለበት፡፡ ከፍተኛው ፍ/ቤት ይግባኝ ባይ ግዴታውን አዘግይቶ ሊፈጽም መቻሉን በማረጋገጥ መልስ ሰጪ መኪናውን አገልግሎት ሣይሰጥ ቆሞ በመቆየቱ ምክንያት ተቋርጠብኛል ያለውን ገቢ የመክፍል ግዴታ አለበት በማለት የወሰነው ተቀባይነት ሊሰጠው የሚገባ እንጂ ሊነቀፍ የሚችልበት መንገድ የለም፡፡

የካሣውን መጠን በተመለከተም ከፍተኛው ፍ/ቤት በአሁኑ መልስ ሰጭ በኩል የቀረበውን ማስረጃ አልቀበልም ሣይል በካሣው አወሳሰን ላይ የተለያዩ ነገሮችን ግምት ውስጥ በማስገባትና በማመዛዘን በርትዕ መወሰኑ በሕጉ የሚደገፍ ነው፡፡ ስለዚህ ይግባኝ ባይ የከፍተኛውን ፍ/ቤት ውሣኔ በመቃወም ይግባኝ ያቀረበው በቂ ባልሆነ ምክንያት በመሆኑ ውድቅ ሊደረግ ይገባል በማለት ተከራክሯል፡፡

በዚህ ጉዳይ የአሁኑ ይግባኝ ባይ አጥብቆ የሚከራከረው ኢንሹራንስ ተገብቶለት የነበረው መኪና በግጭት ጉዳት ሊደርስበት የቻለ ቢሆንም ወዲያው አደጋው እንደደረሰ ወደ ጋራዥ በማስገባት በውሉ መሠረት በማስጠገን መልስ ሰጭ እንዲረከበው በማድረግ በውልም ሆነ በሕጉ ያለብኝን ግዴታ ፈጽሜአለሁ፡፡ መልስ ሰጭ መኪናው በደረሰበት አደጋ ሣቢያ ሣይሠራ በመቆየቱ አገኘ የነበረው ገቢ

ተቋርጦብኛል በማለት ይገባኛል ለሚለው የጉዳት ኪሣራ /ካሣ/ ይግባኝ ባይ ኃላፊ የሚሆንበት የውልም ሆነ የሕግ ምክንያት የለም፡፡

ከፍተኛው ፍ/ቤት ይህንን አልፎ ካሣ መክፈል አለብህ ብሎ የወሰነው የሕግም ሆነ የማስረጃ መሠረት በሌለው መንገድ ነው በማለት ሲሆን የአሁኑ መልስ ሰጪ ደግሞ ይግባኝ ባይ በውልም ሆነ በሕጉ ያለበት ግዴታ አደጋ የደረሰበትን መኪና አሰርቶ በማስረከብ ላይ ብቻ የተወሰነ አይደለም፣ በውሉ ያለበትን ግዴታ አዘግይቶ የፈጸመ ሆኖ ከተገኘ በሕጉ አዘግይቶ በመፈጸሙ ምክንያት በሌላው ተዋዋይ ወገን ላይ ለደረሰው ጉዳት ኃላፊ ይሆናል መኪናውን በውሉ ላይ በተወሰነው ጊዜ ውስጥ አሰርቶ ሣያስረክብ የቆየ መሆኑ ከተረጋገጠ በዚህ ምክንያት ሊቋረጥ የቻለውን ገቢ በተመለከተ ይግባኝ ባይ ኃላፊ ነው ተብሎ እንዲከፍል የማይደረግበት ምክንያት የለም ባይ ነው፡፡

ከዚሁ የግራ ቀኙ ክርክር አቀራረብ እንደሚታየው የመጀመሪያው በዚህ መዝገብ መወሰን የሚገባው ዋናው የክርክር ጭብጥ የአሁኑ ይግባኝ ባይ ግጭት የደረሰበትን መኪና በ40 ቀን ውስጥ አስጠግኖ ባለማስረከቡ ምክንያት ገቢው ተቋርጦ ቆይቷል ተብሎ ለተጠየቀው የጉዳት ኪሣራ ኃላፊነት አለበት የለበትም የሚለው ጉዳይ ነው፡፡

ኢንሹራንስ የተገባለት መኪና አደጋ ደርሶበት ኢንሹራንስ ሰጭ የሆነው የአሁን ይግባኝ ባይ በ40 ቀን ውስጥ አስጠግኜ አስረክባለሁ ብሎ ጋራዥ ካስገባ በኋላ 920 ቀኖች አቆይቶ አስረክቧል በማለት በዚህ ጊዜ ውስጥ ሊቋረጥ የቻለውን የመኪናው በቀን ብር 1,000 ሂሣብ ታስቦ የ880 ቀኖች ብር 880,000 ሊከፍለኝ ይገባል በሚል በራሱ ስምና ሞግዚት በሆናቸው አራት ልጆች እንዲሁም ወኪሉ ነኝ ባለው አንበሳ በዙ ስም ክስ ያቀረበው አቶ በዙ አበበ ሆኖ ይገኝ እንጂ ለመኪናው መድን የገባችው ወ/ሮ ጥሩወርቅ ደጀኔ መሆኗን የኢንሹራንሱ ውል ሰነድ ያስረዳል፡፡ አቶ በዙ አበበ በመኪናው ኢንሹራንስ ጉዳይ ላይ ተዋዋይ ሣይሆን ኢንሹራንስ ሰጪውን ሊከሰው የቻለው ከኢንሹራንስ ገቢዋ ከወ/ሮ ጥሩወርቅ ደጀኔ ጋር ባልና ሚስት ስለነበርን ኢንሹራንስ የተገባለት መኪና የጋራ ሀብት ነው በሚል ምክንያት እንደሆነ ከክሱ አቀራረብ ለመረዳት ተችሏል፡፡ ኢንሹራንስ ገቢዋ ወ/ሮ ጥሩወርቅ ደጀኔ በጥር ወር 1987 ዓ.ም. ከዚህ ዓለም በሞት መለየቷን ከመዝገቡ ጋር እንዲያያዝ የተደረገው የፍርድ ቤት ውሣኔ ያመለክታል፡፡ ሕጋዊ ወራሾች ናቸው የተባሉት አምስት ልጆችና ከሣሽ የሆኑትም የወ/ሮ ጥሩወርቅ ደጀኔ ህጋዊ ወራሽ ናቸው የተባሉት ልጆች ኢንሹራንስ ከተገባለት መኪና ጋር በተያያዘ የመክሰስ መብት የላቸውም በሚል መንገድ ያቀረበው ክርክር ስለሌለ በዚህ ረገድ የሚታይ የክርክር ነጥብ የለም፡፡

ኢንሹራንስ የተገባለት መኪና የኢንሹራንስ ውል ፀንቶ ባለበት ወቅት ታህሣሥ 14 ቀን 1988 ዓ.ም የግጭት አደጋ የደረሰበት መሆኑ በክሱ ላይ የተገለጸ ሲሆን ኢንሹራንስ ሰጭ የሆነው የአሁን ይግባኝ ባይም አደጋው የደረሰው የኢንሹራንሱ ውል ፀንቶ ባለበት ጊዜ ስለመሆኑ ብቻ ሣይሆን አደጋው በኢንሹራንሱ ፖሊሲ የሚሸፈን መሆኑን አምኖበት አስጠግኖ ለማስረከብ ወስዶት ጋራዥ በማስገባት ሲያሰራው ከቆየ በኋላ በመጨረሻ የተሠራ መሆኑ ተረጋግጦ ከሣሾች እንዲረከቡት ተደርጓል፡፡ የአሁኑ መልስ ሰጭ መኪናው በ40 ቀን ውስጥ ተጠግኖ መረከብ ሲገባኝ 880 ቀኖች ዘግይቷል በሚል ምክንያት የተቋረጠውን የመኪናውን ገቢ የአሁኑ ይግባኝ ባይ

መክፈል ይኖርበታል ወደሚል ክስና ክርክር ሊያመራ የቻለ ይሁን እንጂ የሚፈልጉት የመኪናው ጥገና ሥራ ተከናውኖ መኪናው በእጃቸው ሊገባ መቻሉን አይክዱም፡፡

ይግባኝ ባይ በ40 ቀን ውስጥ መኪናውን አስጠግኖ ለማስረከብ ግዴታ ገብቷል የተባለውን በተመለከተም የአሁኑ መልስ ሰጭ ጥር 5 ቀን 1992 ዓ.ም በማሻሻል ጽፎ ለከፍተኛው ፍ/ቤት ባቀረበው የክስ ማመልከቻ እና በዚህ መዝገብ ለቀረበው ይግባኝ ህዳር 28 ቀን 1996 ዓ.ም በተጻፈ ጽሁፍ መልስ ሲሰጥ ኢንሹራንስ ሰጭው ኢንሹራንስ የተገባለት ተሽከርካሪ የግጭት አደጋ የደረሰበት ስለመሆኑ ሲገለፅለት በ40 ቀን ውስጥ አስጠግኖ ለማስረከብ ተስማምቷል ብሎ ከመጥቀስ በቀር ይህንን የሚያረጋግጥ ማስረጃ አላቀረበም፡፡ በአስረጂነት የቀረበው የኢንሹራንሱ ውል ሰነድ ደግሞ ኢንሹራንስ በተገባለት ተሽከርካሪ ላይ በግጭት ጉዳት በሚደርስበት ጊዜ ኢንሹራንሰ ሰጭው የማስጠገን ኃላፊነት ያለበት መሆኑን የሚያስረዳ እንጂ አስጠግኖ የማስረከቡ በቀኑ-ገደብ የተወሰነ ስለመሆኑ የሚያሳይ አይደለም፡፡ ስለዚህ መልስ ሰጭ ኢንሹራንስ ሰጭ የሆነው የአሁኑ ይግባኝ ባይ አደጋ የደረሰበትን ተሽከርካሪ በ40 ቀናት ውስጥ አስጠግኖ የማስረከብ ግዴታ አለበት፣ በዚህ ጊዜ ውስጥ አስጠግኖ ለማስረከብ ሣይችል መቅረቱ ግዴታውን አዘግይቶ እንዳልፈፀመ ይቆጠራል በሚል ያቀረበውን የመከራከሪያ ምክንያት ምንም ዓይነት መሠረት ስለሌለው ተቀባይነት የለውም፡፡

የተሽከርካሪው የጥገና ሥራ በመዘግየቱ ምክንያት ከሣሾች ከተሽከርካሪው ማግኘት ይገባን የነበረው ጥቅም /ገቢ/ ተቋርጧል ለሚሉት የአሁኑ ይግባኝ ባይ የመክፈል ኃላፊነት አለበት የለበትም የሚለውን ከኢንሹራንሱ ውል ፖሊሲ እና ከሕጉ አንፃር ስንመረምር በአስረጂነት ቀርቦ ከመዝገቡ ጋር ተያይዞ የሚገኘው የንግድ ተሽከርካሪዎች የመድን ዋስትና ውል ፖሊሲ በሚል የተጻፈው ሰነድ ተሽከርካሪው ከአገልግሎት ውጭ በመሆኑ ምክንያት ኢንሹራንስ ሰጪው ለኢንሹራንሰ ገቢው ክፍያ የማድረግ ኃላፊነት የሌለበት መሆኑን ያስረዳል፡፡ ይህም ማለት ተሽከርካሪው በግጭት ወይም በመገልበጥ አደጋ ጉዳት ደርሶበት ተጠግኖ እስኪወጣ ድረስ ከአገልግሎት ውጭ ሆኖ ለሚቆይበት ጊዜ ኢንሹራንሰ ሰጪው ኢንሹራንስ ገቢው ከተሽከርካሪው የሚያገኘው ገቢ ተቋርጦበታል ብሎ ክፍያ የማድረግ ኃላፊነት የለበትም ማለት እንደሆነ ግልፅ ነው፡፡ በመሆኑም የአሁኑ መልስ ሰጭ ተቋርጠብኛል የሚለው የተሽከርካሪ ገቢ ከኢንሹራንስ ውል ፖሊሲ አኳያ ሲታይ ኢንሹራንስ ሰጭው ኃላፊ ከሚሆንባቸው ምክንያቶች ውስጥ የሚመደብ ስላልሆነ በውሉ ኃላፊ የሚሰኝበት ጉዳይ አይሆንም፡፡

በሕጉም ረገድ ስንመለከት በንግድ ሕግ ቁጥር 663/1/ ላይ እንደተመለከተው ኢንሹራንስ ሰጭው ኢንሹራንስ ለገባው ሰው መድን የሚሆነው በውሉ ላይ ለተገለጸው አደጋ ነው፡፡ ካሣም ለመክፈል የሚገደደው በውሉ ላይ የተመለከተው አደጋ ሲደርስ ነው፡፡ በንግድ ሕግ ቁጥር 655/1/ ላይ የተመለከተውም ይህንኑ የሚደነግግ ነው፡፡

በዚህ መዝገብ በቀረበው ጉዳይ ደግሞ የአሁኑ መልስ ሰጪ ካሣ ሊከፈለን ይገባል የሚልበት ምክንያት በኢንሹራንስ ውል ፖሊሲ የሚሸፈን ባለመሆኑ በሕጉ ካሣ ለመጠየቅ የሚያስችለው አይደለም፡፡ ኢንሹራንስ የተገባለት ተሽከርካሪ ለኢንሹራንስ ገቢው ሲያስገኝለት የነበረው ገቢ መቋረጥ በኢንሹራንስ ፖሊሲው የማይታቀፍ መሆኑ

ከተረጋገጠ ኢንሹራንስ ሰጭ የሆነው የአሁኑ ይግባኝ ባይ በውሉ ላይ ባልተመለከተ ምክንያት ኢንሹራንስ ለገባው ሰው መድን ሊሆን ስለማይችል በዚህ ረገድ ካሣ የመክፈል ኃላፊነት አለበት ለማለት አይቻልም፡፡

በሌላም በኩል ይግባኝ ባይ በውል ያለበትን ግዴታ አዘግይቶ መፈጸሙ በንግድ ሕጉ ስለኢንሹራንስ ውል በሚመለከቱት ድንጋጌዎች መሠረት ባይሆንም በፍትሐብሔር ሕጉ ስለ ውሎች በጠቅላላው በሚመለከተው ከቁጥር 1790 ጀምሮ ባሉት ድንጋጌዎች መሠረት በኢንሹራንስ ገቢው ላይ ለደረሰው የጉዳት ኪሣራ ኃላፊነት አለበት ተብሎ በክሱ የተጠቀሰውን የመከራከሪያ ነጥብ በተመለከተም ከፍ ሲል እንደተገለጸው ይግባኝ ባይ በተሽከርካሪው ላይ ግጭት እንደደረሰበት በ40 ቀን ውስጥ አስጠግኖ ለማስረከብ በመስማማት የገባው የተለየ ግዴታ ስለመኖሩ የሚያረጋግጥ ማስረጃ አልቀረበም፡፡ በኢንሹራንስ ውሉም ላይ ኢንሹራንስ የተገባለት ተሽከርካሪ በግጭት ጉዳት ቢደርሰብት ኢንሹራንስ ሰጪው በተወሰነ ጊዜ ውስጥ አስጠግኖ ማስረከብ አለበት የሚል ነገር የለም፡፡

በተሽከርካሪው ላይ ግጭት መድረሱን ይግባኝ ባይ እንዳወቀ ለማስጠገን ወደ ጋራዥ ማስገባቱን መልስ ሰጭ በክርክሩ ላይ ገልጿል፡፡ ወደ ጋራዥ ካስገባው በኋላ ተጠግኖ እስኪወጣ ድረስ ረጅም ጊዜ ሊወስድ የቻለው በይግባኝ ባይ ምክንያት መሆኑ የተረጋገጠበት መንገድ የለም፡፡ የአሁን መልስ ሰጭም ተሽከርካሪው ለጥገና ወደ ጋራዥ ከገባ በኋላ የመከታተሉ ኃላፊነት የይግባኝ ባይ የሥራ ድርሻ ነው ከማለት በቀር ሣይከታተል በመቅረቱ ምክንያት የተሽከርካሪው ጥገና ሥራ ሊዘገይ መቻሉን አላስረዳም፡፡ ለጥገናው ሥራ የሚያስፈልገውን ወጪ በወቅቱ ባለመክፈሉ ተሽከርካሪው ሣይሠራ ቆሞ ቆይቷል ወይም የጥገናው ሥራ ሊዘገይ ችሏል አልተባለም፡፡ መልስ ሰጭ በተሽከርካሪው ላይ ግጭት ከደረሰበት በኋላ በእጃችን ሣይገባ 920 ወይም 880 ቀናት ሊቆይ ችሏል ለሚለውም ይህንን ያህል ጊዜ ሊወስድ የቻለው በይግባኝ ባይ ጥፋት መሆኑን ሊያረጋግጥ አልቻለም፡፡ ይግባኝ ባይ ፈፅሟል የተባለው ይህ ነው የሚባል ጥፋት ሣይኖር መልስ ሰጭ ደርሶብኛል ለሚለው የጉዳት ኪሣራ በሕጉ ኃላፊ የሚሆንበት ምክንያት አይኖርም፡፡

በአጠቃላይ በዚህ ጉዳይ የአሁኑ ይግባኝ ባይ ኃላፊ የሚሆንበት የውልም ሆነ የሕግ ምክንያት ስለሌለ ለአሁኑ መልስ ሰጭ መክፈል ይገባዋል የሚባል ካሣ የለም፡፡ ስለሆነም የድሬዳዋ ከፍተኛ ፍ/ቤት የአሁኑ መልስ ሰጭ ተቋርጦብኛል ላለው የመኪና ገቢ ይግባኝ ባይ ኃላፊ የሚሆንበት ጉዳይ ነው በማለት ካሣ እንዲከፍል የወሰነው ያለአግባብ ሆኖ ስለተገኘ በተጠቃሽ መዝገብ ሐምሌ 1 ቀን 1995ዓ.ም በዋለው ችሎት የሰጠው ውሣኔ በፍ/ሥ/ሥ/ሕ/ቁ. 348/1/ መሠረት ሙሉ በሙሉ ሽረነዋል፡፡

ይግባኝ ባይ በክርክሩ ምክንያት ደርሶብኛል የሚለው ወጪና ኪሣራ ካለ በፍ/ሥ/ሥ/ሕ/ ቁ.463/1/ መሠረት ዝርዝሩን የማቅረብ መብቱን ጠብቀናል፡፡

በዚህ መዝገብ የተሰጠው ውሣኔ ትክክለኛ ግልባጭ ለድሬዳዋ ከፍተኛ ፍ/ቤት ይተላለፍ ብለን መዝገቡን ዘግተን ወደ መዝገብ ቤት መልሰናል፡፡

የማይነበብ የሁለት ዳኞች ፊርማ አለበት፡፡

የሒሳብ ልዩነት

ይግባኝ ባዩ የሚያከራክረው የገንዘብ ክፍያ ጉዳይ መነሻ የሆነው መድን የተገባለት መኪና ጉዳት ሲደርስበት በመድን ፖሊሲው /ውል/ በገባው ግዴታ መሠረት መኪናውን ለማስጠገን ወይም የጉዳቱን ካሣ ለመክፈል የተስማማ ለመሆኑ የመድን ውሉ የሚያስረዳ ሲሆን አከራካሪም አልሆነም፡፡

ይግባኝ ባይ በመድን ውል ላይ የተደረሰውን ስምምነት መሠረት አድርጐ መኪናውን ለማሰራት መርጧል፡፡ መኪናውን ለማሰራት መምረጥ ደግሞ በተቻለ መጠን በተገቢው ጊዜ አሰርቶ ለማስረከብ ግዴታ መግባት መሆኑን /በተለይም ከመድን ውሉ ዓላማ አንፃር መረዳት ይገባል፡፡

በዚህ መሠረት ይግባኝ ባዩ ግዴታውን ፈጽሞ መገኘት ይጠበቅበታል፡፡ ይህን ግዴታውን ሣይፈጽም ቀርቶ አዘግይቶ ከፊጸመ መኪናውን በማስጠገን ፈንታ በመኪናው ላይ የደረሰውን የጉዳት ኪሣራ ለመክፈል ቢመርጥና ክፍያውን በቶሎ ባይከፍል የገንዘቡ ክፍያ ለዘገየበት ኪሣራ ለመክፈል ሊገደድ እንደሚችል ሁሉ መኪናውንም አዘግይቶ በማሠራቱና ባለመኪናው መኪናው በወቅቱ ተሰርቶ ባለመረከቡ ምክንያት ለደረሰበት ጉዳት ኪሣራ ሲጠይቀው ሊከፍል ይገባል፡፡

ይግባኝ ባዩ መኪናውን በአርባ ቀን ውስጥ አሠርቶ ሊያስረክብ ከባለጋራዡ ጋር ተስማምቶ መኪናውን ሲያሠራ ለዘጠኝ መቶ ሃያ /920/ ቀናት ያዘገየው ለመሆኑ መልስ ሰጭው ያስረዳ ሲሆን ይግባኝ ባዩም ያልካደው ለመሆኑ መዝገቡ ያስረዳል፡፡ መኪናው ሣይሠራ የዘገየው በበቂ ምክንያት መሆኑን ማስረዳት ያለበት ይግባኝ ባዩ ሲሆን አሳማኝ ምክንያት አቅርቦ አላስረዳም፡፡ የሚከራከረው በጉዳቱ ምክንያት ለተቋረጠ ጥቅም በመድን ውል መሠረት ለመክፈል አልገደድም በማለት ነው፡፡ ይህ ክርክሩ ደግሞ በሁለት ምክንያቶች ተቀባይነት ሊያገኝ አይገባውም፡፡ ከዚህ በላይ እንደተገለጸው በመድን ውል ላይ ይግባኝ ባዩ መኪናው ጉዳት ቢደርስበት ለማስራት ተስማምቷል፡፡ አሠራለሁ ሲል ግዴታ የገባው በተገቢው ጊዜ የመኪናው ጉዳት እንዲጠገን ሊያደርግ እንጂ አሠራለሁ ብሎ መኪናውን ከተረከበ በኋላ በገባው ግዴታ መሠረት ሳይፈጽም ጉዳት ቢያደርስ አይጠየቅም ለማለት አይደለም፡፡ ይልቁንም የመድን ፖሊሲው ዋና ዓላማ መድን የገባው ሰው መድን በተገባለት ንብረት ላይ የሚደርስበትን ጉዳት ለማስቀረት ወይም ለመቀነስ ወይም ተመጣጣኝ ካሣ እንዲያገኝ በመሆኑ መድን ሰጪው መኪናው የደረሰበትን ጉዳት አስጠግናለሁ ብሎ ቶሎ ባለማስጠገን መድን በገባው ሰው ላይ ሌላ ጉዳት የሚያደርስበት ከሆነ የመድን ሽፋኑ ዓላማ ተሳክቷል ማለት የማይቻልና ዓላማውን የሚፃረር ይሆናል፡፡

በሁለተኛ ደረጃ ይግባኝ ባይ የተከሰሰው መኪናውን አስጠግናለሁ ብሎ ተስማምቶ ላለማስጠገኑ ስለመሆኑ መልስ ሰጭ አስረድቷል፡፡ ይግባኝ ባዩም ይህን አልካደውም፡፡ ይልቁንም ስምምነቱን የተቀበለ ለመሆኑ ከባለጋራዡ ጋር መኪናውን በአርባ ቀን ውስጥ ለማሰራት ተስማምቶ መኪናውን ለባለጋራዡ ማስረከቡን መዝገቡ የሚያስረዳ ሲሆን ይህም አከራካሪ ሆኖ አልተገኘም፡፡ ይግባኝ ባዩ መኪናውን አሠራለሁ ብሎ

በአርባ /40/ ቀናት ለማሰራት ውል ከባለጋራዡ ጋር ከፊጸመ በእነዚህ ቀናት ውስጥ መኪናውን ለማሰራትና ለማስረከብ ግዴታ መግባቱንም ለመገንዘብ አያዳግትም፡፡

በተባለው ቀን ውስጥ አሰርቶ አልተገኘም፡፡ ያልፈጸመው በበቂ ምክንያት ስለመሆኑ አላስረዳም፡፡ መኪናውን ለማሰራት ይህን ያህል ጊዜ ይወስዳል ብሎ ለመገመት የማይቻል ነው፡፡ ባለመኪናው መኪናውን ይግባኝ ባዩ አሰርቶ እንዲያስረክበው ሲጠይቀው የነበረ መሆኑን መዝገቡ ያሳያል፡፡ ከዚህም መረዳት የሚቻለው ይግባኝ ባዩ ተገቢውን ትጋት አድርጐ መኪናውን አሰርቶ አለማስረከቡን ነው፡፡

በመሆኑም ይግባኝ ባይ መኪናውን ለማሳደስ ተስማምቶ መኪናውን ተረክቦ ለባለጋራዡ እንዲሰራ ካስረከበ በኋላ በተገቢው ጊዜ መኪናውን አሳድሶ ለባለቤቱ ማስረከብ ሲገባው ግዴታውን ሣይወጣ በመቅረቱ ምክንያት በባለመኪናው ላይ ለደረሰው ጉዳት ወይም ኪሣራ በፍ/ሕ/ቁ. 1790/2/ እና 1791 መሠረት በኃላፊነት ሊጠየቅ ይገባል፡፡

ስለዚህ ከመድን ፖሊሲም ሆነ ይግባኝ ባዩ መኪናውን በአርባ ቀናት ውስጥ አሰርቶ ለማስረከብ ከገባው ግዴታ አንፃር በባለመኪናው ላይ ለደረሰው ጉዳት በኃላፊነት ሊጠየቅ ሲገባና የኪሣራው መጠን በመልስ ሰጭው በኩል የቀረቡት ማስረጃዎች አግባብነትና ክብደት ተመርምረው ይግባኝ ባዩ ተመጣጣኝ ኪሣራ እንዲከፍል ሊወሰን ሲገባ በነፃ መለቀቅ የለበትም በማለት ከተሰጠው ውሣኔ በተጠቀሱት ምክንያቶች መሠረት በሐሳብ ተለይቻለሁ፡፡

የማይነበብ የአንድ ዳኛ ፊርማ አለበት
ጌታቸው ምህረቱ

Federal Supreme Court of Ethiopia

Judges: Menberetsehai Tadesse
Dagne Melaku
Getachew Miheretu

Appellant: Ethiopian Insurance Corporation
Respondent: Bezu Abebe
Civil Appeal File No. 13263
March 1, 2004

Insurer's liability for consequential damage; whether an insurer is liable for loss of income suffered by the insured while the object insured was under repair for a longer period of time-interpreting insurance policy- risks excluded-Articles 663(1) and 665(1) of the Commercial Code; whether a party to a contract can be said to be late in performing its obligation, thus in breach of a contract where the contract itself fixes no specific time for performance-Articles 1790(1) and 1791 of the Civil Code.

An appeal was lodged against the judgment of the Federal High Court on the ground that the insurer is neither contractually nor legally liable to compensate consequential damage

Held: The judgment of the Federal High Court was reversed by majority.

Summary of the Judgment

Respondent's delivery vehicle was damaged in an accident during the currency of a valid insurance contract with the appellant. The insurer, i.e., the present appellant, having opted for repairing the insured vehicle, took the vehicle and gave it to a garage owner in which the latter agreed to undertake the repair and deliver the vehicle within 40 days. However, delivery was effected to the respondent, i.e. the insurer after a delay for 920 days.

Respondent brought an action against the appellant before the Federal High Court of Dire Dawa to recover a sum of Birr 880,000 by way of damages for an allegedly lost income (for a period of 880 days while the vehicle was not in use as it was under repair and at the rate of Birr 1000 a day) on the ground that the appellant caused such loss by failing to honor its obligation to repair and handover the vehicle within the agreed period of 40 days.

Appellant denied liability for the said loss of income arguing that it had had the vehicle repaired and returned to the respondent as per its contractual obligation; that the appellant did not undertake to repair and deliver the vehicle within 40 days upon notification of occurrence of risk; that pursuant to the insurance policy the duty of the insurer was to repair and deliver the vehicle and the insurance policy did not provide for a specified time within which the insurer had to repair and deliver the vehicle.

The Federal High Court found the appellant liable for the alleged loss of income and awarded the insured a sum of Birr 586, 666.66 (an amount the court fixed by equity).The

Court further ordered the insurer to refund to the insured the amount the insured paid by way of court fee, advocate's fee plus an additional sum of Birr 1000 for what the Court said was due as other costs.

On appeal the Federal Supreme Court, by majority, reversed the decision of the trial court holding that the insurer is not liable for the allegedly lost income, while a dissenting opinion upheld the decision of the lower court on that issue.

The Supreme Court framed the issue of whether the insurer is liable for the income allegedly lost during the time taken to have the vehicle repaired.

The Court argued that the insurance policy adduced by the parties provides that the insurer has no obligation to compensate the insured for any loss suffered because the insured vehicle was out of use. This is obviously to mean, the Court reasoned, that if the insured vehicle has been damaged, and the insurer has no liability to compensate the insured for the loss of income the insurer could have derived during the time it may take to have the vehicle repaired. Thus, seen from the point of view of the insurance policy, the income allegedly lost was not one among the risks for which the insurer is to be held liable on the policy.

Pursuant to Article 663(1) of the Commercial Code an insurer shall guarantee the insured against the risk specified in the policy; and that under Article 665(1) its liability to compensate arises when the risk insured against materializes.

In the case at hand, the respondent is not legally entitled to claim compensation as the risk occurred is not covered by the insurance policy. It is not possible to say that the appellant is liable for the loss of income which the insured could have obtained from the use of his vehicle where it is shown that such loss is not the type of risk covered in the policy.

The Court also rejected the respondent's contention that the appellant, pursuant to Article 1790ff of the Civil Code, is liable for the damage that ensued from late performance of obligation on the part of the appellant on the ground that there is no evidence which shows that the appellant had assumed a specific obligation in which it was bound to repair and deliver the insured vehicle within 40 days of the occurrence of damage; there is nothing in the insurance policy to the effect that the insurer shall cause the repair of the vehicle and deliver it within a fixed period.

The Court also reasoned that the respondent has not shown that the delay in repairing and delivering the vehicle was attributable to the fault of the appellant either because the latter failed to follow up the repair process or did not pay for the costs necessary to carry out such repair.

Finally, the majority opinion concluded that there was neither contractual nor legal ground on which the appellant insurer could be held liable to pay compensation for the loss of income allegedly suffered by the respondent insured. The Court reversed the decision of the Federal High Court and taxed the respondent with the cost of litigation.

Dissenting opinion

In as much as the insurer would have been liable for delay of performance if it had opted for paying damages in cash and was late in effecting such payment, it should equally be held liable for the loss its delay to repair and deliver the vehicle in due time might have caused upon the insured where the insurer has chosen to repair and deliver the vehicle instead of compensating the insured in cash.

Appellant's contention that it is not bound, under the insurance policy, to compensate for the loss of income is untenable for two reasons. Firstly, where the appellant contractually assumed the obligation to repair the insured vehicle, it means that its duty is rather to cause such repair in due time and it should not be construed to mean that the appellant is not at all liable for a damage that may ensue if it fails to honor such duty where it opted for repairing the vehicle itself than paying compensation in cash. As the main purpose of an insurance policy is to avoid, or to reduce damage, or to obtain compensation equivalent to the damage suffered, a conduct on the part of the insurer which could expose the insured to additional damage by failing to repair and deliver the vehicle is in due time is contrary to the purpose of the policy.

Secondly, where the insurer agreed with a [a third party] garage owner so that the latter shall repair and deliver the vehicle within 40 days time, it is not difficult to understand that the appellant had also assumed the same obligation towards the respondent; but the appellant has not shown any sufficient cause, though the burden of proof lies upon it, for its failure to accomplish this duty within the time fixed. Rather the appellant was at fault not to have exerted the necessary diligence to discharge its obligation. The dissenting opinion concluded that the appellant was liable as per Articles 1790(2) and 1791 of the Civil Code for the loss of income allegedly suffered by the respondent due to appellant's failure to discharge its obligation in due time

ETHIOPIA'S RELUCTANT MOVE TO JOIN THE WTO: A PRELIMINARY LOOK AT LEGAL AND INSTITUTIONAL IMPLICATIONS OF ACCESSION

Melaku Geboye Desta*

Introduction

The World Trade Organization (WTO) is the pre-eminent global body for the regulation of international trade in goods and services today. With a current membership of 152 countries and customs territories, and about 30 others negotiating their accession to it, the WTO can easily aspire to universal membership as a real possibility. Indeed, the 152 members alone already account for roughly about 95 percent of global merchandise trade.[1] Ongoing negotiations for the accession of Russia, Iran and Algeria – the only countries with significant share of international trade still outside the trading system – promise that virtually all international trade will take place within its framework of rules and enforcement mechanisms in the near future.[2]

Perhaps to the surprise of many, Ethiopia has yet to join the WTO. Given Ethiopia's tradition of enthusiastic participation in multilateral initiatives, this contribution attempts to ask some of the basic questions about why Ethiopia uncharacteristically stayed out of such an important endeavour for so long and why it wants to join now, and what the potential implications of the decision to join the system will be for the legal, institutional and economic policy landscape of the country both during the accession process as well as after achieving membership.

To do this, section II provides a brief historical account of how the multilateral trading system evolved over time. The purpose of this section is to situate Ethiopia's current

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[1] See WTO Secretariat, *International Trade Statistics 2007* (Geneva 2007).

[2] The reality is of course more complicated. A significant portion of international trade takes place within a web of bilateral and regional preferential trade arrangements, whether of a reciprocal (e.g. free trade areas and customs unions) or non-reciprocal (e.g. unilateral schemes based on the Generalised System of Preferences, GSP) nature. And yet, these preferential agreements are supposed to operate under a framework of rules set by the WTO system itself. As Dam put it in 1963, the GATT "has been charged with the duty to regulate the formation of customs unions and free trade areas." Kenneth W. Dam, "Regional Economic Arrangements and the GATT: The Legacy of a Misconception", 30 *University of Chicago Law Review* (1963), p. 615. Moreover, the fact that a country is not a member of the GATT/WTO system does not always mean that the rules of that system do not affect the international trade interests of that country; indeed, it is natural that the moment a country decides to trade with another, the rules and regulations in the latter inevitably dictate the actual conduct of such trade.

interest to join the WTO in its historical context, and the discussion on the evolution of the trading system itself is only secondary to this objective of assessing where Ethiopia stood throughout this historical process. The discussion in this section, and to a certain extent in others, is however incomplete in the sense that it is written only from an 'outside' perspective, i.e. based on the official records of the trading system itself rather than any archives of the Ethiopian Government on the subject.[3]

This is followed in Section III by a brief introduction to the accession process. There is ample literature on this subject and the sole purpose of this section is to provide a highlight of the process to make sure the article makes sense on its own. Section IV then asks the question of why Ethiopia wants to join the system now. We find indications of the Government's thinking from quite a few sources,[4] but a statement made by Ethiopia's representative to the WTO at the meeting of the General Council on 10 February 2003 that considered Ethiopia's accession application appears to have captured this well.[5] This section attempts to answer the "why?" and "why now?" questions using this official statement as a point of departure. Section V concludes that the Government is right to seek to join the WTO, and it needs to be supported. The accession process is a painful one for the country now, but it will be worth all the effort in the future. To maximise the benefits of the accession process, and of final membership, this article concludes with a proposal for an institutional response that relevant government departments, academic institutions and the business community might need to consider, and also outlines some areas for future research.

It is hoped that the article will make a modest contribution to the debate that must take place among all stakeholders in this area, encompassing all of us as citizens, farmers, business people, civil servants, academics, lawyers, economists, and the fledgling civil society. The article is written with such a wide readership in mind.

I. Brief Historical Note: Where was Ethiopia for So Long?

One of only four African members of the League of Nations (since 1923)[6], a founding member of virtually all major global inter-governmental organizations that cropped up in the aftermath of the second World War, including the United Nations, the World Bank and the International Monetary Fund, and a leading player in continental and regional initiatives within Africa, it is a mystery as to why Ethiopia appears to have

[3] It is the hope of this writer that people with an 'inside' perspective will contribute to this journal and fill this gap in our understanding.

[4] The discussion in this article is based exclusively on publicly available information, which means that our sources are limited to the few official statements available out there, including: WTO, *Request for Observer Status: Communication from Ethiopia* (WT/L/229, 10 October 1997) and WTO, *Request for Extension of Observer Status: Communication from Ethiopia* (WT/L/445, 11 January 2002).

[5] See WTO doc. WT/GC/M/78, 7 March 2003.

[6] Liberia and South Africa were founding members of the League while Egypt joined in 1937.

never wanted to join the International Trade Organization (ITO) in the 1940s and the General Agreement on Tariffs and Trade (GATT) that effectively took over since 1948.[7]

It is not due to lack of awareness of what was going on at the time. The ITO Charter was negotiated under the auspices of the United Nations Economic and Social Council (ECOSOC), of which Ethiopia is a founding member. Nor would it be related to any ideological discomfort with the system, since the political and economic thinking of the Imperial Government of Ethiopia (1941-1974) was closer to the established West than the then emerging East.[8] The real reasons are difficult to determine, but a look at the history of the GATT/WTO system will provide the context within which government decisions were taken. To that end, it may be helpful to distinguish the establishment phase of the multilateral trading system (between 1945 and 1948), which would have allowed Ethiopia to become a founding member, from its later evolution during which Ethiopia could have acceded to it.

A. Ethiopia during the Establishment of the Trading System

The whole idea of establishing an international trade organization was conceived by the United States (US) Government, which saw a rules-based system of international trade relations as a key component of its mission to build a post-war world at peace with itself.[9] The US administration believed that in order to build world peace and stability, countries should adopt "a code of economic ethics and agree to live according to its rules".[10] Then US President Truman believed that the same principles of fair dealing that were being applied in politics by the United Nations also applied to economics and declared, "this is the way to peace".[11] The US Government thus took

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[7] On the history of the ITO negotiations, see Clair Wilcox, *A Charter for World Trade* (Macmillan, New York, 1949). See also John H. Jackson, *World Trade and the Law of GATT* (Bobbs-Merrill, Indianapolis 1969).

[8] Indeed, it is worth bearing in mind that a number of countries from the Eastern Bloc, such as Hungary, Poland and Romania, became GATT contracting parties in the late 1960s and early 1970s. For a list of the 128 countries that were contracting parties to the GATT on the eve of the WTO's establishment in January 1995 along with the date on which they signed the GATT, see http://www.wto.org/english/thewto_e/gattmem_e.htm. For a broad survey of the economic thinking of the Imperial regime, and particularly the close economic links with the US, see Shiferaw Bekele (ed.), *An Economic History of Ethiopia: The Imperial Era 1941 – 74* (Codesria, Senegal 1995).

[9] US Government official Harry Hawkins is quoted to have said: "We've seen that when a country gets starved out economically, its people are all too ready to follow the first dictator who may rise up and promise them all jobs. Trade conflict breeds non-cooperation, suspicion, bitterness. Nations which are economic enemies are not likely to remain political friends." Hawkins, as quoted in Jackson, *supra* n. 7, p. 38.

[10] US President Truman, as quoted in Wilcox (1949), *supra* n. 7, pp. 20-21.

[11] *Id.* P. 21.

the initiative and actively led the whole process that resulted in the conclusion of the Havana Charter for the establishment of the ITO in 1948.[12]

Already in 1945, the US Government had sent invitations to fifteen countries to participate in negotiations for the reduction of tariffs and other trade barriers.[13] The invitation was accepted by all except the USSR and talks commenced in December of the same year.[14] Ethiopia was not in that list. Given Ethiopia's cordial relations at the time with the US, this might indicate that the US determined the list on economic rather than political considerations. And when the UN ECOSOC, at its first meeting in London in February 1946, adopted a US-sponsored resolution for the calling of an International Conference on Trade and Employment, it appointed the US and the same 15 countries in the US list, plus another three (Chile, Lebanon and Norway), as the Preparatory Committee for the Conference.[15] It was this committee of 18 countries, i.e. except the USSR, that prepared the draft of the ITO Charter between October 1946 and August 1947. The draft later became the "basis for discussion" at the Havana Conference from 21 November 1947 to 24 March 1948.[16] The objective of the Havana Conference was to agree on a draft Charter that would establish a new specialized agency of the UN ECOSOC, the International Trade Organization.[17]

At the first session of the Preparatory Committee in London (15 October to 26 November 1946), the US "gave notice of its intention to enter into tariff negotiations with the members of the group"[18], thereby formally sowing the seeds of what later came to be known as the GATT. The Preparatory Committee completed the draft ITO Charter at the second session that commenced in Geneva on 10 April 1947 and concluded on 22 August 1947. But members of the Preparatory Committee were soon joined by five other countries (Burma (Mynamar), Ceylon (Sri Lanka), Pakistan, Southern Rhodesia (Zimbabwe), and Syria) to undertake the first tariff negotiations and adopt the GATT text, effectively the commercial policy chapter of the draft ITO charter, which was concluded on 30 October 1947. The GATT was applied provisionally through the Protocol of Provisional Application (PPA) on 1 January

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[12] See Interim Commission for the International Trade Organization, *Final Act and Related Documents of the Havana Conference* (UN doc. E/CONF. 2/78, April 1948).

[13] These were Australia, Belgium, Brazil, Canada, China, Cuba, Czechoslovakia, France, India, Luxembourg, New Zealand, South Africa, the Netherlands, UK, and the Union of Soviet Socialist Republics (USSR). See Clair Wilcox, *supra* n. 7, p. 40.

[14] See http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

[15] See UN ECOSOC, *Resolution Regarding the Calling of an International Conference on Trade and Employment*, para. 6 (Annexure 1 to E/PC/T/33).

[16] See GATT, *Analytical Index: Guide to GATT Law and Practice, Updated 6th Edition* (Geneva, 1995), p. 5.

[17] See UN Information Center, *Press Release No. 36* (8 April 1947), para. 1.

[18] See Wilcox, *supra* n. 7, p. 43.

1948 among the eight countries listed in paragraph 1 of the PPA plus Cuba.[19] These nine countries and the 14 others that signed the PPA by the cut-off date of 30 June 1948 set under its paragraph 3 became GATT founding 'members' – its original Contracting Parties.[20]

Ethiopia was not involved in this process. Several other countries not members of the ITO Preparatory Committee sent observers to the first and second sessions of the Preparatory Committee as well as the Drafting Committee and, as we saw above, some even joined the tariff negotiation process and became original parties to the GATT. But we have not found any records of Ethiopia ever expressing interest in participating in this process. Indeed, once the draft ITO Charter was finalized by the Preparatory Committee, invitations were extended to all UN members to participate in the Conference that was scheduled to open in Havana on 21 November 1947. According to a report of the Chairman of the Preparatory Committee, as of 30 October 1947, 28 countries had accepted the invitation,[21] while eight others, including Ethiopia, had refused the invitations.[22] Ethiopia was thus absent when 53 countries signed the ITO Charter at Havana on 24 March 1948.[23] But the Charter never entered into force[24] and the resulting gap was essentially filled by the GATT.

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[19] These are Australia, Belgium, Canada, France, Luxembourg, the Netherlands, the United Kingdom (UK) and the US.

[20] Chile missed the 30 June 1948 deadline and became an 'original' contracting party only through a Special Protocol of September 1948. Note also that China, Lebanon and Syria later withdrew from the GATT. For more on this, see GATT, *Analytical Index: Guide to GATT Law and Practice, Updated 6th Edition* (Geneva, 1995), pp. 3-6; and WTO, *World Trade Report 2007* (hereafter WTR 2007).

[21] These are Australia, Brazil, Canada, China, Colombia, Costa Rica, Denmark, Haiti, Liberia, Luxemburg, Netherlands, New Zealand, Norway, Philippines, Turkey, United Kingdom, United States, Uruguay, Afghanistan, Sweden, Pakistan, Portugal, Switzerland, Trans-Jordan through Iraq, Indonesia, Burma, Ceylon, and Southern Rhodesia. See *United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment,* E/PC/T/PV.2/7, 30 October 1947, pp. 17.

[22] The seven others are Byelo Russia (Belarus), Saudi Arabia, Ukraine, USSR, Yugoslavia, Siam (Thailand), and Bulgaria. *Id*.

[23] Only four of the 53 countries were from Africa: Afghanistan, Australia, Austria, Belgium, Bolivia, Brazil, Burma, Canada, Ceylon, Chile, China, Colombia' Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, *Egypt*, El Salvador, France, Greece, Guatemala, Haiti, India, Indonesia, Iran, Iraq, Ireland, Italy, Lebanon, *Liberia*, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Peru, Philippines, Portugal, *South Africa, Southern Rhodesia*, Sweden, Switzerland, Syria, Transjordan, United Kingdom, United States of America, Uruguay, and Venezuela (African countries in italics).

[24] The reasons for this failure are many and varied. Many commentators now believe that the Charter was too ambitious to enter into force at the time. Among the specific reasons often mentioned include its treatment of agriculture (which some developed countries thought had gone too far – and note that the US secured a waiver from GATT's already weak agriculture provisions in 1955 – while mainly the developing countries thought it had not gone far enough), its approach to international commodity agreements, its ambitious investment and competition chapters, and so on. Indeed, it appears that by the time the Charter was submitted for ratification before national legislatures, the political tide appeared to have turned hostile towards economic liberalization. In the words of the WTO itself, ratification of the ITO Charter "proved impossible" in some national legislatures and "[t]he most serious opposition was

In sum, what stands out about Ethiopia at this time is not the fact that it was not invited by the United States or the UN ECOSOC to take part in the Preparatory Committee but its express refusal to do so when the invitation to participate in the Conference was finally made. This section has shown that Ethiopia actively rejected the trading system then, but we do not know why it chose to do so. But, whatever the reasons at the time, it is now clear with the benefit of hindsight, and an appreciation of the escalating "entry fee" to the WTO over the years, that this was an expensive mistake for the country, and the real cost of that mistake will become only clearer as the current accession negotiations progress.

B. Ethiopia and the GATT: from Active Rejection to Active Observation

From its modest beginnings as a provisional agreement among 23 largely rich countries, GATT membership grew sharply over the following decades. It is worth noting in this connection that GATT recognizes independent customs territories that may not satisfy the international law requirements of statehood as subjects of rights and obligations on the same basis as states.[25] For both states and independent customs territories, GATT allowed two routes for accession – a standard route under Article XXXIII,[26] and a special route under Article XXVI:5(c).[27]

The special route of Article XXVI:5(c) was intended to achieve two things: (1) regulate the application of the GATT to dependent territories for which GATT

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in the US Congress.... In 1950, the United States government announced that it would not seek Congressional ratification of the Havana Charter, and the ITO was effectively dead." See http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

[25] GATT Article XXIV:2 defines a customs territory as "any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories." Jackson has noted that GATT preparatory meetings had Southern Rhodesia, Burma, and Ceylon in mind as they "were deemed to have autonomy in external commercial relations when GATT was drafted in 1947" and were accepted as contracting parties to the GATT. See Jackson *supra* n. 7, p. 96. See also Melaku Geboye Desta, "EC-ACP Economic Partnership Agreements and WTO Compatibility: An Experiment in North-South Inter-Regional Agreements?", 43(5) *Common Market Law Review* (2006) pp. 1343-1379.

[26] The text of Art. XXXIII provides as follows: "A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority."

[27] GATT Art. XXVI:5(c) provides as follows: "If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party."

contracting parties had international responsibility,[28] and (2) facilitate participation in the GATT of newly-independent or semi-independent countries and customs territories.[29] Following the decolonisation of large parts of Africa and Asia in the 1950s and 1960s, a number of countries from these regions used this route to join the GATT.[30] Indeed, this route allowed newly-independent countries to become GATT contracting parties in some cases without having to undertake serious commitments of their own.[31] The accession-by-sponsorship option was of course *de jure* unavailable for Ethiopia as it was never colonized by any foreign power.[32] The only route for Ethiopia to accede to the GATT would thus be that in Article XXXIII.

Article XXXIII is notorious for its opacity, providing merely that any state or separate customs territory may accede to the GATT "on terms to be agreed between such government and the Contracting Parties." During its 47 years of life, GATT successfully processed the accession of scores of countries,[33] which was done mostly as part of its series of trade negotiation rounds.[34] Again, we could not find any records

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[28] This is a reference to countries or territories under colonial or other foreign rule in which the ruler is a party to the GATT and the colony or dependent territory does not yet have full autonomy over its own external commercial relations.

[29] The following statement made by the UK representative to the GATT in 1986 where the UK sponsored the accession of Hong Kong as a separate customs territory would be a good example of how it worked in practice. The UK declared that Hong Kong "possesses full autonomy in the conduct of its external commercial relations and of the other matters provided for in the Agreement. In accordance with the provisions of Article XXVI(5)(c) of the said Agreement and with the wishes of Hong Kong, Hong Kong will, with effect from the date of this communication, be deemed to be a contracting party to the Agreement. … the United Kingdom will restore Hong Kong to the People's Republic of China with effect from 1 July 1997 and that the United Kingdom will continue to have international responsibility for Hong Kong until that date." GATT doc. L/5986, 24 April 1986.

[30] Indonesia became the first country to accede to the GATT under Art. XXVI:5(c) in 1950, which followed recognition by the Netherlands (27 December 1949) of Indonesia's unilateral declaration of independence on 17 August 1945. See *WTR 2007*, p. 213. Starting with the 1957 accession of Ghana, the first sub-Saharan African country to gain its independence in the same year, all sub-Saharan African countries currently members of the WTO, with the exception of the Democratic Republic of Congo, first became GATT contracting parties via the sponsorship route. See GATT Secretariat, "De Facto Status and Succession: Article XVI:5(c): Revision", GATT doc. MTN.GNG/NG7/W/40/Rev.1. See also *WTR 2007*, Appendix Table 10, pp. 253-56. For a legal analysis, see GATT, "De Facto Application of the General Agreement", GATT doc. C/130, 28 June 1984.

[31] A 1995 GATT Trade Policy Review of Cameroon noted, for example, that "Cameroon had no tariff bindings in the pre-Uruguay Round GATT". See http://www.wto.org/english/tratop_e/tpr_e/tp2_e.htm. After the conclusion of the Uruguay Round, Cameroon bound only three tariff lines, i.e. 0.1 percent of its total tariff lines. See WTO, *Market Access: Unfinished Business – Special Studies 6* (Geneva, 2001), pp. 7-8.

[32] Note also that this route is not available any more for accession to the WTO.

[33] GATT had a total of 128 contracting parties as at the end of 1994, i.e. on the eve of the creation of the WTO.

[34] As VanGrasstek observed, in "the great majority of GATT accessions, the applicant's 'entry fee' was negotiated concurrently with one of the eight rounds of multilateral trade negotiations conducted under the auspices of the GATT." See Craig VanGrasstek, "Why Demands on Acceding Countries Increase over Time: A three-dimensional analysis of multilateral trade diplomacy", in UNCTAD, *WTO*

showing if Ethiopia ever sought to join the system through the standard route of GATT Article XXXIII.

However, Ethiopia's attitude towards the trading system certainly changed over the years. Firstly, Ethiopia participated in the GATT on an ad hoc basis since its early days. To mention just a few examples, Ethiopia participated in the debate on the problem of commodities regulation in 1956.[35] It was also one of the countries that responded positively to a 1967 GATT invitation for non-member developing countries to take part in the work of the Trade Negotiations Committee of Developing Countries with a view to their participation in those negotiations.[36] Secondly, Ethiopia benefited from the training programmes of the GATT from as early as 1960.[37] Finally, Ethiopia participated in GATT activities as an observer since at least 1984.[38] Although there were no formal GATT rules on the role of observers, in practice, this meant that Ethiopia could attend meetings and participate in discussions but had no voting rights.[39] This established GATT practice has now been consolidated in detailed rules of procedure within the WTO, which expressly provides that an observer's right to speak "does not include the right to make proposals, unless a government is specifically invited to do so, nor to participate in decision-making."[40] The highest point of Ethiopia's GATT participation in this capacity was reached during the Uruguay Round

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Accession and Development Policies (Geneva, 2001, hereafter UNCTAD (2001)), p. 121. To mention an early example, the second GATT round of tariff negotiations at Annecy (France) in 1949 was entirely about tariff negotiations between the original Contracting Parties and 11 countries that just acceded to the GATT. See WTO, *WTR 2007*, p. 181. GATT sponsored eight such rounds: Geneva (1947), Annecy (1949), Torquay (1951), Geneva (1956), Dillon (1960-1961), Kennedy (1964-1967), Tokyo (1973-1979), and Uruguay (1986-1994). The ninth, or the WTO's first, round of trade negotiations is the ongoing Doha Development Agenda which was launched in November 2001.

[35] GATT Intersessional Committee, *Commodity Problems: Present Situation Regarding the Draft on Commodity Arrangements*, IC/W/51 10 September 1956.

[36] See GATT Trade Negotiations Committee of Developing Countries, *Participation of Non-GATT Countries: Note by the Secretariat*, TN(LDC)/6, 10 April 1968.

[37] GATT records show that an Ethiopian economist was one of nine young African economists that attended lectures in the Secretariat in February 1960. See GATT, *Fellowship Programme and Course for Officials of Governments Parties to the GATT or Members of the United Nations: Note by the Executive Secretary*, L/1327, 27 October 1960. Ethiopian officials continued to participate in GATT training programmes since the 1960s.

[38] See GATT, *Observer Status in GATT: Note by the Secretariat*, GATT doc. C/129, 27 June 1984. Although I was unable to verify this with the help of original GATT documents, Professor Jackson noted in his 1969 authoritative treatise that Ethiopia had an observer status in GATT already in 1968. See Jackson, *supra* n. 7, p. 901.

[39] At GATT Council meetings, for example, observers would traditionally be invited to speak on a particular point only after Council members have spoken. See GATT doc. C/129, *supra* n. 38, para. 11.

[40] WTO, *Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council*, WTO doc. WT/L/161, 25 July 1996, Annex 2, para. 10.

negotiations when it sounded nearly as committed to the principles and objectives of the trading system as any full-fledged member could be.[41]

Such increasingly warm and active participation could not of course alter the fact that, by the time the WTO was created, Ethiopia remained outside the GATT system. For Ethiopia and others still outside the system, the transition from GATT to the WTO also meant a transition to a more difficult and demanding system of accession with ever rising "entry fee".[42] As Gerald Curzon observed in 1965, accession to the GATT was "biased in favour of newcomers" and GATT contracting parties "do not normally try to drive too hard a bargain in payment of concessions which they made to third countries many years before."[43] Those 'good old days' have undoubtedly gone.[44]

C. Ethiopia and the WTO: Seeking Membership with Reluctance?

It was in 1997, two years after the establishment of the WTO, that the Ethiopian Government formally submitted an application for observership with a declaration of its "intention to apply for accession to the WTO Agreements in the near future".[45] Under the WTO rules of procedure, a government that requests such status is expected to initiate accession negotiations "within a maximum period of five years".[46] The WTO General Council accepted Ethiopia's application at its meeting of 22 October 1997 in which Ethiopia was represented at ministerial level, indicating the importance the

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[41] During the Uruguay Round negotiations, Ethiopian representative Gezahegne Tsegaye said that Ethiopia "follows the activities of the organization with keen interest, because not only do the activities of GATT directly or indirectly concern all countries, but also the objectives and principles of the organization merit the respect by all countries." Gezahegne went on to argue about the marginalization of the poor, endorsed statements made by the LDC Group in the Round and concluded: "while my delegation notes with satisfaction the progress made in the Uruguay Round of negotiations, it feels concerned that most of the substantive issues will have to be tackled within the remaining one year of the Round. Under the circumstances, the negotiations on the substantive issues will have to be accelerated further in order for the Round to reach a successful end." See GATT doc. SR.45/ST/33, 21 December 1989. As it turned out, the Uruguay Round negotiations continued for another four years.

[42] See Murray Gibbs, in UNCTAD (2001), p. xviii, noting that the process of WTO accession "has become more difficult than that of accession to the GATT 1947."

[43] Curzon, as quoted in Steve Charnovitz, "Mapping the Law of WTO Accession" , *WTO at Ten: Governance, Dispute Settlement and Developing Countries*, in Merit Janow, Victoria Donaldson and Alan Yanovichm (eds. Juris Publishing, forthcoming), p. 4, available at SSRN: http://ssrn.com/abstract=957651.

[44] Note however that this could be a matter of perspective. Peter Sutherland is certainly not alone when he says that those countries that undertook significant commitments as part of their accession benefited from their accession more than those that acceded with less rigorous commitments, as happened during the GATT days. See Peter Sutherland, "Transforming Nations: How the WTO Boosts Economies and Open Societies", in 87(2) *Foreign Affairs* (2008).

[45] WTO, *Ethiopia – Request for Observer Status: Communication from Ethiopia*, WT/L/229, 10 October 1997.

[46] See WTO Rules of Procedure *supra* n. 40, para. 4.

Government attached to the process.[47] However, domestic events soon overtook any intentions expressed in Geneva, and Ethiopia missed the five-year deadline within which to initiate the accession process. This meant that Ethiopia had to seek an extension for its observer status in 2002,[48] which was granted by the WTO General Council at its meeting of 13-14 May 2002.[49] This time, Ethiopia acted on its promises and submitted its request for accession in January 2003.[50] At its meeting of 10 February 2003, the General Council accepted the application and established an accession working party with standard terms of reference: "to examine the application of the Government of Ethiopia to accede to the WTO Agreement under Article XII, and to submit to the General Council recommendations which may include a draft Protocol of Accession."[51] As we shall see further below, however, Ethiopia submitted its Memorandum on Foreign Trade Régime (MFTR) only in 2007.

II. What Next for Ethiopia? Highlights of the Accession Process

The establishment of the working party is an important first step, but it is also the easiest part of the process. Almost every WTO member present at the General Council meeting appeared keen not to miss an opportunity to register a friendly statement about Ethiopia's decision to seek accession.[52] This friendly atmosphere inside the

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[47] See WTO doc. WT/GC/M/23, 28 November 1997.

[48] See WTO, *Ethiopia - Request for Extension of Observer Status: Communication from Ethiopia,* WTO doc. WT/L/445, 11 January 2002. Among the most eye-catching statements in the two brief documents submitted by the Government was the statement about a tariff overhaul in which the maximum rate was slashed from 230 per cent prior to the reform to 50 per cent by 1997, and to 40 percent by 2002. See Ethiopia's 1997 request, p. 3, and 2002 request, para. 22.

[49] See WTO doc. WT/GC/M/74, 1 July 2002.

[50] See WTO, *Technical Note on the Accession Process: Note by the Secretariat: State of Play and Information on Current Accessions: Revision*, WT/ACC/11/Rev.7, 18 May 2007.

[51] See WTO doc. WT/GC/M/78, 7 March 2003, para. 31. Membership of the working party is open to all WTO members, and we will have indications of the numbers only after the first meeting of the working party takes place. In practice, the size of working parties "varies considerably". According to a WTO note, as of November 2005, Russia had the largest working party with 58 members, while Bhutan and Montenegro had the smallest number of members at nine each. See WTO Secretariat, *Technical Note on the Accession Process – Note by the Secretariat: Revision,* WT/ACC/10/Rev.3, 28 November 2005, p. 8. Note that in both cases then EC-25 was counted as one.

[52] See WTO doc. WT/GC/M/78, 7 March 2003, paras. 12-30, in which virtually every WTO member present "warmly welcomed Ethiopia's statement, and supported its request for accession and the establishment of a working party to examine it." The members that spoke, either for themselves or on behalf of groupings, include Morocco (on behalf of the Africa Group), Bangladesh (on behalf of the LDCs), the European Communities, India, Israel, Kenya, Pakistan, China, United States, Peru (on behalf of GRULAC, an informal grouping of Latin-American members of the WTO), Indonesia (on behalf of the ASEAN Members), Bahrain, Botswana, Canada, and Turkey, and Slovenia (on behalf of Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovak Republic).

meeting room will change soon, and there are almost no rules governing what goes on in that room.

A. The Process

The accession process is carried out on two parallel and often overlapping tracks – a multilateral track that aims to find out about the relevant laws, policies and practices of the acceding country and ensure they are brought into conformity with WTO rules, and a bilateral track that aims to extract as many specific commitments from the acceding country as is deemed reasonable by each member of the working party.

The multilateral and fact-finding track starts with the applicant country's submission of a Memorandum on its Foreign Trade Régime, a crucial document that is prepared according to a detailed outline format provided by the WTO Secretariat.[53] Once the MFTR is submitted, members of the working party start the questions and answers process in which they try to learn as much as they can about the applicant country's trade and legal regime and identify areas of possible inconsistency with WTO Agreements.[54] This multilateral process then moves on to negotiate "the terms of accession", which covers WTO rules on goods, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and systemic issues in the area of services.[55]

Parallel to the multilateral process, bilateral market access negotiations on goods and services take place between the acceding country and any interested WTO member.[56] A successful conclusion to the process comes in the form of a Report of the Working Party, including a draft Decision and Protocol of Accession, which is forwarded to the General Council. The Protocol "contains a single package of agreed commitments on rules, concessions and commitments on goods, and specific commitments on services" and "sets out the terms on which the Applicant is invited to join the WTO."[57]

As noted earlier, Ethiopia submitted its MFTR only in January 2007 and this has already triggered the bilateral questions and answers process, which has the potential to become a drawn-out exchange of papers between Ethiopia and any member of the working party. The first accession working party meeting took place in May 2008.

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[53] See WT/ACC/1, Attachment.

[54] See WT/ACC/10/Rev.3, 28 November 2005.

[55] See *Id.*, p. 5.

[56] See *Id.*

[57] See *Id.*

B. Inequities of the Accession Process

Given the tradition of consensus with which decisions are taken at the WTO, the slowest or most obstructive member of the working party normally dictates the pace of the entire process. As noted already, the whole accession process is subject to the same opaque language of GATT Article XXXIII, which has been reproduced almost verbatim in Article XII:1 of the Marrakesh Agreement establishing the WTO.[58] This is a provision that was written with deliberate vagueness and parsimony so as to guarantee existing members complete control over the identity of countries that may join and the speed and terms under which they may do so. As the WTO Secretariat observed,

> *Perhaps the most striking feature of WTO Article XII is its brevity. It gives no guidance on the 'terms to be agreed', these being left to negotiations between the WTO Members and the Applicant. Nor does it lay down any procedures to be used for negotiating these terms, the latter being left to individual Working Parties to agree. … In this, it follows closely the corresponding Article XXXIII of GATT 1947.*[59]

There are a number of useful guidelines prepared by the WTO Secretariat and the United Nations Conference on Trade and Development (UNCTAD) about the accession process, but every country is different and it is impossible to say definitively what a specific acceding country can expect from this arduous process. The one-sided nature of the rule and the process has been used in practice to delay, and in some cases deny, the accession of countries for other than trade-related reasons,[60] and when accession is finally granted, to impose terms and conditions that go well beyond the commitments undertaken by existing members. We have seen from previous experience that newly-acceding countries could be "forced" to undertake obligations that exceeded those applying to existing WTO members (often called "WTO-plus

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[58] Article XII (1) and (2) of the Marrakesh Agreement provides as follows: "1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto. 2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO."

[59] WTO Secretariat, *Technical Note on the Accession Process – Note by the Secretariat: Revision* (WT/ACC/10/Rev.3, 28 November 2005), p. 3.

[60] A recent article on the *Financial Times* (London, 15 April 2008, p. 6) noted that Ukraine's then imminent accession to the WTO (as from 16 May 2008), has put the country in a position to block Russia's bid to join the WTO, "giving it significant leverage that it could use in natural gas supply talks or in retaliation over Moscow's opposition to plans by Ukraine and Georgia to join NATO." Likewise, it was widely reported in the media that Russia ratified the Kyoto Protocol in 2004 at least in part because the EU made support for Russia's WTO accession conditional on such move. See *The Independent* (London, 23 October 2004).

obligations") while they acquired less-than full rights within the system (often called "WTO-minus rights").[61] In a few cases, this process has been used by WTO members to effectively "modify" the rules of the WTO Agreement and its annexes that apply to newly-acceding countries.[62]

The inequities resulting from the opacity of Article XII of the WTO Agreement and the self-serving manner with which many developed countries apply it to the accession of developing countries has attracted criticism from observers and acceding countries themselves over the years. To cite only two examples, Craig VanGrasstek called it "almost a reverse form of special and differential (S&D) treatment for developing countries,"[63] while Grynberg and Joy described it as a process "akin to having a complainant at a panel act as the sole panellist" and an "abuse of power".[64]

C. The WTO Decision to Expedite the Accession of LDCs

It was in response to these and many other criticisms that the Doha Ministerial Declaration promised special procedures to accelerate the accession of LDCs.[65] This commitment was supplemented by a 2002 decision of the WTO General Council which aimed to set out "simplified and streamlined accession procedures" for LDCs.[66] The key points of the Decision include (1) an exhortation that WTO members must "exercise restraint" in seeking concessions and commitments on trade in goods and services from acceding LDCs; (2) a reaffirmation that acceding LDCs offer access through "reasonable concessions and commitments" on terms commensurate with their individual development, financial and trade needs; (3) a commitment to make existing special and differential treatment benefits immediately available to all acceding LDCs from the day of accession; (4) a commitment to make available the transitional periods and arrangements foreseen under specific WTO Agreements, which should be accompanied by action plans for implementation of commitments and supported by technical assistance and capacity building measures; (5) a commitment not to demand

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[61] For an insider analysis, see Marc Bacchetta and Zdenek Drabek, "Effects of WTO Accession on Policy – Making in Sovereign States: Preliminary lessons from the recent experience of transition countries", WTO Staff Working Paper DERD-2002-02 (April 2002). For a legal analysis of these concepts, see Charnovitz, *supra* n. 43.

[62] For analysis of how this process was used to alter the WTO rules that apply to China, see Julia Ya Qin, "'WTO-Plus' Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol", in 37(3) *Journal of World Trade* (2003), pp. 483-522.

[63] See VanGrasstek, *supra* n. 34, p. 115.

[64] See Roman Grynberg and Roy M. Joy, "The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System", in UNCTAD (2001), p. 36.

[65] See Doha Ministerial Declaration (WT/MIN(01)/DEC/1, 20 November 2001), para. 9. The Declaration further stated, in para. 42, that: "Accession of LDCs remains a priority for the Membership. We agree to work to facilitate and accelerate negotiations with acceding LDCs. We instruct the Secretariat to reflect the priority we attach to LDCs' accessions in the annual plans for technical assistance."

[66] See WTO, *Accession of Least-Developed Countries: Decision of 10 December 2002*, WTO doc. WT/L/508, 20 January 2003.

membership of plurilateral agreements as a precondition for WTO accession; (6) a cautious suggestion for WTO members to be supportive of LDCs in their bilateral negotiations including the conduct of such negotiations "in the acceding LDC if so requested"; and (7) to give priority to acceding LDCs in the provision of "targeted and coordinated technical assistance and capacity building" including under the Integrated Framework (IF).[67]

The adoption of this Decision was soon followed by the successful accession of Cambodia and Nepal in 2003, the first and so far the only LDCs to join the WTO since its establishment in 1995.[68] No African country has acceded in accordance with Article XII of the WTO Agreement since 1995,[69] and indeed no sub-Saharan African country (hereinafter SSA) except the Democratic Republic of Congo has ever joined the GATT/WTO system through the standard accession route over the past six decades. Although this reflects the fact that most SSA countries took advantage of the sponsorship option described above, there are also quite a few African countries that have tried the full-fledged accession process that are still struggling to see it finalized.[70] Devising the right strategy with which to exploit the lamentable record of the WTO on LDCs in particular to their advantage is one of the challenges for the Ethiopian negotiators.

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[67] The IF was first established in 1997 by six multilateral institutions (IMF, ITC, UNCTAD, UNDP, World Bank and the WTO) to support LDCs in the multilateral trading system by helping them integrate trade into their national development plans and "to assist in the co-ordinated delivery of trade-related technical assistance in response to needs identified by the LDC." See http://www.integratedframework.org/about.htm. Among its most valuable contributions are the so-called Diagnostic Trade Integration Studies (DTIS), including one for Ethiopia. All these studies are freely available for download at: http://www.integratedframework.org/index.html.

[68] The two candidates were formally welcomed into the club at the WTO's Cancun Ministerial Conference in September 2003, which may not be remembered for much else. See WTO, *Ministerial Conference: Fifth Session – Cancún, Ministerial Statement: Adopted on 14 September 2003*, WT/MIN(03)/20, 23 September 2003, para. 2.

[69] A qualification must be added here: Cape Verde, an African country that graduated out of the LDC category in 2007, got its accession package approved by the WTO General Council on 18 December 2007, but the country has yet to ratify the deal in order to complete its accession. Cape Verde can do this until 30 June 2008, pending which it remains an observer at the WTO. See WTO Press Release, "Lamy welcomes Cape Verde's accession as another sign of confidence in the WTO", Press/503, 18 December 2007.

[70] African countries currently negotiating accession, apart from Ethiopia and Cape Verde, are Algeria (since June 1987), Comoros (since October 2007), Equatorial Guinea (since February 2008), Liberia (since December 2007), Libya (since July 2004), Sao Tomé and Principe (since May 2005), Seychelles (since July 1995), and Sudan (since October 1994). The dates in parentheses indicate when their accession applications were accepted and accession working parties established.

III. Why Join the WTO, and Why Now?

To start with the question of timing, the Government's decision to join the WTO now must be seen in the light of the economic reform programme it has been pursuing since 1991/92. The reform programme aimed to replace the command economy of the previous regime with a market economy by, *inter alia*, "lifting restrictions on the private sector, instituting markets for factors of production, macro-economic and trade liberalization."[71] This economic programme has been developed into an overall economic development strategy that has come to be known as Agricultural Development-Led Industrialization (ADLI).[72] A key feature of the reform programme has been the unilateral economic liberalization process that, in trade terms, led to a reduction of the maximum import tariff levels in the country from as high as 240 percent prior to 1991 to 80 percent in 1995 and 35 percent in 2002.[73] WTO accession thus appears to be the logical extension of this reform programme.

In preparation for its WTO accession negotiations, the Government has established a WTO Affairs Department within the Ministry of Trade and Industry (MOTI), the ministry responsible for trade negotiations. While the minister of MOTI is the chief negotiator, a national Steering Committee made up of about 12 ministers and the heads of about ten autonomous governmental agencies has been set up to provide overall guidance for the negotiations and submit legislative proposals to the Council of Ministers for final decision. Furthermore, a national Technical Committee has been established to provide technical support to the negotiation effort.[74]

This does not of course answer the critical question of why Ethiopia wants to join the WTO at all. A few governmental documents and speeches by relevant officials provide indications of the overall objectives of the Government in seeking accession, but the statement made by Ethiopia's representative at the meeting of the WTO General Council on 10 February 2003 that considered Ethiopia's accession application appears to have captured well the Government's thinking in this respect and this section attempts to answer the "why" question using that official statement as a point of departure.

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[71] See WTO, *Trade-Related Technical Assistance Needs-Assessment Presented By Ethiopia*, WT/COMTD/IF/19, 26 February 1998, p. 8.

[72] ADLI's objectives are "to create adequate markets so as to sustain the growth of the agricultural sector; [to] generate foreign exchange necessary for the overall economic development; and [to] ensure the promotion of an internationally competitive industry." See WT/L/445, *supra* n. 4. A recent World Bank report strongly endorses this approach saying "the growth strategy of agriculture-based economies for many years to come has to be anchored in improving agricultural productivity." *World Development Report 2008: Agriculture for Development* (2007) p. 7.

[73] See Diagnostic Trade Integration Study (DTIS) of *Ethiopia: Trade and Transformation – Summary and Recommendations (*July 2004), Vol. 1, p. 20.

[74] See Ministry of Trade and Industry, *Directive 1/1999*, November 2007, Amharic version on file with author.

A. Reasons Given by the Government

At that General Council meeting, the representative of Ethiopia outlined "some of the reasons which had led his Government to decide to start the WTO accession process and to be part of the multilateral trading system" as follows:

> *[the Government] was fully convinced that the best way to accelerate economic growth and development was to integrate its economy into the multilateral trading system. To be a Member of the WTO was to be part of the rules-based multilateral trading system, and this would create confidence for investors and serve as an instrument to attract foreign direct investment for diversifying the production base and expanding the supply capacity of the country. It would also help to secure predictable and transparent market access. The effective participation of the least-developed countries in the decision-making process of the multilateral trading system would encourage them that the speed, nature and direction of globalization would be compatible with their developmental needs.*[75]

This statement makes it clear that the Government has identified at least four broad and interrelated objectives for its WTO accession: (1) to accelerate economic growth and development, (2) to attract foreign investment, (3) to secure predictable and transparent market access, and (4) to influence the speed, nature and direction of globalization. The first three objectives in particular are conventional explanations often invoked as reasons for WTO accession. However, we will argue below that the direct role of WTO accession for the attainment of these otherwise worthy goals may be limited. But, if the Government handles the accession process carefully and carries out its membership obligations in good faith, WTO accession is likely to help achievement of these goals, albeit indirectly.

1. WTO Accession and Economic Development

To start with the first and overriding objective, the relationship between trade liberalization – the one thing we can surely expect to come out of the WTO accession process – and economic growth is a complex and controversial one.[76] While there is strong evidence that suggests that "freer trade tends to lead to greater growth", no one seriously claims that freer trade necessarily leads to this. Leading trade economist and ardent champion of the multilateral trading system Jagdish Bhagwati wrote that "those who assert that free trade will also lead necessarily to greater growth *either* are ignorant of the finer nuances of theory and the vast literature to the contrary on the subject at hand *or* are nonetheless basing their argument on a different premise: that is,

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[75] See WTO doc. WT/GC/M/78, 7 March 2003.

[76] For an excellent analysis of the relationship between trade and economic development, and accessible to the non-economist, see WTO, *World Trade Report 2003* (Geneva 2003), pp. 78-113.

that the preponderant evidence on the issue (in the postwar period) suggests that freer trade tends to lead to greater growth after all."[77] Another influential group of scholars argued more recently that development comes primarily from inside, that "outsiders can play only a limited role" and that national "history and economic and political institutions have trumped other factors in determining economic success."[78] The World Bank also agrees that "[m]ost of the gains from trade liberalization result from a country's own reforms."[79] Peter Sutherland, the first Director General of the WTO (and the GATT's last), sees a more significant role in "outsiders", but even he does not present WTO membership as the primary determinant of economic success; he considers the trading system only as "a catalyst" for outside support once the internal commitment to reform is firmly in place – i.e., when "political leaders understand that fundamental change is necessary, or unavoidable, and that it cannot be achieved without [such] support from the outside."[80]

Even if we were to assume that freer trade leads to greater growth, it does not necessarily follow that a country has to be a WTO member to liberalize its trade policies.[81] Unilateral liberalization is always an option and, while WTO membership can facilitate the liberalization process, membership comes with a package of its own, and parts of that package can impose additional costs. As Ismail noted, "[t]here is increasing recognition that WTO rules may have gone too far in reducing the discretion available to many developing countries to use some trade policy instruments to enhance their economic development".[82] Indeed, it has been almost an article of faith among developing countries that the very design of the GATT/WTO system has been skewed against their interests since its inception. A summary of India's reaction to US proposals for the ITO in 1946, recounted by then US negotiator Clair Wilcox, captured well the discontent of developing countries at the time:

> *In India, as in other underdeveloped countries, the original American Proposals were regarded with suspicion. They were designed exclusively, it was said, to serve the present needs of the industrial powers. They offered no hope of reducing disparities in living standards between the nations of the world. They afforded no positive program for the development of backward areas. Their approach was wholly negative; they would deny to undeveloped nations freedom to*

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[77] Jagdish Bhagwati, *Free Trade Today* (Princeton, 2002), p. 42.

[78] See Nancy Birdsall, Dani Rodrik, and Arvind Subramanian, "How to Help Poor Countries", 84(4) *Foreign Affairs* (July/August 2005), pp. 136-152.

[79] World Bank, *Global Economic Prospects 2004*, p. 206.

[80] Sutherland, *supra* n. 44.

[81] However, for an argument that WTO accession helped its new members to accelerate their economic development, see Sutherland, *supra* n. 44.

[82] Faizel Ismail, "How Can Least-Developed Countries and Other Small, Weak and Vulnerable Economies Also Gain from the Doha Development Agenda on the Road to Hong Kong?", 40(1) *Journal of World Trade* (2006), p. 58.

> *use the very devices by which the industrial powers had established their pre-eminence.*[83]

This developing country view was later found to have merit by a high profile study commissioned by the GATT itself in 1958, which concluded, *inter alia*, that "there is some substance in the feeling of disquiet among primary producing countries that the present rules and conventions about commercial policies are relatively unfavourable to them."[84]

The result was that the history of developing countries in the GATT/WTO system became a history of relentless struggles to modify the system in their favour, which traditionally meant an effort to water down the extent of obligations applying to them in the form of what is now generally known as special and differential treatment.[85] Among the notable multilateral responses that took a legal form over the lifetime of the GATT/WTO system are the amendment of GATT Article XVIII by the 1954-55 GATT Review Session to relax the conditions under which developing countries could take measures for infant industry protection as well as for balance-of-payments purposes, the 1964 addition of Part IV to GATT on trade and development, the introduction of the Generalized System of Preferences in 1971 on the basis of a temporary waiver from the MFN principle which was later put on a permanent legal foundation as the Enabling Clause, as part of the Tokyo Round agreements in 1979, and the insertion of special and differential treatment provisions in virtually every agreement that has been concluded as part of the Uruguay Round whether in the form of exemption from specific obligations, longer transition periods to implement certain commitments or the institution of special procedures in dispute settlement cases involving developing countries.[86] It is depressing to realize that most of the development issues at the top of the agenda today are almost exactly the same as they were during the formative years of the trading system.[87]

The conclusion for us here would be straightforward: WTO membership is neither a necessary nor a sufficient condition for economic growth and development. However, we can go a step further and argue that parts of the WTO package have the potential to

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[83] Wilcox, *supra* n. 7, p. 31.

[84] GATT, *Trends in International Trade: Report by a Panel of Experts* (presided by Gottfried Haberler, Geneva 1958), para. 62.

[85] As Keck and Low put it, the issue of special and differential treatment has been "a defining feature of the multilateral trading system for most of the post-war period." A. Keck and P. Low, *Special and Differential Treatment in the WTO: Why, When and How?* (WTO Staff Working Paper 2004), p. 3.

[86] For more on this, see WTO Secretariat, "Non-Reciprocal Preferences and the Multilateral Trading System" in WTO, *World Trade Report 2004* ((hereafter *WTR 2004*), pp. 26-44) and Dos Santos, et al, "Generalized System of Preferences in General Agreement on Tariffs and Trade/World Trade Organization: History and Current Issues", 39(4) *Journal of World Trade* (2005) pp. 637-670.

[87] For more on the trade and development debate, see Robert Hudec, *Developing Countries in the GATT Legal System* (Gower Publishing, Aldershot, Hampshire 1987).

directly undermine the development objectives of countries such as Ethiopia. The main threat comes from the TRIPS Agreement, which was brought into the WTO primarily to protect the interests of developed countries over developing countries.[88] Developing countries agreed to TRIPS in exchange for developed country commitments to liberalize agriculture and textiles,[89] but the result is an intellectual property regime that, in the words of Lord Templeman, will help to "keep developing countries in a state of economic subjection which is no better than the colonial exploitation of the last century."[90] None other than Bhagwati argued that the WTO approach to intellectual property, such as its 20-year protection for patents, amounts to "a transfer [of resources] from most of the poor countries to the rich ones" and dismisses TRIPS as "an item that does not belong to the WTO."[91] The utility of the TRIPS Agreement for poor countries like ours is next to non-existent,[92] and the Agreement itself recognizes this and provides for flexibilities designed to respond to the particular challenges of LDCs.[93] But, empirical evidence suggests that those flexibilities are rarely used by these countries.[94]

From the perspective of an acceding country, therefore, the accession process is effectively about finding the right point of balance between what is supportive of development in the WTO against that which could be damaging to development.

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[88] As Finger put it, intellectual property came into the Uruguay Round agenda "at the insistence of developed country industries. … [F]ew delegates or analysts (such as this reviewer) appreciated the size of the liability TRIPS would create for intellectual property users." See Michael Finger, "Review essay" in 6(1) *World Trade Review* (2007), p. 139. For an extensive treatment of the TRIPS Agreement, see UNCTAD-ICTSD, *Resource Handbook on TRIPS and Development* (Cambridge 2005).

[89] Donald Mcrae, "Developing Countries and 'The Future of the WTO'", 8(3) *Journal of International Economic Law* (2005), p. 603.

[90] Lord Sydney Templeman, "Intellectual Property" in 1(1) *Journal of International Economic Law* (1998), p. 605.

[91] Bhagwati, *supra* n. 77, p. 75. Likewise, Birdsall *et al* argue that "[c]urrently, the developed world uses international trade agreements to impose costly and onerous obligations on poor countries. The most egregious example has been the [TRIPS Agreement]. TRIPS will make the prices of essential medicines significantly greater, and this at a time when poor countries are being ravaged by one of the worst health epidemics ever known—HIV/AIDS. The price increase means that money from the citizens of poor countries will be transferred directly to wealthy pharmaceutical companies. … An international community that presides over TRIPS and similar agreements forfeits any claim to being development-friendly." Birdsall *et al*, *supra* n. 78, pp. 144.

[92] For a rare story of potential success by an LDC pursuing the route of intellectual property protection, see "Coffee in Ethiopia: Direct from the source", *The Economist*, April 17th 2008. It tells the story of how the Ethiopian Government successfully trademarked its three top coffee varieties, Harar, Yirgacheffe, and Sidamo and licensed the brands to about 70 suppliers worldwide, which has created the hope that this will establish the varieties as brand names and "enable farmers to demand higher prices."

[93] See, e.g. TRIPS Art. 66.

[94] For a recent review of the role of the TRIPS Agreement on technology transfer and development, see UNCTAD, *The Least Developed Countries Report 2007: Knowledge, Technological Learning and Innovation for Development* (Geneva 2007), available at http://www.unctad.org/Templates/Page.asp?intItemID=3073.

While it seems fairly clear that WTO membership can play a significant role in facilitating economic development, it is only secondary to a national commitment to economic, legal and overall policy reform. It is this internal commitment to reform that seems to have played the decisive role in the economic development of many countries that have acceded hitherto. The lesson from that experience appears to be that, for governments that have taken the firm commitment to reform, the WTO provides them with a framework within which to implement it, a catalyst with which to speed it up, and a reason to remain loyal to it even in the face of politically more expedient short term options.[95]

2. WTO Accession and Foreign Direct Investment

The role of WTO membership and consequent trade liberalization on the flow of foreign direct investment is at best unclear, and at worst counterproductive. There is plenty of empirical evidence that suggests that one of the main reasons companies invest in a foreign country is to avoid the import barriers of that country by producing their goods from inside the border. As a WTO Secretariat report noted, "[b]ypassing protectionist measures by establishing production facilities in the protecting country is perhaps the oldest explanation for FDI".[96] This theory would naturally lead to the conclusion that, other things being the same, higher import restrictions are more attractive to FDI than lower ones. In fact, the conclusion reached by economists who studied the subject is much more nuanced than that: "both high and low trade barriers can attract FDI, but of different types. … FDI attracted to protected markets tends to take the form of stand-alone production units geared to the domestic market. In contrast, low trade barriers, especially on intermediate goods, are conducive to vertical FDI attracted by the fundamental advantages of the host country, such as low labour costs, natural resources and generally favourable economic conditions. Judging from the cross-country regressions on inflows of FDI to developing countries, countries with an 'open' trade regime seem on average to attract more FDI than countries with a 'closed' trade regime."[97]

What this means for our purposes is that not much can be expected in terms of FDI flows from WTO membership per se.[98] Government policy seems to play the decisive

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[95] This is also what comes out from Sutherland's analysis: "The fundamental value of WTO membership – and the negotiations that precede it – is an opportunity to establish an agenda and identify priorities for the candidate countries. Government ministers and officials and businesspeople in these countries have to consider issues of WTO compliance whenever they are tempted to slip back into the old ways. Broadly, the restraints imposed by the WTO push countries toward better governance. Above all, the global trade rules provide a cover for reformers." Sutherland, *supra* n.44.

[96] See WTO, *The Relationship between Trade and Foreign Direct Investment: Note by the Secretariat*, WT/WGTI/W/7, 18 September 1997, para. 62.

[97] WT/WGTI/W/7, 18 September 1997, para. 73.

[98] Unlike participation in multilateral trade agreements, there is a clearer link between the conclusion of bilateral investment treaties (BITs) and the flow of FDI. A recent study in the US found that: "After reviewing both the literature, which makes note of the potential impact of BITs with strong investor

role once more. This can be illustrated by what is happening in those sectors that are already attractive to foreign investors, such as telecoms and finance. Foreign investment is not happening today in these sectors mainly because of government policy to keep the sectors closed to foreigners[99] rather than the country's non-membership of the WTO. If the accession process forces the Government to change such policies, we will probably see a quick flow of foreign investment into these sectors, but the same could very well happen much earlier if the Government were to make the policy change prior to accession.

3. WTO Accession and Secure Market Access

The third objective identified by the Government, i.e. to secure predictable and transparent market access, is much more plausible and directly relevant than the others. There is no doubt that WTO membership provides Ethiopian producers more predictable access to foreign markets. A question can be raised even here, though. As an LDC, Ethiopia already has duty- and quota-free access to some of the most lucrative markets for virtually anything that we are able to produce and supply. The generous everything-but-arms initiative of the EU[100] and the Africa Growth and Opportunity Act (AGOA) of the US[101] easily come to mind here. A typical counterargument here is that these are unilateral measures, introduced with the laudable object of helping the poorest countries in the world, but they are often time-limited and can be withdrawn unilaterally at the whims of those countries; hence they are also too unpredictable for any businessperson to base their decisions on. On the other hand, a commitment within the WTO framework is legally binding, and hence stable and predictable, and its breach will have legal consequences.

From a strictly legal angle, this is certainly the case. Breach of a commitment within the WTO will not be as easy as withdrawing a privilege granted unilaterally, not least because there is the threat of resort to the dispute settlement mechanism. In reality, however, this is a threat that exists only on paper for many developing countries. The

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protections, and our own econometric study on the promotional effects of a U.S. BIT, we find strong evidence that BITs have, to a significant extent, attained their stated goal of promoting investment." Jeswald W. Salacuse and Nicholas P. Sullivan, "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain", 46(1) *Harvard International Law Journal* (2005), p. 11.

[99] For the reasons why the Government is keeping telecoms in monopoly ownership, see "Interview: Meles Zanawi, Ethiopian prime minister", *Financial Times,* 6 February, 2007.

[100] See Council Regulation (EC) No. 416/2001 (28 Feb. 2001) O.J. 2001, L 60/43, later replaced by Council Regulation (EC) No 980/2005, *OJ L* 169/1, 30.6.2005, usually called the everything-but-arms (EBA) initiative. This is a unilateral EC instrument which applies equally to all LDCs in the world. For the current UN list of LDCs, see www.un.org/special-rep/ohrlls/ldc/list.htm.

[101] See Raj Bhala, "Global Interdependence and International Commercial Law: Generosity and America's Trade Relations with Sub-Saharan Africa", 18 *Pace International Law Review* (2006), pp. 133-225.

dispute settlement process is often too costly for a poor country to make use of,[102] and even the final benefits of a 'victory' before a panel and/or the Appellate Body could easily be illusory.[103] That is why LDC participation in WTO dispute settlement has been practically nonexistent over the past 12 years. According to the WTO's own analysis, one reason small countries do not participate in the dispute settlement process is because they "lack the necessary retaliatory power to enforce rulings in their favour. Anticipating the futility of their endeavours to coerce economically powerful countries into compliance, small countries abstain from engaging in costly litigation procedures in the first place or right away opt for other options to protect their interests".[104]

It follows that while WTO accession will enhance the predictability and transparency of market access opportunities for Ethiopia's products, it is important that we approach the accession process with a realistic view of what we can get out of it. Equally, the developed countries that offer unilateral market access privileges are unlikely to withdraw them arbitrarily despite the fact that there is no legal reason to stop them from doing so. It was not for legal reasons that they introduced such preferential access opportunities to poor countries in the first place. All the GATT/WTO system did was "authorise" these countries, with a waiver from the Most-Favoured Nation principle, to introduce, if they so wished, more favourable terms of trade for defined groups of poor countries without having to extend the same treatment to all members; but, it did not require them to do so. The political, moral and possibly economic arguments that persuaded them to introduce such schemes in the first place are likely

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[102] Shaffer and Nordstrom found that "it can take up to three years to litigate a [WTO] dispute, cost more than half a million dollars in legal fees, and require a significant time commitment from government officials who may already be severely under-resourced. Moreover, all this could be for naught, since there is no assurance that a ruling will be affirmative or that the respondent will comply in a manner that leads to market access." They concluded that "Notionally equal litigation rules provide unequal opportunities for WTO Members. Small trading nations are effectively constrained from being able to use the legal system to the full extent, constituting, in practice, a form of in-built discrimination." Shaffer, Gregory C. and Nordstrom, Hakan, "Access to Justice in the World Trade Organization: The Case for a Small Claims Procedure?" (May 2007), available at SSRN: http://ssrn.com/abstract=983586.

[103] There is extensive literature on the problems with the remedies system of the WTO particularly for developing countries, but for an excellent summary of the debate and a proposed solution, see Marco Bronckers and Naboth van den Broek 'Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement', 8(1) *Journal of International Economic Law* (2005) 101-126. The authors argue that the WTO dispute settlement system envisages two types of remedies: compensation (in the form of reduction of trade restrictions in sectors where the winning party in the dispute has a particular interest) or retaliation (in the form of withdrawal by the winning party of proportionate trade concessions in sectors of particular interest to the offending party). However, while compensation is only theoretical (because it is dependent on the agreement of the offending party), retaliation is often counterproductive to the interest of the winning party and almost impossible to use especially by developing countries. In their own words, trade retaliation "is not available to [developing country] Members, with the possible exception of the largest amongst them. The cost of imposing these measures is simply too high, and developing countries feel – often rightly so – that given the small size of their markets, retaliation will never put sufficient pressure on larger, more developed Members." Shaffer and Nordstrom, *Id.,* p. 102.

[104] *WTR 2007,* p. 278.

to remain nearly as effective a guarantee as the WTO dispute settlement system can be for a poor country like ours. The real challenge on Ethiopia's export trade for now and the foreseeable future remains our poor production and supply capacity rather than the traditional trade barriers in the developed countries.[105]

4. WTO Accession and Globalization

Finally, the fourth objective of the Government, i.e. to use participation in WTO decision-making processes to influence the speed, nature and direction of globalization is again plausible, if slightly overstated. If Ethiopia plays its cards well, its membership can further strengthen the groups within the WTO that have been fighting for a more development-friendly trading system, whatever that is. This can however be only a long-term ambition. The sheer breadth and technical complexity of the WTO system means that our focus for the short- to the medium-term will remain on how to best master the technical details of the system and use the knowledge to negotiate a reasonable accession package that preserves some policy space and still forces us to critically examine our laws, institutions and practices and take appropriate reform measures. Whether we like it or not, the globalization process is shaped by forces totally beyond the control of any single nation, and the best we can do is follow at a reasonable distance rather than lead from the front.

In conclusion, it appears that the objectives set by the Government for its WTO accession, while certainly plausible, probably paint too rosy a picture of WTO membership. This is not however to suggest that Ethiopia should not join the WTO; it is only to argue that the said reasons are based on an exaggerated view of the trading system and its potential role for the development of the country. Otherwise, it is the view of this author that Ethiopia's accession to the WTO is long overdue and the sooner we join, the better. The reasons are neither original nor exhaustive, and include the following.

B. Additional Reasons

The WTO Secretariat's comprehensive *World Trade Report 2007* mentions two "popular propositions" often used to make the case for accession to the WTO, i.e. accession as an "external anchor" and accession as a "signalling device", but they dismiss them both as having not yet been formalized and difficult to assess exactly how they operate.[106] I suggest that both propositions have some relevance for Ethiopia's accession. Importantly, I see three potential benefits from the process of accession as well as final membership of the WTO.

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[105] I use the term "traditional trade barriers" advisedly to refer to tariffs and quantitative restrictions as opposed to the health, technical and other standards that still are significant barriers particularly to our agricultural exports.

[106] See *WTR 2007*, p. 60.

Firstly, for a country like Ethiopia, with laws largely unknown outside a narrow circle, and often irrelevant to day-to-day administrative and business practice, the accession process gives us an opportunity to systematically collect our laws and evaluate the extent to which the laws in the books are observed in the daily life of the nation. It is not difficult to demonstrate that a wide gap exists between the laws in the *Negarit Gazetas* and the 'laws' in action. The accession process will force us to critically examine our own system, learn our own laws and practices and revise them to fit in with an externally-imposed system of rules and principles.[107] This is where "external anchorage" and "lock-in" become relevant. Not only do we need to understand and reform our laws, we will also need to defend them in front of a powerful club of nations that are prepared to challenge us.

Secondly, the transparency requirements of the WTO, i.e. reporting obligations contained in virtually all WTO instruments[108] on all trade-related legislative and administrative developments in the country as well as the periodic national trade policy reviews conducted by the WTO mean that the law review and reform process is a continuing one. It is an expensive and time-consuming process, but it will ultimately be more than offset by the resulting benefits. If carried out properly, the effect can be clearer, more business-friendly and enforceable laws that are administered professionally and transparently and with accountability embedded in them. Put differently, the process of accession as well as the resulting membership obligations could enhance rule of law and the quality of institutions in the country. The quality of institutions is "an important component of a well-functioning market" and "[t]he state of institutions will … likely affect the amount of trade and welfare generated by trade liberalization."[109] As Carothers put it, "[b]asic elements of a modern market economy such as property rights and contracts are founded on the law and require competent third-party enforcement. Without the rule of law, major economic institutions such as corporations, banks, and labor unions would not function, and the government's many involvements in the economy — regulatory mechanisms, tax systems, customs structures, monetary policy, and the like — would be unfair, inefficient, and opaque."[110] Both the process of accession as well as final membership can be used to consolidate rule of law and speed up the process of institution building in the country.

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[107] As Murray Gibbs observed, acceding countries "often lack the capacity to clearly identify the conflicts between their existing laws, regulations and administrative practices and the obligations of the WTO Agreements." UNCTAD (2001), p. 163.

[108] Just to mention a few examples, see GATT Art. X, GATS Art. III, TRIPS Art. 63 and so on.

[109] See *WTR 2004*, p. xxiv. The term institution is used in a broad sense to mean "formal and informal rules of behaviour, ways and means of enforcing these rules, procedures for the mediation of conflicts, sanctions in the case of a breach of the rules, and organizations supporting market transactions." *Id.* See also E-U Petersmann, "How to Promote the International Rule of Law: Contributions by the World Trade Organization Appellate Review System" 1 *Journal of International Economic Law* (1998), pp. 25-48, at 26.

[110] Thomas Carothers, "The Rule of Law Revival", 77(2) *Foreign Affairs* (March/April 1998) p. 97.

Finally and related to the above two, a number of WTO provisions require the establishment of an independent system for the objective and impartial judicial review of administrative action.[111] The transparency requirements and the periodic surveillance process described above, coupled with the fact that there is now an explicit requirement on the Government to ensure availability of a well-functioning independent judicial review mechanism, can have significant positive implications for the evolution of the country's administrative and judicial systems.

The reasons briefly outlined above are worthy goals in themselves, but they are also critical means for the achievement of other goals, including those of economic growth and attraction of foreign investment identified by the Government. For these and several other reasons, the decision of the Government to accede to the WTO is the right one.

Concluding Remarks and Areas for Future Research

The WTO is virtually about everything the government of a nation is – whatever is within the scope of government activities could potentially be brought within the scope of the WTO. This ranges from the type of industrial, agricultural and even social development policies adopted, to the way imports and exports are treated, to the manner government agencies purchase stationery for office use, to the content and manner of administration of almost any laws of the country. Not only are governments required to enact, and live by, laws that comply with WTO requirements, they are also often required to be seen to be doing so – transparency is a vital principle of the WTO system.

The Ethiopian Government is right to seek accession to the WTO, and it must be supported. The reasons given by the Government for its decision to seek accession – facilitation of economic growth, attraction of foreign investment, securing predictable and transparent market access, and influencing the direction of globalization – are broadly in line with the conventional explanations about the benefits of WTO accession. As we attempted to show in section IV above, however, the direct role of WTO accession for the attainment of these otherwise worthy goals may be limited. But, if the accession process is handled carefully and final membership obligations carried out in good faith, WTO accession is likely to help achievement of the goals articulated by the Government, *albeit* indirectly. WTO accession will require review and reform of laws and policies and the establishment of administrative procedures and implementing institutions that are objective, impartial and effective. The attributes of rule of law, administrative transparency and accountability, and impartial judicial review of administrative action are some of the most vital prerequisites for a

[111] See, e.g. GATT Art. X:3(b), GATS Art. VI:2(a), and TRIPS Art. 41:4.

functioning domestic market that is attractive to domestic and foreign investment and supportive of economic growth and development.

In order to make the best out of the accession process, however, relevant government departments, academic and training institutions and the business community must carefully consider how they can work together to come up with the best possible institutional response. The priority must be to establish research and training institutions, made up of economists, lawyers and international relations experts, dedicated to international economic relations. Ethiopia's position as the seat of international, continental and regional economic institutions means that there is potentially a large pool of expertise within Addis that can be tapped into without undue difficulty. A number of multilateral and bilateral initiatives have been launched to support particularly the LDCs, and the Integrated Framework (IF) is perhaps the most prominent multilateral effort so far. A project proposal prepared jointly by the Government, the business community and universities for the establishment of a dedicated research and training institution is likely to win the financial and other backing of some of these funding arrangements. The Government and the business community must also encourage and support the establishment of independent think tanks and non-governmental organizations that are vital for the huge task of information dissemination, public education, and critical analysis and debate that is badly needed in the course of this process.

New research and analysis in this area should be able to help us appreciate that, apart from the poor production and supply capacity mentioned above, the main hurdles against our export trade relate to a combination of bad geography and poor infrastructure rather than tariff-based protectionism in our potential markets.[112] However much we may love our rugged terrain and enjoy the breathtaking landscape, we know that those same topographical features, together with distance from the nearest sea port, mean high cost of infrastructure and high overall transaction costs for our import-export trade, often making our exports unprofitable and our imports unaffordable. This is particularly the case for the two sectors in which we have the potential to compete on the global marketplace, i.e. agriculture and mining, which are characterised by the production of goods with a "low value-to-weight ratio."[113] A policy to enhance Ethiopia's exports must thus primarily focus on how best to address the infrastructure problems.

As if our rugged terrain, distance from the sea and poor infrastructure are not hurdles enough, Ethiopia's landlockedness since 1993 has added an even larger problem to the

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[112] The impact of tariffs on the export competitiveness of our goods can be significantly smaller than the effect of transport costs. According to a WTO study, "for the majority of Sub-Saharan African countries, transport cost incidence for exports (the share of international shipping costs in the value of trade) is five times higher than tariff cost incidence (the trade weighted *ad valorem* duty actually paid)." *WTR 2004*, p. 114.

[113] See *WTR 2004,* p. 115.

mix. Infrastructural challenges can be overcome by a determined effort from within; problems of transit and access to the sea, on the other hand, require the consent and cooperation of other sovereign states within the province of international law. This leaves our vital national interests in the hands of sometimes unfriendly, often unpredictable, and possibly unstable, regimes in the region.[114] This is where regional economic integration arrangements could play an important role, including in building regional political stability and a cooperative spirit.[115] Regrettably, however, Ethiopia once again appears to be a reluctant player even here, which can be seen from its non-membership of the COMESA Free Trade Area, the lack of progress in the economic integration objectives of the Intergovernmental Authority on Development (IGAD) and the absence of any other serious bilateral or regional integration initiatives to which Ethiopia is a party.[116] Whatever one's view of the proliferation of regional trade agreements (RTAs) over the past decade or so, a geographically disadvantaged country such as Ethiopia is likely to benefit from closer regional economic integration. The research and training institutions proposed above should help us clarify the role of these and other factors on our export trade opportunities and assist policymakers to get a clearer sense of priorities. Such research should inform not just our trade negotiation policy but the type of products we specialize in must also reflect these geographical, political and infrastructural realities.

Finally, and by way of caution, while the Government's decision to seek accession is the right one, it is not clear if it is truly committed to a speedy conclusion of the accession process. It is already 11 years since Ethiopia formally became an observer to the WTO with the declared intention to apply for accession "in the near future",[117] and five years since its accession application was accepted by a meeting of the General Council where the Ethiopian representative expressed his Government's "commitment

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[114] Note that, even under normal circumstances, landlocked countries face "on average, 50 per cent higher transport costs than otherwise equivalent coastal economies." *WTR 2004,* p. 115.

[115] RTAs can serve several objectives, an important one of which is regional political stability. It is widely recognized that creating linkages between economies through RTAs "can make conflicts more costly and favour cross-border collaboration". *WTR 2003,* p. 50.

[116] Note that there are a few intra-IGAD arrangements of a bilateral nature. For example, Ethiopia and Sudan have a bilateral agreement which aims to promote trade and broader economic relations between the two countries. The parties to this agreement however agreed to grant only Most-Favoured-Nations (MFN) treatment to each others' goods. (See *Trade Agreement between the Government of the Republic of Sudan and the Government of the Federal Democratic Republic of Ethiopia*, signed at Khartoum on 6th March 2000, on file with author.) Likewise, Ethiopia and Kenya also have a bilateral trade agreement with effectively the same objectives as the Ethio-Sudan agreement except that the former has a broader scope. (See *Trade Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Kenya*, signed at Addis Ababa on 23rd July 1997, on file with author.) In both cases, the key trade commitment only requires of the parties MFN treatment for each other's trade in goods and services. Given that all three countries are members of COMESA, which naturally aims to deliver preferential terms of access that are more favourable than MFN, it is difficult to find a trade rationale behind such agreements, let alone the seed of any free trade agreement.

[117] WTO doc. WT/L/229, 10 October 1997.

to speed up the accession process."[118] This needs to change. Given the technical complexity of the process and our institutional deficiencies, only a sense of utmost urgency can bring this process to completion within a reasonable period.

At the same time, we know that the process may drag on even under the best of intentions and commitments on our part. This is where a careful management of our diplomatic relations will be needed. As anywhere in life, friends in high places are vital, and the friendly relations that prevail between Ethiopia and a number of influential WTO members and groupings will be critical. The Africa Group and the LDCs Group within the WTO are a natural ally that should be skilfully utilized to expedite the process. A number of developed members of the WTO, including the influential US and EU, might also like to see Ethiopia inside the WTO. Indeed, the Organization itself will be keen to support a determined African LDC to complete the process expeditiously not least because its reputation and legitimacy will benefit from it. However, ultimately, Mosoti was right when he said that the ability to carry through the accession process successfully depends on "the tenacity and expertise of the acceding country's negotiators and political will and support from home."[119]

[118] See WTO doc. WT/GC/M/78, 7 March 2003, para. 11.

[119] Victor Mosoti, "The Legal Implications of Sudan's Accession to the World Trade Organization", *African Affairs* (2004), 269–282, pp. 273-74. As the WTO Secretariat likes to stress, "much depends on the readiness of the applicant country to meet not only the rules and obligations of the WTO's market-economy principles, and its policies of pro-competition and non-discrimination, but also the market-access conditions for goods and services which the applicant country grants to other WTO Members." See WTO, "WTO successfully concludes negotiations on China's entry", *Press/243*, 17 September 2001, http://www.wto.org/english/news_e/pres01_e/pr243_e.htm.

REFORM OF LEGAL EDUCATION IN ETHIOPIA: THE ETHIOPIAN EXPERIENCE IN THE CONTEXT OF HISTORY, THE PRESENT, AND THE FUTURE

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Introduction

The objectives of this article are to: (1) provide a brief history of efforts to establish and to improve legal education in English speaking African countries; (2) assess the strengths and weaknesses of those efforts; (3) place Ethiopia's on-going and extensive efforts to strengthen its program of legal education in historical and present day context; and (4)identify areas of future collaboration between Ethiopia's legal educators and external funders, including governments, foundations, and law schools outside of Ethiopia.

I. Some Perspectives on the Goals of Collaborations In Support of Legal Education in Africa

The creation and maintenance of a strong legal profession is thought in the United States to be a key element in promoting the efficient and fair administration of justice. Law schools and bar associations in the United States stress the importance of training ethical and socially responsible lawyers. The mission statement of the Northwestern University School of Law reads as follows:

> *The mission of Northwestern University School of Law is to lead in advancing the understanding of law and legal institutions, in furthering justice under the rule of law, and in preparing students for productive leadership, professional success, and personal fulfillment in a complex and changing world.*[1]

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The motto of the American Bar Association ("ABA") is "Defending Liberty, Pursuing Justice."[2] Prominent members of the legal profession in the United States urge that American law schools should do more to train future leaders of our society.[3]

The recent book *Educating Lawyers*, popularly known as the "Carnegie Report on Legal Education," notes that in the United States, professional education is:

> *[I]nherently ethical education in the deep and broad sense. The distillation of the abilities and values that define a way of life is the original meaning of the term ethics. It comes from the Greek ethos, meaning 'custom,' which is the same meaning of the Latin mos, mores, which is the root of 'morals.' Both words refer to the daily habits and behaviors through which the spirit of a particular community is expressed and lived out. In this broad sense, professional education is 'ethical' through and through.*[4]

As a consequence of the recognition that the quality of legal education is important to the quality of justice, substantial resources, both private and public, are devoted to legal education in the United States.

The question of what the role of African law schools should be in their countries is a more complex issue, one that cannot be resolved in a sentence, a paragraph, in an article, or by outsiders. Moreover, the state of legal education varies from country to country. This article focuses on the state of legal education in sub-Saharan Africa, excluding South Africa, where legal education is relatively well-supported.

In the 1960's and 1970's, it was thought by many legal educators in the United States that law schools in Africa could play a key role in developing a cadre of able, ethical, and effective leaders.[5] As a consequence beginning in the 1960's, a great deal of time, effort, and money were spent on attempting to create African law schools in the image of Western, university-based legal education.[6] This effort waned in the mid-1970's as the

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Faculty of the Addis Ababa University and to Ato Muradu Abdo of the Law Faculty of Addis Ababa University for their help in supplying information and materials regarding the latest developments in legal education in Ethiopia.

[1] *See* THE STRATEGIC PLAN FOR NORTHWESTERN UNIVERSITY SCHOOL OF LAW, 2 (2001), *available at* http://www.law.northwestern.edu/difference/Strategic_Plan.pdf (last visited Feb. 25, 2008).

[2] *See* American Bar Association, http://www.abanet.org (last visited Feb. 25, 2008).

[3] *See* Ben W. Heineman, Jr., *Lawyers as Leaders*, 116 Yale L.J. Pocket Part 266 (2007), *available at* http://yalelawjournal.org/images/pdfs/102.pdf ("…law schools should more candidly recognize the importance of leadership and should more directly prepare and inspire lawyers to seek roles of ultimate responsibility and accountability than they do today.") (last visited Feb. 25, 2008).

[4] WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND, & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 30-31 (Jossey-Bass 2007).

[5] *See generally*, JOHN S. BAINBRIDGE, THE STUDY AND TEACHING OF LAW IN AFRICA, (Fred B. Rothman & Co., 1972); Quintin Johnstone, *American Assistance to African Legal Education*, 46 TULANE L.R. 657 (1972).

[6] *Id*; *see also* J. Donald Kingsley, *The Ford Foundation and Education in Africa*, African Studies Bulletin, Vol. 9, No. 3 (Dec., 1966); L. Michael Hager, *Legal Development and Foreign Aid: A Liberian Experience*, 29 J. LEGAL EDUC. 482 (1978).

result of a number of factors, including political unrest in many African countries, as well as the prevalence of one-party states that were not supportive of higher education generally and legal education in particular.[7] In addition, a debate emerged (still on-going) concerning whether the "law and development" theory that underlay the early efforts to establish Western-style law schools in Africa was responsive to the needs of Africa.[8] The participants in the 1986 conference, "Twenty Years After: A Conference of Law Teachers Who Worked in Africa,"[9] convened by Professor John Bainbridge, a leader in efforts to support legal education, reached no consensus regarding the future of legal education in Africa or of the role of ex-patriot participants in that future.[10]

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[7] *See* TWENTY YEARS AFTER, A CONFERENCE OF LAW TEACHERS WHO WORKED IN AFRICA (Compiled by John S. Bainbridge, 1986) [hereinafter TWENTY YEARS AFTER]. At this conference, Cliff F. Thompson, a leader in the movement to strengthen African law schools in the 1960's and 1970's remarked, "[w]e went to Africa in 1961, and we left our final job there in 1973. In 1983, I returned on a Fulbright grant to Sudan and Ethiopia. Political events in Sudan have washed away much of what was done, but the remnants of much able work by visitors and Sudanese remains, should the rule of law, whether Islamic or Sudanese common law, again be allowed to flower. Able faculty remain in the University of Khartoum and in government ministries, but the destruction of the legal and judicial system, which was carried on by General Numeri even before his Islamization of the substantive law, was a serious blow to the work of two decades. Given the Marxist-Leninist regime in Ethiopia, I expected the situation there to be even worse, but was greatly surprised to find many direct ties to the early work of people who served there. In 1983, the law school was composed of those whom we had helped educate at the law school, and who had taken over as leading educators and senior government officials upon our departure." *Id.* at 18. More recently, one scholar has noted, "[t]he downturn in the continent's economic fortunes has taken a heavy toll on African universities and their law schools. Recruitment, and particularly retention, of able African law teachers by impoverished universities has become increasingly difficult, and that problem has affected the quality of some of today's legal education." Muna Ndulo, *Legal Education in Africa in the Era of Globalization and Structural Adjustment*, 20 PENN. ST. INT'L L. REV. 487, 502 (2002).

[8] Another participant in the TWENTY YEARS AFTER conference remarked, "I have suggested that we were all moved by the spirit of the times, a Zeitgeist, when we set forth to build legal education and research in Africa. The times change, and with it their prevailing spirit. The years since …have been full of doubts and criticisms of what we tried to do. We have read and heard charges of legal imperialism and chauvinistic devotion to American law and legal education directed at efforts not only in Africa but all over the world. There was certainly naiveté and ignorance that was quickly recognized and led to the efforts to make law and development into a serious field of research. But I believe that the rise of criticism had less to do with errors and follies we may have committed than with a broad change in the Zeitgeist. The whole conception of development that guided us in the early years came to be seriously questioned or rejected by the turn of 1970's. Governments were less benevolently regarded, planning was 'in crisis', and faith withered in the powers of foreign assistance to build national institutions. We came into a time of emphasis on equity and direct efforts to meet the basic needs of the poorest. University development was criticized as favoring national elites and foundation interests in law shifted toward legal aid to the poor and human rights." Remarks of Francis X. Sutton, TWENTY YEARS AFTER, *supra* note 7, at 23-24.

[9] *Id.*

[10] In his remarks at the 1986 TWENTY YEARS AFTER conference, Jim Paul noted that the then Dean of the law School in Ethiopia had recently written him saying that "all who participated in the law school endeavor, 'set a standard that we have never forgotten and that we only wish we could reproduce today,' TWENTY YEARS AFTER, *supra* note 7, at 57. But this did not mean to Dean Paul that a new initiative should imitate the old: "…[A] more basic understanding has been occurring during recent years, and it is I think, a very important, very enduring perspective. People, including, I believe, people at the Ford Foundation…have become much more interested in 'development' as a process of helping the poor, not only to realize 'basic needs' but to realize self-reliance, dignity, and the kinds of

Since 1986, there has been no organized effort among American law teachers, in cooperation with their African colleagues, to again reassess the efforts of the 1960's and 1970's to provide assistance to legal educators in Africa, or to attempt to chart a new course that might address the concerns of the critics of the "law and development" movement. The time is now ripe for such a reassessment and for the development of new strategies for supporting legal education in Africa. We argue that this is an appropriate and, indeed, a critical time for such a reassessment, because of the importance of international human rights norms and practices in Africa, and because of the forces of globalization. New strategies must be the result of close collaboration with African law faculties, with our African colleagues in the lead.[11] They and we should be cognizant of the need to support the training of lawyers and of other legal professionals who can expand access to justice efficiently and economically.[12]

African law schools have the potential to produce the next generation of leaders committed to promoting human-rights through ethical and social responsibility.[13] This critical potential remains unrealized and is in jeopardy due to a lack of resources. Despite legal educators and university administrators' best efforts in Africa, African law schools are starving.[14] This means that young lawyers graduating from African law schools often lack meaningful training in key ethical, professional, commercial, and human rights-related subjects.[15] These students also lack exposure to new teaching methodologies, and due to

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empowerment and initiative which come when people enjoy rights. A big task of development, as conceived today, is to help self-help activities, to help people become legally empowered to shape their own futures and not be pawns for the state's or someone else's concept of 'development.'" *Id.* at 59. Another participant at in the Conference noted that future initiatives should "focus on the need for material resources to be given to the African law faculties, a fairly easy thing to do…but I am frankly somewhat skeptical about the effectiveness of the role which can be played by Americans, and by Westerners in general in the political process that is going on in Africa today. Remarks by Gary E. Davis, United Nations Development Program, *Id.* at 74.

[11] The ABA announced in October 2007 that its Rule of Law Program had received a $2.5 million grant from USAID to support legal education and judicial education in Ethiopia. *New Ethiopia Program Part of Growing Work in Africa*, ABA, Oct. 10, 2007, http://www.abanet.org/rol/news/news_ethiopia_new_aba_roli_office.shtml. This program should provide new information about effective approaches to providing support for legal education in countries in which law schools lack resources.

[12] *See* Malawi Prison Service: Paralegal Advisory Service, *available at* http://www.mps.gov.mw/paralegal.htm (last visited Feb. 25, 2008).

[13] This does not mean, however, that the provision of justice at the grassroots level can or should always be provided by formally trained lawyers and judges. Indeed, many argue that the legal profession in resource-starved countries is not particularly inclined or particularly well-suited to deliver legal services to the poor or at the community level. *See*, *e.g*., Adam Stapleton, "Introduction and Overview of Legal Aid in Africa," *in* ACCESS TO JUSTICE IN AFRICA AND BEYOND, MAKING THE RULE OF LAW A REALITY, 1-35 (Eds. Penal Reform International and the Bluhm Legal Clinic of the Northwestern University School of Law, 2007). This being said, formal justice systems require well-trained lawyers to run them and to make informed policy decisions, as well as to act as advocates and judges in human rights and commercial cases that have far reaching effects on individuals, communities, governments, and businesses.

[14] Laure-Helene Piron, *Time to Learn, Time to Act in Africa*, *in* PROMOTING THE RULE OF LAW ABROAD, 275, 276-78 (Thomas Carothers ed., 2006).

[15] Indeed, one commentator has noted recently that the "Red Terror" trials in Ethiopia were hampered by lack of skilled personnel in both the Special Prosecutor's Office and in Ethiopia's Public Defender's

limited access to legal information, the most recent developments in national and international law.

Although the philanthropic community once recognized that support of legal education in Africa was a critical element in the support of humane, efficient, and predictable justice systems, external donors (non-African governments and foundations) have all but abandoned their support of African legal education.[16] This article argues that despite the prevailing consensus in the United States regarding the importance of educating future judges, legislators, and lawyers, the same consensus has not been evident in the external funding of justice initiatives in Africa. This situation demands change.[17]

Historically, the legal profession in Africa was seen primarily as an aid to the developmental efforts of the respective governments.[18] Consequently, the overall objective of legal education at the inception of independence in African states was to train lawyers to serve the manpower needs of the newly formed countries.[19] Over the years this objective has been maintained despite changes in the domestic and international circumstances of African countries.[20] As a matter of colonial policy, legal education was discouraged due to

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Office. With respect to the services provided by public defenders to the defendants in the "Red Terror" trials, this commentator notes that, "[p]ublic defenders lacked formal skills to deal with the complex national and international concepts involved in the trials." Girmachew Alemu Aneme, *Apology and Trials: The Case of the Red Terror Trials in Ethiopia*, 6 AFR. HUM. RTS. J. 64, 79 (2006).

[16] *See* Piron, *supra* note 14, at 276-78 (demonstrating the changed focus from legal education to a more generalized attention to the concept of rule of law in donor aid to Africa); Ndulo, *supra* note 7, at 493. ("In the 1960s and 1970s American legal scholars contributed a great deal to knowledge and skills to the growth of legal education in Africa. This source of law teachers has virtually ceased because of the economic difficulties that most African countries are experiencing and the lack of international support for funding for such law teachers."); The Partnership for Higher Education in Africa, launched in 2000 by the Carnegie Corporation, the Ford Foundation, the John D. and Catherine T. MacArthur Foundation, and the Rockefeller Foundation (which now includes the Kresge Foundation, the William and Flora Hewlett Foundation, and the Andrew Mellon Foundation) has not provided support for legal education in Africa and appears to have no plans to do so. *See* The Partnership for Higher Education in Africa, http://www.foundation-partnership.org/ (last visited Feb. 25, 2008).

[17] *See* Mark K. Dietrich and Nicolas Mansfiield, *Lessons Spurned: Legal Education in the Age of Demoncracy Promotion* 1 (East West Management Institute's Occasional Papers Series, Spr. 2006), *available at* http://www.ewmi.org/Pubs/EWMILegalEducationReform.pdf (". . .the failure of reformers and donors to emphasize legal education reform in their programs constitutes a major mistake, critically undermining the effort to establish the rule of law in the developing world. The inability or unwillingness of donor organizations in the United States to tackle legal education in meaningful way also tells us something about America's overall approach to promoting the rule of law; that we are often myopic, looking only for short-term results in an area where long-term vision and commitment is necessary, and where change is likely to be generational. As America tackles legal reform in the even more complex and daunting context of the Muslim world, this is an error that it cannot risk repeating.") *Id* . at 2.

[18] Dr. Kwame Nkrumah, Speech at the Opening of the Ghana Law School: Ghana Law in Africa, 6 J. AFR. L., 103, 107 (1962).

[19] *See id*. at 107-108; *see also* Emmanuel Kwabena Quansah, *Educating Lawyers for Transnational Challenges: Perspectives of a Developing Country-Botswana*, 55 J. LEGAL EDUC. 528, 528-33 (2005) [hereinafter *Educating Lawyers*].

[20] For example, the minimum academic standards for legal education in Nigeria approved by the National University Commission states the main objective of legal training in Nigeria to be, *inter alia*,

its potential for producing political agitators.[21] Consequently, emphasis had been placed on the training of other professionals, such as engineers, doctors and agriculturalists, to the detriment of the legal profession.[22]

The need of these nascent independent countries for lawyers was relatively acute.[23] Governments, in their desire to accelerate the growth of the legal community, funded legal education in the context of the overall development of higher education.[24] Scholarships for legal education were awarded dependent upon the manpower needs of the country with some countries being more progressive than others.[25] Growing decline in the economic fortunes of African countries has forced funding for legal education to compete with other pressing national priorities, causing a considerable continental deterioration of legal education.[26] Accordingly, funding of universities, including law schools, has taken on an increasingly regional and international dimension.[27]

Several international partners have been active in funding or implementing programs aimed at enhancing the transformation of the African education system, in general, and higher education, in particular.[28] The African Higher Education Activities in Development

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"specifically aimed at producing lawyers whose level of education would equip them properly to serve as advisers to governments and their agencies, companies, business firms etc…" *See* M.O. Adediran, *Transnational Curriculum for Tomorrow's Lawyers,* Written for the Association of American Law Schools conference on Educating Lawyers for Transnational Challenges at Oahu, Hawaii, U.S.A (May 26-29, 2004).

[21] *See* W. A. Twining, *Legal Education within East Africa*, *in* Commonwealth Law Series No. 5 115, 116 (1966).

[22] *See id.*; Piron, *supra* note 14. (Even in a post-colonial context, "justice programs have not benefited from the same rhetorical push that the [Millenium Development Goals] have provided for other sectors such as health or education."); M. Ndulo *Legal Education, Internationalization and African Law School*, 2 J. OF COMMONWEALTH L. AND LEGAL EDUC., 22, 31 (2004).

[23] It has been pointed out that the situation was better in West Africa than in East Africa. *See* L.C.B. Gower, "The Legal Profession" in INDEPENDENT AFRICA – THE CHALLENGE TO THE LEGAL PROFESSION, 108, 116-117 (Cambridge, Harvard University Press 1967); *see also* Twining, *supra* note 21.

[24] John Seaman Bainbridge, THE STUDY AND TEACHING OF LAW IN AFRICA, 53, 68-69 (1972).

[25] *See id*. at 54-55 (detailing the different approaches taken by African nations to the issue of offering scholarships: Tanzania provided full scholarships, Malawi offered 9 out of 10 students scholarships, but Nigeria and Liberia offered none); *see also* Gower, *supra* note 23, at 140 (The first time the Nigerian Federal Government gave scholarships for law studies was in 1964. These were six out of the total of 606 scholarships granted to students to study various courses).

[26] *See* Akilagpa Sawyerr, *Challenges Facing African Universities: Selected Issues*, 1, 8, 36-37 (Feb. 2004) (unpublished paper, on file with the Association of African Universities (AAU)), *available at* http://www.aau.org/english/documents/asa-challengesfigs.pdf (last visited Feb. 25, 2008); *see also* David Court, *Financing Higher Education in Africa: Makerere, the Quiet Revolution* (The World Bank and Rockefeller Foundation, Working Paper No. 22883, 2000).

[27] *See* African Union [AU], *Record of Proceedings of the 2nd African Union Meeting of Experts,* (February 27-28, 2006), *available at* http://www.aau.org/au_experts/docs/after_conf/proceedings.pdf; *see also* AU, *Second Decade of Education for Africa (2006-2015) Plan of Action, Revised* (August 2006), *available at* http://www.education.nairobi-unesco.org/PDFs/Second%20Decade%20of%20Education%20in%20Africa_Plan%20of%20Action.pdf (last visited Feb. 25, 2008).

[28] *See* Joel Samoff & Bidemi Carrol, *The Promise of Partnership and Continuities of Dependence: External Support to Higher Education in Africa*, 47 AFR. STUD. REV. 67 (2004).

(AHEAD) database, developed by the Association of Commonwealth Universities (ACU), in support of the Association of African Universities (AAU), and the South African Universities' Vice-Chancellors Association (SAUVCA) ten year partnership program, has compiled data on 349 externally-funded projects in African higher education.[29] An analysis of the database shows that the main thematic areas that draw the highest funding are: (1) sector governance projects (by the World Bank); (2) human resource development projects (by the Canadian International Development Agency (CIDA) and the Japan International Cooperation Agency (JICA)); (3) institutional strengthening as well as HIV/AIDS projects (by Ford Foundation); and (4) quality enhancement/curriculum development, science and technology, and research collaboration (by The Norwegian Programme for Development, Research and Education (NUFU) and JICA).[30] In analyzing this database it becomes clear that legal education is not featured in any measure of importance.[31]

There have been several U.S. national organizations and private foundations engaged in funding higher education in Africa, but here again little funds are channeled specifically towards legal education.[32] As a consequence, there is a need to push legal education to the forefront of international aid to higher education in Africa. The overarching goal of this effort is to attract the requisite funding necessary to sustain reform and modernization of legal education in Africa.

This debate raises many questions. For instance, has African legal education been ignored by western governments and foundations that favor other means of promoting the rule of law? If so, why have African law schools failed to receive the extent of funding that supports other Rule of Law initiatives? Should African legal education receive more support from external sources? Finally, what types of initiatives and collaboration should characterize on-going support for legal education in Africa? Before we suggest answers to these questions, we shall provide a brief history of external aid to legal education in Africa.

II. A Brief History of Western Partnerships with English Speaking African Law Schools

Since the mid-twentieth century there have been various modes of interactions among Western lawyers and law professors and their African counterparts. The "Law and Development" movement of the 1960's and early 1970's was an attempt by American law professors and foundations to teach and import Western legal codes, educational, and legal systems to Africa to support economic development.[33] This movement has been criticized

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[29] JAY KUBLER, AFRICAN HIGHER EDUCATION ACTIVITIES IN DEVELOPMENT: THE AHEAD DATABASE (Association of Commonwealth Universities Sept. 2005), *available at* http://www.acu.ac.uk/policyandresearch/publications/aheadpaper.pdf (last visited Feb. 25, 2008).

[30] *Id.* at 18.

[31] *Id.*

[32] *Id.*; *see also* Samoff & Carrol, *supra* note 28.

[33] JULIO FAUNDEZ, LEGAL REFORM IN DEVELOPING AND TRANSITION COUNTRIES–MAKING HASTE SLOWLY, (Law, Social Justice and Global Development (LGD) Jan. 8, 2001), *available at* http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/faundez/ ("The role of lawyers in the process of

for its perceived insensitivity to the particular political, economic, and social needs of African communities.[34] During the period from 1975 to 1990, attention shifted to support of legal infrastructure, particularly the training of judges and legal officers, and attention to community-based programs, particularly those that made legal services available to the poor.[35] Since 1990, a new movement devoted to the support of legal system improvement,

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development was a matter of great concern for the group of American law professors who in the 1960s launched the well-known, but short-lived law and development movement. In their view, legal education in developing countries was inadequate as it placed excessive emphasis on rote learning of legal rules and doctrine, a method which, apart from dull, did not enable the students properly to understand social and economic reality...As these law professors believed that lawyers had a major role to play in the development process they set out to help a select number of developing countries reform legal education. As we know, the enterprise was cut short because funds dried up and the professors became aware that it was futile to attempt to export legal liberalism." *Id.* at 8.5.; *see also* Leah Wortham, *Aiding Clinical Education Abroad: What Can be Gained and the Learning Curve on How to do so Effectively*, 12 CLINICAL L. REV. 615, 632-644 (2006) [hereinafter *Aiding Clinical Educations Abroad*].

[34] FAUNDEZ, *supra* note 33, at 6.2. ("In addition to the immediate political impact that any technical assistance project is bound to have, legal reform projects also generate resentment as they are often depicted as tools designed to impose alien legal regulatory schemes which undermine the indigenous legal culture."); *see also* Laura Nader, *Promise or Plunder? A Past and Future Look at Law and Development*, Global Jurist: Frontiers Vol. 7: Iss. 2, Art. 1. (2007), *available at* http://www.bepress.com/gj/vol7/iss2/art1/. *But see*, Hon. J. Clifford J. Wallace, *Globalization of Judicial Education*, 28 YALE J. INT'L L. 355 (2003) ("A globalized judicial education would supplement, not replace, existing local education efforts. Despite countries' differences, judicial education principles are generic, and a globalized judicial education system based on those universal principles will improve and enhance court systems, irrespective of the country's legal system, size, wealth, or age.") *Id.* at 358; *see also* Bryant G. Garth, *Building Strong and Independent Judiciaries Through The New Law and Development: Behind The Paradox of Consensus Programs And Perpetually Disappointing Results*, 52 DEPAUL L. REV. 383 (2002) ("The setting for today's law and development is quite different…the consensus is far stronger in favor of reform and the legal approaches identified with the United States, including the core idea of a strong and independent judiciary. Lawyers do not have to fight for their role this time. Economists have come to see the importance of legal institutions to the markets that they now promote [footnote omitted]." *Id.* at 385. Garth also notes that the character of proposed legal reform initiatives has a lot to do with the political and economic philosophies of the U.S. power elite: "…the process is a hegemonic one that focuses on the business of exporting and importing on debates and issues that have salience in the north (here in the United States) at a particular time and place. We export our own palace wars." *Id*. at 395-96).

[35] *See, e.g.,* MANY ROADS TO JUSTICE: THE LAW RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD (Mary McClymont & Stephen Golub eds. 2000) [hereinafter MANY ROADS TO JUSTICE]; Open Society Justice Initiative, *Clinical Legal Education in Africa, available at* http://www.justiceinitiative.org/activities/lcd/cle/cle_africa (last visited Feb. 25, 2008). Prof. Geraghty has participated in U.S. Dept. of State/American Bar Association programs, including a program in Ethiopia designed to provide information about clinical legal education and a State Department/ABA project designed to provide American and African children's rights advocates opportunities to learn from each other about children's rights, juvenile court, and child protection systems, and the implementation of the UN Convention on the Rights of the Child. Each of these programs involved exchanges between African and American law faculties. Professor Cynthia Bowman of the Northwestern University School of Law led a State Department funded program which was a collaboration between Northwestern Law School and the Faculty of Law at the University of Ghana, Legon. A product of this collaboration is a book on women's rights co-authored by Prof. Bowman and Prof. Akua Kuenyehia, a former Dean of the Faculty of Law, Ghana and currently a judge of the International Criminal Court at The Hague, Netherlands. The Northwestern Law School has also

dubbed "Development Law," has emerged.[36] The movement is primarily supported by multilateral and bilateral institutions.[37] Recently, the US government has been active through the United States Agency for International Development (USAID) in supporting Rule of Law programs in Africa, with a heavy focus on the training of judges.[38]

The ABA's African Law Initiative Sister Law Program sought to establish a framework for cooperative relationships by achieving a number of goals.[39] These goals included gaining an overview of legal education in Africa and the United States, exploring areas of mutual and special interest such as educational programs, libraries, and responsibilities to the bar and the public, and developing an action plan for the future.[40] However, this program is no longer in existence.[41] The ABA's Africa-related projects are now managed by its Rule of Law Initiative.[42] The initiative's webpage references the ABA's support of various projects, such as the Louis Arthur Grimes Law School in Liberia and support for the Liberian National Bar Association.[43] Likewise, the British Commonwealth Legal Education Association (CLEA), through its West African and Southern African chapters, has sponsored law paper competitions, moot courts, and a legal research center in Cameroon.[44]

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worked with Ghanaian faculty to develop a clinical program and a children's law curriculum. Northwestern Law librarian Chris Simoni has traveled twice to Ethiopia to consult regarding law library development and to the Law Faculty at Legon, Ghana for the same purpose. Northwestern Law School has provided opportunities for our colleagues from Ghana to pursue their research in our library.

[36] Grady Jessup, *Symbiotic Relations: Clinical Methodology–Fostering New Paradigms in African Legal Education*, 8 CLINICAL L. REV. 377, 397 (2002) [hereinafter *Symbiotic Relations*] (citing Lan Cao, *Law and Development: A New Beginning?* 32 TEX. INT'L L.J. 545 (1977)) ("The emergence of Development Law provides a new construct following the demise of the law and development movement which was attributable to deficiencies in modernization and dependency theories of law reform. [footnote omitted]. Development Law is a fresh approach to evaluating the impact of existing national laws governing political and economic development of developing nations by adapting laws, policies or customs to meet the unique national needs without the baggage of imposed laws and norms of the modernization theory or exploitation of natural and human resources of the dependency theory."); *see also* Richard Bilder & Brian Z. Tamanaha, *Law and Development, Law and Crisis in the Third World*, 89 AM. J. INT'L L. 470, 472 (Apr. 1995).

[37] *See* Thomas Carothers, *The Rule of Law Revival, in* PROMOTING THE RULE OF LAW ABROAD, 10-11 (ed. Thomas Carothers, 2006); *see also*, FAUNDEZ, *supra* note 33.

[38] *See* Office of Democracy and Governance Bureau for Democracy, Conflict, and Humanitarian Assistance, U. S. Agency for International Development, *Guidance for Promoting Judicial Independence and Impartiality* (rev. ed. Jan. 2002), *available at* http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf.

[39] Steven Keeva, *To Africa, With Law*, 81 A.B.A. J. 89 (Feb. 1995).

[40] *Id.*

[41] *See* M. Wolf, *Summary of Proceedings,* 2, *American Bar Association Section of Legal Education and Admission To The Bar, African Law Initiative Sister Law School Program* (1997).

[42] *See* American Bar Association, Promoting the Rule of Law, http://www.abanet.org/rol/ (last visited Feb. 25, 2008).

[43] *See* American Bar Association, Current Events/Updates, http://www.abanet.org/aba-africa/eventsupdates.shtml (last visited Feb. 25, 2008).

[44] Commonwealth Legal Education Center, *Developing the CLEA Legal Resource Centre in Cameroon, available at* http://web.archive.org/web/20040205210350/http://www.ukcle.ac.uk/clea/newsletter/87/cameroon.html (last visited Feb. 25, 2008); *see also* Commonwealth Legal Education Centre, *Developing Legal*

The World Bank has also taken the lead in promoting judicial reform with the objective of improving conditions for sustainable development.[45] World Bank programs supporting the improvement of legal infrastructures are likely to continue to take center stage with a growing recognition that such programs must walk the fine line between supporting "reform" and being sensitive to African cultural, social, and legal norms and expectations.[46] The legal and judicial sector studies that precede large scale funding of legal and judicial reform projects contribute to the overall understanding of the African justice system's strengths and weaknesses.[47] The support for these programs will inevitably be substantial due to the comprehensiveness of World Bank-funded projects, and the perceived and actual links between a stable and predictable legal system and economic progress.

III. Observations

It is interesting to note that African legal education has been largely left out of the mix as far as large-scale funding from foreign governments, foundations, and banks are concerned.[48] Presently, Rule of Law projects say little about initiatives to support legal education in Africa.[49] In part, this lack of attention may be the result of the belief that American initiatives to support legal education in the late 1960's and early 1970's were a futile attempt to "export legal liberalism."[50] However, this belief alone could not have

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Education in the Commonwealth: Some Current Issues ("*Developing Legal Education"*), *available at* http://ltfiledown.qut.edu.au/download.asp?rNum=3384545&pNum=2522503&fac=law&OLTWebSiteID=CLEA&dir=gen&CFID=579781&CFTOKEN=38933363 (last visited Feb. 25, 2008) [hereinafter *Developing Legal Education*].

[45] *See* Swithin J. Munyantwali, T. Mpoy-Kamulayi, & Paati Ofosu-Amaah, *Legal and Judicial Reforms Activities in Africa: Experience to Date and Prospects for Further Improvement* (Feb. 2003) (unpublished manuscript presented at the All Africa Conference on Law, Justice, and Development, Abuja, Nigeria, on file with authors).

[46] *Id.*

[47] Legal Vice Presidency, The World Bank, *Legal and Judicial Reform: Strategic Directions* (Jan. 2003), *available at* http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/10/24/000160016_20031024092948/Rendered/PDF/269160Legal0101e0also0250780SCODE09.pdf (last visited Feb. 25, 2008) [hereinafter *Legal and Judicial Reform]*; s*ee e.g.* Linn Hammergren, The World Bank, *Diagnosing Judicial Performance: Toward a Tool to Help Guide Judicial Reform Programs* (Nov. 1999), *available at* http://www1.worldbank.org/publicsector/legal/HammergrenJudicialPerf.doc (last visited Feb. 25, 2008); *see also Order in the Jungle*, THE ECONOMIST, Mar. 13, 2008, *available at* http://www.economist.com/displaystory.cfm?story_id=10849115.

[48] *Legal and Judicial Reform, supra* note 47. (focus of "Legal Training" is not centered around the education of lawyers but is focused on development of civil society and the knowledge of the citizenry). The World Bank does acknowledge the importance of legal education but does draw attention to the need for additional or increased funding. *Id.*

[49] *See e.g.* FAUNDEZ, *supra* note 33, at 17. ("[T]he quality of legal education in developing countries has not significantly improved since the mid-1970's. Although it is self-evident that a well-trained legal profession is essential for ensuring the long-term sustainability of legal reforms, the issue of legal education is notoriously absent from current debates on legal reform.").

[50] *Id.* (citing John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); *see also*, Peter Sevareid, TWENTY YEARS AFTER, *supra* note 7, at 107-08.

prevented those who wished to support legal education in Africa from continuing with programs that sought to improve the quality of Africa's legal education. There must have been other reasons why the outreach of the 1970's did not continue.

These reasons could include a lack of faith in the political environments in which many African law schools and universities operated, the notion that Westerners had "shown the way" and that it was time to let African law schools sink or swim on their own, or that African law faculties rightly wanted to Africanize their institutions to the extent that large scale foreign presence was incompatible with the goal of developing autonomous, truly African law schools.[51] Indeed, the African Union's plan for higher education states that, "[i]t is the wish of the African Union that the Plan will be largely self-funded, from the internal resources of the member states. It is also expected that intra-continental support for the poorest countries by wealthier African countries will become institutionalized as regular practice."[52]

Although support for legal reform in Africa was aggressively pursued by governments, foundations, and banks, the question remains why different means of support for African law schools were not pursued. For example, governments, foundations, and banks could have reached out to African law schools with the same sensitivity that characterized the new approaches to undertaking Rule of Law initiatives in the late 1980's and 1990's.[53] Significant resources could have been devoted to collaborations that would have supported curriculum design, consideration of new teaching methodologies including clinical education, and faculty development.[54] Such initiatives could arguably have made law schools at African universities more significant players in promoting the rule of law than they have been in recent years.[55] After all, many of the leaders of the judicial systems, which outsiders sought and still seek to reform, are graduates of African law schools. However, it seems that a collective decision was made that African law schools did not have as much to contribute to the promotion of the rule of law as did already existing judicial systems, provided that those systems could be reformed.[56]

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[51] *See* Wortham, *supra* note 33, at 637-40 (citing Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L. L. 470 (1995) (arguing that many of the failures of the Law and Development movement stemmed from failure to meet the specific needs of the respective African nations – whether specific to ethnic or tribal concerns or the unsettled political climate).

[52] *Second Decade of Education for Africa (2006-2015)*, *supra* note 27, at 2.

[53] Richard J. Wilson, *The New Legal Education in North and South America*, 2 STAN. J. INT'L L. 375 (1989) (demonstrating the changed focus of legal education in South America in the 1980s towards increased efforts to assist the poor with knowledge of their legal rights and increased access to justice programs).

[54] *See* Wortham, *supra* note 33, at 640-44 (citing the examples of financial assistance to clinical education programs in Vietnam, South America, and South Africa that proved successful).

[55] One commentator has observed, "[t]he lawyers produced by the present system of legal education in Africa are trained to become legal technicians. They are encouraged to have little or no interest or comprehension of policy issues inherent in the law. They are generally reluctant to criticize current law. Even as technicians, they have limits, for few are competent to represent national and commercial interests in international business transactions, involving complexities of taxation and international finance." Ndulo, *supra* note 7, at 500.

[56] It should be noted, however, that there has been government and foundation support for a number of collaborations between American clinical faculty and African law schools. USAID and the Fulbright

If, indeed, this decision was made, we argue that it was a bad decision. African law schools and African legal systems would be relatively better off today if substantial funding had been committed with proper sensitivity to indigenous culture and values. The impact of effective legal education upon emerging African lawyers and political leaders could be substantial. Despite the energy and commitment of Africans and Americans who have continued to work to support legal education in Africa,[57] African law faculties continue to be under-funded. This reality means law teachers in Africa simply cannot afford to devote their full-time to teaching and scholarship. [58]

African law faculties cannot afford to implement new teaching methodologies because they do not have access to new materials and technologies.[59] The Commonwealth Legal Education Association (CLEA) has identified the following constraints, among others, facing a number of Law Schools in the Commonwealth: (1) resource constraints; (2) staffing constraints; (3) retention of professors; (4) lack of local legal materials; (5) lack of access to electronic resources; and (6) outdated law curricula.[60] These constraints are relative and they are more acute in Commonwealth African countries than in other parts of the Commonwealth.[61] In some African countries, such as Liberia, law schools do not have access to any materials because of civil strife.[62]

Program have sent American clinical faculty to Botswana, Eritrea, Mozambique, Kenya, and Nigeria. American law schools have granted sabbaticals to faculty who have taught in South Africa. The U.S. Information Service (U.S.I.S) (now part of the U.S. Department of State International Information Programs) has funded American law school clinical faculty to teach in Ethiopia, South Africa, Malawi, and in Kenya. The Ford Foundation has funded clinical teachers in South Africa. An author of this paper, Prof. Geraghty, was one such teacher. In 1968, as part of a Ford Foundation initiative, he traveled to the Addis Ababa University School of Law under the supervision of a law professor studying the court system in Ethiopia. In 1996, he returned to that law school as part of a U.S. State Department/ABA funded program to collaborate on a clinical curriculum for that law school. Through the Northwestern University School of Law's International Team Project program, he has traveled with law students to visit Botswana, Namibia, Malawi, Tanzania, and Uganda; *See generally* Roy Stuckey, *Compilation of Clinical Law Teachers with International Teaching or Consulting Experience, available at* http://law.sc.edu/clinic/docs/internationalsurvey2005.pdf (last visited Feb. 25, 2008).

[57] MANY ROADS TO JUSTICE, *supra* note 35, at 3. The University of Addis Ababa School of Law, under the leadership of Acting Dean Taddese Lencho, has drafted an ambitious strategic plan for its law faculty. This plan includes upgrading law school facilities, professional development opportunities for its faculty (including access to PhD programs), and renewed emphasis on the production of scholarship. *Draft Strategic Plan*, June 2007 (on file with author). This program will be supported in part by the international law firm DLA Piper and by the Northwestern University School of Law.

[58] Professor Ndulo observes, "Few really able people want to work for long in situations that offer no rewards in either money or prestige—and such is the case with law teaching in Africa today." Ndulo, *supra* note 7, at 502.

[59] *Id.* at 492-495 (describing the general state of African legal education in former British colonies as one focusing on the learning of general holdings of British law and the marked absence of law reports detailing recent rulings in African courts as well as the dearth of practical experience); *see also* KUBLER, *supra* note 29.

[60] *See*, CLEA, *Developing Legal Education, supra* note 44, at 21-31; s*ee also* Addis Ababa University Faculty of Law, *Reform on Legal Education & Training in Ethopia* (Draft) (on file with authors).

[61] *See* CLEA, *Developing Legal Education, supra* note 44, at 21-31.

[62] *U.F. Law Students Act to Replace Legal Texts Destroyed by Liberia Civil War*, Press Release, University of Florida, Levin College of Law *(*on file with the authors*).*

The time has come to design a new program of massive aid to African law schools. This program should follow an in-depth study of the needs of law schools in Africa in order to ensure the design and implementation of appropriate initiatives. However, even before such a study is undertaken, it is possible to predict some of the serious problems that such a study would identify.

IV. A Study of Legal Education in Africa: Expected Results

A. Faculty Salaries

After a study is completed we predict that a consensus will emerge, stating that one key problem is the inadequate amount of money allotted for faculty salaries. Interactions with faculty members in Ethiopia, Tanzania, Uganda, Malawi, and Ghana reveal that the average professors' salary ranges from $400.00 to $500.00 per month.[63] At the same time, members of African law faculties are highly sought after by governments, corporations, and by private law firms.[64] The consequence of this dynamic is that many law faculty members in Africa find it impossible to devote their full-time to teaching.[65] We concede that we do not know how to solve this problem other than by providing support for research and program initiatives that would augment the salaries of the African law faculty engaged in such projects. However, subsidies from outside sources that single out law professors might be politically unacceptable to African universities.[66] This is especially true due to the peculiar salary structure of faculty members at African universities. African universities pay equal salaries to professors of all disciplines, and singling out law professors for additional subsidy may lead to upheaval among staff unions in the universities.[67] However, increasing the resources available to these faculty members and generating enthusiasm about the process and importance of legal education and scholarship are both critical needs. Additionally, giving frequent opportunities to African law professors to undertake short research and teaching visits (or what has been dubbed "Cooks Tours")[68] to American law schools, for which they may be given a stipend, could also have a positive impact.

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[63] It must be noted that the structure of academic posts in African Law Schools differ from that of American Law Schools. In Botswana, for instance, the structure starts from Lecturer to Senior Lecturer, to Associate Professor and ending with full professor. In Nigeria the structure starts with Lecturer II and goes on to Lecturer I, Senior Lecturer, Associate Professor, and Professor. Salaries attached to these academic positions vary considerably. In Ethiopia, full professors are paid about $350 per month. Boston College Ctr for Int'l Higher Educ., Int'l Network for Higher Educ. in Africa, a*vailable at* http://www.bc.edu/bc_org/avp/soe/cihe/inhea/profiles/Ethiopia.htm .

[64] *See* Akilagpa Sawyerr, *Challenges Facing African Universities – Selected Issues*, at 23-25, *available at* http://www.aau.org/english/documents/asa-challengesfigs.pdf (last visited January 16, 2008) (noting the general challenges of African universities of maintaining faculty because of the lure of private sector professors).

[65] *See* Ndulo, *supra* note 7*,* at 502.

[66] Professor Quansah makes this observation based on his experience in teaching at universities in Ghana, Nigeria, and Botswana.

[67] *Id*.

[68] *See* D. GUSTAFSON, MANAGING ECONOMIC DEVELOPMENT IN AFRICA 224 (Warren H. Hausmen ed., M.I.T. Press 1963).

B. Law Libraries

Funding to support law teachers in Africa in a scholarly capacity should be a high priority at African universities. Law libraries in many African law schools are in a sad state. This knowledge is borne out of experience in connection with Northwestern University School of Law's collaborations with the libraries in Ghana, Ethiopia, and Uganda.[69] In order to accomplish effective scholarship, African legal academics must often leave their countries for law schools in Europe or the US.[70] Law students in these and other African countries have little access to the most recent developments in the laws of their own country, and virtually no access to current news concerning international law and human rights.[71] Creating and maintaining highly developed and innovative libraries in African law schools could make those schools models for the establishment of consensus based legal systems.

C. Teaching Methodologies

New, more interactive, teaching methodologies, particularly those based on the clinical education model, might also invigorate legal education in Africa. Initially, it would be necessary to explore the extent to which African legal educators share this view. Preliminary conclusions based upon work that Northwestern University School of Law has done in Ethiopia, Ghana, Tanzania, and Malawi suggest that interactive teaching methodologies are well-received by students.[72] Although we must be cautious not to confuse the pervasive politeness of African law students with enthusiasm for our presentations, many African law students complain that the teaching in African law schools is too mechanical, especially in the larger classes.[73] Smaller classes employing a more interactive model might generate more enthusiasm for the learning process. This method of teaching requires resources, for instance more classrooms, a higher degree of support for faculty members, technological improvements for the multimedia presentations, student performances for review, and access to information on the internet.[74]

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[69] Information regarding these collaborations is on file with the authors.

[70] *See* Sawyerr, *supra* note 64, at 23-26 (since faculty salaries have dried up African professors do not have sufficient time to research and use sabbatical opportunities as both a means to engage in research and help subsidize their minimal salary); *see also* Ndulo, *supra* note 7, at 502 (noting the lack of resources available within Africa to law scholars as well as the lack of critical thinking about the law).

[71] Ndulo, *supra* note 7, at 492-493 (describing lack of access to law reports of recently decided cases in African courts as well).

[72] Thomas F. Geraghty, *Legal Clinics and the Better Trained Lawyer (Redux): A History of Clinical Education at Northwestern,* 100 NW. U. L. REV. 231, 240, 251 (2006) [hereinafter *Legal Clinics and the Better Trained Lawyer (Redux)*]; s*ee also* Jessup, *Symbiotic Relations*, *supra* note 36, at 379-80 (citing Michael Wolf, Summary of Proceedings, 2, American Bar Association Section of Legal Education and Admission To The Bar, African Law Initiative Sister Law School Program (1997)) ("The reports prepared by American and African law professors participating in the ABA African Law Initiative Sister Law School Program provide strong evidence that Clinical Legal Education as part of the curriculum at an African Law School is an enriching and significant component of the law school experience.").

[73] Ndulo, *supra* note 7, at 500-01 (noting that African law professors are essentially legal technicians and the classes are quite rigid in nature and arguing for more imaginative degree programs and critique).

[74] *See, e.g*, Geraghty, *Legal Clinics and the Better Trained Lawyer (Redux), supra* note 72, at 249 (from the inception of clinical programs to their expansion the programs require increased funding to ensure

A clinical method of teaching could take the law student outside of the classroom and into the field. The model would involve carefully supervised student externships in government agencies, non-governmental organizations (NGO's), and human rights organizations. In these placements, students would receive first-hand experience of the shortcomings of the justice system in relation to under-served populations, as well as government and human rights organizations' responses to those needs. Law school-sponsored clinics could also be developed, allowing students and faculty to work together representing individuals and groups.[75] Such "clinics" now exist in many countries (Botswana, Ghana, Nigeria, South Africa, Sierra Leone, Uganda, Tanzania, Malawi, Kenya); however, the majority of these clinics are not formally affiliated with any law schools.[76] Predominately, the law students who work in these clinics do so without receiving academic credit.[77] In addition, student practice rules should be developed, allowing students to practice law under the supervision of clinical faculty.[78] However, this idea poses political problems, especially with local bar associations.[79]

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sufficient educators and resources for effective teaching).

[75] We acknowledge the political problems that would be posed to universities in some countries by the existence of such clinical programs.

[76] African legal clinics not formally associated with a law school: MBDHP's Legal Clinics Section (Burkina Faso), Centre for Practical Legal Studies (Mozambique), Legal Aid Clinic (Namibia), Legal Clinic (Butare, Rwanda), Legal Clinic (Saint Louis, Senegal), Legal Clinic (Somaliland), and Kampala Law Development Centre Legal Aid Clinic (Uganda). African legal clinics associated with law schools in Africa: Legal Aid Clinic (University of Mekelle, Ethopia), University of Nairobi Clinical Program (Kenya), Akungba Law Clinic (Adekunle Ajasin University – Nigeria), University of Ibadan Law Clinic (Nigeria), University of Maiduguri Law Clinic (Nigeria), Abia State University Law Clinic (Nigeria), University of Uyo Campus Law Clinic (Nigeria), Rhodes University Legal Aid Clinic (Rhodesia), Human Rights Clinic Fourah Bay College (Sierra Leone), University of KwaZulu-Natal Law Clinic (Durban, South Africa), Wits Law Clinic (Johannesburg, South Africa), Community Law Centre (Mmabtho, South Africa), University of Pretoria Law Clinic (Pretoria, South Africa), and University Legal Aid Centre (Tanzania). The preceding information was provided by Ms. Mariana Berbec of the Open Society Institute and is on file with the author.

[77] In Botswana, clinical work forms part of the Clinical Legal Education courses which are compulsory for all fourth and fifth year students and for which a total of 12 credits are awarded. In South Africa, legal clinics are a well established part of the curricula of law schools, for example Universities of Natal and Witswatersrand, to name a few. *See* M. Wolf, *Summary of Proceedings, Workshop on Clinical Legal Education in Africa* 1, ABA SEC. ON LEGAL EDUC. AFR. LAW INITIATIVE SISTER LAW SCHOOL PROGRAM (July 8-12, 1996) at 9 (1996).

[78] The following countries lack student practice rules as confirmed with professors at African Law Schools: Nigeria (email response provided by Prof. Oke-Samuel on February 2nd, 2008, on file with authors), Zambia (email response proved by Dr. Patrick Matibini on Febrary 6th, 2008, on file with authors), and Nambia (email response provided by Prof. Amoo on February 11th, 2008, on file with authors). While students at the Akungba Law Clinic at Adekunle Ajasin University in Nigeria can receive academic credits for clinical work, they are not allowed to practice in courts and can only observe with a supervising attorney. *See* email response provided by Professor Oke-Samuel, Feb. 2, 2008 (on file with authors).

[79] *See* email response by Professor Ndubisi, Jan. 30, 2008 (on file with authors). In Nigeria, students have "limited opportunity to observe trial advocacy under the supervision of a qualified lawyer", but only *after* they have completed a law degree. *Id.* But, "[e]fforts are underway by university law clinics and NGOs to persuade the Bar and judicial authorities to expand opportunities for student practice." *Id.*

A major advantage of funding programs in the "clinical legal education" category is that such programs can respond to the critique of African legal education that it has been too much taken with Western values and the domestic debate that law schools provide no practical training.[80] Additionally, the clinical method of teaching is able to counter the debate over "legal imperialism" in that, if properly managed, the clinical method will always be responsive to the "real world" of legal practice and social needs.[81] This "real world" technique, whether it is brought into the classroom, into a government agency or NGO, or into a law school sponsored legal clinic, will inform and control the subject matter taught and learned.[82] In this way the clinical method most appropriately ensures that the legal education received by law students is culturally relevant and sensitive.[83]

There is a tendency in African law schools to use textbooks that usually reflect the state of the law in England.[84] In this realm, a program providing assistance in formulating local content material for teaching may be useful. For instance, in Botswana there is an inordinate reliance on South African and English textbooks.[85] While these textbooks tend to reflect the common law of Botswana, they do not reflect the statutory law to the same extent.[86] This is likely because the statutory laws inherited from the country's historical political association with South Africa and England have remained substantially unchanged, while conversely there have been tremendous legislative reforms in the two countries over the years which are not reflected in the current editions of relevant textbooks.[87] Students therefore find themselves being lectured about Botswana law, and

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[80] Jessup, *supra* note 36, at 387-388; *see, e.g. Vanguard, Nigeria: Critical Reform Considerations for Preparing a Well Fit Lawyer of the Future*, AFRICA NEWS, Jul. 11, 2003.

[81] *See* Richard J. Wilson, *Training for Justice: The Global Reach of Clinical Legal Education*, 22 PENN. ST. INT'L L. REV. 421, 422- 24 (2004).

[82] *Id.* at 423-24, 428.

[83] Wortham has put forward three requisites for support of clinics abroad. These are (1) clinic programs should be based on students' live experience providing legal services to poor people or under-served interests, (2) law school faculty must play a significant role in the design, administration, and teaching of the program and (3) the funder should assess the competence and sincerity of those seeking to implement the program and make a subsequent assessment of the clinic's operation. Wortham, *supra* note 33, at 655-70.

[84] "Legal education in Nigeria is modeled on that of England and Wales." Information provided by Professor Ndubisi of the University of Ibadan, Nigeria. For more information on Nigerian Legal Education *see* http://www.nigeria-law.org/Legal%20Practitioners%20Act.htm and http://www.nigeria-law.org/Legal%20Education.htm. *See also,* Nkrumah University of Science & Technology in Ghana, www.knust.edu.gh/law/books.php (last visted Feb. 25, 2008) (In the Faculty of Law, for example, the recommended textbook for the course on Ghana Legal System is a book on the English Legal system).

[85] For instance, in Botswana there is an inordinate reliance on South African and English textbooks. (For example, in the University of Botswana in teaching Delict (Tort), reliance is placed on the South African Text book, Burchell, *Principles of Delict*. In Succession, the South African text book by Corbett, *The Law of Succession in South Africa*, is used as a basic text and the English text of *Cross on Evidence* is required reading for the law of Evidence; *see also* G. van Niekerk, *The Application of South African Law in the Courts of Botswana,* 38 COMP. INT'L L J. S. AFR. 312 (2004).

[86] For example, the English Divorce Reform Act 1969, on which the Botswana Matrimonial Causes Act 1973 was based, has since been replaced by the Family Law Act 1996. Current English divorce textbooks, such as Cretney & Masson *Principles of Family Law*, discuss the latter Act with passing references to the former. In teaching divorce law therefore, reliance had to be placed on the repealed law of England.

[87] *Id.*; *see* Prof. Ndubisi's comments, *supra* note 84.

then reading about a different law in the textbook. Whilst there has been a spirited attempt to produce local legal texts, publishers have not shown the required enthusiasm to publish them due to the smallness of the Botswana's education market.[88] Thus, funding to produce local legal text is of current importance.

Clinical education is faculty intensive, labor intensive, time consuming, and exhausting.[89] Only the law schools in the United States with relatively substantial resources can support large programs in clinical education. If this is so, how can we expect African law schools to make substantial investments in clinical education? One answer is to look back on the history of the establishment of clinical programs in the United States in the late 1960's and early 1970's.[90] The Ford Foundation, through a spin-off foundation called The Council on Legal Education for Professional Responsibility, urged law schools to create clinical programs and provided substantial seed money for those clinical programs it helped to develop.[91] The faculty members who populated those early clinical programs were young and relatively "inexpensive" recent graduates of law schools, who were enthusiastic about the opportunities that those programs offered to teach and to provide service.[92] Thus, the initial cost of setting up the early clinics in the United States was relatively modest. Reliance upon recent graduates was key not only to the financial viability of these early programs, but to generating enthusiasm among law students as well. These students and faculty shared common ideals and formed communities of learning, scholarship, and service.[93]

The clinical movement in American legal education has evolved to the extent that clinical education is now evident in every law school in the country.[94] Almost every American law student is exposed to the "real world" of lawyering through clinical legal education.[95] The "inexpensive" beginnings of clinical education in the United States are evident in some African countries. In Botswana, for example, the legal clinic was conceived as part of the Department of Law in implementing its mandate to provide academic as well as practical skills training in its L.L.B. program.[96] The administrator and the teaching staff of the clinic

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[88] Prof. Quansah is relating his and his colleagues' efforts at the Department of Law, University of Botswana in trying to interest local publishers to no avail in publishing manuscripts that have been prepared on various aspects of Botswana Law.

[89] *See, e.g*, Geraghty, *Legal Clinics and the Better Trained Lawyer (Redux), supra* note 72, at 249 (noting the need for increased clinical professors and space); *see also* George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162,182-83 (1974).

[90] See, e.g, Geraghty, *Legal Clinics and the Better Trained Lawyer (Redux), supra* note 72, at 238-44.

[91] *See* Clinical Education for the Law Student CLEPR Conference Proceedings, Buck Hill Falls, June, 1973; *see also*, Selected Readings in Clinical Education, Council on Legal Education for Professional Responsibility, the International Legal Center, 1973. For the most comprehensive list of readings in clinical legal education, *see* J.P. Ogilvy and Karen Czapansky, CLINICAL EDUCATION, AN ANNOTATED BIBLIOGRAPHY (Revised, 2005) *available at* http://faculty.cua.edu/ogilvy/Biblio05clr.htm.

[92] *Id.*

[93] *Id.*

[94] Wilson, *supra* note 82, at 421.

[95] *Id*. at 421-24.

[96] A very important part of the program at the University of Botswana is the Clinical Legal Education courses which were introduced in the 1986/87 academic year. The courses which are compulsory for all students are taken over a two-year period – the 4th and 5th years of the program. It consists of: (1) an

are part of the Department of Law.[97] Clinical responsibilities are part of the job description of Department staff, and as such there is no need to recruit staff specifically to operate and maintain the clinic.[98] The drawback of this arrangement is that the clinic does not have a separate budget from the Department of Law, and as a result it is severely handicapped in its operations.[99] There is also a marked reluctance on the part of staff to undertake clinical duties due to its inherent time-consuming nature.[100] In such a circumstance, funding to augment the budget of the Department, and perhaps to recruit staff specifically for the legal clinic, will help to improve and enhance the teaching of practical legal skills.

V. Ethiopia: A Case Study in National Leadership and Collaboration

A. History and Reform

Modern legal education in Ethiopia began in 1952 when law courses were taught at the University College of Addis Ababa.[101] In 1961, Haile Selassie I University was formally established and law courses were taught there.[102] In 1963 James C.N. Paul became Dean of the Law Faculty at Haile Selassie I University, bringing with him Ford Foundation support and a substantial ex-patriate faculty.[103] From the early 1960's until the early 1970's the Haile Selassie I University Law Faculty was predominately American and European. However, leaders of the Law Faculty did put in place a process to "Ethiopianize" the Law Faculty.[104] Foreign governments and foundations provided major support for the new law school. By the late 1970's and early 1980's the Law Faculty was staffed primarily with Ethiopian faculty and led by Ethiopian deans. During the period of the Dergue, and, indeed for some years after the overthrow of the Dergue, support for legal education in Ethiopia waned. [105]

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eight week long internship within legal establishments during the long vacation at the end of the fourth year; (2) participation in at least one moot or mock trial session each academic year; (3) attendance at clinical seminars for a minimum of two hours a week; and (4) attending to clients and files in the legal clinic on a regular basis.

[97] Quansah, *Educating Lawyers, supra* note 19, at 530-31.

[98] *Id.*

[99] *Id.*

[100] Observation of Professor Quansah based on teaching experience in Nigeria and Botswana.

[101] Getachew Assefa, *The Current Situation of Legal Education in Ethiopia: Problems and Proposals*, 6, Proceedings Int'l Conf, *Why A Justice Personnel Training Center for Ethiopia*, (Addis Ababa, Ethiopia, July 2003).

[102] *Id.* at 8

[103] *Id.* at 9.

[104] *See* Getachew Aberra, *The Faculty of Law and the Curriculum for Legal Training*, *Wonber* No. 2 ALEMAYEHU HAILE MEMORIAL FOUNDATION, (2008).

[105] Dr. Aberra notes that after Emperor Haile Selassie's government was overthrown in 1974, "…all expatriate staff of the faculty had left Ethiopia. Obviously, this sudden departure of expatriate staff had its negative impact on the standard of legal education given by the Faculty…The Ford Foundation which had been a major source of financial assistance soon terminated its assistance to the Faculty. As a result, the Faculty could no longer get current law books, journals, periodicals and other reference materials. It was therefore, found very difficult to maintain the high standard of legal education that was set by Dean Paul and his colleagues during the early 1960's." *Id.* at 101.

Since 2000, the Government of Ethiopia and legal educators in Ethiopia have placed substantial emphasis on the importance of legal education.[106] This is evidenced by the establishment of 20 government-supported and private law schools in Ethiopia, and by an intensive effort by the Ethiopian government and law school faculty to put into place a sophisticated strategic plan, as well as a comprehensive framework for reform of legal education in Ethiopia. These efforts have involved a massive and detailed re-examination of the role of law schools in Ethiopia, an examination of the composition and qualifications of law school faculty, the creation of a standardized curriculum, and the creation of teaching materials.[107] This has been a thoughtful and coordinated effort on the part of the Ethiopian Government and law faculty throughout the country to make legal education more accessible and more relevant to the demands of a diverse citizenry and consumers of legal services.

The reform of legal education in Ethiopia began in 2002 when the Ethiopian Government, under the auspices of its Ministry of Capacity Building, launched the National Comprehensive Justice Reform Project.[108] This Project had as one of its goals the reform of legal education in Ethiopia.[109] One of the committees formed to design and implement this project was the "Technical Committee" which undertook a study of private and public law schools in Ethiopia, in Europe, and in the United States.[110] The problems identified by June, 2006 report were as follows:

> *The curriculums in place have failed to incorporate new demands and developments such as investment, alternative dispute resolution, and federalism. The curriculum's failure to focus on skill oriented courses and its inclination towards theory based courses stand out as a major problem of the curriculum. There is serious shortage of human and material resources needed for achievement of goals set by the curriculum. Another downside of the curriculum is its failure to clearly indicate mechanisms for quality assurance.*[111]

In an effort to address these issues, the Addis Ababa University Faculty of Law, the senior law faculty in Ethiopia developed a strategic plan.[112] The strategic planning document

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[106] The importance of this initiative is underscored by the Ethiopian Government's adoption of a Code of Conduct for Federal Court Advocates. This Code provides in part that, "Any advocate shall have the responsibility to assist the organs of the administration of justice in the effort to promote respect for the rule of law and the attainment of justice. Any advocate shall, in particular discharge his professional duty to his client, other lawyers and opposing party, the court, his profession, and the society in general honestly, faithfully, and truthfully." Federal Negarit Gazeta, 6th Year, No. 1, 24th Sept. 1999, Council of Ministers' Regulations, p.1156

[107] See, *Reform on Legal Education & Training in Ethiopia* (June 2006) (working draft, on file with Professor Thomas F. Geraghty).

[108] *See Reform on Legal Education & Training in Ethiopia*, *supra*, note 60, at p. 6.

[109] *Id.* The Project recognized that, "effective law schools …can contribute to the sustenance of democracy, peace, good governance and justice as well as…producing competent and responsible graduates that can detect and fight against unethical and corrupt practices." *Id*. at 7.

[110] *Id.* at 8.

[111] *Id.* at 9.

[112] Strategic Planning Document for the Addis Ababa University Law Faculty, provided by Acting Dean Tadesse Lencho (insert date) (on file with Thomas F. Geraghty).

adopted by the Addis Ababa University Law Faculty identifies key challenges and plans for meeting those challenges. The strategic planning document takes a hard look at legal education at Addis Ababa University. This strategic planning document merits consideration by any law school that is contemplating a strategic planning process.

In the plan's section entitled, "Internal Situation Analysis: Strengths and Weaknesses," it is noted that a strength of the Law Faculty of Addis Ababa University is "a considerable number of strong, experienced and committed academic staff."[113] On the other hand, the plan identifies a weakness of the Law Faculty as being, "[t]oo few academic staff members with PhD's," and "[t]oo few academic staff members with experience in research and publications."[114] Thus, the capacity of Ethiopian law schools to produce scholarship is a key component of Ethiopia's plan to improve the quality of its program of legal education.

The Addis Ababa University Faculty of Law's vision, as set forth in its plan, is to "become a preeminent center of legal studies dedicated to excellence in teaching, critical inquiry and public action in an academic community that cultivates vibrant discourse on the rule of law development and social justice in Ethiopia."[115] The Addis Ababa University's Law Faculty's mission is to "[a]ctively work for the enhancement of rule of law, equality, human rights, democracy, social justice, tolerance and economic development for the peoples of Ethiopia through quality programs of teaching, research and community service."[116] Other law schools in Ethiopia have adopted similar thoughtful, far reaching, and ambitious objectives, equally signaling the re-emergence of legal education as a priority in Ethiopia. The program of clinical instruction at the Mekelle University Law Faculty is a particularly impressive example of the re-invigoration of legal education in Ethiopia.[117]

Ethiopian legal educators are thus attempting to meet the twin challenges of making the substance of legal education relevant to the needs of Ethiopia's citizenry and developing new teaching methodologies that will improve the quality of training that its law students receive. Ethiopia has taken several impressive steps to achieve these twin goals.

Ethiopia has formulated a model curriculum that will be adopted by all Ethiopian law schools.[118] This 5 year undergraduate curriculum is responsive to the needs of modern

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[113] *Id.* at 3.
[114] *Id.*
[115] *Id*. at 24.
[116] *Id.*
[117] On February 24-28, 2008, the Faculty of Law of Mekelle University sponsored a national workshop on clinical legal education. Seven public and two private Ethiopian law schools participated in this conference. A committee consisting of legal educators in Ethiopia was formed to establish a national network of Ethiopian law clinics. E-mail from Desta G/Michael Giday, Director, Mekelle University Law Faculty Legal Aid Clinic, to Prof. Thomas F. Geraghty (March 6, 2008) (on file with Prof. Thomas F. Geraghty).
[118] E-mail from Ato Muradu Abdo, Coordinator of the Research and Publication Unit of the Addis Ababa University, Faculty of Law, to Professor Thomas F. Geraghty, (March 23, 2008) (on file with Prof. Thomas F. Geraghty). "A new curriculum has been put in place in over 20 public and private law schools in Ethiopia. The curriculum has two aspects: a core curriculum with about 40 courses (about

Ethiopia, focusing heavily upon both the history and present status of Ethiopia's legal system and upon core courses such as contracts, torts, property, criminal law and business organizations, and human rights.[119] In addition, courses in legal skills, such as legal writing, appellate advocacy, judgment writing, and legal clinics are offered throughout the curriculum.[120] Course materials for these offerings are being prepared under the auspices of the Justice System and Legal Research Institute of Ethiopia and the Ministry of Capacity Building. These materials are comprehensive and well-organized.[121] The materials are a critical contribution to modern-day legal education in Ethiopia. Prior to the creation of these materials, much of legal instruction in Ethiopia was based upon materials prepared in the late 1960's and early 1970's by expatriate faculty.

B. Significant Remaining Challenges

1. Centralization and De-Centralization

The proliferation of law schools throughout Ethiopia has the salutary effect of making legal education available to more of Ethiopia's citizens. In order to manage the expansion of legal education, the Government of Ethiopia has chosen to centralize various aspects of legal education including admissions, curriculum development, and assignment of faculty. Unlike law schools in most other countries, law schools in Ethiopia have no role in deciding who is admitted to their schools; and, prospective law students have no ability to choose which public law school they would like to attend. Although centralized decision making is necessary to manage the kind of expansion put in place by the Ethiopian Government, some might argue that elimination of competition for the best students and faculty will result in few truly exceptional law schools. On the other hand, it is difficult to see how a government-funded initiative to fund legal education throughout Ethiopia could be managed differently. Perhaps an incentive structure could be created to further curriculum reform, excellence in teaching, and scholarly productivity.

2. Selectiveness in Admitting Law Students/Increased Enrollments

It is commonly accepted that during the early years of legal education in Ethiopia, the Addis Ababa University Faculty of Law attracted the most talented graduates of Ethiopia's secondary schools. However, the capacity of the Law Faculty in Addis Ababa to enroll students was always limited. Moreover, the logistics and expense involved in training all of

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120 credit hours) and an area of concentration of about 15 courses (about 40 credit hours)." *Id.* Each law school must provide the core curriculum, but can elect concentrations. *Id.*

[119] Course Offering Breakdown (Regular LL.B. Program) Sept. 2006 (unpublished manuscript, on file with Prof. Thomas F. Geraghty).

[120] *Id.*

[121] Ethiopia's Justice and Legal System Research Institute, *Materials on Introduction to Law and the Ethiopian Legal System* (Oct. 2007) (on file with Professor Thomas F. Geraghty) (These materials underscore Ethiopia's commitment to provide law students with new teaching material that is drawn from, and that is directly relevant to, Ethiopian history and experience.). *See also* a course material on Legal History and Traditions (Oct. 2007) provided by Dean Fikremarkos Merso, (unpublished manuscript, on file with Professor Thomas F. Geraghty) (extensive course work materials prepared under the auspices of the Ethiopia's Justice and Legal System Research Institute).

Ethiopia's lawyers in Addis Ababa were daunting. Inevitably, the dramatic expansion of the number of slots available in Ethiopia's law schools has resulted in a more diverse but less academically elite student body.

The decision to expand the opportunities to obtain legal education is undoubtedly in the best interests of the country. However, this decision has implications for curriculum and for instruction that are very challenging, especially in the context of undergraduate programs in law. Increased enrollments in public law schools require additional faculty and administrative resources. Larger class size means less faculty contact and individualized instruction. Thus, it becomes difficult to implement new and more interactive teaching methodologies, such as clinical legal education. The cost of duplication and distribution of materials increases with the number of students admitted. These are difficult issues, especially during a period of time in which there is a vigorous effort to expand opportunities for students and faculty.

3. Curriculum Development and Implementation

As noted above, Ethiopia has invested significant resources in developing a new curriculum supported by new teaching materials. The need for new materials was acute. Few new materials had been created since the early 1970's. The new materials reflect the realities of practice in the formal justice system and also recognize the important role of customary dispute resolution systems.

The new model curriculum will require the education and training of more law faculty. Both old and new faculty will have to become experts in areas of law not previously covered by the curriculum. In addition, implementation of more interactive teaching methodologies will also require teacher training. If clinical programs are implemented and expanded, Ethiopian law schools will be required to attract faculty who have experience in practice. [122]

In order to address the need for new law faculty who are prepared to teach in the model curriculum, the Government of Ethiopia is expanding its ability to provide post-graduate legal education in Ethiopia to train law teachers locally and relatively inexpensively. Until recently, most Ethiopian law faculty received their graduate degrees from foreign universities. Given the expansion of legal education in Ethiopia in recent years, sending all law professors abroad for graduate legal education will become increasingly, and perhaps, impossibly expensive. Thus, new initiatives are underway to train Ethiopian law faculty in Ethiopia. .[123]

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[122] A training in new pedagogy was organized by the Justice and Legal System Research Institute in September 2007 for about 70 participants drawn from all law schools in Ethiopia. A similar pedagogy workshop is planned to be held in July 2008.

[123] There are a number of new initiatives underway to support the capacity of Ethiopian law schools to provide graduate legal education. The law firm, DLA Piper, is working with the Addis Ababa University Law Faculty to provide graduate-level instruction in business-related courses. The University of Alabama, under the leadership of Professor Norman Singer and the Ethiopian Ministry of Capacity Building launched a program in March of 2008 to support post-graduate legal studies. The Dutch Government has been supporting law faculty at Jima University and at Bahir Dar University by

The ambitious plans of legal educators in Ethiopia to train future law professors to teach traditional law courses seem well on track from the standpoint of providing the substantive knowledge to teach a new and ambitious curriculum. What is not so clear is what efforts will be made to train existing and future law professors in teaching methodologies that are more interactive and problem-based. In particular, the training of clinical faculty poses significant additional challenges. No planning document reviewed by the authors of this article set forth a plan for attracting and training law teachers qualified to provide clinical instruction.

A critical pre-requisite for teaching clinical skills such as legal writing, appellate and trial advocacy, negotiation, and mediation, is experience in practice. It is not clear the extent to which Ethiopia plans to draw upon practicing lawyers to be trained as law professors. In fact, anecdotal evidence suggests that many new law faculty in Ethiopia are very recent law school graduates. Moreover, the emphasis on the production of traditional scholarship as the primary criterion for the hiring, retention, and promotion of law faculty may be inconsistent with the objective of attracting and retaining faculty qualified to teach clinical courses.

4. Research

The Journal of Ethiopian Law is one of the oldest and most respected law journals in Africa. After the founding of the modern law school in Addis Ababa in 1963, the Journal was published on a regular basis and included articles on newly enacted codes as well as on the interplay between the new codes and customary practices.[124] During and after the time of the Dergue, the Journal was published infrequently and Ethiopian law faculty found it difficult to find support for their scholarly activities.

This situation is changing thanks to the renewed efforts of Ethiopian faculty and staff. The Journal of Ethiopian Law is being published on a regular basis. [125] Moreover, Ethiopian law faculty are increasingly publishing their work in law journals abroad.[126]

However, further support for research is required. While faculties need grants to foster and support their research, they also need time off from teaching that will allow them to write. In addition, they need better access to information. The latter will require a modern library

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covering the cost of post-graduate legal studies. The University of Pretoria has also been instrumental in providing opportunities for Ethiopian law graduates to obtain post-graduate degrees.

[124] See for example, John H. Beckstrom, Divorce *in Urban Ethiopia Ten Years after the Civil Code,* 5Eth.J.L.2(1969) at 283-304; and Thomas F. Geraghty, *People, Practices, Attitudes and Problems in Lower Courts of Ethiopia*, 5Eth.J.L.2(1969) at 427-512.

[125] As per information received by Professor Thomas F. Geraghty from Ato Muradu Abdo, the Coordinator of the Research and Publication Unit of the Faculty of Law of Addis Ababa University, in 2007, Vol. 22 of the Journal of Ethiopian Law came out; in 2008, the Journal will have two issues, July and December issues; the July issue is going according to the schedule; it looks that the regularity of the Journal is being restored.

[126] *See,* e.g., Girmachew Alemu Aneme, *Apology and Trials: The Case of the Red Terror Trials in Ethiopia*, 6 AFR. HUM. RTS. J. 64, 79 (2006); Muradu Abdo, *The International Investment Regime: Towards Evolutionary Bilateral and Regional Investment Treaties?* 1MJIEL1(2004) at 54-75.

and increased access to the internet. Currently, internet access is expensive and slow, complicated by frequent power outages.

5. The Role of Ethiopian Law Schools in Support of Good Governance and Social Justice

Ethiopia's very impressive strategic planning document, *Reform on Legal Education & Training in Ethiopia*, states that "law schools shall actively work for the enhancement of democracy, good governance, tolerance, equality, social justice and economic development for the people of Ethiopia through quality programs of teaching, research and public service…"[127]

As in every county, this lofty goal of legal education is difficult to implement in the context of classroom instruction. Students are pre-occupied with the necessity of learning the law and becoming adept at utilizing the tools of legal analysis and practice. Faculty are dedicated to providing students with the information and training necessary for the performance of technical tasks. In countries that do not enjoy the tradition or luxury of well-established and well-funded resources and institutions to support good governance and social justice, pre- and post-graduate involvement in such activities may, as a practical reality, be quite limited.

Meeting the challenge articulated in Ethiopia's vision for reform of legal education will be difficult. If during law school students are exposed to project-based learning that is focused on good governance and social justice, then that vision could very well become a reality. Implementing "project-based learning" will necessitate additional planning and resources. In addition, it requires the support of the government for programs that may involve analysis of existing practices within Ethiopia's system of justice.[128]

6. Ethiopian Law Schools and the Practicing Bar

In the various documents reviewed by the authors, and in conversations with Ethiopian law faculty and with Ethiopian lawyers, there is very little mention of collaboration between law faculties and practicing lawyers. One has the impression that it is common for graduates of Ethiopian law schools not to remain involved as alumni in the activities of the law schools they attended. It is also common for members of law faculties to have little contact with members of the practicing bar. Without continuing exchanges between law faculties and members of the practicing bar and bar associations, it will be difficult to

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[127] *Reform on Legal Education & Training in Ethiopia*, *supra*, note 60, at p.53.

[128] *See*, *e.g.*, Work undertaken at Northwestern Law School's Center on Wrongful Convictions ("CWC"). CWC, Our Mission , http://www.law.northwestern.edu/wrongfulconvictions/aboutus/mission.html. Through the work of faculty and students at the CWC in the representation of the wrongfully convicted, reforms of the criminal justice system in the United States have been suggested and implemented. *See* CWC, About Us, http://www.law.northwestern.edu/wrongfulconvictions/aboutus/. (detailing the clinics work on offering reforms to reduce the conviction of the wrongfully convicted).

ensure that curricula and teaching methodologies are relevant. It will also be difficult to teach the many practice-oriented courses that are envisioned by Ethiopia's model legal education curriculum. Moreover, law students will be deprived of valuable information about the challenges facing the profession as well as information that will allow them to make informed career choices.

VI. Conclusions and Modest Suggestions

A. Conclusions

This article began with a description of efforts of Westerners to provide support for legal education in Africa. It then went on to describe the dynamic progress now underway in Ethiopia to improve the availability and quality of legal education.

Ethiopia has accepted the proposition that improvements in its system of legal education are critical to the overall well-being of its citizens. This is an auspicious time for legal educators in Ethiopia and for those outside of Ethiopia who seek to support Ethiopia in this ambitious undertaking. Because what is happening in Ethiopia is particularly dynamic, those involved in shaping legal education initiatives in other countries should take notice.

However, it is apparent that even with the resources now being devoted by the Ethiopian Government to legal education, resources from outside of Ethiopia will be needed to support the Government's ambitious plans. Ethiopia needs access to legal information, new materials, new teaching methodologies, and a continuing ability to draw upon the experiences of legal educators from around the world. All of this is expensive.

It is also apparent that many foreign governments, private foundations, foreign law schools, and international NGO's are available to assist in the effort to make legal education in Ethiopia more relevant, more available, and current in legal information, teaching methodology, and technical support.

B. Modest Suggestions

The progress that Ethiopia has made in legal education has been made despite the fact that there is sometimes a lack of coordination of the efforts of the Ethiopian Government and Ethiopian law faculty, and the efforts of non-Ethiopians interested in supporting legal education in Ethiopia. In fact, one of the difficulties faced by both the Ethiopian Government and non-Ethiopian supporters of legal education in Ethiopia is the lack of a centralized knowledge base regarding past and present initiatives to support legal education in Ethiopia. This means that organizations and individuals who may have resources to devote to legal education in Ethiopia often have difficulty making sure that their initiatives are not duplicative and are welcomed by Ethiopian legal educators. A central repository of information and opportunities could be of great benefit to all of those concerned about the future of legal education in Ethiopia, especially at this critical moment when there is so much interest in and support of new initiatives.

The practicing bar in Ethiopia could be a valuable resource in support of efforts to improve the quality of legal education in Ethiopia. The practicing bar should engage law faculties in discussions about the priorities to be given the various initiatives that are planned and/or on-going. Law faculties should seek out members of the practicing bar to assist with programs of legal education, particularly those courses and programs that teach lawyering skills and human rights. There is considerable evidence that leaders of the Ethiopian Lawyers Association are concerned about the development of a stable and predictable legal system staffed by well-qualified and experienced lawyers.[129] Leaders of the Ethiopian Lawyers Association have recently played constructive leadership roles in helping to resolve difficult legal, political, and human rights issues in Ethiopia.

Finally, we make a plea for more support of exchanges between law teachers in Ethiopia and law teachers from abroad. We acknowledge that there is nothing particularly new or creative about this suggestion. But it is a basic truth that we learn from each other. Such learning cannot take place without opportunities for truly collaborative and sustained interactions. It takes time, effort, and money to develop the relationships that lead to the most productive collaborations. There are many opportunities for such collaborations on behalf of legal education in Ethiopia. Given the recent expansion of legal education in Ethiopia, and the priority placed upon legal education in Ethiopia, governments, foundations, and law schools outside of Ethiopia should view support of legal education in Ethiopia as an important opportunity to make a difference.

[129] See, *e.g.*, THE ETHIOPIAN BAR REVIEW (February, 2007) (a publication of the Ethiopian Bar Association containing the articles on trademarks, arbitration, and case reports).

ENVIRONMENTAL POLICY AND LAW OF ETHIOPIA: A POLICY PERSPECTIVE

Khushal Vibhute[*#]

Introduction

Man, who has acquired the power and ability to transform his environment in countless ways, has unending desire for better quality of life and materialistic comforts. The state, which claims sovereignty over its natural resources, has also been excessively exploiting and indiscriminately using natural resources at its command to meet its endless desire for development. The excessive exploitation of natural resources and their imprudent use, rather misuse, by Man and State have been posing serious threats to the fragile ecosystem. The environmental crisis is evinced by global warming; rise in the sea level; ozone depletion; acid rains; water, air and soil pollution; the extinction of numerous animal and plant species, and the loss of biodiversity.

The global community, conscious of the deteriorating ecosystem and its consequences, has been trying hard to arrest further deterioration of the environment. The hitherto convened three mega Conferences, *namely*, the UN Conference on the Human Environment (UNCHE, 1972), the UN Conference on Environment and Development (UNCED, 1992), and the World Summit on Sustainable Development (WSSD, 2002), have, *inter alia*, evolved a couple of global prescriptive and normative environmental policies and principles. These are the precautionary principle (including the environmental impact assessment), the polluter-pays principle, sustainable development, and common but differentiated responsibility. These principles have influenced environmental policies and laws of different countries, including Ethiopia.

The present paper attempts to have a 'closer look' at the environmental policy and law of Ethiopia and to highlight the nexus between the policy and the law.

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[#] I would like to sincerely thank Ato Muradu Abdo, former Asst. Dean of the Law Faculty, for allotting me a course on Law of Environment and thereby 'motivating' me, in my background and understanding of International Environmental Law, to have a 'closer look' at the Environmental Policy and Law of Ethiopia and for persuading me to pen it down.

I would also like to express my sincere thanks to the Officials of the Environmental Protection Authority for giving me audience for frank informal interactions and for unhesitant parting with documents and information in their armory. The dialogue and documents have immensely helped me in having further 'deeper peep' into the Environmental Policy and Law of Ethiopia and in sharpening some of my ideas.

I would like to acknowledge the efforts taken by Ato Girma Haile for making me available the Federal First Instance Court's decision in Action for Professionals' Association for the People (APAP) v Environmental Protection Authority, Civil File No. 64902/21.02.1999 (EC).

1. Environmental Policy of Ethiopia- A Broad Policy Perspective

1.1 Environmental Policy and Environmental Law-Mutual Context

Environmental law, ostensibly, is the juridical articulation of environmental policies and programs. However, the evolution and formulation of environmental policy of a State is a complex process. It is influenced, rather dictated, by policy-oriented approaches to other sectors correlated with the environment. Environmental policy of a State is bound to have significant correlation with the State's population policy, agricultural policy, land and natural resources use policy, development policy, industrial policy, rural and urban development policy, forest policy, mining policy, and transport policy, to name a few. Eco-interests of the political parties, national scientific advancement and development priorities, among others, also play significant roles in the formulation of environmental policy.

1.2 Environmental Policy of Ethiopia- A Sketch

A broad and basic environmental policy of Ethiopia is reflected in the FDRE Constitution,[1] the Environmental Policy of 1997 (hereinafter the EPE).[2]

1.2.1 FDRE Constitution-Environmental Spirit and Policy Principles

A set of 'fundamental rights' and 'environmental objectives' incorporated in the FDRE Constitution exhibits Ethiopia's deep concern for the environment. They also contain some basic policy-oriented principles and guidelines for environmental protection and management.

A. Fundamental rights

The FDRE Constitution guarantees the fundamental right to live in a clean and healthy environment, the right to livelihood, and the right to sustainable development.

(1) ***The right to a clean and healthy environment***

The FDRE Constitution is one of the constitutions in the world that explicitly recognizes the right to live in a clean and healthy environment. Art 44(1) declares that 'all persons have the right to a clean and healthy environment'. It finds place in the Chapter dealing with 'Fundamental Rights and Freedoms' along with other precious rights of an individual, such as the right of thought and expression, the right of assembly and demonstration, the right of access to justice, and the right to property, to mention a few. Such a high place accorded to it in the Constitution exhibits the country's deep concern for the environment.

[1] The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995.
[2] Environmental Protection Authority and Ministry of Economic Development and Cooperation, *Environmental Policy* (1997).

(2) *The right to livelihood*

Art 44(2) of the Constitution guarantees a person, who is displaced or has lost means of his livelihood due to the implementation of State programs, the right to seek appropriate compensation from the State. It reads:

> *All persons who have been displaced or whose livelihoods have been adversely affected as a result of State programmes have the right to commensurate monetary or alternative means of compensation, including relocation with adequate State assistance*.

The right to livelihood, another aspect of the right to live in a clean and healthy environment, can potentially check the Government's actions and programs that threaten to dislocate persons and thereby disrupt their right to livelihood.

(3) *The right to sustainable development*

Art 43(1) of the Constitution, *inter alia*, guarantees the people of Ethiopia 'the right to sustainable development' and 'the right to improved living standards'.

The right to sustainable development, as globally perceived, refers to the development that meets the needs of the present generation without compromising the environmental needs of its future generations. [3] Art 43(4) reiterates the underlying idea of sustainable development i.e. development through rational and prudent use of the environmental resources. In pursuance of the right to sustainable development, Ethiopia, by virtue of art 43(3), is required to see to it that its international agreements and relations, concluded, established or conducted, with other states protect and ensure the right to sustainable development.

The right to improved living standards, obviously, has reference to the better quality of life in terms of environment as well as other basic needs and comforts.

Against this backdrop, it is significant to note that art 89 of the Constitution, which outlines 'economic objectives', *inter alia*, refers to the Government's duty to hold, on behalf of the People, land and other natural resources and to deploy them for the common benefit and development of the People.[4]

B. The constitutional imperatives of the right to a clean and healthy environment and of the right to sustainable development

The constitutional significance of arts 43 and 44 and of the fundamental rights guaranteed thereunder can be realized when one recalls the provisions of arts 13 and 105 of the Constitution. The former imposes on the Federal and the States legislative, executive and judicial organs 'the responsibility and duty to respect and enforce' the Fundamental Rights.

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[3] See, World Commission on Environment and Development, *Our Common Future* (1987) 43.
[4] Art 89(5), FDRE Constitution.

While art 105 mandates that arts 43 and 44 and the rights guaranteed thereunder, being Fundamental Rights, can be amended *only* when (i) all the State Councils, by a majority vote; (ii) the House of Peoples' Representatives, by a two-thirds majority vote, and (iii) the House of Federation, by a two-thirds majority vote, approve the proposed change(s).

C. Environmental objectives

The Constitution also enumerates a set of 'environmental objectives' and places them under the chapter dealing with 'National Policy Principles and Objectives'. These objectives are placed along with the 'principles' for 'external relations' and 'national defence', and 'political, economic, social and cultural objectives'. Such a constitutional treatment and status accorded to them, obviously, exhibit the prime concern of the Ethiopian Government for 'environment'. Art 92, listing these environmental objectives, reads:

1. *Government shall endeavour to ensure that all Ethiopians live in a clean and healthy environment.*
2. *The design and implementation of programmes and projects of development shall not damage or destroy the environment.*
3. *People have the right to full consultation and to the expression of views in the planning and implementation of environmental policies and projects that affect them directly.*
4. *Government and citizens shall have the duty to protect the environment.*

Art 92, thus, not only reiterates the fundamental right to live in a clean and healthy environment but also imposes a corresponding constitutional 'duty' on the Federal and the Regional Governments, along with citizens, 'to protect the environment'. In the same spirit, it expects the Governments to ensure that development projects and programs do not damage or destroy the environment. It also assures Ethiopians that they have the constitutional right to participate in the planning and implementation of environmental policies and projects that affect them directly.

These 'environmental objectives' are not merely pious or cosmetic constitutional declarations. Art 85(1) of the Constitution mandates all organs of the Federal and Regional Governments 'to be guided' by these 'objectives' in implementing the Constitution, other laws and public policies. The objectives, thus, do acquire the status of 'guiding principles' in the State Governance.

D. International environmental obligations- the Fundamental Principle

Art 9(4) of the Constitution, one of the fundamental principles of the Constitution, makes international agreements ratified by Ethiopia an integral part of its domestic law. It states that 'All international agreements ratified by Ethiopia are an integral part of the law of the land'.

No other substantive step, except a Proclamation ratifying the convention, is required to make a ratified agreement an integral part of the Ethiopian law. The President of Ethiopia

has to proclaim it in the *Negarit Gazeta* [5] and the Judiciary, along with the Executive, has to take its judicial notice.[6]

1.3 Environmental Policy: Goal, Objectives, Key Guiding Principles, and Implementation Strategy

The Environmental Protection Authority Establishment Proclamation No. 9/1995, which came into force on August 24, 1995, i.e. three days after the FDRE Constitution came into force, established the Environmental Protection Authority (hereinafter the Authority), *inter alia*, to prepare environmental protection policy and laws.[7] It accomplished its task on April 2, 1997 by completing the EPE.

In the backdrop of the environmental philosophy and spirit of the fundamental rights to live in a clean environment and to sustainable development, the EPE offers a structural and strategic policy-blueprint of the environmental governance in Ethiopia. The structural and strategic paradigm of the EPE is designed in the light of, and guided by, the well articulated 'Overall Policy Goal' and 'Specific Policy Objectives'. The 'goal' and 'objectives', in turn, are premised on, and built around, the eleven 'Key Guiding Principles'.[8]

1.3.1 Environmental Policy: the Goal, Objectives and Key Principles

A. The overall policy goal

The overall policy goal is two-fold, *namely*, the improvement and enhancement of the health and quality of life of Ethiopians, and promotion of sustainable development. The former gives stress on the improvement of the environment for realizing the constitutional right to a clean and healthy environment. While the latter gives, prominence to the balancing of environmental needs and interests of the present and of the future generations.

B. The specific policy objectives

The Specific Policy Objectives of the EPE, which set comparatively more specific policy goals for the environmental law, are: (i) to ensure that essential ecological processes and life support systems are sustained, biological diversity is preserved, and renewable natural resources are used in such a way that their regenerative capabilities are maintained and that the needs of future generations are not compromised, (ii) to ensure that the benefits of exploitation of non-renewable resources are also extended to the future generation, (iii) to prevent the pollution of land, air and water in the most cost-effective way so that the cost of effective preventive intervention does not exceed the benefits; (iv) to ensure peoples' participation in the eco-management, (iv) to improve the environment of human settlements in such a manner that satisfies the physical, social, economic, and cultural

[5] Art 71 (2), *ibid*.
[6] Art 2(3), Proclamation No. 3/1995.
[7] Art 6, Proclamation No. 9/1995.
[8] Paras 2.1-2.3, EPE.

needs of the inhabitants, and (v) to enhance public awareness and understanding about the link that exists between development and environment.

C. The key guiding principles

The 'key guiding principles' are the principles on which the 'overall policy goal' and the 'specific policy objectives' are based. These 'key guiding principles', the EPE hopes, will help the policy-makers in shaping subsequent environmental policies, strategies and programs and their implementation. These principles, according to the EPE, will also help them in ensuring consistency in the sectoral and cross-sectoral environmental policies dealt with under the EPE. Some of the pertinent 'key guiding principles' are: (i) every person has the right to live in a healthy environment, (ii) the development, use and management of renewable resources need to be based on sustainability, (iii) the use of non-renewable resources need to be minimized and where possible their use should be extended through recycling, (iv) when a compromise between short-term economic growth and long-term environmental protection is necessary, the compromise should be in favor of protection of the environment, (v) environmental protection should be made an integral part of development planning, (vi) regular and accurate assessment and monitoring of environmental conditions should be undertaken and the information relating thereto should be widely shared with the public, (vii) increased awareness and understanding of environmental and resource issues should be promoted by policy makers, government officials, and the population, (viii) a 'conservation culture' in environmental matters among all levels of society should be encouraged, and (ix) an integrated implementation of cross-sectoral and sectoral policies and strategies should be perceived as a pre-requisite for attaining objectives of the EPE.

D. The sectoral and cross-sectoral policies

The EPE also formulates a set of comprehensive sectoral and cross-sectoral environmental policies. The former signify that the environmental policy, to be comprehensive, needs certain policy-oriented approach to other inter-related sectors of the environment. While the latter signify the need to tackle, with specific goals, other related sectors, social as well as economical, to make the environmental policy more effective and holistic. As stated earlier, environmental policy of a State is influenced by a number of other related policies. The EPE, with an inimitable vision, has outlined environmental policy in terms of policy statements pertaining to varied inter-related sectors and cross-sectors[9] in a single document so that a goal-oriented comprehensive environmental policy of Ethiopia emerges therefrom.

A careful reading of the sectoral and cross-sectoral environmental policies reveals their stress on safeguarding the environment and emphasis on the sustainable, judicious, and eco-friendly use of the environmental resources. These policy propositions, with contextual

[9] Paras 3.1-3.10 & 4.1-4.10, *ibid*. Nevertheless, Ethiopia has a couple of policy documents on specific issues. See, the National Population Policy (1993), the National Biodiversity Policy (1997), the Economic Policy (1998), the Federal Water Resource Management Policy (1998), and the Agricultural and Rural Development Policies and Strategies (2002).

variations, also propagate a blend of protective, preventive, precautionary, and conservative approaches to, and strategies for, the protection and use of the environmental resources.

Out of these, Environmental Impact Assessment (EIA), as a means of assessing in advance the adverse impacts of any developmental activity on the environment and of incorporating an appropriate measure in the development plan itself, figures more prominently in the EPE. Further, the 'Environmental Information System' asserts that the right to live in a clean and healthy environment 'carries with it the right to be informed about environmental issues'.

1.3.2 The Implementation Strategy

In consonance with the constitutional spirit and in the light of its 'overall goal', the 'specific policy objectives' and the 'key guiding principles', the EPE, in its last segment, also indicates the way to implement the environmental policy. It visualizes an institutional mechanism that gives political as well as popular support to the sustainable use and effective management of natural and environmental resources at all the levels from the Federal down to the *Wereda* and community levels.

The legal instruments designing institutions and strategies for conservation, development and management of natural and environmental resources, the EPE stresses, should be in conformity with the Constitution, especially with respect to the decentralization of power; harmonization of sectoral interests, and integration of environmental planning with development planning.

With a view to avoiding conflict of interests, the EPE proposes that the task of developing and managing natural resources, as a matter of policy, should be assigned to one organization and that of environmental protection, regulation and monitoring to another. It suggests that the enforcement and administration of environmental laws and regulations should be assigned to (the Federal and Regional) courts.

1.3.3 Significance of the Environmental Policy

The environmental policies and strategies reflected in the EPE are not mere pious declarations or wishful thoughts of their author, the Authority. It seems that they have emerged after considerably intensive deliberations among members of the Authority, a multi-Ministerial statutory body. It was composed of the Minister of Agriculture, the Minister of Trade and Industry, the Minister of Health, the Minister of Mines and Energy, the Commissioner of the Science and Technology Commission, the Minister of Water Resources, and the General Manager of the Authority.[10] Further, it is equally significant to note that *the Conservation Strategy of Ethiopia* (CSE),[11] a multi-volume report, dealing extensively with the principles, guidelines and strategies for the effective management of the environment and sustainable development of the country, has played a crucial role in

[10] Art 8, Proclamation No. 9/1995.

[11] Environmental Protection Authority and Ministry of Economic Development and Cooperation, *Conservation Strategy of Ethiopia*, vols I-V (1996).

shaping the EPE. It seems that the Authority has drawn inspiration from, and heavily relied upon, the second volume of the CSE, captioned '*National Policy on Natural Resources and the Environment*, in its formulation of the EPE.

Further, the EPE is also endorsed by the Federal Council of Ministers in April 1997 itself. The seal of approval by the Council of Ministers added further impetus, legal as well as political, to the EPE and to the environmental policy-objectives, principles, and strategy-incorporated therein.

2. Environmental Law of Ethiopia: A Policy-Oriented Analysis

2.1 Environmental Law of Ethiopia: Legislative Framework

In the backdrop of the environmental policy, let us now have a 'closer look' at the environmental law of Ethiopia.

Environmental laws of Ethiopia can conveniently be grouped into two broad categories based on their underlying motivational sources. *First*, the Proclamations enacted by the Parliament for giving effect to the environmental policy reflected in the FDRE Constitution and the EPE. *Second*, the Proclamations giving effect to international environmental obligations of Ethiopia.

However, at the outset we want to make it clear that in this paper we will confine ourselves to, and concentrate on, the post-FDRE Constitution Proclamations that intend to translate environmental policy of Ethiopia into the law. Therefore, Proclamations or other instruments having the force of law, or that dealt with, or had bearing on, one or the other aspect of the environment, and emanated from, or prevailed during, the erstwhile imperial regimes, the Dergue regime or the period of the Transitional Government, will not figure in the present paper. This is appreciatively done for two obvious reasons. *First*, the present writer, as mentioned in one of the opening paragraphs of the paper, is merely interested in having 'a closer look' at the existing environmental policy and law of Ethiopia. *Secondly*, the pre-FDRE Constitution legislative instruments, dealing with, or having bearing on, the environment, in the present submission, do not qualify to be labeled as 'environmental law', in the strict sense of the terms, as the connotations 'environment' and (the consequential) 'environmental law' paved their way in the arena of 'law' and thereby became amenable to legal discourse only after the UNCHE (1972). At the most, these instruments may be termed as 'incidental' environmental laws as their 'prime objective' was not the protection of the environment. Similarly, we will not undertake any analysis of the Proclamations that, by virtue of art 9(4) of the FDRE Constitution, have given effect to the international environmental obligations of Ethiopia.

In fact, the FDRE Constitution, by conferring on individuals the right to have a clean and healthy environment and on Ethiopians the right to improved living standards and to sustainable development and creating a corresponding constitutional duty on the Government to make every possible effort to ensure that Ethiopians live in a clean and healthy environment and not to, through its programmes and projects of development, destroy or damage it, and on the Ethiopians to protect the environment, has envisaged a

great role of (environmental) law in the realization of these constitutional rights and in the protection and improvement of the environment.

However, the Federal Legislature, except enacting the Proclamation No. 9/1995 establishing the EPA and assigning to it, *inter alia*, the task of formulating environmental policy, did not until 2002 show much enthusiasm in using law in the environmental governance. In the absence of sound environmental policy until 1997, the legislative inaction can understandably be appreciated. However, not a single Proclamation, dealing with environment, emanated from the Parliament between 1997 and 2002 even though the EPE was ready to translate itself into law. Only in October 2002, it, through the Environmental Protection Organs Establishment Proclamation No. 295/2002 (hereinafter the EPO Proclamation), has 're-established' the Environmental Protection Authority (hereinafter the EPA) and repealed the Proclamation No. 9/1995.

Nevertheless, the EPO Proclamation carries significance in the Ethiopian environmental law regime for two reasons. *First*, it is the first Proclamation in the series of the Proclamations that are tuned, contextually, thematically as well as operationally, to the tone of the EPE. With a view to avoiding conflict of interests between the organizations that are responsible for the environmental development and management activities, on the one hand, and the organizations responsible for the environmental protection, regulation and monitoring, on the other, as proposed in the EPE, [12] it, *inter alia*, re-structured the EPA. It, again in tune with the EPE, seeks to establish a 'system' that fosters coordinated but differentiated responsibilities of environmental monitoring at the Federal and Regional levels. *Secondly*, it has set in motion the EPA, an autonomous public institution of the Federal Government, headed by, and accountable to, the Prime Minister, to see that the 'environmental objectives' reflected in the FDRE Constitution and the basic principles set out in the EPE are realized.

In pursuance of the EPE, the Environmental Impact Assessment Proclamation No. 299/2002 (hereinafter the EIA Proclamation) and the Environmental Pollution Control Proclamation No. 300/2002 (hereinafter the EPC Proclamation), dealing respectively with EIA and environmental pollution control, followed in December 2002 the EPO Proclamation.

These three Proclamations, in fact, constitute the core of the Ethiopian environmental law regime. They, among other things, deal with protection of the environment, the safeguarding of human health and well-being, the prevention of pollution, the environmental standards and enforcement thereof, the enforcement mechanism, and environmental impact assessment.

2.2 Environmental Law of Ethiopia: Structural Paradigm

Now, we will have a closer look at the structural framework of the environmental law that emerges from the EPC and the EIA Proclamations, the two core substantive environmental law instruments.

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[12] Preambulary para 1, EPO Proclamation.

Realizing the fact that some socio-economic development activities may be harmful to the environment, the EPC Proclamation, through appropriate measures and strategies, endeavors to mitigate the environmental pollution. While the EIA Proclamation, realizing that adverse impacts of a development activity on the environment can be predicted and assessed in advance and accordingly apt measures can be taken to arrest those effects or risks, provides for a mechanism of EIA.

2.2.1 The EPC Proclamation

The EPC Proclamation, *inter alia*, prohibits a person from polluting or causing any other person to pollute the environment in violation of the 'environmental standards' (hereinafter ESs) to be set by the EPA. Causing environmental pollution is an offence under the Proclamation.[13] It authorizes the EPA or the relevant Regional Environmental Agency (hereinafter the REA) to take an apt administrative or legal measure, including the closure or relocation of an enterprise, against such a person. A polluter is required to clean up or pay the cost of cleaning up the polluted environment as determined by the EPA or the REA.[14]

For the purposes of preventing environmental pollution, the Proclamation mandates the EPA to formulate practicable ESs. Art 6 (1) runs:

> *In consultation with competent agencies, the Authority shall formulate practicable environmental standards based on scientific and environmental principles. The sectors that require standards shall include at least the following:*
>
> *(a) Standards for the discharge of effluents into water bodies and sewage systems.*
> *(b) Air quality standards that specify the ambient air quality and give the allowable amounts of emission for both stationary and mobile air pollution sources.*
> *(c) Standards for the types and amounts of substances that can be applied to the soil or be disposed of on or in it.*
> (d) *Standards for noise providing for the maximum allowable noise level taking into account the settlement patterns and the availability of scientific and technological capacity in the country.*
> *(e) Waste management standards specifying the levels allowed and the methods to be used in the generation, handling, storage, treatment, transport and disposal of the various types of waste.*

However, art 6(3) authorizes the EPA to prescribe different ESs for different areas for protecting the environment or rehabilitating it. Art 6(5) also empowers it to waive, for a fixed period, compliance with some requirements of specified ESs for promoting 'public

[13] For details, see '4.2 Operational Strategies', *infra*.
[14] Art 3, EPO Proclamation.

benefit'. A Regional State, based on its specific situation, can adopt ESs stringent than that stipulated by the EPA. However, it, by virtue of art 6(4), is not permitted to adopt the standards that are less rigorous than those set by the EPA.

The Proclamation provides for the enforcement of ESs through the 'Environmental Inspectors' (EIs) to be appointed by the EPA or the relevant REA.[15] For effective implementation of these standards, it also imposes certain duties on individuals and creates a set of offences for their failures.[16]

The Proclamation does not allow a person to handle, store or dispose any hazardous waste, radioactive substance, or hazardous chemicals without having a license from the EPA or the relevant REA to this effect. A person engaged in handling of hazardous waste is required to take appropriate precaution to prevent any damage to the environment or to human health or well-being. A person engaged in the preparation, manufacturing or trading in hazardous substance or hazardous chemical is required to ensure that the chemical is registered, packed and labeled as per the applicable standards.[17]

By virtue of art 5 of the Proclamation, all urban administrations in the country are duty-bound to ensure that the collection, transportation, and, as appropriate, the recycling, treatment, or safe disposal of municipal waste is carried out through an integrated municipal waste management system. And the EPA, in collaboration with the relevant REA, is required to monitor and evaluate adequacy of the system and to ensure its effectiveness.

2.2.2 The EIA Proclamation

The EIA Proclamation intends to ensure development without unacceptable adverse impacts on the environment. It aims to integrate environmental considerations in the development planning process so that natural resources are used in a responsible manner and thereby the environment is protected. It endeavors to ensure eco-friendly development.

It, *inter alia*, empowers the EPA, through Directive, to determine the categories of development projects that are/are not likely to have negative impacts on the environment. The development projects that fall in the category of activities that entail adverse impacts on the environment require EIA.[18] A proponent, who initiates a development activity that finds place in the list of the activities that are likely to have adverse impacts on the environment, is required to get the EIA done before the proposed project is launched. For this purpose, he is obligated: (i) to identify the likely adverse impacts on the environment

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[15] Arts 7-9, *ibid*. For details see, '4. Implementation of Environmental Law: Institutional Framework and Operational Strategies', *infra*.

[16] Arts 12-17, *ibid*. For details see, '4.2.1.2 Environmental Crimes and Penal Sanctions: A Strategy for Controlling Environmental Pollution', *infra*.

[17] Arts 4 & 5, *ibid*.

[18] Art 5(1), EIA Proclamation. The EPA has identified major activities that require/not require EIA. See, Environmental Protection Authority, *Environmental Impact Assessment Procedural Guideline Series 1* (2003). For comments on EIA, see Mellese Damtie and Mesfin Bayou, *Overview of the System of Environmental Impact Assessment in Ethiopia: Gaps and Challenges* (2007).

of his project, (ii) to incorporate in the design of his project the apt means of their prevention or containment, and (iii) to get an Environmental Impact Study Report (EIS Report) prepared, at his cost, by experts.[19] The EIS Report is required to contain 'sufficient information' to enable the EPA or the concerned REA to determine as to whether the proposed project should or should not be allowed to proceed. An EIS Report, as a rule, is required to include in it a description of: (i) the nature of the project, including the technology and processes to be used, (ii) the content and amount of pollutants that are likely to be released during operation of the project, (iii) source and amount of energy required for its operation, (iv) likely trans-regional environmental impacts of the project, (v) characteristics and duration of all the estimated environmental impacts, (vi) measures proposed to eliminate, minimize, or mitigate the identified negative impacts, (vii) contingency plan in case of accident, and (viii) procedures designed for self-auditing and monitoring of the activity during its operation.[20] Then, he is required to submit the EIS Report, along with its brief summary in non-technical terms and necessary documents, to the EPA for review and necessary approval, if the proposed project is subject to licensing, execution or supervision by a Federal agency or when it is likely to produce trans-Regional impacts. Otherwise, he is required to submit it, for review and approval, to the REA where he plans to launch the project.[21]

The EPA or the relevant REA, before it reviews the Report, has to make it available to the public and experts and to solicit their comments. Then, it has to evaluate the Report in the light of the comments received from public and experts as well as from the communities that are likely to be affected by implementation of the project.[22] After review, the EPA or the relevant REA, may: (i) approve the project and issue the required authorization, (ii) approve the project and issue authorization with 'conditions' that the proponent should fulfill, or (iii) refuse implementation of the project, if it is convinced that the negative impacts cannot be satisfactorily avoided.[23] In case of conditional approval, the proponent is under legal obligation to fulfill the terms and conditions attached with the authorization[24] and the EPA or the relevant REA is to monitor and evaluate the compliance.[25] Failure on part of the proponent to comply with the conditions may warrant a fine in amounting between 10,000 and 20,000 Birr,[26] suspension or cancellation of the authorization, and the consequential suspension or cancellation of the license.[27]

Every licensing agency is under legal obligation, prior to issuing an investment permit or a trade or an operating license for any development project, to ensure that the EPA or the relevant REA has authorized its implementation.[28]

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[19] Art 7, *ibid*.
[20] Art 8, *ibid*.
[21] Art 14(1), *ibid*.
[22] See, arts 9(2) & 15, *ibid*. Also see art 6(3).
[23] Art 9(2), *ibid* .
[24] Art 7(4), *ibid*.
[25] Art 12(2), *ibid*.
[26] Art 17(4), *ibid*.
[27] Art 12(3), *ibid*.
[28] Art 3(3), *ibid*.

The Proclamation provides for incentive as well as punitive measures for ensuring EIA of development projects.

3. Implementation of Environmental Law: Institutional Framework and Operational Strategies

3.1 Institutional Framework

A careful look at the EPC and the EIA Proclamations discloses that the EPA is entrusted with the task of environmental protection.

3.1.1 The EPA- the Old and the Re-structured: Change in Philosophy and Role Perception

The prime 'objective' with which the Authority was created in 1995 was 'to ensure that all matters pertaining to the country's social and economic development activities are carried out in a manner that will protect the welfare of human beings as well as sustainably protect, develop and utilize resource bases on which they depend for survival'.[29] It was composed of two components, the General Manager [with the Deputy General Manager] and the Environmental Protection Council (EPC). The latter was composed of: (i) an official (designated by the Government-Chairman), (ii) the Minister of Agriculture, (iii) the Minister of Trade and Industry, (iv) the Minister of Health, (v) the Minister of Mines and Energy, (vi) the Commissioner of Science and Technology, (vii) the Minister of Water Resources, and (viii) the General Manager of the Authority.[30] The General Manager was the Chief Executive Officer of the Authority. The EPC had twin powers, i.e., (i) to deliberate upon policy matters concerning environmental protection and to submit (to the Council of Ministers) recommendations thereon, and (ii) to evaluate and approve directives and standards issued by the Authority.[31]

The Authority, as a composite legal entity, was, *inter alia*, charged with the responsibility of: (i) preparing environmental protection policy and laws, and, upon approval, following up their implementation, (ii) preparing standards that help in the protection of soil, water and air as well as the biological systems they support, and following up their implementation, (iii) recommending the application of diverse encouragement and regulatory measures for the better protection of the environment, (iv) following up of the implementation of international treaties on environmental protection to which Ethiopia is a party, (v) providing instructions required for enhancing awareness of the need for environmental protection, and (vi) rendering advice and technical support to Regions on environmental protection.[32]

The EPO Proclamation re-structured the Authority with renewed philosophy and assigned it much more extended and varied roles to translate the constitutional rights to a clean and healthy environment and to sustainable development, and the EPE objectives, into a reality.

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[29] Art 5, Proclamation No. 9/1995.
[30] Art 8, *ibid*.
[31] Art 10, *ibid*.
[32] Art 7, *ibid*.

The EPA is created with the objective of formulating and implementing policies, strategies, laws and standards that foster socio-economic development that sustains longer and protects the environment.[33] It, unlike its predecessor, is accountable to the Prime Minister.[34]

The re-structured EPA, however, like the Authority, has two basic components with different nomenclatures, *namely*, the executive and policy-making. Director General, appointed by the Government, Heads the EPA, directs and administers its activities.[35] While the Environmental Council (EC) comprises of the Prime Minister (or his designee)-Chairman, members to be designated by the Federal Government, a representative designated by each National Regional State, a representative of: the Ethiopian Chamber of Commerce, the local NGOs, the Confederation of the Ethiopian Trade Unions, and the Director General of the EPA.[36] Responsibilities of the EC are: (i) to review proposed environmental policies, strategies and laws, and issue recommendations to the Government, (ii) to evaluate and provide appropriate advice on the implementation of the EPE, and (iii) to review and approve directives, guidelines and ESs prepared by the EPA.[37]

The EPA, as a composite legal institution, is entrusted with a variety of (26) powers and duties. These powers and duties can, for clarity and brevity, be grouped into seven thematic heads, *namely*, (i) formulation of environmental policies, laws and their enforcement, (ii) setting ESs and their enforcement, (iii) EIA, (iv) collection and dissemination of information about environmental matters, (v) participation in the formulation and implementation of international environmental policy, (vi) co-ordination (research on environmental protection and other activities), and (vii) advisory.[38]

A careful comparative look at the structural framework of the Authority and the EPA discloses that the latter moves away from the multi-Ministerial-influence in the formulation and implementation of environmental policies and laws. It gives representation to the Federal and Regional Governments, the Ethiopian Chamber of Commerce, local NGOs, and Trade Unions in the formulation of environmental policies, laws, strategies, and in the approval of directives, guidelines and ESs prepared by the EPA, and implementation of the EPE. It also reveals that it, among others, is made more responsive to the environmental policies and objectives reflected in the Constitution as well as in the EPE and to their realization. With this changed philosophy and role perception, it is assigned the overall task

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[33] Art 5, EPO Proclamation.
[34] Art 3(2), *ibid*.
[35] Arts 7(2) & 11(1), *ibid*.
[36] Art 8, *ibid*. The first EC is constituted only on September 21, 2007. It consists of : (i) the Deputy Prime Minister, Chairman, (ii) the State Minister, Ministry of Agricultural and Rural Development, (iii) the State Minister, Ministry of Mines and Energy, (iv) the State Minister, Ministry of Water Resources, (v) the State Minister, Ministry of Public Works and Urban Development, (vi) the State Minister, Ministry of Trade and Industries, (vii) the Mayor, Addis Ababa City Administration, (viii) the Mayor, Dire Dawa City Administration, (ix) the Head, National Regional States (all) (x) the President, Ethiopian Chamber of Commerce, (xi) the President, Forum for Environment, (xii) the President, Confederation of Ethiopian Trade Unions, and (xiii) the Director General, EPA.
[37] Art 9, *ibid*.
[38] Art 6, *ibid*.

of eco-management. To accomplish its task in a better way, the EPA is armed with the thitherto unknown multifarious powers (like setting ESs and their compliance, power to seek entry into any premise, and inspect anything while enforcing the ESs), equipped with a variety of strategies (like establishing a system for EIA, carrying cost-benefit analysis of development projects), and entrusted with certain duties (like liaising with competent agencies for environmental protection, carrying studies for combating desertification and mitigating the effects of draught on the environment and taking corrective measures).

3.1.2 Sectoral Units and Regional Environmental Agencies- A New Co-ordination Institutional Strategy

The EPO Proclamation has brought in another significant change in the environmental monitoring system. It mandates every Ministerial and Government Unit of the Federal and Regional Governments to establish (or designate an existing one) an environmental unit and to charge it with the responsibility of ensuring that activities of the Ministerial or Government Unit are compatible with and carried out in accordance with the environmental laws in vogue.[39]

It also mandates the Regional States, and the Addis Ababa and the Dire Dawa Administrations to establish (or designate the existing one) an independent environmental agency in the region. Such an institution is required to be premised on the EPE and the CSE and to incorporate a decision making process that allows public participation. And the REA be charged with the responsibility of: (i) coordinating the formulation, implementation, review and revision of the regional conservation strategies, (ii) monitoring, protecting and regulating the environment of the region, and (iii) ensuring the implementation of the Federal ESs, or of the region's own if they are not less stringent than that of the Federal ones.[40] The REA is also required to prepare periodic reports on the status of environment and of sustainable development in the region and to submit them to the EPA.[41]

3.2 Operational Strategies

In pursuance of its objective, the EPO Proclamation has conferred more than two dozens 'powers and duties' on the EPA. However, subsequently, within less than two months, two of these powers and duties, *namely*, 'setting of ESs and their compliance' and the 'establishing a system of EIA', probably perceiving them as the most crucial strategies for accomplishing the environmental objectives reflected in the Constitution and the EPE, received legislative attention. The EPC Proclamation and the EIA Proclamation respectively govern these two.

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[39] Art 14, *ibid.*
[40] Art 15(1) & (2), read with art 2(8), *ibid*.
[41] Art 15(3), *ibid*. However, it is not clear as to whether these reports are subject to review by the EPA.

3.2.1 Environmental Pollution Control: Strategy and Scheme

The EPC Proclamation, as mentioned earlier, mandates the EPA to lay down ESs for different sectors of the environment. Discharge of effluents in the given environment in excess of the stipulated standards amounts to 'pollution'. It categorically prohibits a person from polluting the environment. Art 3(1) states that 'No person shall pollute or cause any other person to pollute the environment by violating the relevant environmental standard'. It makes an act of pollution, and acts related thereto, an offence.

A. Environmental standards: Norms and compliance **with them**

After taking into account the environmental standards prevalent in some of the developing Asian and African countries, like Bangladesh, Pakistan, India, Jamaica, China, Thailand, Uganda, Nigeria, Zambia, and Kenya, and looking into the relevant information obtained from the UNEP, United Nations Industrial Development Organization (UNIDO), the European Union, and the United States' Environmental Protection Agency, the EPA has prepared a set of ESs to be introduced throughout Ethiopia.[42] However, a REA, taking into consideration peculiar ecological conditions in the region, can have its own standards provided they are not lesser stringent than that prescribed by the EPA.

However, these standards are merely provisional in nature and are not in operation as they are still awaiting the requisite statutory approval of the EC.

The EPA or the concerned REA is mandated to ensure 'compliance' of the ESs through EIs appointed by it.[43] With a view to ensuring effective compliance with these standards, an EI is empowered:

1. *To seek entry into any land or premise at any time (which seems appropriate to him) even without a court order or prior notice, if he thinks that such a notice is likely to be prejudicial to the efficient performance of his statutory duty.*
2. *To question any person alone or in the presence of witness.*
3. *To check, copy or extract of any paper, file or a document, which, in his opinion, is related to pollution.*
4. *To take samples, in the presence of the proprietor or his representative, of any material and to carry out or cause to be carried out tests thereof for determining whether or not it causes harm to the environment or to life.*
5. *To take photographs, measure, draw, or examine any commodity, process or facility for ensuring compliance of the Proclamation and/or any other relevant law.*
6. *To seize any equipment or any other object that is believed to have been used in the commission of an offence under the Proclamation and/or any other relevant law.*

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[42] See, Environmental Protection Authority, *Provisional Standards for Industrial Pollution Control in Ethiopia* (2007).
[43] Art 7(1), EPC Proclamation.

7. *To specify a person the matter constituting contravention of the Proclamation and/or of any other relevant law, and to specify the measures that he needs to take to remedy the contravention within the stipulated period.*
8. *To suggest corrective measures to be taken immediately, including cessation of the activity, when he suspects that an activity may cause damage to the environment.*[44]

With a view to ensuring unreserved compliance with the ESs, the Proclamation also mandates a person, natural as well as juridical, not to hinder or obstruct an EI in the execution of his duty.

The EPA or the relevant REA is empowered to take any administrative or legal measure, including the closure or relocation of an enterprise, if it, in its opinion, poses a risk to human health or to the environment.

B. Environmental crimes: A strategy for controlling environmental pollution

One of the prominent strategies employed for combating environmental pollution is the creation of environmental crimes and subjecting their perpetrators to severe punitive sanctions. The EPC and the EIA Proclamations have resorted to this strategy.

The EPC Proclamation has created a set of offences relating to: (i) pollution, (ii) environmental inspectors, (iii) records, and (iv) wastes and hazardous materials.

By virtue of art 3(1) of the EPC Proclamation, as mentioned earlier, no person is allowed to pollute or to cause any other person to pollute the environment. And art 16 of the Proclamation makes an act of discharging pollutants in the environment in violation of the stipulated ESs an offence. The offence is punishable by a fine of not less than 1,000 Birr and not more than 5,000 Birr or an imprisonment for a term between one year and ten years, or both. And if the polluter happens to be a juridical person, its liability further escalates. It is punishable by a fine amounting between 5,000 and 25,000 Birr *and* imprisonment of the officer in charge for a term between five and ten years or by a fine between 5,000 and 10,000 Birr or both.

The Criminal Code of 2004 (hereinafter the CC),[45] however, stipulates more severe punishment for causing pollution. It provides for a fine of upto 10,000 Birr or rigorous imprisonment for a term of up to five years for discharging, in contravention of the relevant law, pollutants into the environment. If the pollution results in serious consequences on the health or life of persons or on the environment, the term of rigorous imprisonment extends up to ten years.[46] The CC also provides for rigorous imprisonment for a term of upto fifteen years if a person intentionally poisons a well, cistern, spring, water hole, river or lake.[47]

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[44] Art 8, *ibid*.
[45] Proclamation No. 414/2004. It has revised and repealed the Penal Code of the Empire of Ethiopia, 1957.
[46] Art 519, *ibid*.
[47] Art 517(2), *ibid*.

Under the EPC Proclamation, the EIs are, *inter alia*, authorized to seek entry into any premises, to inspect documents, to question a person, to take samples and to carry their tests, and to seize any instrument. It also creates corresponding obligation on the persons concerned to render the requisite assistance to him. Art 13 makes (i) any act of a person that hinders or obstructs an EI in the execution of his duty, (ii) a failure of a person to comply with lawful orders of an EI, (iii) a refusal to an EI to seek entry into any land or premise, (iv) an act of hindering an EI from getting access to records, (v) an act of preventing an EI from checking, copying or extracting any paper, file or any other document, and (vi) withholding, misleading or giving wrong information to an EI, an offence. Such a person, if happens to be a natural person, is punished by a fine of not less than 3,000 Birr and not more than 10,000 Birr. If it happens to be a juridical person, its liability extends to a fine of not less than 10,000 Birr and not more than 20,000 Birr and an imprisonment (of the officer in charge) for a term between one year and two years or a fine amounting between 5,000 and 10,000 Birr or both.

If a person, who, by virtue of the Proclamation or any regulation, is required to keep records fails to do so or alters records, he is punishable by a fine of not less than 10,000 Birr and not more than 20,000 Birr.[48]

A person who fails to manage any hazardous waste or another substance according to the relevant laws, mislabels or fails to label or in any way withholds information about any hazardous waste or other material or attempts to take part or takes part or attempts to aid or aids in the illegal traffic of any hazardous waste or other material is punishable by a fine of not less than 20,000 Birr and not more than 50,000 Birr. If the person happens to be a juridical person, it is punishable by a fine of not less than 50,000 Birr and not more than 100,000 Birr and the officer in charge to an imprisonment for a term between five and ten years, or a fine of not less than 5,000 Birr and not more than 10,000 Birr or both.[49]

In addition to these specified penal sanctions, the Proclamation contains two additional punitive clauses. Art 12, which is a sort of residuary penal provision, deals with the punishment for the acts that amount to offences under the Proclamation or any other law in force but no punishment is provided therefor either in the Proclamation or the Penal Code of 1957. It provides for a fine of not less than 5,000 Birr and not more than 10,000 Birr or an imprisonment for a term up to one year or both, if the offender happens to be a natural person. And if the perpetrator happens to be a juridical person, the punishment provided for is a fine of not less than 10,000 Birr and not more than 20,000 Birr. However, if the juridical person happened to be in charge and had knowledge about the commission of the offence but failed in his duty to avert it, he would be ordered to pay a fine of not less than 5,000 Birr and not more than 10,000 Birr or to undergo an imprisonment for a term up to two years or to bear both. However, art 12(3) makes the punishment prescribed under the Proclamation inapplicable if the punishment provided for the offence by the Penal Code (now CC) is more severe.

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[48] Art 14, EPC Proclamation.
[49] Art 15, *ibid.*

Art 17 of the Proclamation, *inter alia*, empowers the trial court, in its discretion, to order confiscation of 'any thing used in the commission of the offence in favor of the State or to dispose it of in any other way' and to order the offender to bear the cost of cleaning up and disposing of the substance, chemical or equipment.

The EIA Proclamation also creates a set of environmental crimes for ensuring EIA. Without prejudice to the relevant provisions of the Penal Code (now CC), it provides for criminal liability for operating a development activity without obtaining the requisite authorization from the EPA or the relevant REA,[50] making a false presentation in the EIS Report, failing to keep the required records, and failing to fulfill conditions attached with the authorization. The first two offences are made punishable by a fine ranging in between 50,000 Birr and 100,000 Birr, while the latter two are made punishable by a fine of not less than 10,000 Birr and not more than 20,000 Birr. It also provides for an additional fine of not less than 5,000 Birr and not more than 10,000 Birr for a Manager if he failed to exercise his due diligence.

The CC also labels certain acts contrary to EIA as offences. It provides for simple imprisonment for a term of up to one year for a person who implements a development project requiring EIA without obtaining the requisite authorization or makes a false statement concerning EIA.[51]

C. Restoration of damage to the environment: A strategy of the eco-management

The EPC and the EIA Proclamations, in addition to the penal sanctions mentioned here before, also provide for restoration of the damage to the environment.

Art 17(c) of the EPC Proclamation empowers a trial court, in its discretion, to order the person convicted under the Proclamation or Regulations issued thereunder to 'restore to the state in which the environment was prior to the infliction of the damage, and when such restoration is not possible to pay appropriate compensation'. Similarly, art 18(5) of the EIA Proclamation allows a trial court, before which a person is prosecuted for committing an offence under the Proclamation and/or Regulations or Directives issued thereunder, in its discretion, to, in addition to the penalty imposed, order the convicted person 'to restore or in any other way compensate for the damage inflicted'.

Art 3(4) of the EPC Proclamation, incorporating the 'polluter-pays principle', and also empowers the EPA and the REA to ask a polluter to clean up or to pay the cost of cleaning up the polluted environment.

D. Incentives: A strategy for preventing environmental pollution

The EPC Proclamation allows the EPA to exempt any new imported equipment for controlling pollution from customs duty. The Council of Ministers is expected to issue a

[50] Art 18(2), EIA Proclamation. It seems that the Printers have inadvertently omitted some material part from the provision.
[51] Art 521, the CC.

Regulation providing incentives for the existing undertakings.[52] However, it has yet to issue such a Regulation. Nevertheless, a Draft Regulation prepared in 2005 by the EPA,[53] for consideration of the Council of Ministers, *inter alia*, indicates the following incentives. Art 10 says:

> *10. Incentives:*
>
> 1. *An industrial enterprise that installs equipment to avoid the generation or to recycle pollutants may be entitled to a 30 percent depreciation allowance on such equipment.*
> 2. *An industrial enterprise that installs equipment to minimize the generation of pollutants at least by 50 percent shall be granted a 15 percent depreciation allowance on the equipment.*
> 3. *Any equipment or spare-parts thereof destined to treat a pollutant shall be exempted from all taxes.*
> 4. *The incentive rights granted under these Regulations shall not limit the enjoyment of other rights provided for under other laws.*

Similarly, the EIA Proclamation mandates the EPA and the REA to, within the means available, 'support implementation of a project destined to rehabilitate a degraded environment'. It enables the EPA, within its capacity, to provide any environmental rehabilitation, pollution prevention, or clean up project with financial and technical support to cover additional costs.[54]

E. Public interest litigation: An innovative strategy of the environmental pollution control

Art 3 of the EPC Proclamation empowers the EPA and the relevant REA to 'take any administrative or legal measure', penal and/or civil, against a polluter. Nevertheless, art 11 of the EPC Proclamation grants 'standing' to a private individual for initiating action 'against any person' who is allegedly causing or is likely to cause damage to the environment. It reads:

> *11. Right to standing*
>
> *1) Any person shall have, without the need to show any vested interest, the right to lodge a complaint at the Authority or the relevant regional environmental agency against any person allegedly causing actual or potential damage to the environment.*
> *2) When the Authority or regional environmental agency fails to give a decision within thirty days or when the person who has lodged the complaint is dissatisfied with the decision, he may institute a court*

[52] Art 10, EPC Proclamation.
[53] The Industrial Pollution Prevention and Control Regulation (2005).
[54] Art 16(2), EIA Proclamation.

case within sixty days from the date the decision was given or the deadline for decision has elapsed.

The phraseology of art 11 does not make it clear as to whether a private individual has 'standing' in initiating criminal as well as civil action against an actual or a potential polluter. Some of the terms (like 'vested interests' and 'complaint') used in the article give indication that he has 'standing' in initiating only a civil action, while others (like 'instituting a court case' and 'damage to the environment', which under the Proclamation can be done only by violating the ESs and thereby committing an offence thereunder) rule out such a restriction. Further, from the wordings of art 11(2) it becomes difficult to ascertain the underlying legislative intent. The provision does not make it crystal clear as to whether the EPA or the REA can/cannot be made a party to the 'court case', along with, or in exclusion of, the alleged polluter. It leaves scope for two possible interpretations. A complainant may argue that it will be difficult/impossible for him to know the 'reasons' and 'factors' that prompted the EPA or the REA for not taking a 'decision' or taking a 'decision' that is neither sound nor appealing unless the former is made a party to the case. And it [the EPA or the REA] should be made accountable for failing in its statutory obligation (of controlling environmental pollution). While the EPA or the REA may oppose such a move on the ground that art 11 gives the complainant the 'right to standing' to initiate an action against a 'person' who is causing or is likely to cause 'damage to the environment' and not against a supervisory body, like it. Both the arguments seem to be equally appealing and fitting into the legislative intent reflected in art 11(2). [55] This sort of ambivalence should be done away with by the Legislature.

Nevertheless, art 11, in the backdrop of art 33 of the Civil Procedure Code of 1965, which lays down a general principle that 'no person' can be a plaintiff in a civil action 'unless he has vested interest in the subject-matter of the suit', carves out an exception. It allows 'any person', even having 'no vested interest', to initiate civil proceedings against a person who is causing or is likely to cause damage to the environment. The phrases 'any person' and 'without the need to show any vested interest' used in art 11 are of wide amplitude. They

[55] Recently, in Action for Professionals' Association for the People (APAP) v Environmental Protection Authority (Civil File No. 64902, Federal First Instance Court, October 31, 2006 [21.02.1999 (EC)] (Unpublished), the first case instituted under art 11 of the EPC Proclamation, these viewpoints were agitated before the Federal First Instance Court. The APAP, a social organization, after lodging a complaint on December 8, 2005 with the EPA about pollution of Akaki and Modjo rivers caused due to discharge of industrial effluents contrary to the EPC Proclamation and urging it to take immediate steps to combat it. The EPA, on December 26, 2005, responding the complaint, pleaded that the environmental standards are still in the draft form and are awaiting the EC's approval and therefore they cannot be relied upon for deciding whether the rivers are polluted or not. It also asserted that it has taken 'all the necessary measures' to combat the pollution. The APAP, being dissatisfied, on March 16, 2006 approached the Federal First Instance Court for seeking apt relief. It made the EPA a defendant. In its petition, APAP, *inter alia*, urged the court: (i) to compel the EPA to take administrative and legal measures to stop the alleged pollution, (ii) to direct the EPA to clean both the allegedly polluted rivers, and (iii) to institute inspectors to ensure that the EPA takes the necessary measures. The court, on 31.10.2006 [21.02.1999 (EC)], ruled that art 11(2) does not permit APAP to sue the EPA. The present writer is told that the Court's ruling is challenged in the Federal High Court and it has decided to hear it. If the appeal is admitted, the issue may probably resurface before the High Court.

enable environmentalists, public-spirited individuals, NGOs or organizations, to invoke art 11 in their fight against environmental degradation.

It enables a private individual to make the EPA and the REA more responsive to the environmental protection and to make them to act with vigor to discipline actual and potential polluters. It gives an opportunity to environmentalists, in the public interest, to attract attention of the EPA and the REA to the environmental pollution when their EIs, advertently or inadvertently, turn blind eyes to anti-environmental activities or deliberately become inactive in discharging their statutory obligations.

However, it is pertinent to note a few pragmatic facts that diminish the practical utility of art 11. When a private individual/an organization intends to institute or institutes a court case against a person for causing or likely to cause damage to the environment, it may not be easy for him/it to collect all the required information to substantiate his/its assertion in the court. He/it does not have any authority to receive information from the polluter or from the EPA or the relevant REA. By virtue of art 19 of the EPC Proclamation, a person engaged in an activity pertaining to any of the provisions of the Proclamation (or any other related law) is obliged to provide information to the EPA or the relevant REA, and only the EPA has access to all environmental information. He/it also does not have any legal authority to seek entry into the premises where alleged anti-environmental activities are being carried out, to take sample of the effluents therefrom, or to inspect documents or equipments. If he/it ventures to do so, he/it takes risk of being prosecuted for unlawful trespass. All these powers, as mentioned earlier, vest with the EIs. Therefore, all the required information can be accessed by, and is available to, the EPA or the relevant REA. In the absence of such information, a complainant is bound to loose his case. Thus, art 11 practically turns out to be non-existent. However, with a view to overcoming the difficulty and to making the 'standing' of a private individual more effective, environmental laws of most of the countries, recognizing *locus standii* of private individuals in environmental matters, have, through law, made it obligatory for the pollution control authorities to make available, on demand, all the relevant information available with them to the individual intending to institute a case against a polluter.[56] Similar provision, with requisite modifications, may advisably be incorporated in the EPC Proclamation.

3.3 Grievance Redressal Mechanism

3.3.1 Redress of Grievance under the EPC Proclamation

The EPC Proclamation, as mentioned earlier, empowers the EPA to formulate ESs and to ensure compliance to them through the EIs, who are armed with vast powers.

[56] For example, in India the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981 oblige the Pollution Control Boards to disclose relevant internal reports and information to a person seeking to prosecute a polluter. However, a Pollution Control Board is allowed to withhold any report if it considers that disclosure would be against 'the public interest'. While in some jurisdictions, individuals are conferred with the right to information, which can be invoked to obtain the requisite information from the environmental protection agencies.

A look at these powers convinces one that EIs need to be armed with these powers for effective compliance of the standards even though some of the powers are drastic. Exercise of most of the powers, obviously in the quest for controlling pollution, is left entirely to the subjective satisfaction of the concerned EI. He is allowed to invoke them when he apprehends that the ESs have been violated or are likely to be violated. Some of the powers, if exercised capriciously or on unfounded apprehensions, may even go against the spirit of some of the cherished rights, constitutional or statutory, of an individual. The Proclamation merely expects an EI to 'discharge' his powers 'with due diligence and impartiality'.[57] Nevertheless, exercise of these powers in a capricious manner or on some unfounded apprehensions cannot be ruled out. The Proclamation does not hint at any substantive or procedural restrictions on the EI. He is left entirely to his conscience and sense of impartiality when he decides to invoke and exercise his powers.

However, the Proclamation provides for a right to appeal to the 'Head' of the EPA [i.e. the Director General] or of the concerned REA by a person dissatisfied with any of the measures taken by the EI. Such an appeal has to be made within ten days from the date on which the EI has taken the measure. And if the 'Head' has not given any decision on the appeal or has given a decision with which the person is not satisfied, he may, within thirty days from the date on which the decision was given or the deadline for such a decision has elapsed,[58] institute a case in a Federal Court of First Instance or a designated regional court, as the case may be.

However, in the absence of self-evident malafide actions of the EI, it would be difficult for the aggrieved person to either convince the Head of the EPA (or of the REA) that the EI did not exercise his powers 'with due diligence and impartiality', the phrase pregnant with legal imprecision and of wide amplitude.

The Proclamation is silent about the way and the manner in which the 'Head' is expected to handle the grievance at his hand. It seems that there is neither a Directive nor a Regulation on the subject. Such a legal instrument, in the opinion of the present writer, is necessary for, *at least*, two reasons: (i) it will streamline the decision-making process at the EPA and the REA, and (ii) it will help to eliminate the apprehended departmental bias from the decision-making process. An aggrieved person might apprehend that the institutional bias might go in favor of the EI, an appointee of the 'Head'. It is one of the settled principles in administrative law that justice should not only be done but also should be seen to have been done. Such an instrument, therefore, will do away with the apprehension and thereby will boost his confidence (and that of others) in the decision-making process at the EPA and the REA levels. It will also ultimately relieve the EPA and the REA from unwarranted court proceedings.

Further, proving a case by an aggrieved person against the EI before the court, for the reasons mentioned here before, is not an easy task. However, if he has been able to make

[57] Art 7(2), EPC Proclamation.
[58] Art 9, *ibid*. However, art 9(1) does not stipulate any deadline for the Head of the EPA or of the REA for giving his decision. Therefore, a combined reading of art 9(1) & (2), in this context, exhibits some legislative ambivalence.

out his case, the Proclamation is silent about the 'relief' he is entitled to as well as the kind of 'liabilty' that can be imposed on the erred EI. It gives an impression that the EI, in the name of seeking compliance with the ESs, is free to exercise his powers even in a capricious manner with impunity. If the impression is correct, it, in the present submission, deserves serious attention of the policy-makers. An appropriate inbuilt mechanism within the administration of the EPA and the REA is, therefore, needed. Such a move will not only boost confidence of the aggrieved persons in the grievance redressal mechanism designed at the EPA, the REA and the judicial levels but will also desist the EIs from exercising their powers on flimsy grounds.

3.3.2 Redress of Grievance under the EIA Proclamation

The EIA Proclamation empowers the EPA or the relevant REA, after evaluating an EIS Report, to approve, refuse or allow with certain conditions the implementation of a development project, and in the latter case to monitor their compliance. It also provides a grievance procedure for a person who is dissatisfied with certain decisions of the EPA or the relevant REA. Art 17 says:

> *17. Grievance Procedures*
>
> *1) Any person dissatisfied with the authorization or monitoring or any decision of the Authority or the relevant regional environmental agency regarding the project may submit a grievance notice to the head of the Authority or the relevant regional environmental agency, as may be appropriate.*
> 2) *The decision of the head of the Authority or relevant regional environmental agency shall, as provided under Sub Article (1) above, be issued within 30 days following the receipt of the grievance*.

The provision is self-explanatory. It enables a dissatisfied proponent to seek redress from the Director General of the EPA or the Head of the relevant REA. They are obligated to give their decision within thirty days from the receipt of the grievance notice.

For appreciating the nature and ambit of the grievance procedure, it is, however, necessary to note two facts. *First*, the EPA or the relevant REA, after evaluating the EIS Report, is empowered to approve, approve with conditions, or refuse an authorization for the proponent's project and to monitor the implementation of an authorized project and to ensure the compliance of the conditions attached with the authorization. *Secondly*, the Proclamation, unlike the EPC Proclamation, does not provide for any judicial remedy to a proponent who is dissatisfied with any decision, including decision about the authorization or monitoring thereof, of the EPA or the REA.

The absence of a provision in the Proclamation for seeking judicial redress against any decision of the Director General of the EPA or of the Head of the REA leaves scope for two conflicting views.

One may argue that the Proclamation excludes judicial review of decisions of the 'Head' of the EPA and of the REA as it gives finality to the decisions. This view gets support from the fact that the EPC Proclamation contains in it an explicit provision enabling a person dissatisfied with the decision of the Director General of the EPA or of the Head of the REA to seek judicial remedy. The absence of a similar provision in the EIA Proclamation exhibits the legislative intent of keeping these decisions away from judicial scrutiny. Further, one may even seek support from art 3, read with art 9, of the EPC Proclamation, which excludes judicial review of certain decisions of the EPA and of the REA pertaining to the control of pollution. The EPC Proclamation does not allow a polluter to seek judicial review of: (i) any of administrative or legal measures taken against him by the EPA or the REA, (ii) its order to install a sound technology for reducing or avoiding generation of waste and to employ methods of recycling of waste, (iii) its order to clean up or to pay the cost of cleaning up of the polluted environment, and (iv) order to close or relocate his enterprise if it is posing threat to the human health or to the environment. The exclusion of judicial review of decisions of the EPA and of the REA under the EIA Proclamation is, therefore, in tune with the legislative policy of keeping decisions of the EPA and of the REA beyond judicial purview.

One, however, may take a position that the absence of explicit provision for judicial redress against the decisions of the Director General and of the Head of the REA in the EIA Proclamation does not give finality to the decisions of the EPA or of the REA. Such an argument finds its base in, and seeks support from, art 37 of the FDRE Constitution. It says that 'everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power'. In no way, he may argue, can the EIA Proclamation take away the constitutional right of access to justice. A dissatisfied proponent, he may assert, therefore, cannot be precluded from seeking judicial redress.

Both the views seem to be equally sound and convincing. We will have to wait until a test case reaches to a court of law to know the judicial interpretation of art 17. However, the present writer is inclined to prefer the second view for the simple reason that an ordinary legislative instrument cannot vitiate a constitutional right.

Conclusions

The FDRE Constitution guarantees the fundamental right to have a clean and healthy environment, the right to improved living standards and the right to sustainable development. It also includes in it a set of well-articulated 'environmental objectives' and accords them the status of 'guiding principles' in the state governance.

Immediately after the Constitution came into force, Ethiopia, in 1995, established the Authority and assigned it, *inter alia*, the task of formulating Environmental Policy. It accomplished its task in 1997 by formulating a comprehensive EPE. The EPE is premised on, and is built around, the fundamental rights to live in a healthy environment and to sustainable development, and the environmental conservation strategy. It also offers a set of sound baseline principles for implementing the policy. The EPE is indeed in tune with the international environmental policy and principles.

In pursuance of the EPE and the environmental spirit reflected in the FDRE Constitution, the Federal Parliament, in 2002, restructured the EPA and armed it with a new set of powers and duties. It also enacted other two core Proclamations for carrying out EIA and controlling environmental pollution.

However, none of the two Proclamations is yet in operation. There are no environmental standards to seek compliance for or no EIA norms to apply. In the absence of these standards and norms, these anti-pollution Proclamations are still dormant in the statute book. The EPA has prepared comprehensive ESs, EIA guidelines, and a few draft Directives for effective environmental governance but they do not have legal force as they have yet to receive the requisite approval of the EC. The EC, for the first time, was constituted in September 2007. It has yet to convene its first meeting. Hopefully, these environmental standards and guidelines will become operative very soon as the EC is set to meet in the near future. It is hoped that EPA thereafter will start functioning with vigor to combat the environmental pollution and to make every possible effort to see that very soon the constitutional right of Ethiopians to live in a clean and healthy environment and the right to sustainable development and to improved living standards become a reality.

However, in the meantime, it would be apt to pay due attention to some of the gray areas, structural as well as operational, spotted in this paper to make the Ethiopian environmental law regime more effective. There is a need to create some appropriate inbuilt-mechanism to ensure that the EIs, who are armed with vast powers, do not exercise their powers in a capricious manner and thereby put legitimate interests and rights of the persons at stake with impunity. Similarly, the right to standing under the EPC Proclamation and the mechanism for grievance redress designed under the EPC and EIA Proclamations, for the reasons highlighted in the paper, deserve serious re-look.

The essence of the EPO, the EPC, and the EIA Proclamations may be clustered, with appropriate thematic segments, in a single Proclamation. The suggestion, if acted upon, will lead to a couple of advantages for the enforcing authorities as well as for the persons concerned. A combined reading of the three Proclamations reveals that a couple of articles are reproduced in more than one Proclamation.[59] Such a repetition can, without loosing context, be avoided in the suggested unified Proclamation. Some of the articles, when read in the context of other Proclamations, sound inapt as they are, with elaboration, dealt under some other Proclamations.[60] Such provisions can be appropriately modified in the proposed new Proclamation.

Lastly, in the opinion of the present writer, it is high time to undertake a decade's review of the achievements of the EPE to see how many of the policy-propositions, and the sectoral and cross-sectoral environmental policies enumerated in the EPE are/are not given

[59] For example, arts 2(1), 2(3), 2(6), 2(8), 2(12) of the EPO Proclamation are repeated in the EIA Proclamation and the EPC Proclamation.

[60] For example, arts 6(4) & 6(5) of the EPO Proclamation become obsolete in the light of the EIA Proclamation. Similarly, arts 6(7), 6(10) & 6(15) of the EPO Proclamation, in the light of the EPC Proclamation, warrant apt modifications.

legislative effect to and reasons therefor. Such an evaluation will reveal the extent to which environmental policies have been translated into the law. It will also stimulate and initiate legislative processes for translating the hitherto untouched/partially touched policy statements into legislative propositions.

ON FORMATION OF A SHARE COMPANY IN ETHIOPIA

Seyoum Yohannes Tesfay*

Introduction

A share company does not spring into being spontaneously. It rather results from planning and other preliminary arrangements by founders. These promotional activities of founders may be classified into three categories. The first is discovery, which consists of finding the business idea to be exploited. Investigation, the second category, involves research or analysis to determine whether or not the proposed business idea is economically feasible. The third category is assembly, which includes the dual process of bringing together the necessary personnel, property and money to set the business in motion and involves the secondary details of completing the formalities requisite to set up the company.[1]

Fraudulent or careless practice in this formation process can undermine permanently the financial solidity, creditworthiness and profitability of the company. Such practice can also jeopardize the legitimate interests of future creditors of the company.[2] Many legal systems, therefore, deem it necessary to provide safeguards to ensure that errors and malpractices fatal to the company and future creditors do not take place. Ethiopian law too has rules and institutions aimed at preventing malpractices and errors in the formation of a share company. This article aims at critically examining these rules and institutions with a view to throwing some light on those that lack clarity, identifying the *lacunae,* where any, and making suggestions to plug the legal loopholes.[3]

To this end, the writer discusses the fundamental attributes of a share company that underlie formation in the section that follows. In the third section, he deals with the seven specific requirements for formation of a share company. Then follows section four where he dwells on contracts concluded on behalf of a company in formation. Defective formation and its consequences are analyzed in section five. In the very last section, the author summarizes his major findings and makes some recommendations.

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[1] H.G.Henn and J.R. Alexander, Law of Corporations,(West Publishing Co., Hornbook Series, 1983) 237.

[2] D.F. Vagts 'Law and Accounting in Business Associations' in A. Conard(ed), International Encyclopedia of Comparative Law, (Paul Siebeck, 1972)7.

[3] *To gain perspective, the writer has made use of literature in various foreign jurisdictions. As regards terminology, words and terms used in Ethiopian law have been used instead of those in the references, where it is believed that will not distort the ideas in the material being used. Corporation, promoters and incorporators are terms that have been retained and recur particularly often in the article. Comparable terms used under Ethiopian law are Share Company for corporation and founders for both promoters and incorporators.*

1. Nature of a Share Company

Understanding the nature or fundamental attributes of a share company helps shed some light on the formation process and the reasons behind the rules on formation. For this reason, one cannot help asking what a share company really is and its essential characteristics that underlie the formation process.

No simple answer can be found for these questions. The answer may actually vary depending on perspective and emphasis given to various theories. There are a number of theories with differing levels of emphasis on specific features of the company. For instance, the license theory tends to treat the share company as a passive devise wholly at the mercy of the state for its characteristics. In this view, the share company is understood as an entity of limited powers whose characteristics, powers and those of the individuals with interest in it are wholly defined and limited by the state.[4] The concession theory according to which the corporation is created by a grant, from the state, of privileges to form an artificial entity seems to be very close to this understanding of the corporation. Hence, the corporation may be characterized as a legal construct having an existence separate from that of the participants in the enterprise.[5]

Some, however, are of the view that the foregoing understandings tend to oversimplify the reality of the corporate enterprise. According to Larry C. Backer, for example, it is individuals that, in the very real sense, enjoy benefits, take the risks and assume responsibilities we lump together under the legal concept of corporation. The principal participants in the corporate enterprise are owners, managers, and employees while creditors, suppliers, customers, franchisees etc…play a secondary role.[6] So, the corporation might be understood as a series of bargains between these actors with conflicting interests and legally specified powers and duties.[7] It seems, this view meshes in well with the "free" or "normative" outlook according to which a corporation is formed by the voluntary act of founders conforming to the general norms established by the legislature.[8]

The foregoing nuanced understandings make it clear that the exact nature of a share company remains elusive. One should, however, note that the concept of Share Company is a conclusory label, not an analytical tool. If consequences are said to flow from it, they are statements of policy, not logical necessities.[9] So, one should not overemphasize the role of logic in the matter. The share company in Ethiopia is no exception to this. With this in mind we will look at some of the features of a share company that the Ethiopian Commercial Code of 1960, (hereinafter the Code), indicates help us understand its nature, and hence the ideas that lie beneath the formation process.

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[4] L.C.Backer, Comparative Corporate Law: United States, European Uniorn, China and Japan (Durham: Carolina Academic Press, 2002) 323.
[5] R.M. Buxbaum, 'The Formation of Marketable Share Companies' A. Conard(ed), Internatioanal Encyclopedia of Compartive Law,(Paul Siebeck 1975) 4.
[6] L.C.Backer, Comparative Corporate Law, op cit, 304.
[7] Id. 323.
[8] R.M.Buxbaum, 'The Formation of Marketable Share Companies', Op. Cit,4
[9] Id. 35.

According to the Code a share company is a legal person, whose liabilities are met only by its assets.[10] Members are liable only to the extent of the contributions promised but not effectively made.[11] So, understanding the nature of a share company, and hence the formation process presupposes understanding the attributes of legal personality, the extent of liability of shareholders and the related concept of capital. For this reason, a brief discussion of the three follows.

1.1 Legal Personality

In spite of occasional refusal by courts and commentators to treat the company as really separate from its shareholders that a share company and its 'owners' are distinct and separate, each with different rights and obligations is thoroughly entrenched.[12] The same holds true in Ethiopia. The Code vests in a share company legal personality.[13] The law regulates this 'singularity' it 'creates'. The nature of that regulation may depend on the underlying understanding of that singularity. Therefore, the way in which different jurisdictions approach corporate regulation is substantially affected by the underlying understanding of the 'corporate personality.'[14] The same holds true regarding regulation of the formation process.

As a legal person a company has certain powers 'necessarily and inseparably incident to every corporation' such as the power to sue and be sued, the power to acquire capital by selling its shares, the right to appoint agents, the power to compromise *bona fide* disputes etc….[15] The foregoing implies that it is the subject of rights and obligations, in its own right, distinct and separate from its shareholders, directors, managers and creditors etc…. It may, therefore, enter into contracts not only with the outside world but also with its members whom it can sue and by whom it can be sued. The transactions of a share company create legal rights and obligations vested in the company itself as opposed to its members. The property owned by the share company is distinct from that of shareholders'. So, shareholders cannot use, mortgage, and alienate etc… company property for private purposes. Set off is not possible between creditors of a shareholder and debtors of the share company.[16]

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[10] Commercial Code of the Empire of Ethiopia Proclamation, 1960, Arts 212 & 210, Proc No. 166, Neg. Gaz. Year 19, no. 3.

[11] Id Art 304 and 499(4)

[12] W.L.Church,Cases and Materials on Agency and Business Organizations Vol. II, (Unpublished Teaching Material, Haileselassie I University, 1965) 385.

[13] Commercial Code Art 212 and 210

[14] L.C.Backer, Comparative Corporate Law, Op.cit, 324.

[15] J.L. Stewart and M.L.Palmer, Company Law of Canada,(Toronto: The Carswell Company Ltd,5th ed.,1962) 46.

[16] W.L.Church, Cases and Materials on Agency and Business Organizations, Op cit 385. Preclusion of set off is true even for partnerships in Ethiopia (Commercial Code Art 257) while partners may use partnership property for personal ends so long as that does not prejudice the interests of the partnership and the rights of other partners to similarly use the same (Commercial Code Art 245)

In sum, the share company in Ethiopia has all the attributes of full corporate personality as is known in the west[17]. Most of the foregoing attributes like distinction between rights and obligations of members and the association, capacity to perform acts consistent with its nature and being party to legal suits are explicitly vested in associations under the Civil Code.[18] Though the Commercial Code does not explicitly vest similar attributes in share companies it can be argued cogently that all these attributes do apply to share companies, necessary changes having been made. This is so, owing to Art 1 of the Commercial Code, which provides 'unless otherwise provided in this Code, the provisions of the Civil Code apply to the status and activities of persons and business organizations….' That means, in the absence of contrary stipulations in the Commercial Code, the attributes of personality of associations in the Civil Code apply to the personality of business organizations. What is more, jurisprudence has it that, most of these attributes are 'necessarily and inseparably incident to every corporation' as seen above.

1.2 Limited Liability

A defining feature of a share company that underlies the rules on formation is the limited liability of members save in exceptional circumstances stipulated by law. Vesting the benefit of limited liability in shareholders is necessitated by the need to shift some of the costs of innovation and its failures to the creditors and employees of companies.[19] It is maintained that people would be reluctant to invest in large and very risky endeavors without the protection afforded by the concept of limited liability. As a result, it is contended, much human progress would be considerably slowed.[20] It is further argued that conferring the benefit of limited liability on shareholders is compatible with generally accepted views of fairness as a widespread distribution of shares results in divorce of ownership from the opportunity to effectively participate in management.[21] Yet another benefit of this rule is that it minimizes the impairment of capital markets. The idea is that in the absence of limited liability creditors would pursue wealthier shareholders first, and the practical imposition of liability would be influenced by the relative wealth of shareholders. As a result, an investment decision would involve a judgment on the financial conditions of not only the company itself but also of fellow shareholders. This would entail substantial cost of acquiring information about the enterprise and fellow shareholders. The bottom line: raising capital would be less efficient and organized securities markets would be impaired.[22] Other alleged benefits include avoiding increased agency costs, facilitation of the diversification of portfolio, and minimizing contracting costs.[23] We cannot dwell on these without making unwarranted digression from the theme of this article.

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[17] See: W.L.Church, Cases and Materials on the Law of Agency and Business Organizations, Op cit pp 385- 389.
[18] Civil Code of the Empire of Ethiopia Proclamation, 1960, Arts 451 454, 455 Proc. No. 165, Neg. Gaz. Year 19, No. 2.
[19] L.C.Backer, Comparative Corporate Law, Op cit, 995
[20] Ibid
[21] Ibid
[22] Id, 996.
[23] Id, 996 to 997.

In keeping with the laws in other jurisdictions, in Ethiopia, only the assets of the company meet the liabilities of a share company.[24] Assets are the sum total of what the company owns in a general sense.[25] They include what the company got from shareholders by way of contribution and earned surplus. Of the original value of contribution from members, the part that corresponds to the sum total of the *par value* of all the shares makes the capital. [26] Anything contributed by shareholders in excess of the *par value* of shares is known as issue *premium* and is not deemed part of capital[27] but is still part of the assets of the company. The other components of the assets of a share company are the various reserves created from the wealth generated by the company itself. The reserves could be the legal reserve required by law[28] reserves created because required by the articles of association and free reserve created by ordinary general meeting of shareholders, there being no requirement in the law or articles of association. [29] All the foregoing constitute the assets of the company available for execution by creditors. No shareholder is personally liable so long as s/he has made her/his promised contribution.[30]

1.3 Capital and Its Protection

Considerable confusion surrounds the notion of capital under different legal systems. This is particularly so in judicial decisions and academic writings in the United States. There is similar confusion in the United Kingdom though to a lesser degree.[31] In general, the concept of capital has been subject to greater refinement in Romano-Germanic legal systems than Anglo-American jurisdictions. At this juncture, one must note, however, that once the indispensable distinctions have been made, the basic notions of the two groups of legal systems come very close together.[32] Delving into discussion of the concept of capital and the subtle differences in different legal systems is beyond the purpose of this article. For our current purpose, suffice it to say, shareholders acquire rights in a company by paying or agreeing to pay for the shares they take, in money or assets which the company agrees shall be treated as having certain value, and share capital, is the money or the assets contributed by members to the company's resources.[33] The money or assets, which are contributed, become the company's property, but the company does not become the shareholder's debtor for its repayment.[34]

Because the liability of shareholders is limited to their contribution as seen above, there is a need to balance this against the interest of creditors. Hence, capital plays a critical role in a

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[24] Commercial Code, Art 304(1).
[25] See generally, P.Mc. Carthy, Materials for the Study of the Law of Agency and Business Organizations,(Unpublished: Haleselassie I University, 1972) 118. For a more technical definition read Commercial Code Arts 73,10, 74,78, & 79.
[26] Commercial Code Arts 10, 73, and 82.
[27] Id, Art 326 and 455.
[28] Id. Art 454.
[29] Id. Art 453.
[30] Id. Art 304(2).
[31] P.V. Ommeslaghe et al 'Capital and Securities of Marketable Share Companies', in D. Vagts(ed), International Encyclopedia of Comparative Law(Paul Siebeck 1990) 3.
[32] Ibid.
[33] R.R. Peninington, Pennington's Company law,(London: Butterworths &Co.Ltd,1990) 135.
[34] Id 136.

share company in Ethiopia unlike in partnerships and sole proprietorships where at least some of the investors are personally liable to creditors of the firm.[35] In Ethiopia, the capital of a share company is always fully subscribed[36], if not fully paid, and is deemed to be a general security for the payment of the debts of the company. For this reason, the law on share companies is replete with provisions that are meant to ensure the company has assets equivalent, at least to its capital at any given point in time.[37] We, thus, have elaborate rules that are aimed at effective raising of capital on which we will dwell at a later stage. This emphasis that the law puts on raising the capital may be said to be a defining characteristic of a share company. In deed, the concern of the law with effective raising of capital explains a whole host of the provisions of the law on the formation of a share company.

2. Requirements for Formation of a Share Company

In some jurisdictions, the formation of a share company normally poses few significant legal problems with some exception to regulated sensitive industry sectors.[38] Particularly, in Common Law traditions like USA, and UK it is a very simple, fast and routine process unless shareholders contemplate a complex capital structure from the moment of incorporation.[39] In contrast, incorporation in Continental European states can be a complex process in which errors fatal to the corporation can take place.[40] With respect to the incorporation process, Ethiopian law resembles very much Continental European countries like France and Germany. Ethiopian law requires fulfillment of seven particulars. These are:

1. Minimum of five members
2. Minimum initial capital
3. Full subscription of the capital
4. Payment of ¼ of the *par value* of cash shares
5. Submission and valuation of contributions in kind
6. Adoption of memorandum and articles of association and
7. Registration and publicity requirements

We will dwell on each of the above, in this particular order, in the pages that follow.

2.1 Minimum of Five Members

Less than five members cannot establish a share company.[41] One may contend that none of these five should be a straw person. In other words, it could be maintained the spirit of the law is that contributions by each should be of the extent required for carrying out the

[35] Regarding the differences among business organizations on the point of members' liability to creditors compare Commercial Code Arts 304 with Art 255,276(1), 280, & 296.
[36] Commercial Code Art 312(1)a.
[37] G.Everett, The Commercial Code of Ethiopia Selected topics,(Unpublished: Addis Ababa University Faculty Of Law, 1972) 23.
[38] R.M.Buxbaum, 'The Formation of Marketable Share Companies' in A.Conard (ed), International Encyclopedia of Comparative Law, Op cit, 1.
[39] L.C. Backer, Comparative Corporate Law, Op cit 665.
[40] Id 667.
[41] Commercial Code Art 307(1)

purpose of the company. This, one may contend, can be inferred from Art 229(3) of the Commercial Code, which provides contributions to a partnership must be of the nature and extent required for carrying out its purpose. If the law requires sufficiency of contribution in a partnership where partners are personally liable, and hence capital is not of critical importance, for a stronger reason, the amount of contribution of a shareholder in a company should not be nominal. This argument could perhaps be further buttressed by the fact that the law requires a company to have a minimum of three directors and that the directors are supposed to deposit directors qualification shares with the company, which are to be a security for the proper discharge of their obligations.[42] So, arguably contributions by straw men are not acceptable even though the Ethiopian law on Share Company is silent on that. Hence, it might be maintained that the law requires five members who each make contribution, which helps in the attainment of the purpose of the share company, not straw men.

The foregoing view could be challenged though. It may be maintained that the minimum permissible *par value* of a share is ten Birr and the law does not specify a minimum number of shares a person should have[43]. So, it could be contended that a person could invest as little as ten Birr. In other words, it may be held that the amount of the contribution by each member should not be subject to any inquiry as taken alone no shareholder's contribution is enough and even taken together a share company can always be under-capitalized seen from the view point of its business. An additional argument based on policy could be made in support of this view. It could be held that inquiring into the extent of contributions by each member would unnecessarily impede the raising of capital. In other words, people with small savings to invest would be barred from investing because of this requirement. This would ultimately deny the company the opportunity of raising funds from a large pool of investors. In view of all these, it may be argued, the contention that contribution by straw men is illegal does not hold water. It may, therefore, be maintained that it is very easy to comply with the law on this point. All that is needed is finding straw men who contribute ten Birr each. As far as my research could uncover, no Ethiopian court or administrative agency inquires into the extent of the contribution by members. Thus, complying with the requirement for the minimum number of members to form a share company is very easy.

A possible justification for the insistence on the company having the prescribed minimum number of shareholders at formation and for that matter at all times[44] is that the Ethiopian law envisages management organs for the share company where only members of the company can be directors.[45] Under sub 2 of Article 347 every share company should have a minimum of three directors. It also needs to have a meeting of shareholders which is the ultimate authority which appoints, monitors, dismisses etc…the directors.[46] So, it may be argued that the company will not be able to have the organs of management that the law anticipates unless it has at least five members.

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[42] Id. Art 347(1)(2) and 349
[43] Id. Art 306(2)
[44] Id. Art 311(1)
[45] Id. Art 347(1)
[46] Id. Art 419

2.2 Minimum Initial Capital

One of the most significant events in the accounting life of any company is its financial creation through the contribution of cash and assets tangible or otherwise by its shareholders. Many legal systems deem it necessary to provide safeguards to ensure that fraudulent or careless practice in formation do not undermine permanently the financial solidity, creditworthiness and profitability of the new company. One of such safeguards is that which requires the capital contributions of the founders equals a specified minimum.[47] This minimum capital requirement has two major objectives. The first is preserving creditors from becoming involved with companies that are financially too frail. The second is to prevent investors from choosing a corporate form when it is too cumbersome and expensive for their intended operations.[48] In other words, where the capital needed is very small, investors are encouraged to form other types of business organizations that are easier to form, and not a share company. Professor Escarra, one of the drafters of the Code, emphasizes this latter role.[49] In sum, the idea behind this requirement is to prevent the failure of companies owing to under-capitalization and, thus, safeguard the interest of stakeholders like shareholders and most importantly creditors of the company as shareholders are not personally liable to company creditors. Owing to its perceived and real role in protecting creditors, the minimum legal capital is sometimes referred to as the 'ransom' for limited liability.[50]

The statutory requirements regarding minimum initial capital for share companies follow no particular pattern. In some countries high requirement is the rule. In some others, an amount, which was once deemed very high, has become meaningless through inflation and devaluation, as the law is not amended to keep pace with the diminishing buying power of money.[51] Yet in others, you have a small amount. Some other jurisdictions do not even require minimum initial capital for the formation of a company. As is well known, the Common Law tradition is opposed to the idea of a minimum capital requirement. Even the few American state codes that specify minimum capital make it a prerequisite for commencing operations as opposed to formation.[52] The practice in the US with regard to minimum capital is typified by the traditional approach illustrated by the Delaware Corporate Law and the modern approach exemplified by the Revised Model Business Corporation Act. Neither approach stipulates a certain minimum aggregate amount of capital to be contributed to the corporation. Each corporation is free to determine its own minimum. Yet, all corporations are required to be adequately capitalized. So, the question

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[47] D.F.Vagts,'Law and Accounting in Business Associations' in A.Conard(ed), International Encyclopedia of Comparative Law, Op cit 7.
[48] Id 8.
[49] P.Whinship (ed), Background Documents of the Ethiopian Commercial Code of 1960 (Addis Ababa: Artistic Printing Press, 1974) 61 .
[50] Kgeens and B.Servaes 'Corporations and Partnerships in Belgium' International Encyclopedia of Laws(The Hague: Kluwer Law International,1997) 69.
[51] R.Buxbaum 'The Formation of Marketable Share Companies', in A Conard(ed), International Encyclopedia of Comparative Law, Op cit pp 9-10.
[52] Ibd.

of adequate capitalization is determined on a case-by-case basis by the corporation itself.[53] Where the corporation is found to be too thinly capitalized, serious consequences follow under corporate, bankruptcy and tax laws. For instance, shareholders may face personal liability for corporate debt in certain cases. Similarly, the priority of shareholder rights to repayment from out of a bankruptcy estate can be reduced by the doctrine of equitable subordination in bankruptcy. What is more, tax authorities may recharacterize shareholder debt as equity under principles of US federal tax laws.[54]

With respect to the legal minimum capital, Ethiopian law resembles continental European jurisdictions that stipulate a legal minimum. Art 306 of the Code provides "the capital of a share company shall not be less than 50,000 Ethiopian Birr." So, shareholders are required to make available to the company at least this much resources at formation. This sum is, therefore, the 'ransom' for the benefit of limited liability in Ethiopia. This may have been a huge sum by Ethiopian standards, in 1960, when the Code was issued. Today, due to inflation, devaluation and other factors, this is a very negligible amount. So, many share companies that satisfy this legal minimum capital will be undercapitalized from the economic vantage point. Yet, the law attaches no legal consequence to economic under-capitalization unlike in the US where failure to adequately capitalize the company will have various repercussions on shareholders.

2.3 Full Subscription of the Capital

In legal systems that recognize share companies or similar organizations by different appellations, the company capital is regarded as an essential prerequisite for the company's existence without which it cannot be set up.[55] In Ethiopia too a share company cannot be formed without capital. In fact, the law clearly stipulates that a share company is a company whose capital is fixed in advance and divided into shares.[56] The founders will, through the feasibility studies they conduct or cause to be conducted, determine the amount of resources the shareholders will have to make available to the entity.[57] So, the capital is predetermined. Many jurisdictions go beyond requiring fixing the capital of a share company in advance. They require subscription of the capital. In fact, Continental European countries, apart from the Netherlands, always required subscription in full of the corporate capital.[58] In keeping with this tradition, the Code provides, a share company shall not be formed until the capital has been fully subscribed.[59] Subscription in the pre-incorporation context means offers by interested investors to purchase shares when the share company is subsequently formed.[60]

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[53] L.C.Backer, Comparative Corporate Law, Op cit 795.
[54] Id.
[55] P.V.Ommeslaghe et al, 'Capital and Securities of Marketable Share Companies' in D. Vagts(ed), International Encyclopedia of Comparative Law, Op cit 3.
[56] Commercial Code Art 304(1).
[57] See: H.G. Henn and J.R. Alexander, Law of Corporations, Op cit pp 236-238.
[58] P.V.Ommeslaghe et al, 'Capital and Securities of Marketable Share Companies' in D. Vagts(ed), International Encyclopedia of Comparative Law, Op cit 9.
[59] Commercial Code, Art 312(1).
[60] J.E Moye, The Law of Business Organizations(St Paul:West Publishing, 4th ed,1994) 235.

In the Ethiopian context, one might argue, subscription is an 'acceptance' by an investor to purchase shares, rather than an 'offer' to do the same. To buttress this viewpoint, one might raise Art 318, which provides 'a *prospectus* is an offer to subscribers made by the founders'. This, it might be argued, shows that the subscribers are responding to the offer already made, and hence upon subscription the contract to buy shares in the company under formation is complete. This, of course might have interesting repercussions on revocability of subscription and the ability of the company to decline subscriptions. Discussion of these subtleties is beyond the current theme. So, suffice it to say that full subscription of capital entails acceptance by investors to buy all the shares into which the capital of the company is divided and offered by founders for sale, at least in cases where the company is formed by public subscription.[61]

Whether a binding offer to buy shares or acceptance of offer already made to that end, the subscription of capital is necessary because every company needs capital to commence business, and investors must be identified and promises to purchase shares must be secured before the new enterprise goes operational.[62] The fact that Ethiopian law requires full subscription, therefore, forecloses the possibility of formation of a share company without, there being sufficient interest to invest therein, hence minimizing the number of failing companies. In Continental Europe, this subscribed capital is an essential element of the company, endowed with a certain measure of permanency. The founders must therefore, establish it and its amount must be specified in the memorandum of association. It can be modified only in compliance with a variety of safeguards and formalities designed to protect both shareholders and creditors.[63] The law in Ethiopia follows this tradition. The memorandum of association must state the amount of the subscribed capital.[64] What is more, changing the subscribed capital requires compliance with various rules that the law puts in place to protect shareholders and creditors alike.[65]

2.4 Payment of ¼ of the par value of cash shares

If capital safeguards offer any significant protection to creditors of the company, it lies in their application to the capital that is actually paid in. In other words, subscribed capital will not be of much utility to creditors as collection of subscriptions is likely to become difficult at the very moment the money is needed.[66] Aware of this problem, some laws like that of the European Union require the founders to put some real assets at risk before they commence business. Even seen from the vantage point of the company's own practical need, it is important that a company collects and reports assets in amounts that bear a reasonable relation to the risks of its business, before it embarks on operation. Otherwise, it might not be regarded as creditworthy.[67]

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[61] Commercial Code Arts 317 to 322.
[62] J.E Moye, The Law of Business Organizations Op Cit 235.
[63] P.V.Ommeslaghe et al, 'Capital and Securities of Marketable Share Companies' in D. Vagts(ed), International Encyclopedia of Comparative Law, Op cit 4.
[64] Commercial Code Art 313(5).
[65] Id. Arts 431, 484 to 494, 454,470 to 473.
[66] A.F.Conard, 'One Hundred Years of Uniform State Laws: The European Alternative to Unifying Incoproration Laws'(1991) 89 Michigan Law Review 24.
[67] Id.

The Ethiopian law on this point requires shares subscribed in cash be paid up upon subscription as to one fourth of their *par value* or a greater amount if so provided in the memorandum of association.[68] This was necessitated, according to the draftsperson, Professor Escara, by the need to put in place 'a sound commercial regime' that provides security to creditors.[69] To avert loss of the money, the law in Ethiopia requires, this amount be paid up and deposited in a bank, in the name and to the account of the company under formation.[70] The official in charge of the Commercial Register will require proof of that before registering the company.[71] The remaining three fourth can be paid in a period not exceeding five years, according to the plan to be formulated by the company pursuant to Art 342 of the Code. Some European jurisdictions do not believe payment of one-quarter provides sufficient security. A case in point is the current French law, which provides 'shares subscribed in cash be paid in respect of at least fifty *per cent* of their face value'.[72]

2.5 Contributions in Kind: Usefulness, Validity, Submission and Valuation

In an organization like a share company where the liability of members is limited to their contributions, the contribution of members is instituted as much in the interest of creditors as in that of other members and the business firm itself.[73] Hence, there is a need to take particular care to ensure that a contribution by a person does not jeopardize the interest of all stakeholders and especially that of the creditors of the company. In this regard, contributions in kind pose a host of problems. Of particular concern in this respect are: a) usefulness of the contribution b) validity of service as contribution. c) lawfulness and morality of contributions and d) submission and valuation of contributions.

a) Usefulness of the contribution: One issue that raises its head in relation to contributions in kind is usefulness of the contribution in the attainment of the business purpose. Accepting contributions in kind which are manifestly useless jeopardizes the success of the company. This in turn exposes creditors to greater risk than anticipated, as the wealth generated by the company too is their security.[74] Besides, ultimately the interests of the shareholders who made useful contributions are adversely affected as the company's chances of success will be low. Owing to this, and due to the fact that accepting a useless contribution might be regarded as a breach of trust on the part of the founders, the contribution should be such that it helps in the attainment of the business purpose of the share company. In recognition of this, some jurisdictions explicitly require that the contributions in kind be of such a nature that they facilitate the attainment of the business

[68] Commercial Code Art 338(1).
[69] P.Whinship (ed), Background Documents of the Ethiopian Commercial Code of 1960, Op cit 62.
[70] Commercial Code Art 312(1)b.
[71] Id. Arts 323 and 97.
[72] Law No 2003-7 of 3 January 2003 Articles 50 (ii) and L225-3 Official Gazette of 4 January 2003.
[73] J.Heenen, 'Partnerships and other Personal Associations for Profit' in International Encyclopedia of Comparative Law (Paul Sieback 1978) 169.
[74] Commercial Code Art 304(1).

purpose of the company. A case in point is the Belgian law that requires incorporators to draft a report indicating the importance to the company of each contribution in kind.[75]

The Ethiopian company law remains mute on the issue of usefulness of contributions in kind. This should not, however, delude one into thinking that a person can make contributions that are manifestly useless. That would run contrary to the legitimate interests of creditors and other stakeholders. Besides, one may maintain that, the fact that the law on partnerships specifies contributions must be of the 'nature' required for carrying out the purpose of the enterprise,[76] implies the same for companies. There is a stronger reason for requiring that in the context of share companies where none of the shareholders is personally liable to creditors unlike in partnerships where at least one partner is liable to creditors even beyond his/her promised contribution.[77] In spite of this, there is no mechanism in the formation process in Ethiopia to ensure the usefulness of contributions.[78] Hence, requiring the founders to file a report on the usefulness of contributions in kind, as under the Belgian law, seems in order.

b) <u>Validity of contribution of service</u>: Another issue one confronts in relation to formation is whether even where useful contribution of service is valid. Some jurisdictions lay this question to rest by taking position explicitly. The current French Law, for instance, provides, shares may not represent contribution in the form of service.[79] Similarly, under OHADA Treaty, now in force in more than 18 Francophone African countries, only cash and in-kind contributions are allowed. Contributions of know-how, work and services (*apports en industrie*) are prohibited.[80] One possible reason for such prohibition is that contribution of service is of limited utility, if any, to the creditors of a company that has defaulted.

Unlike in the foregoing countries, the law in Ethiopia does not expressly prohibit contribution of service. In fact, it may be cogently argued that contribution of past services, unlike future services, does not seem to jeopardize the legitimate interest of stakeholders in the matter and is permissible where rendered by persons other than founders. This is implied from the fact that the company is under obligation to take over commitments entered into by founders and reimburses all expenses incurred, among others, to pay for services rendered, so long as the services were necessary for the formation of the company.[81] So, one may contend, there is no material difference in effecting payment for such services from the capital and writing off the money owed by the company by issuing shares instead to people other than founders who rendered services in the formation process. This viewpoint is particularly convincing as the law expressly allows, *albeit* in relation to increase of capital after formation, issuing shares to pay off current debts in

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[75] K.Geens and B Sarves, Corporations and Partnerships in Belgium, <u>International Encyclopedia of Laws</u>, Op Cit 62.
[76] Commercial Code Art 229(3).
[77] Compare and Contrast Commercial Code, Arts 255(2), 276(1), 280(1), 296,300 with 304(2).
[78] Interview with Ato Ermias G/Mariam, Registration Officer, Registration and Licensing Department, Ministry of Trade and Industry, February 6, 2008
[79] Law No 2003-7 of 3 January 2003 Articles 50 (ii) and L225-3 Official Gazette of 4, January 2003.
[80] Earnest and Young International, A Guide To OHADA Treaty(Unpublished Brochure) 6.
[81] Commercial Code Art 308(2).

order to increase capital.[82] The service rendered by founders is treated differently owing to the need to protect subscribers from founders securing unreasonably high rewards taking advantage of their dominant position at this early stage, according to Professor Escara.[83] To this end, Commercial Code Art 310 expressly prohibits conferring on founders any benefit other than reserving a share in profits not exceeding one fifth of the profits in the balance sheet for a period not exceeding three years. In fact, Art 310(3) specifically states no founder shares may be issued.

In contrast, it may be argued, the law impliedly prohibits an undertaking to render service in the future. This can be gathered from Art 339(1), which provides shares representing contributions in kind are fully paid for, not later than the day of the registration of the company. It seems, therefore, a promise to render service to the company after formation can never be a valid contribution, and hence cannot form part of the capital of a share company. This viewpoint is further strengthened by the fact that contribution of service is of limited utility to creditors of the company, should the company default. The creditor may not have any interest in getting the service promised by the shareholder. Even if creditors were by some curious circumstances interested in that, specific/forced performance is not required where that affects the personal liberty of a debtor, as does rendering service, under Ethiopian law.[84]

c). Lawfulness and Morality of Contributions: The legal act of contribution may be null and void because its object is unlawful or immoral.[85] "Unlawful" obligations are those contrary to public law or to the mandatory rules of private law. In relation to obligations to convey rights on things as contribution, the object could be unlawful if the thing being contributed is not *in commercio,* that is, non-conveyable by law. For instance, parts of the human body are not *in commercio*.[86] Hence, they cannot be contributed to a company. More importantly, goods excluded from private commerce on grounds of public health as well as things excluded from private commerce for other reasons like public domain property[87] and all land in Ethiopia cannot be contributed to a company. Regarding land, one notes that the FDRE Constitution vests ownership of land exclusively in the 'State and in the peoples of Ethiopia'.[88] Hence, ownership over land cannot be contributed. Note, however that, leasehold right on land, be it on rural or urban land, can validly be contributed.[89] Regarding immoral objects, it suffices to say that a contribution may be found to be null on this ground by courts. Venturing into what kind of contributions may be

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[82] Id. Art 464(2)b.

[83] P.Whinship (ed), Background Documents of the Ethiopian Commercial Code of 1960, Op cit 62.

[84] Commercial Code Art 1read together with Civil Code Arts 1776, 2583. See Also Civil Procedure Code Decree, 1965, Arts 389(1), 400(1), 394, 399, 401 Proc No. 52,, Neg. Gaz. Year 24, No. 3 and George Krzeczunowicz, Formation and Effects of Contracts in Ethiopia (Addis Ababa:Addis Ababa University, Faculty of Law 1983) pp 124-126.

[85] The Civil Code Art 1716. Note at this juncture that the Civil Code complements the Commercial Code because the latter in its first article clearly stipulates that.

[86] Civil Code of Ethiopia, 1960, Op cit. Art 18.

[87] Id Art 1454.

[88] FDRE Constitution Proclamation, 1995, Art 40(3) Proc. No 1, Neg.Gaz. Year 1, No. 1.

[89] Re-Enactment of Urban Lands Lease Holding Proclamation, 2002, Art 13(1), Proc. No. 272 Neg. Gaz. Year 8, No. 19.See also Rural Land Administration and Land Use Proclamation, 2005, Art. 8(3), Proc. No. 456, *Fed. Neg. Gaz.* Year 11 No. 44.

deemed moral or immoral here would be intruding into the courts authority probably for no useful reason.[90]

d) Submission and valuation of contributions in kind: If the capital of the company is to be raised effectively, thus, foreclosing putting at risk the interest of creditors, shareholders and the company itself, contributions in kind must be submitted at the earliest possible time. What is more, their value should not be exaggerated. To this end, Ethiopian law requires contributions in kind be fully made at the very latest on the day of the registration of the company.[91] To prevent overvaluation of contributions in kind, previously, the law ordained that a member who makes a contribution in kind file a report made and sworn by experts appointed by the Ministry of Trade and Industry.[92] These disinterested experts were required to state the method of valuation they followed, and indicate the value they gave to each of the items contributed.[93] Furthermore, this report by independent experts was to be annexed to the memorandum of association so that third parties would have the chance to have a look and make their own judgment.[94] According to Professor Escara,, this system of valuation, which was, in part, borrowed from the Italian Civil Code, was one of the most simple and effective methods available.[95] Indeed, it does seem to be very effective. Unfortunately, the foregoing system of valuation is no longer in place. The agreement of founders or members of the company as to the value of the contributions in kind has substituted this method.[96] So, all that the new law requires is founders, and where the company is formed by public subscription[97] other members too, agree on the worth of contributions made in kind.

The system currently in place is fraught with problems. For one thing, it might be impractical where there are a large number of shareholders with small investment each. Besides lacking the expertise necessary to value contributions made in kind, people who have invested insignificant sums might find involvement in this exercise waste of time, thus leaving it to few. These few could manipulate the process to favour themselves. What is worse, shareholders might deliberately overestimate the value of the contributions of each member in a bid to enhance the creditworthiness of their company by inflating its capital. In some cases, things could get much worse than that. An 'agreement' might be made to 'contribute' property that does not exist or does not belong to the 'contributing' member. This is possible because the notary before whom the memorandum of association is to be signed is required by law to ascertain the right of the transferor to transfer the property, only with respect to contributions made to transfer property for which title

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[90] George Krzeczunowicz, Formation and Effects of Contracts in Ethiopian Law, Op cit pp 65-70.
[91] Commercial Code Art 339(1).
[92] Id. Art 315(1).
[93] Id. Art 315(2).
[94] Id. Art 315(3).
[95] P.Whinship, (ed.),Background Documents of the Ethiopian Commercial Code Op cit 62.
[96] Commercial Registration and Business Licensing Proclamation, 1997, Art 8, Proc. No 67, Neg. Gaz. Year 3, No. 25, as amended, Proclamation to Amend the Commercial Registration and Business Licensing Proclamation, 2003, Art 2(1), Proc. No 376, Id, Year 10, No. 9.
[97] Commercial Code Arts 317 to 322.

certificates are issued under the law.[98] Obviously, the law does not require title certificates for every type of property that might conceivably be contributed to a share company. Title certificates are issued under the law only for immovables and special movables, namely, cars and ships assimilated to immovables.[99]

To prevent mischief in this regard, the people entrusted with authentication of memorandums of association have come up with a novel but problematic method. They require putative contributors of things whose ownership is not evidenced by title certificates to submit receipts of payment upon purchase, customs declarations etc…. Where such 'proofs' are not adduced they do not authenticate the memorandum of association.[100] The problem with this 'solution' is that these documents prove neither the ownership nor the very existence of the property indicated therein. The item indicated on such documents could well have been transferred to someone else for consideration or *gratis* or even destroyed. That they do not accept any contribution not supported by such documents is, therefore, more of a problem than a solution. By insisting on the production of these documents they are effectively excluding contribution of certain things with respect to which such documents can never be adduced such as, say, contribution by a cattle breeder of some of his oxen born to his cows.

The foregoing should not, however, mislead one into thinking that the current law has no mechanism at all aimed at averting overvaluation. It does require directors and auditors to verify and, where necessary, review the valuation made, within six months from the formation of the company. If the revaluation by auditors and directors shows that the contribution in kind was overvalued by one fifth or more, the person who made the contribution in kind is required to make good the difference.[101] What is more, founders are jointly and severally liable for the damage resulting from such overvaluation.[102] My contention is that this is too little too late. During six months of operations lots of mischief could be committed. A host of people may transact with the company in reliance of the inflated capital. So, the revaluation will be little more than shutting the stable door after the horse has bolted, especially in cases where the contributing member(s) and founders are not people of wealth, able to make whole the persons caused damage by the overvaluation. Hence, there is a need to prevent overvaluation rather than relying on *post facto* remedies.

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[98] Authentication and Registration of Documents Proclamation, 2003, Art 4(7), Proc. No 334, Neg. Gaz. Year 9, No 54.

[99] Civil Code Art_1195 and 1186(2), Maritime Code Proclamation, 1960, Arts 7(1), 45 and 50, Proc. No 164, Neg.Gaz. Year 19, No 1.

[100] Interviews with Ato Desalegn Woldegebriel and W/ro Tsehai Mamo, Notaries at the Section for the Registration of Business Organizations and Investors, FDRE Ministry of Justice Documents Authentication and Registration Office, February 7, 2008.

[101] Commercial Code Art 315(3) &(4). Where the verification under this sub-article results in the value of the contribution being lowered by less than one fifth it seems neither the contributing member nor the founders are liable for the balance. This, in my view, is recognition by the lawmaker of the fact that valuation is just an estimate and *bona fide* differences in value can always occur. In other words, the revaluation does not necessarily show the true value of the contributed property. Besides, the value of the contributed property could well have changed due to changes in the market situation. All these necessitate having a margin of tolerance. The lawmaker, it seems, believed that a margin of tolerance of one fifth is fair in the Ethiopian context.

[102] Id Art 309(1)a.

To this end, there is a need to explore ways of getting around the problems that necessitated abolishing evaluation by disinterested experts, which presumably are lack of experts in sufficient numbers and the resultant delays in company formation. One possible solution is outsourcing this, instead of relying on employees of the Ministry. Another is introducing valuation as a business. The Ministry could license and supervise firms that engage in valuation as their business. If this does not succeed, one should perhaps think along the lines of the law on private limited companies. As can be gathered from the Commercial Code Art 519(1)&(2), it is members of the company that determine the value of contributions in kind in private limited companies. This, of course, is accompanied by accountability to those that might be adversely affected by overvaluation. Members of the private limited company are jointly and severally liable to third parties for the valuation fixed. And this liability remains, notwithstanding that a member was not aware of the overvaluation.[103] In other words, all members are personally liable, beyond their contribution to compensate those who have sustained loss as a result of overvaluation. Indeed, this solution is not without its own downside in the context of a share company where you can have theoretically thousands of shareholders, some with very small investment. Every investor would be expected to verify the value of every other investor's contributions. This could be impractical and unfair. Nevertheless, its *pros* and *cons* should be weighed.

2.6 Adoption of the Memorandum and Articles of Association

a) Memorandum of Association: Various national legal systems prescribe that a share company have a document known by various appellations in different countries like memorandum of association, charter, certificate of incorporation, *projet de status, Satzung, teikam* etc…. Most company laws specify a number of mandatory provisions to be included in this document.[104] It will also have optional provisions that do not go against the mandatory provisions of the law.[105] Owing to this, the memorandum normally reveals the unique nature of the company and helps particularize the company by showing the company's name, capital structure, purpose, location, number of members of the board, their powers etc….[106] In short, therefore, it '…constitutes both a legislative, *albeit* delegated, set of common norms, and a memorandum of agreement, not necessarily the exclusive one, between a number of entrepreneurial venturers, reflecting their understanding of the format, scope and aims of their venture'.[107]

As do the laws of other countries, the Commercial Code of Ethiopia, requires that the formation of a share company be by a public memorandum, known as the memorandum of

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[103] Id Art 519 (3)&(4).
[104] R.M.Buxbaum, 'The Formation of Marketable Share Companies' in A.Conard (ed), International Encyclopedia of Comparative Law Op cit 11.
[105] R.R. Pennington, Penington's Company Law, (6th ed), Op cit 3.
[106] R.M.Buxbaum, 'The Formation of Marketable Share Companies' in A.Conard (ed), International Encyclopedia of Comparative Law Op cit 11.
[107] Id 12. See also C. de Hoghton(ed), The Company: Law Structure and Reform in Eleven Countries (London: George Allen & Unwin LTD, 1970) pp 71-76.

association.[108] According to Art 313, the memorandum of association must contain names, nationality and address of the shareholders as well as the number of shares, which they have subscribed, the name of the company, its head office and branches, if any. It must also indicate the business purpose of the company, the amount of capital subscribed and paid up, the *par value*, number, form and classes of shares as well as the value of contributions in kind, their object, the price at which they are accepted, the designation of the shareholder and the number of shares allocated to him by way of exchange. What is more, the memorandum of association must indicate the manner of distributing profits, the share in profits allocated to founders, the number of directors and their powers, and the agents of the company. Besides the foregoing, the auditors, the period of time for which the company is to be established and the manner in which the company will publish its reports must be indicated in the memorandum of association.

The above are but the required elements of the memorandum of association. So, members can provide for such other matters, as they deem proper. Hence, each memorandum can vary significantly from another.

b) Articles of Association: It is important to distinguish between rules that might be called 'substantive' and 'housekeeping flexibility.'[109] According to Richard M. Buxbaum, the former actually shape the enterprise while the latter govern the routine and internal varieties of meeting and their procedures, and similar essentially parliamentary matters.[110] Ideally, the latter functions and their ordering might be put into a less formal and flexible document known in different jurisdictions by various names such as the articles of association, *projet de statuts,Geschaftsordnung* etc….[111] In other words, the memorandum defines the company's objects, and confers powers on it; the articles determine how those objects are to be achieved and powers exercised.[112] Though this is the ideal scenario, the fact remains that there is no consensus among legal systems as to which items belong to which category. Therefore, almost every system permits some admixture of substantive and formal provisions in the same document, hence no clear-cut distinction between the memorandum and articles of association.[113]

The Commercial Code of Ethiopia requires the share company to have articles of association.[114] Unlike with regard to the memorandum of association, it does not list down what the contents of this document should be. It does, however, give clues as to the possible contents in different parts of the Code.[115] On reading the various provisions that indicate its possible contents one gets the impression that it is by and large meant to deal with in-house affairs, which have little impact on third party interest. Cases in point are,

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[108] Commercial Code Art 313.
[109] R.M.Buxbaum, 'The Formation of Marketable Share Companies' in A.Conard (ed), International Encyclopedia of Comparative Law Op cit 12.
[110] Ibd.
[111] Ibd.
[112] R.R. Pennington, Penington's Company Law, (6th ed), Op cit 24.
[113] R.M.Buxbaum, 'The Formation of Marketable Share Companies' in A.Conard (ed), International Encyclopedia of Comparative Law Op cit 12.
[114] Commercial Code Art 314.
[115] W.L. Church, Cases and Materials on Agency and Business Organizations, Op cit 446.

one may contend, its contents like the fact that groups of shareholders having different legal status must have at least one representative in the board of directors[116] remuneration of directors,[117] who presides over the meeting of shareholders[118] the possibility of extending the time at which the ordinary annual meeting may be called,[119] and the question of representation in shareholder meetings.[120]

Other provisions of the Commercial Code indicating the possible contents of the articles of association show that it may contain provisions, which might have repercussions on third parties. Good examples are Commercial Code 363(2) and 457. The former states that the articles of association must specify whether the directors are jointly responsible as managers of the company or whether one only of the directors is responsible. It may be contended that, read together with Commercial Code Arts 323(2)(b), which requires the articles of association be deposited in the commercial register and the binding effects of entries in the register[121] such a provision will have consequence on third parties. Particularly, dealing with a director not indicated as the one with powers to deal with outsiders may result in unenforceable transaction. Certainly, the provisions of the articles of association dealing with the payment of fixed or interim interest[122] have the potential to impact third parties. So, it may be argued that, in Ethiopia, the provisions in the articles of association are not limited in their impact to shareholders or in house matters. They might have far reaching consequences on third parties like creditors of the company.

Cognizant of the foregoing, perhaps, the Commercial Code deems the articles of association as part and parcel of the memorandum of association.[123] As a result, only an extraordinary general meeting of shareholders can amend it, with the same *quorum* and majority requirements as for the amendment of the memorandum of association. [124] The law also recognizes the interest of the public in knowing its contents. It, therefore, requires that it be deposited in the commercial register alongside the memorandum of association.[125]

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[116] Commercial Code Art 352.
[117] Id. Art 352(2)(4).
[118] Id. Art 404
[119] Id. Art 418(2).
[120] Id. Art 420(2).
[121] Id. Art 120(2).
[122] Fixed or interim interest is money paid to shareholders even where there are no profits during the period of preparatory works and construction of the enterprise and ceases to be payable as soon as normal business begins according to Commercial Code Art 457. If interim interest is paid before the company commences business operations, it means the payment entails return of contributions to shareholders. Obviously, this affects third parties as it reduces the capital/assets of the company, which are their security in an enterprise where every shareholder is the beneficiary of limited liability.
[123] Commercial Code Art 314(3).
[124] Id. Arts 423 and 425.
[125] Id. Art 323(2)a and b.

2.7 Registration and Publicity

Different legal systems recognize an institution widely known as 'the commercial register'.[126] Of course, its organization and functions vary from country to country. It may, for example, be kept by a judge or at least under judicial control or by administrative organization or even by vocational organization like a chamber of commerce.[127] The idea is that the register serves various private and public purposes such as proving the status of the business organization/trader, provision of information as to the types and levels of business activities, as an administrative record etc….[128] In fact, in some legal systems, registration in the commercial register may be an indispensable condition for entitlement to certain benefits like obtaining legal personality.[129]

Like in other jurisdictions, we have the institution of the commercial register in Ethiopia.[130] The law requires that the final text of both the memorandum and the articles of association that are to be drawn up at the meeting of subscribers[131] be deposited in this register[132] .It is only once the subscribers have signed these documents before a notary public[133] and the same are deposited in the commercial register that the company becomes a legal person.[134] Incidentally, this contrasts with the practice in some jurisdictions like most US states where this organizational meeting takes place after the corporation has come into formal existence when the incorporator files the articles of incorporation with the Secretary of the State or a comparable state official.[135] Unlike with the practice in the US, one notes a close similarity, in this regard, between the incorporation processes of share companies in Ethiopia and the Spanish *sociedad anonima*(SA) and the French *societe anonyme*(SA).[136]

On top of registration, previously, the law had required publication of a notice in the official commercial gazette before a share company acquired legal personality.[137] However, the official commercial gazette, which had been anticipated by the Commercial Code, never came into existence. Thus, the law was amended to require publication of the notice in a newspaper published by the Federal Government with a countrywide circulation or published by Regional Government[138]. This requirement of publication in newspaper has

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[126] D.Tallon, 'Civil and Commercial Law' in K. Zweigert(ed), International Encyclopedia of Comparative Law ,(Paul Siebeck, 1983) 110.
[127] Id.
[128] Id.
[129] Id.
[130] Commercial Registration and Business Licensing Proclamation 67/97, Art 4. Commercial Code Arts 86-114.
[131] Commercial Code Arts 320 and 321(2).
[132] Id. Art 323(2) a & b, Council of Ministers Regulation 13/1997, Art 6(5).
[133] Proclamation to Provide for the Authentication and Registration of Documents, Proc No. 334/2003 Art. 2(2), 5(1)c .
[134] Commercial Code Arts 323 and 223 read together.
[135] L.C.Backer, Comparative Corporate Law Op cit 666 Compare also the Revised Model Business Corporation Act "RMBCA" Sec 2.01-2.06, 10.20-10.22 and the Delaware General Corporation Law 'DGCL' sec 101-109.
[136] On these two systems read L.C.Backer, Comparative Corporate Law, Op cit 668.
[137] Commercial Code Arts 323, 2223 & 87.
[138] Commercial Registration and Business Licensing Proc. 67/1997 Art 8(1)&(2).

now been abolished altogether because of the unwarranted delay that it caused in formation of business organizations, and the considerable expenses it sometimes entailed.[139]

3. Contracts Made On Behalf Of Company In Formation

As can be gathered from the foregoing discussions, a share company comes into existence as a result of planning and other preliminary arrangements by founders which. Henn and Alexander classify into discovery, investigation and assembly, raised in the introduction part.[140] Throughout these phases founders may require the service of various professionals. They may also have to secure various options, licenses, patents, and lease etc… for the company to be formed. For these reasons, they will have to conclude contracts and incur expenses before the company is born.[141] Therefore, the questions of whether and the extent to which founders are liable for such commitments arise.

In principle, the founders are fully jointly and severally liable in respect of the commitments entered into for the formation of the company.[142] This does not mean that the transactions of the 'entity' under formation concluded by founders can be avoided by the entity after formation when third parties claim rights on the basis of the said transactions against it. Commercial Code Art 308 (2) imposes an obligation on the company to take them over. The same is true in other legal systems.[143] But as honoring these contracts will encumber company assets, there is a need to address the concerns of the subscribers who had no say on what contracts to conclude. That is why the law limits the company's obligation in this regard. The company is obliged to take over the commitments and expenses only in so far as they were necessary for the formation of the company or approved by the general meeting of the subscribers.[144] In relation to this, one notes that Ethiopian law does not seem to require express adoption of the commitments and expenses by the company for it to be bound. All that the third party who wants to proceed against the company has to show is that the commitments and expenses were necessary for the formation of the company.

In this regard, the question arises as to whether a third party who transacted with a founder retains the right to proceed against the founders even though the company has the obligation as seen above. The case where the founder specifically binds himself on the contract, whether or not the company to be formed wishes to or does adopt the contract

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[139] Read together Proclamation to Amend the Commercial Registration and Business Licensing Proc 376/2003 Art 2(2) and Art 8(1) of Proc 67/1997. According to a pamphlet from the Ethiopian Press Agency the cost of publishing a notice that is a page long in the Ethiopian Herald or 'Addis Zemen' is 10,626:00 Birr VAT inclusive. As a result, publishing the excerpts from the memorandum of association as was required by law entailed prohibitively high expenses in some instances. What is worse, the time it took for the notice to appear was very long. Currently, any notice to be publicized needs to be submitted to the Ethiopian Press Agency ten days ahead of the desired date of publication.

[140] H.G.Henn and J.R.Alexander, Law of Corporations, Op cit 237.

[141] Ibd.

[142] Commercial Code Art 308(1).

[143] R.M.Buxbaum, 'The Formation of Marketable Share Companies' in A.Conard (ed), International Encyclopedia of Comparative Law Op cit 30.

[144] Commercial Code Art 308(2).

poses no problem. Problematic is the situation where the founder takes no such explicit responsibility.[145] Different legal systems give differing solutions on the basis of different theories. In Common Law systems the labels used such as adoption and novation matter. Where the term used in the law is 'adoption' of the agreement the previous contracting parties are fully liable in addition to the new party, i.e. the company. In contrast, 'novation' is an agreement for substitution of parties, and thus of liability.[146] So, the company takes on all the obligations assumed by the founders thus relieving the latter. Some systems infer the continued liability of the founder on the basis of agency law which provides 'unless otherwise agreed a person who, in dealing with another, purports to act as agent for a principal whom both parties know to be nonexistent or wholly incompetent, becomes a party to such contract.'[147] In the Civil Law systems too there are differing constructs, which might lead to different results as to the continued liability of the founders. The general tendency, however, seems to be to make them still liable, the debate being more about the obligation of the company to reimburse the founders who have paid the third party.[148]

Given the importance of the language used in the law with regard to this issue, it is important to note that Art 308(2) of the Commercial Code says '…the company shall take over these commitments from the founders….' Is this language suggestive of novation hence resulting in substitution of parties and, therefore, obligations or is it simply entitling the promoter to reimbursement without relieving him from continued obligation towards the third party? Strong arguments can be raised in support of the latter point. One may contend that the law talks about the obligation of the company to take over the commitments from the founders, NOT about the contracting party's obligation to relinquish the right to claim from the founders. This argument may further be strengthened by the fact that at least some of the people who transact with promoters have no way of telling what the capital of the company will be. For this reason, it can be said that they rely on the credit worthiness of the promoter. Therefore, denying them the right to proceed against the promoters would be giving them less than they bargained for unless they have expressly accepted that. If this line of interpretation is taken, the result is in consonance with that reached by many countries of the Civil Law tradition as indicated above.

A host of other issues may arise in relation to pre incorporation contracts. One such issue is where a person prematurely acts on behalf of a 'share company' because he erroneously but in good faith thinks the share company has been formed. Should such person be made personally liable like a founder just because the transaction took place before incorporation? A review of recent case law in the US shows that courts have relied on common law concepts like *de facto* corporation, *de jure* corporation, and corporation by *estoppel* that provide uncertain protection against personal liability for these kinds of pre-incorporation transactions.[149] The Revised Model Business Corp Act, Sec 2.04 gives even more protection as it makes liability for such pre incorporation acts conditional on the third

[145] R.M. Buxbaum, "Formation of Marketable Share Companies' in A. Conard(ed) International Encyclopedia of Comparative Law, Op Cit 31.
[146] Id 33.
[147] Id 31 and Restatement of Agency 2nd (1957) S. 326 as quoted in footnote 200.
[148] Id 60.
[149] L Backer, Comparative Corporate Law, Op cit 686.

party knowing that there was no corporation.[150] It makes sense to exempt from personal liability a person who honestly and reasonably but erroneously believed to represent a company when there was in fact no company at the time.

This does not seem to be the position taken by Ethiopian law. It provides that the 'founders are liable for commitments entered into for the formation of the company'. It then continues '…*all persons* who have acted in the name of the company before its registration in the commercial register shall be *similarly* liable'.[151] Remember at this juncture that, the company's legal personality and existence commences upon registration under Ethiopian law.[152] So, such people are personally liable like founders though unlike founders they might believe in good faith that the company already exists. Ethiopian law is not alone in taking such a position though. Many US states have statutes, which provide expressly that those who prematurely act for or on behalf of a corporation are personally liable on all transactions entered into.[153]

4.Defective Formation and its Consequences

Traditionally, legal systems made distinction between two categories of defects in the formation of a company. The first category pertained to the concept of 'agreement to form a corporation' or in American usage 'underlying joint venture'. Defects pertaining to vices in consent like a 'shareholder' joining the company under duress, owing to fraud or mistake fall in this category of defect.[154] In other words, the initial act of incorporation of a share company is but a contract. Thus, validity requirements for the formation of a contract are applicable to the creation of a share company.[155] So, defects pertaining to the validity requirements of the contract comprise the first category of defects. The second category of defects comprised improper publication of the memorandum, defects of form thereof, failure to hold organizational meeting and the like, which are more formal or technical in nature. These technical defects had no retroactive annulling effect on the company while they could result in dissolution of the company.[156]

There was less uniformity as regards the consequences of defects of the first category. In pre 1967 French law, for instance, defects in relation to 'agreement to form a corporation', the first category above, affected the juridical status of the entity. Thus, dissolution for failure of the underlying agreement might have had a retroactive effect leaving creditors of the defective entity to share with personal creditors of the shareholders in the remaining assets of the defective entity on a non-preferred basis.[157] In contrast, the long held German

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[150] Id.
[151] The Commercial Code, Art 308(1), emphasis mine.
[152] Id Art 323(1) and 223.
[153] L. Backer, Comparative Corporate Law, Op cit 686.
[154] R.M.Buxbaum, 'Formation of Marketable Share Companies', in A.Conard (ed), International Encyclopedia of Comparative Law, Op cit 26.
[155] K.Geens and B. Servaes, 'Corporations and Partnerships in Belgium', International Encyclopedia of Laws , Op cit 61.
[156] R.M.Buxbaum, 'Formation of Marketable Share Companies', in A.Conard (ed), International Encyclopedia of Comparative Law, Op cit 26.
[157] Id.

approach, also adopted in some other countries, did not give similar effect to consensual errors on the side of parties that have subscribed shares in the company. Such errors did not result even in the avoidance of the payment duty in respect of his/her contribution on the part of such subscriber once the company has been formed. In other words, a person who subscribed owing to fraud would still be required to pay what s/he 'promised' to contribute.[158] After the 1969 revision even the French statute eliminates the annulling effects of these contractual defects. The modern tendency is to prevent defective formation of either type from affecting the juridical status of the entity unsettling the expectations of third parties in good faith. The consequence of defective formation is, therefore, either calling on the company to rectify the problem or resulting in dissolution and winding up of the entity, not retroactive nullity. In deed, this is specifically provided for in most statutes.[159]

Under Ethiopian law no valid contract can exist unless parties capable of contracting have given their consent sustainable at law, the object of the contract is sufficiently defined, is possible and lawful.[160] So, in the Ethiopian context defects pertaining to these could, perhaps, be regarded as defects of the first category, i.e, defects pertaining to the 'agreement to form a corporation'. Examples of defects under this category are, therefore, vices in the consent of founders or/and subscribers like duress, fraud or mistake and lack of the requisite legal capacity.[161] Arguably, the seven requirements like minimum number of members, minimum initial capital, full subscription of capital etc…discussed under section 3 above fall under the second category of defects, i.e. the 'formal' or 'technical' defects.

The Commercial Code of Ethiopia has only one article dealing with defective formation and its consequences. It provides, "where the share company is entered in the commercial register it will have legal existence and personality even where some legal requirements for the formation of the company have not been fulfilled."[162] Where the non-compliance with the formation requirements endangers the interest of creditors or shareholders, the court may, upon the application of such creditors or shareholders, order the dissolution of the share company or take provisional measures it deems proper.[163] The court is barred from considering a tardy application. Such application should be made within three months from registration.[164]

From the foregoing, one notes that the law does not classify defects in formation into defects pertaining to 'agreement to form a company' or contractual defects and technical or formal defects. It simply says defects in formation will have no consequence on the legal existence or personality of the company once it is registered. So, one may contend that neither type of defect will have retroactive effect of annulling the company, and the transactions entered into by it. The law expressly provides that shareholders or creditors

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[158] Id. 27.
[159] Id. 28.
[160] Commercial Code Art 1 cum Civil Code Arts 1678. See also G. Krzeczunowicz, Formation and Effects of Contracts in Ethiopian Law Op cit 57.
[161] Commercial Code Arts 307, 3016-322 and Civil Code Arts 1696-1710.
[162] Id. Art 324(1).
[163] Id. Art 324(2).
[164] Id. Art 324(3).

affected by defects in formation can apply for *dissolution* (Emphasis mine). This implies that creditors of the company as well as the shareholders themselves will have the kind of rights they have in the said process, i.e, dissolution.[165] So, it may be contended even a person who joined the company under duress will have to make the 'promised' contribution to the extent that is required by the interest of third parties in good faith.[166] Of course, s/he will have recourse against the party at fault for the resultant damage. In effect, this means the Ethiopian law is in line with developments in other jurisdictions when it comes to the consequence of defects in formation on third parties in good faith. Though it seems courts have not entertained sufficient number of cases pertaining to this issue to warrant making conclusions[167], there are indications showing a proper understanding of the law on the matter. For instance, in the case between the National Bank of Ethiopia and Horn International Bank Share Company, the court confirmed the revocation of business license by the National Bank, which was issued on the basis of false evidence, according to the National Bank. It then instructed the liquidator to pay creditors of the bank from the proceeds of the sale of its assets though the issuance of the license and hence the formation was found defective[168]. It did not rule that the defect has retroactive effect of annulling the company and the transactions entered into by it. The court rather acknowledged the need to protect the interest of third parties in good faith. A problem in regard to defective formation is that the law does not provide a list of defects that warrant dissolution and those that do not, hence leaving the courts with no guidance.

Conclusions and Recommendations

Fraudulent or careless practice in the formation process of a share company can undermine the financial solidity of the company. What is worse, such practices jeopardize the legitimate interests of future creditors. Cognizant of this, the law in Ethiopia provides some safeguards. By and large, these safeguards resemble those provided in the Continental European legal tradition and are in keeping with current standards and trends. There are a few points with respect to which revision is warranted though. Those that stand out follow:

1. The reasons for requiring minimum initial capital are twofold. The first is preserving creditors from becoming involved with companies that are financially too frail. The second is to prevent investors from choosing to form a share company when it is too cumbersome and expensive for their intended operations. The minimum initial capital of 50,000 Birr, which the Ethiopian law requires to this end, can achieve neither of the purposes above today. Hence, there is a need to either increase the amount to reflect the current reality or follow the alternative mechanism used in the USA, according to which, the company is simply required to be 'adequately capitalized', subject to consequences where it is found to have been too thinly capitalized.

[165] Id. Arts 501,504(1),505.
[166] Id Art 499(4).
[167] Interview with Ato Yossief Aemro, Judge at the Federal High Court, On February 26,2008
[168] National Bank of Ethiopia v Horn International Bank Share Company (Civil File No 58/92, Federal High Court, Ginbot 24 1992 EC) (Unpublished)

2. In an organization like a share company where the liability of members is limited to their contributions, the contribution of members is instituted as much in the interest of creditors as in that of other members and the business firm itself. Hence, there is a need to take particular care to ensure that a contribution by a person does not jeopardize the interest of all stakeholders and especially that of the creditors of the company. In this regard, contributions in kind are cause for concern in Ethiopia.

2.1. The first is that in regard to the usefulness of contributions in achieving the business purpose of the company. Accepting contributions in kind which are manifestly useless jeopardizes the success of the company. This in turn exposes creditors to greater risk than anticipated, as the company will generate little wealth to be used for discharging its financial obligations. Yet, the Ethiopian company law is silent on the issue of usefulness of contributions in kind. As a result, there is no mechanism meant to ensure the usefulness of contributions, in the formation process. Hence, requiring the founders to file a report on the usefulness of contributions in kind, as under some other jurisdictions, seems appropriate.

2.2. The second problem is that in regard to contribution of service. Unlike in some other jurisdictions, contribution of service is not expressly prohibited in Ethiopia. In fact, it may be argued that contribution of past services, unlike future services, does not jeopardize the legitimate interest of stakeholders. Hence, it would be good if the law took clear stand on this.

2.3.The third problem in relation to contributions in kind pertains to their submission and valuation. Previously, the law required that contributions in kind be valued by disinterested experts from the Ministry of Trade and Industry. This requirement has been scraped. The agreement of founders or members of the company as to the value of the contributions in kind has substituted this method. All that the new law requires is that founders, and where the company is formed by public subscription, subscribers agree on the worth of contributions made in kind.

This system is fraught with problems. For one thing, it might be impractical where there are a large number of shareholders with small investment each. What is worse, shareholders might deliberately overestimate the value of the contributions of each member in a bid to enhance the creditworthiness of their company by inflating its capital. In some cases, things could get much worse than that. An ‘agreement’ might be made to ‘contribute’ property that does not exist or does not belong to the ‘contributing’ member. This is possible because the notary before whom the memorandum of association is to be signed is required by law to ascertain the right of the contributing member to transfer the property, only with respect to contributions made to transfer property for which title certificates are issued under the law.

So, there is a need to explore ways of getting around the problems that necessitated abolishing valuation by disinterested experts, which presumably are lack of experts in sufficient numbers and the resultant delays in company formation. One possible solution is outsourcing this, instead of relying on employees of the Ministry. Another is introducing valuation as a business. The Ministry could license and supervise firms that engage in valuation as their business. If this does not succeed, one should perhaps think along the

lines of the law on private limited companies, i.e., make members of the company jointly and severally liable for the valuation fixed as under Art 519(1) and (2).

3. Yet another area in which the law seems to have shortcomings pertains to absence of guidelines as to defects in formation that warrant dissolution. One notes that the law in Ethiopia does not classify defects in formation into defects pertaining to 'agreement to form a company' or contractual defects and technical or formal defects. It simply says defects in formation will have no consequence on the legal existence or personality of the company once it is registered. So, one may contend that neither type of defect will have retroactive effect of annulling the company and the transactions entered into by it. In effect, this means the Ethiopian law is in line with developments in other jurisdictions when it comes to the consequence of defects in formation on third parties in good faith.

WHOSE POWER IS IT ANYWAY: THE COURTS AND CONSTITUTIONAL INTERPRETATION IN ETHIOPIA

YONATAN TESFAYE FESSHA*

Introduction

The 1995 Constitution of the Federal Democratic Republic of Ethiopia (hereinafter the 'FDRE Constitution' or 'the Constitution') provides the power to "interpret"[1] the Constitution to the House of Federation (hereinafter 'the House'), which is the second chamber of the parliament. The Constitution also establishes the Council of Constitutional Inquiry (hereinafter 'the Council'), a body composed of members of the judiciary, legal experts appointed by the House of Peoples' Representatives and three persons designated by the House from among its members, to examine constitutional issues and submit its recommendations to the House for a final decision. The formal way through which issues of constitutional interpretation pass is via the Council. Issues of constitutional interpretation are referred to the Council by a court or "the interested party"[2] to a dispute. This is, of course, very different from a number of other more well-known legal systems which vest the power of constitutional review either in ordinary courts or in constitutional courts set up exclusively for constitutional matters.

As indicated above, the House has the final and ultimate power to interpret the Constitution. However, the role of the courts in the interpretation of the Constitution is still far from settled. The function, relation and co-existence of the courts and other organs of state need to be spelled out clearly. The extent to which and the circumstances under which the judiciary should defer to other institutions, and especially to the House, need to be ascertained. The difficulty lies in determining where the role of the court ends and that of the other institutions (especially the Council and House) begins.

This contribution investigates the locus of constitutional interpretation and constitutional review in Ethiopia. As the title of the article and the discussion in the preceding paragraphs suggest, it asks who interprets the constitution. It specifically explores the role of the courts. It shall do this in four related parts. Section two provides us with a brief comparative account on the development of constitutional review in the different major constitutional systems of the world. This is followed by a concise historical review of

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[1] The Ethiopian Constitution uses the terms 'constitutional interpretation' and 'constitutional disputes'. Nowhere in the Constitution does one finds the terms constitutional review or judicial review (i.e. the power to invalidate legislation for constitutionality). The concept of constitutional review is, however, recognized by the constitution, as it is obvious from the reading of article 84(2) of the Constitution.

[2] For a discussion on the term 'interested party' see Abebe Mulat, "Who is the Interested Party to Initiate a Challenge to the Constitutionality of Laws in Ethiopia" The Law Student Bulletin Vol. 1 (1999), p. 9-12.

constitutional review in Ethiopia. The article then proceeds to examine constitutional review under the present constitution. In this regard, it first examines the argument that puts constitutional review under the normal business of courts. Second, it examines the argument from the duty to enforce the constitution, which *albeit* on a different basis, arrives at the same conclusion – the courts cannot avoid interpreting the constitution as they have the constitutional duty to enforce the constitution. The discussion on constitutional review is made complete after discussing the developments that have unfolded in the areas of constitutional review after the adoption of the Constitution. The article then concludes with a few remarks.

I. A Brief Comparative Note On Constitutional Review[3]

Constitutional review, the power to determine the constitutionality and, therefore, the validity of the acts of the legislature, takes various forms. This depends on various factors. Irrespective of these differences, however, most countries in the world have been practising some form of constitutional review.[4]

The subject of constitutional review, however, gained considerable attention only after 1803 when the American Supreme Court in *Marbury v. Madison* asserted its power to review the conformity of legislation with the constitution and to disregard a law held to be unconstitutional.[5] Since then it is not uncommon to find ordinary courts empowered to control the compatibility of legislation and executive acts with the terms of constitutions. This is what is often referred to as decentralized or diffuse system of constitutional review. In such a system, of which America is a good example, constitutional review is a power exercised by all courts.

This system of constitutional review, which is also alternatively referred to as the "American" system of control, failed to strike root in Europe. This is attributable to various reasons, among which are the difference in legal traditions of Europe and America,[6] the inability of European judges to exercise constitutional review and the different level of status accorded to constitutions in Europe and the United States between the two world

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[3] This section is adopted from the work previously published by the same author. Yonatan Tesfaye Fessha, "Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review" 14 African Journal of International and Comparative Law Vol. 14(1), (2006), p. 53-83. The term constitutional review in this article is used interchangeably with judicial review. Judicial review, in this article, refers to the act of reviewing the constitutionality of statutes or legislation.

[4] Today close to 100 countries have some form of constitutional review. See MI. Aboul–Enein "The Emergence of Constitutional Courts and the Protection of Individual and Human Rights: A Comparative Study" in AO. Sherif and E. Cotran (eds.) The Role of the Judiciary in the Protection of Human Rights (1997), p. 284.

[5] Marbury v Madison (Supreme Court of U.S 1803 5U S. (1(Granch) 137, 2, L.Ed.60 quoted in D. Kommers and J. Finn American Constitutional law: Essays, cases and Commentary Notes (2000), p. 25.

[6] In Europe, the law is identified with legislation, whereas in the United States there is still a substantial common law. European courts cannot engage in the interpretation of constitutions while quite a contrasting attitude is established in the United States where ordinary courts are entitled to interpret the constitution.

wars.[7] A number of European countries, in which constitutional review of legislation was virtually an unknown phenomenon till the end of World War II, have, by and large, adopted a different model of constitutional review. In most of the European countries the power of constitutional review is assigned to a single organ of state. This may be either a supreme court or a special court created for that particular purpose. This system is called a concentrated system of constitutional review.[8]

In France, where it is considered that "constitutional review through an action in the courts would conflict too much with the traditions of French public life" [9], constitutional review, is exercised by a body other than a court. It is the *Conseil Constitutionnel*, a political body, which exercises constitutional review. The *Conseil Constitutionnel* challenges the constitutionality of a law only before it is promulgated by parliament. Hence, some authors refer to the system as a preventive system of constitutional review.[10]

The institution of constitutional review in France is often wrongly described as another "European Model". This is partly because of the fact that the *Conseil Constitutionnel* deals only with constitutional questions. However, the *Conseil Constitutionnel* is a political body composed of members appointed by a person holding political office and political institutions: The President of the Republic, the National Assembly and the Senate. Its whole structure is essentially political. Moreover, in contrast to the other systems of constitutional review, the *Conseil Constitutionnel* does not deal with constitutionality of law as a result of "a challenge in the ordinary courts by way of defence". Examination of Bills before promulgation is typically the only way envisaged for dealing with questions of constitutionality.

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[7] See generally L. Favoreu, "Constitutional review in Europe" in L. Henkin and A.J. Rosenthal (eds.), Constitutionalism and Rights: The Influence of the United States Constitution Abroad (1990). Until the post world war II period only a few European constitutions, most notably the 1920 Austrian constitution, recognized constitutional review. It was introduced in France until the introduction of the institution of the *Conseil Constitutionnel* in the 1958 Constitution. For further discussions see C. Sampford and K. Preston, Introducing the Constitution: Theories and Principles and Institution (1996), p. 22 –25.

[8] M. Cappilleti Judicial review in Comparative Perspective (1989), p. 136-146. In Great Britain and some other countries, where the doctrine of parliamentary sovereignty has long been regarded as the most fundamental element of the constitution, no organ has legal authority to invalidate statutes on the ground that they are not in conformity with the constitution (the unwritten constitution) or some fundamental moral or legal principles. In Britain, the legislative authority of parliament is supreme, and the function of the court, in this system, is merely to give effect to these laws. In the words of Dicey, the legislature "has the right to make or unmake any law whatever" and no person, body or court outside Parliament "is recognized by the law of England as having a right to override or set aside the legislation of parliament". In the most quoted statement of Walter Bagehot, "[t]here is nothing the British Parliament can not do except transform a man into a woman and a woman into a man" Quoted in Y. Meny and A. Knap Government and Politics in Western Europe (1998), p. 317. See also generally J. Goldsworthy The Sovereignty of Parliament: History and Philosophy (1999). With the introduction of the Human Rights Act 1998 in Britain, the courts, if satisfied that primary legislation is incompatible with a right recognized by the European Convention of Human Rights, can make a declaration of incompatibility. The declaration of incompatibility, however, does not, in itself, affect the validity of the challenged legislation. For further discussion see PP. Craig Administrative Law (2003), p. 570-571.

[9] See generally J Bell French Constitutional Law (2001), p. 1-27.

[10] Ibid.

II. Constitutional Review In Ethiopia: Historical Overview

A brief examination of the legal history of Ethiopia reveals that constitutional review, as one writer commented, "does not have a gratifying history".[11] To begin with, the 1931 Constitution, the first written constitution, did not include a specific provision on constitutional adjudication. One may even argue that such conception of constitutionalism was not possible during that period. This mainly has to do with the fact that the 1931 Constitution, in the first place, was designed to enhance both change and stability in favour of the monarchy rather than impose a limit on government.[12] It especially achieved this by "effectively removing the church from the forefront of Constitutional power play".[13] As a result, the powers of the Emperor were not subject to any strict kind of review and his authority could not be contested.[14]

Neither was there a practice of constitutional review after the introduction of the 1955 Revised Constitution. This is despite the fact that the 1955 Constitution contains a supremacy clause under Article 122. According to this provision, the Constitution, together with those international treaties conventions and obligations to which Ethiopia [is] a party, shall be the supreme law of the Empire, and all future legislation, decrees, orders, judgments, decisions and acts inconsistent therewith shall be null and void.

No specific organ, however, was empowered to exercise the power of constitutional review and thus declare legislations, decrees, orders, judgments, decisions and acts, which are unconstitutional, null and void. Based on this provision, one may advance an argument, as some do,[15] that constitutional review was possible under the 1955 Revised Constitution. Theoretically, this is not completely implausible. The fact that the 1955 Constitution did not explicitly empower a specific organ to exercise the power of constitutional review does not exclude such a possibility. As the history of constitutional review in America demonstrates, a court may exercise constitutional review without explicit authorization of the Constitution. This may also be the reason why some even hold that the 1955 Revised Constitution followed the American system of judicial review. The above construction, however, does not take account of the power structure envisaged by the Constitution. Under a Constitution that recognizes the "indisputability" of the power of the Emperor and grants him a legislative power (in addition to the fact that he appoints all members of the Senate in the two chamber parliament), it is almost impossible to talk of constitutional review. As George Krzeczunowicz has rightly pointed out, the power of the Emperor to quash any decision rendered by the courts would make the exercise of constitutional review

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[11] Assefa Fiseha, "Constitutional interpretation: the respective role of courts and the House of Federation" in Faculty of Law/Civil Service College (ed.) Proceedings of the Symposium on the Role of the Courts in the Enforcement of the Constitution (2000), p. 18.

[12] Fasil Nahum Constitution for a Nation of Nations: The Ethiopian Prospect (1997) 21. Tradition and religion were the only limits on the power of the monarch, Emperor HaileSelassie. The introduction of the constitution, by centralizing government power in the hands of the Emperor, limited the influence of both religion and tradition.

[13] Ibid.

[14] CN, Paul and C. Clapham Ethiopian Constitutional Development (1967), p. 287.

[15] Meaza Ashenafi "Ethiopia: Process of Democratization and Development" in A An-narim(ed.) Human Rights under African Constitutions (2003), p. 30.

pointless.[16] The fact that some argue that the 1955 Revised Constitution had envisaged an American system of constitutional review can possibly be explained by the fact that the Constitution was drafted by three American legal scholars. The belief, therefore, is that the Constitution reflects the American experience.[17]

The advent of the 1987 Constitution, on the other hand, has brought with it the designation of an institution that exercises the power of constitutional review. The Constitution contained express clauses on the interpretation of the Constitution and determination of the constitutionality of legislative acts. It was the State Council, a political body, which was entrusted with the control of constitutionality. It is reported that no significant case was brought before it.[18]

The present Constitution, however, provides detailed provisions on constitutional interpretation. It has also established the institutional framework necessary to discharge this function. With this as a background, we now proceed to discuss constitutional review and constitutional interpretation under the present Constitution. The aim of this discussion is to explain the institutional structure adopted by the Constitution for constitutional interpretation and specifically for constitutional review. Establishing the role of the House and the courts is a specific objective of this section.

III. Constitutional Review Under the 1995 Constitution

The FDRE Constitution deals with the issue of constitutional review under Article 83.[19]

> *Article 83 Interpretation of the Constitution*
> *1. All Constitutional disputes shall be decided by the House of Federation.*
> *2. The House of Federation shall, within thirty days of receipt, decide a constitutional dispute submitted to it by the Council of Constitutional inquiry.*

As the reading of this article indicates, it does not tell us much about constitutional review. It only declares that the House decides on all constitutional disputes. But what is a constitutional dispute? Is it the same as a ruling on the constitutionality of laws or does it only refer to the expounding of the provisions of the constitution or to both? A reading of some other provisions of the constitution may shed light on the meaning of this term.

Article 62 of the Constitution which provides for the powers and functions of the House states, under sub article one, that the "[House] has the power to interpret the constitution".

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[16] G. Krzeczunowicz, "Hierarchy of Laws" Journal of Ethiopian Law Vol. 1(1), (1984), p. 111-117.
[17] Ibrahim Idris, "Constitutional Adjudication under the 1994 FDRE Constitution" Ethiopian Law Review Vol. 1(1) (2002), p.63.
[18] Assefa, cited above at note 11, p. 19.
[19] It is important to note right from the beginning that the title of this article is interpretation of the Constitution and not constitutional review or judicial review.

This is what article 84, the other relevant article that deals with the power of the Council has to offer:[20]

1. *The Council of Constitutional Inquiry shall have the power to investigate constitutional disputes. Should the Council, upon consideration of the matter, find it necessary to interpret the Constitution, it shall submit its recommendations thereon to the House of Federation.*
2. *Where any Federal law is contested as being unconstitutional and such a dispute is submitted to it by any court or interested party, the Council shall consider the matter and submit it to the House of Federation for a final decision.*
3. *When an issue of constitutional interpretation arises in the courts, the Council shall:*
   A) Remand the case to the concerned court if it finds that there is no need for constitutional interpretation; the interested party, if dissatisfied with the decisions of the Council, may appeal to the House of Federation
   B) submit its recommendations to the House of Federation for a final decision if it believes that there is a need for constitutional interpretation

The meaning and implications of these articles has been the subject of controversy and debate. The Chief Justice of the Federal Supreme Court (FSC), on one occasion, stated that "the power to interpret the Constitution is equated with the power to declare federal or state law as unconstitutional and therefore null and void".[21] Thus, according to him, the act of invalidating legislation for unconstitutionality is what the phrase 'Constitutional interpretation' is meant to signify in the Ethiopian Constitution.[22] The import of this argument is that it is only the power to enquire into the constitutionality of legislation that the Constitution has entrusted to the House. The Constitution, as a result, does not identify a single organ that is responsible for constitutional interpretation. In the absence of any law or provision that excludes the courts from the business of constitutional interpretation, they conclude, the courts still have the power to expound the provisions of the Constitution through interpretation, short of invalidating legislation for unconstitutionality.

A careful reading of the provisions of the Constitution, however, does not warrant the conclusion that the Constitution, in referring to constitutional interpretation, only refers to the power to determine the constitutionality of legislation. The Constitution does not equate constitutional interpretation with the act of invalidating legislations. In order to demonstrate this one needs to determine what a "constitutional dispute" is since article 83 of the Constitution and, by implication, article 84(1) of the Constitution[23] state that the House shall

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[20] A discussion of the power of the Council indirectly indicates the power of the House as the Council serves as an advisory organ of the House.

[21] Kemal Bedri Key note address in Faculty of Law/Civil Service College (cited above at note 11).

[22] Donovan, an American scholar, has also argued that the act of interpretation, which the drafters had in mind when they assigned the power of constitutional interpretation to the House was the act of declaring a federal or state legislative provision invalid as violative of the Ethiopian Constitution. See DA. Donovan, "Levelling the Playing Field: the Judicial Duty to Protect and Enforce the Constitutional Rights of Accused Persons Unrepresented by Counsel" Ethiopian Law Review Vol. 1(1) (2002), p.31.

[23] Any power entrusted to the Council is a power given to the House as the former is merely an advisor of the latter on matters of constitutional interpretation and constitutional review.

decide all constitutional disputes. Once we determine what a constitutional dispute is, we can, then, easily identify the role of each organ in constitutional interpretation and constitutional review.

An apparent feature of a constitutional dispute, that one identifies easily, is the determination of constitutionality or what we call constitutional review. This is the power of invalidating a legislative act, which is considered to be in contradiction with the Constitution. This is also what the Constitution in article 84 (2) refers to when it makes mention of the "unconstitutionality of a federal or state law". This is the first aspect of a constitutional dispute. A constitutional dispute, however, should not necessarily involve the issue of unconstitutionality of legislation. What makes a dispute a constitutional dispute is the mere fact that the dispute involves constitutionally recognized rights. The determining factor is that a claim is made based on the provisions of the Constitution or that provisions of the Constitution are in one way or another implicated in a case brought before the court. Resolving such a dispute may not require more than expounding the provisions of the Constitution. At the most, what would be required of the responsible organ under such circumstances is to determine the scope and application of the constitutional rights to the operative facts of the case. It would not require of them to declare a legislative act unconstitutional.

The Ethiopian Constitution, in agreement with the above explanation of constitutional dispute, recognizes that not all cases of constitutional dispute entail the need to determine the constitutionality of legislation. This is clear from article 84(1), which empowers the House to receive matters that give rise to issues that involve constitutional interpretation. Here the Constitution, by simply referring to the interpretation of the constitution (without mentioning anything about issues of constitutionality), has made it clear that it acknowledges that constitutional interpretation may not always be about determining the constitutionality of legislations. That is also why it specifically deals with the issue of constitutional review under another specific provision, article 84(2), and does not lump it together with article 84(1), which generally discusses constitutional interpretation. Had the Constitution, like the Chief Justice argued, equated constitutional interpretation with the act of determining the constitutionality of legislations, it would not have been necessary to deal with the latter under a separate provision (i.e. article 84(2)).

Thus, a constitutional dispute, in the context of the Ethiopian Constitution, has two aspects: the general task of interpreting the Constitution with a view to ascertaining the meaning, content and scope of a constitutional provision (article 84(1)) and the more specific task of determining the constitutionality of "federal or state law" (article 84(2)). Thus, in contrast to the conclusions of the Chief Justice, the Constitution does not equate constitutional interpretation with the act of determining the constitutionality of legislation. In fact, it recognizes that not all cases of constitutional dispute involve issues of constitutionality. It acknowledges that the process of interpreting the Constitution does not always lead to what the Chief Justice referred to as the end product (a declaration of unconstitutionality).

Once this is made clear, the argument that courts have the power to interpret the Constitution falls away. It becomes obvious that the House has both the general power of interpreting the Constitution and the specific function of invalidating legislation that is unconstitutional. This

is so because the Constitution, under article 84(1) and (2), provides to the House both the power to decide on matters where it is necessary to interpret the Constitution and cases where the constitutionality of any federal or state law is contested.

The House, in discharging its duty of constitutional adjudication, is assisted by the Council, an advisory body, whose main function is to examine constitutional issues and submit its findings to the House. This is a body composed of mostly legal experts of high standing, headed by the Chief Justice of the FSC.[24] The list of its members include the Vice President of the FSC, six legal experts appointed by the President of the Republic on recommendation by the House of Peoples' Representatives and three other persons designated by the House from among its members.

Where issues of constitutional interpretation arise, the matter is first referred to the Council by a court or 'the interested party'. The Council, upon receiving the matter, should deliberate upon it and submit its recommendations to the House if it believes that the issues raised involve constitutional interpretation. If the Council, on the other hand, believes that there is no need for constitutional interpretation, it can remand the case to the concerned court. In this regard, it should be noted that the findings of the Council are mere recommendations and the House is at liberty to adopt or reject the recommendations of the Council. The Council, as indicated earlier, is thus an institution with an advisory capacity. The House, on the other hand, is the body that is entrusted with the function of providing the ultimate and final decision both on constitutional interpretation and more specifically on the constitutionality of legislations.

This concentration of power in the House has provoked debates regarding the role of courts in constitutional interpretation. Does it mean that there is no role left for the courts as far as constitutional interpretation is concerned other than referring to the Council matters that require the interpretation of the Constitution? The article now turns to deal with this issue.

IV. THE ROLE OF THE COURTS

Notwithstanding the consensus on the ultimate power of the House to interpret the Constitution and rule on the constitutionality of legislations, there is an argument that has been going on for a while now to the effect that the courts still have the power to interpret the Constitution and refuse to apply a legislation on the ground that it is not in conformity with the Constitution. Some of them rely on what they call "the normal (sometimes they call it "inherent") judicial business of courts" and argue that the power of the courts includes refusing to apply an Act of parliament on the ground that it is not compatible with the Constitution.[25] Others advance their argument based on the premise that the courts have the duty to enforce the Constitution.[26] However, those who argue along these lines do not accept

[24] See article 83-84 of the Constitution.

[25] Tsegaye Regassa, " Courts and the Human Rights Norms in Ethiopia" in Faculty of Law/Civil Service College, cited above at note 11, p.116.

[26] See Assefa, cited above at note 11, p. 13.

the conclusion that the courts can invalidate an Act of parliament. They rather limit the power of courts to espousing the provisions of the Constitution.

In the following paragraphs, the article examines these positions. The purpose of this exercise is to identify the role of the courts, if there is any, in constitutional interpretation and constitutional review in Ethiopia. The article shall commence the discussion by elucidating the argument from "the inherent judicial task", which according to this writer, is not defensible under the Ethiopian legal system.

1. CONSTITUTIONAL REVIEW: 'THE NORMAL BUSINESS OF COURTS'?

According to some Ethiopian academics, declaring a law invalid is the "inherent" judicial task of the courts. These academics start from the premise that it is the usual/ normal business of courts to find and declare the law. When a court nullifies legislation on the ground that it is unconstitutional, it is applying the existing law as opposed to a non-existing or repealed law.[27] The court, in other words, is declaring what the law is. The "normal business of courts" thus includes the act of invalidating legislation for unconstitutionality. Based on this, they argue that the courts should proceed to resolve constitutional disputes without referring them to the Council. To substantiate their argument, they forward two reasons. First, all judicial power (including finding, interpreting, and declaring the law) belongs to courts. In relation to this, a reference is made to article 79(1) of the Constitution, which vests all judicial powers, both at Federal and State level, in the courts. Second, all laws, practices and decisions in contradiction with the Constitution, which are nullified *ab initio* by the Constitution, need no interpretation. What they need is mere application, which in this case is a mere declaration of repeal.[28]

The first line of argument which relies on the so called "inherent judicial task" bears a resemblance to the arguments advanced by Chief Justice Marshall in the most celebrated case of *Marbury v Madison*. In that case the court, despite the absence of explicit constitutional authorization to do so, refused to apply an Act of a coordinate branch of government. By doing so, it assumed for itself the power of judicial review. In Marshall's opinion, a written Constitution is a law and it is "the province and duty of the judicial department to say what the law is".[29] Thus, judicial power, according to him, includes reviewing Acts of the legislature.

The problem with this line of argument is its reliance on the so-called "inherent judicial task", a concept that does not necessarily apply in Ethiopia. It assumes that finding, interpreting and declaring a law is an "inherent judicial power", which in the Ethiopian case is vested in the courts. It, however, is not clear if judicial power necessarily includes reviewing Acts of the legislature. A brief survey of the different legal systems would show that this is not always the case. France, for instance, could be a good example. In France, Constitutional control of legislation has always been entrusted specifically to political non-

[27] Tsegaye, cited above at note 25, p.116.
[28] Ibid.
[29] Marbury v Madison, cited above at note 5.

judicial bodies. There is a long-standing distrust of the judges, who were perceived as being the 'bitterest enemies of even the slightest liberal reform".[30] Giving the judiciary a controlling power has always been considered as something that 'conflicts too much with the traditions of French public life'.[31]This, in fact, was the main reason for denying courts the power of constitutional review and establishing the *Conseil Constitutionnel* in 1958.

As it is also stated in the beginning of this chapter, in the United Kingdom, where parliamentary sovereignty is "the dominant characteristic of [the] political institutions", judging statutes to be invalid for violating either moral or legal principles of any kind is not the "normal business of courts". Courts have no legal authority to invalidate statutes on the ground that they are contrary to fundamental moral or legal principles.[32] Understanding judicial power as including the exercise of the power of constitutional review has always been considered dangerous, as it would amount to "a massive transfer of political power from parliament to judges".[33] The same is also true for New Zealand.[34]

One may not even be sure whether this (i.e. the inherent judicial task and considering the Constitution as any other ordinary but supreme law) is not Marshall's invention. During the early days of America, the Constitution was understood to be a political instrument different in kind from ordinary laws.[35] Enforcing the Constitution was accordingly understood to be an extraordinary political act. In refusing to execute particular laws, judges [back then] relied on a variety of justifications, all of which were closer to outdated English precedents than subsequent American doctrine, which extended judicial power to include the power of constitutional review.[36] It was only after Chief Justice Marshall that the written Constitution started to be considered as any other law that falls within the ambit of judicial authority.[37]

As indicated earlier, this development is, however, not matched by corresponding developments in other legal systems. The situation, for example, is quite different in Ethiopia. As the brief review of the history of constitutional review earlier in this chapter indicated, declaring a law void for its repugnancy to the constitution has never been considered as the normal business of the courts. Either it had never been recognized as such or, when it was, it was explicitly given not to the courts but to another political body. It is, therefore, difficult to accept in the Ethiopian context the argument that judicial power includes the power of refusing to apply legislation on the ground that it is incompatible with the Constitution.

The academics, in making a case for the role of the courts in constitutional review, also relied on the argument that the courts, in refusing to give effect to legislation on ground of

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[30] Bell, cited above at note 9, p.2o.
[31] "It is neither in the spirit of a parliamentary regime nor in the French tradition to give the Courts…the right to examine the validity of a *loi*." See Id, p. 27.
[32] Goldsworthy, cited above at note 8, p.1-3.
[33] Craig, cited above at note 8.
[34] Ibid.
[35] S. Snowsis, Judicial Review and the Law of the Constitution *(*1990) p. 1.
[36] Ibid.
[37] Id, 2-4.

incompatibility, need not engage in interpretation. This is so because legislation, which is in conflict with the Constitution, is nullified *ab initio* by the Constitution. What is required from the courts is mere application, which in this case is mere declaration of repeal. It is true that provisions of laws, which contradict the Constitution, are of no effect right from the beginning and not when the court declares them so.[38] "The declaration is merely descriptive of a pre-existing state of affairs."[39] In an interesting remark by Ackermann J:

> *The court's order does not invalidate the law; it merely declares it to be invalid. A pre-existing law which [for instance] was inconsistent with the provisions of the constitution become invalid the moment the relevant provisions of the constitution came into effect…the test for invalidity is an objective one.*[40]

However, making such a distinction in the present context would only be simplifying the matter as interpretation and declaration cannot be divorced from one another. It is, of course, the Constitution that nullifies them *ab initio*. This, however, does not mean that interpretation is not needed. Any institution that is competent to make this decisive declaration needs to necessarily engage itself in constitutional interpretation. A declaration of unconstitutionality requires of a court to examine the impugned provisions of law against the rights recognized by the Constitution. The court needs to determine whether the impugned provision infringes the rights and whether such infringement is justified by the limitations recognized by the Constitution. In fact, it is when the court exercises its power of constitutional review that it needs to undertake a vigorous and careful interpretation of the Constitution. Enquiring into the constitutionality of legislation is always 'a question of much delicacy'.[41]

As the foregoing discussion suggests, any argument to empower the courts with a constitutional review power cannot base itself on a claim that engaging in such exercise is the normal judicial business of courts. This would be an erroneous application of an American principle in a country that has a different legal tradition. It would also amount to utter disregard of the existence of various legal systems that construe judicial power quite differently and stand quite in contrast to the American judicial system.

2. THE DUTY TO ENFORCE THE CONSTITUTION AND CONSTITUTIONAL INTERPRETATION

A number of Ethiopian academics and officials of the judiciary, though on a different basis, still maintain the argument that Ethiopian courts have the power to interpret the Constitution. The argument is that this power stems from the constitutional commitment to respect and enforce the fundamental rights and freedoms set forth in chapters two and three of the Constitution.[42]

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[38] Article 9 of the Constitution states that any law which contravenes the Constitution shall be of no effect.
[39] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 94.
[40] *Ferreira v Levin No* 1996 (1) SA 984 (CC) para 27.
[41] Snowsis, cited above at note 35, p. 131.
[42] See Assefa, cited above at note 11, p. 13; Tsegaye, cited above at note 25, p.111. Article

The basic premise of this argument is that 'enforcement presupposes interpretation'. In the words of Assefa Fiseha:

> *The judiciary's role in 'respecting and enforcing' fundamental rights and freedoms is clearly enshrined in Article 13 and this role of 'respecting and enforcing' fundamental rights and freedoms is illusionary unless the judiciary is, in one way or another, involved in interpreting the scope and limitation of those rights and freedoms for [sic] which it is duty bound to 'respect and enforce'.*[43]

The court, it is argued, is faced with this "unavoidable duty" of interpreting the Constitution both in civil and criminal cases.[44] The following issues are often raised to illustrate that constitutional interpretation is a necessary corollary to adjudication of criminal cases:

> *Was the respondent granted a sufficient hearing before his driver's license was revoked? Did the entry into the burglar's house require a search warrant? Does hearsay violate the right of confrontation? …Has the defendant's detention for seventeen consecutive days violated the right of speedy hearing? Was the zoning ordinance that shut down the loud speakers at the local cathedral a violation of free speech,[religion] and separation of church and state?*45

Therefore, to the extent that the courts enforce the rights and freedoms enshrined in the Constitution, they exercise the power of interpreting the Constitution. To this extent, they conclude, the courts have the power to state what the constitutional law is.[46]

It is, however, not clear whether all enforcements of rights under chapter three of the Constitution presuppose interpretation. Of course, most often courts are required to interpret the law in order to determine the meaning of the applicable law and apply it to the operative facts of the case brought before them. It is seldom that courts mechanically apply a pre-existing rule. This, however, does not mean that there are no cases where the courts cannot enforce a provision of the Constitution by simply applying it, without going into the business of interpretation. However few they might be, it is submitted, there are still cases where the courts can enforce the provisions of the Constitution without interpretation.

It is also because not every single enforcement of a provision of a constitution, or any law for that matter, requires interpretation that it is sometimes said that one should simply apply the law when its meaning is clear. When the language of a constitution provides a plain, clear meaning, the plain meaning of the language is to be applied and there is no

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13(1) of the Constitution reads: "All Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this chapter".

[43] Assefa, cited above at note 11, p. 14.

[44] M Wills "Draft Materials on the Ethiopian Constitution" (1999) 29 as cited in Assefa, cited above at note 11, p. 15.

[45] Ibid.

[46] Assefa, cited above at note 11, p. 14.

room for judicial construction.[47] In such cases, it is submitted, the judiciary is left with little to do other than strictly and literally to applying and enforcing the provisions of the Constitution.[48]

Of course, there is a view that says a court cannot give meaning to a provision of a constitution, 'however plain', without engaging in the work of interpretation. According to this view, all legal meaning is fundamentally a matter of context and interpretation.[49] The proponents of this view also believe that words only take on their real meaning when placed in context. In the words of De Ville, interpretation is a "mode of existence rather than a methodology".[50] According to him, we are always interpreting.

This theory of interpretation, which denies the existence of a 'non-positional' interpreter under all circumstances, entails the view that all texts are indeterminate. This, however, is difficult to accept in a country like Ethiopia, which follows the civil law tradition where detailed rules are enacted and judges are expected to strictly apply them without engaging in interpretation. In Ethiopia, as may also be the case in many other civil law countries, the legislature enacts laws which are detailed, explicit and clear. Under such circumstances, however unreasonable the law may sound, the judges are expected to apply it consistently.

Many of the provisions of the Ethiopian Constitution, especially those that the courts are expected to invoke in their daily functioning, are stated in an explicit and clear manner.[51] This becomes clear when one looks closely at some of the provisions of chapter three of the Constitution. Article 21 for instance, provides for the rights of persons held in custody and convicted prisoners. Under sub article 2, it states, "all persons shall have the opportunity to communicate with and to be visited by their spouses or partners, close relatives, friends, religious councillors, medical doctors and their legal counsel". If a detainee or a prisoner presents a claim before the court alleging that he was denied contact with any of these individuals, the court need only to invoke the provisions of this article and order the defendant to comply with the constitutional provision. To do so, the court need not engage itself in interpreting the Constitution. It only needs to mechanically apply this specific provision of the Constitution to the facts of the case.

Article 19, which provides for the rights of persons arrested, is another good example. One of the important stipulations of this article is that persons arrested have the right to be brought before a court within 48 hours of their arrest. This is a very important principle of any criminal justice system that courts need to enforce vigorously. It lies at the heart of the duty of a state to protect citizens from any arbitrary and unlawful pre-trial arrest or detention. However, the application of this article needs no interpretation. It only requires a judge to ascertain the time of arrest and thus compute the time that went on before the

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[47] C. Antieau, Constitutional Construction (1982), p.3.

[48] Ibid.

[49] S. Sugunasiri, "Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability, Dalhousie Law Journal Vol. 22 (1999) p.126.

[50] JR de Ville Constitutional and Statutory Interpretation (2000), p. 3.

[51] Donovan stated that the language used in the sections of the Constitution detailing the rights of Ethiopian citizens caught up in the criminal justice system are written in the familiar language of the everyday functioning of the courts. See Donovan, cited above at note 22, p. 31-34.

arrested person is presented before the court.[52] The same also goes for article 23, which provides for the prohibition of double jeopardy and article 32, which decrees freedom of movement.

The implication of this argument is that the courts are expected to enforce the provisions of chapter three of the Constitution only to the extent that it does not engage them in interpretation. However, "if issues of Constitutional interpretation arise in the courts"[the words of the Constitution itself] in the process of enforcing the Constitution, the courts should refer the matter to the Council.[53]They should refrain from giving meaning to the provisions of the Constitution and resolve the constitutional dispute. Under such circumstances, they are expected to defer to the interpretation of the House.

Such understanding of the position of the Constitution in regard to constitutional review is also important if the provisions of the Constitution itself are to be considered as consistent and not contradicting each other. To the extent possible, provisions of the Constitution must be read in conformity. This is often referred as the 'unity of the constitution' or "harmonious interpretation of the constitution". [54] Reading the Constitution as allowing courts to interpret the Constitution in the course of enforcement gives the impression that the provisions of the Constitution are inconsistent with each other. This is because, as already mentioned, the Constitution, under article 84, provides the House with the power to interpret the Constitution, in addition to the specific task of determining the constitutionality of legislative acts. On the other hand, if the argument that the courts are only allowed to enforce the Constitution to the extent that it does not require interpretation is valid, then the provisions of the Constitution will be rendered consistent. The Constitution will then be read as having categorically assigned a role for each organ (i.e. the House, the Council and the courts).

The controversy surrounding constitutional review was only confined to the text of the Constitution. After the year 2001, however, that is almost six years after the adoption of the Constitution, another element that gave momentum to the controversy came into picture. The following section shall discuss this specific and important post-Constitution development.

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[52] Of course, there is another element of this same stipulation that may require the courts to engage in interpretation. The Constitution states that the court, when calculating the 48 hours, should not include the time reasonably required for the journey from the place of arrest to the court. On a case-by-case basis the court may decide, "the time reasonably required for the journey". This obviously may require the court to interpret what the constitution meant when it refers to the "reasonableness" of the time. This, however, is only in cases where people may have to travel a long distance before they reach a nearby court. For obvious reasons, this does not apply in most of the towns where there is always a court, which is not too far from the police station.

[53] Article 84(3) proceeds with the assumption that the courts refer a case to the Council when issues of Constitutional interpretation arise in the former. This obviously suggests that courts are expected to refer the matter to the council in the event deciding the matter at hand requires interpretation of the Constitution.

[54] N. Steytler, Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, *1996* (1998), p.17.

V. POST-CONSTITUTIONAL DEVELOPMENT

In the middle of 2001, the House of Peoples Representatives issued two proclamations consecutively. Proclamation NO 250/2001, which deals with the powers and responsibilities of the Council of Constitutional Inquiry, was issued first. Proclamation No 251/2001 that was issued to consolidate the House of the Federation and define its powers and responsibilities followed this.

Prior to the enactment of these two legal instruments, there was a general belief, among those who believe that the courts are mandated to interpret the Constitution (either by way of enforcement or as part of their "normal judicial task"), that the courts hold the power to review the constitutionality of executive acts. According to the proponents of this argument, the courts can examine the constitutionality of executive acts and, if they found them to be incompatible with the Constitution, consider them null and void.

To substantiate their argument, proponents of this viewpoint capitalize on the reading of the Amharic and English versions of Article 84(2) of the Constitution, which have different meaning and implication. According to the English version, "where any federal or state law is contested as being unconstitutional…." the House of Federation provides the final decision. "The import of this provision is that the constitutionality of laws enacted by the House of Peoples' Representatives or state legislatures can only be challenged before the CCI and final decision is rendered by the House of Federation."[55]

A rough translation of the Amharic version of Article 84(2), on the other hand, suggests that it is only where "laws enacted by the federal or state legislative bodies [i.e. the House of Peoples Representatives or state legislature] are contested" that their constitutionality can be challenged before the Council and final decision is rendered by the House of Federation. Thus, according to the Amharic version, 'law' in article 84(2) only refers to formal enactments of either the House of Peoples' Representatives or state legislative bodies. The offshoot of this argument is that the ordinary courts can challenge the compatibility of the acts of the executive with the Constitution. In other words, the courts, for instance, have the power to consider whether so-called *regulations*, which are issued by the Council of Ministers, contravene the Constitution. The same applies for enactments passed by the Federal government or its agencies or by regional agencies or governments.[56]

Advocates of this position maintain that this is consistent with the parliamentary system adopted by the Constitution.

> *In parliamentary system, at least theoretically speaking, the existence and effectiveness of the executive depends upon the securing of continuous support from the members of parliament. Consequently it is often said that, parliament is supreme, subject, of course, to the supremacy of the constitution. All other branches of government are accordingly bound to assume that legislation enacted by parliament is constitutional and that is why ordinary courts are*

[55] Assefa, cited above at note 11, p.12.
[56] H. Scholler, Notes on Constitutional interpretation in Ethiopia (2003) p. 7.

> *prohibited from nullifying such legislation…[Thus] when the constitutionality of executive acts is at issue, the judiciary is bound to review for their constitutionality.*[57]

Henrich Scholler who, almost in the same words, argues that the reason for this limitation is that the Constitution does not want to exclude the executive power from control by the courts also shares this. "Only the parliament itself is excluded, because in parliament the popular will is expressed and should [not] be subject to control by a court."[58]

Much need not be said on the fact that it is difficult to sustain this position in the face of the conclusion we reached at the end of the previous section of this article. This is for all the same reason that invalidating executive acts for constitutional incompatibility requires interpreting the Constitution, which according to the Constitution, is a task left for the House of Federation.

The implausibility of this position is, however, made more apparent by the two proclamations. According to the Council of Constitutional Inquiry Proclamation, the House of Federation has the power to decide on the constitutionality of any law or decision by any government organ or official, which is alleged to be contradictory to the Constitution.[59] Law, according to this Proclamation, is meant to include "the proclamations and regulations issued by the federal government or the state as well as international agreements which Ethiopia has endorsed and accepted". Thus, the review power of the House of Federation is not limited only to laws issued by the Federal and state legislative bodies but also extends to executive acts, which includes directives and by-laws.

Some have considered these proclamations as having further elaborated the provisions of the Constitution with regard to constitutional interpretation and cleared the confusion that attended the role of the different organs in constitutional interpretation and in the more specific task of constitutional review. Others have taken these developments to be unconstitutional. According to them, these proclamations have unconstitutionally consolidated the power of the House of Federation and further marginalized the courts from the important task of constitutional interpretation. Some even speculate that these proclamations were issued as a response to the growing consensus, especially among academicians and some members of the judiciary, regarding the "unavoidable" role of courts in interpreting the Constitution and more specifically in invalidating executive acts.[60]

It is submitted that these post-constitution developments go along with the general trend of the Constitution in excluding the courts from any exercise that involves expositing the

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[57] Assefa, cited above at note 11, p. 12.

[58] Scholler, cited above at note 56, p.7.

[59] Article 17(2) of the Proclamation reads: where any law or decision given by any government organ or official which is alleged to be contradictory to the Constitution is submitted to it, the council shall investigate the matter and submit its recommendation thereon to the House of federation for a final decision.

[60] Personal observations of the different views advanced by participants of the conference on "Constitutional interpretation in Ethiopia", organised by the Federal Supreme Court and Friedrich Ebert Stiftung, 2002 Addis Ababa, Ethiopia.

provisions of the Constitution. The Constituent Assembly, that adopted the Constitution, believed that constitutional issues are more than judicial matters. "It was, therefore convinced that such a task was so essential to the basic interests of the nations, nationalities and peoples of Ethiopia that it could not be entrusted to an organ other than the House of Federation."[61] It is this conviction that is now affirmed by the enactment of the two proclamations.

CONCLUSION

As the foregoing discussion suggests, the ultimate authority to interpret the constitution is vested in the House. This includes the power to declare legislative acts and executive acts invalid when it finds them to be repugnant to the Constitution. The House fulfils this task with the expert help of the Council, which provides the House with recommendations. The discussion has also demonstrated that the courts have neither the power to give an exposition of the provisions of the Constitution nor the power to exercise constitutional review. The line among academics that attempt to endow courts with the power to interpret the Constitution can only be a pious wish.

As this same author has argued elsewhere, this particular Ethiopian approach to constitutional interpretation and constitutional review does not escape from the same criticism that is levelled against constitutional system that relied on courts for constitutional review. Its attempt to eschew the counter-majoritarian problem by creating a novel system of constitutional review that excluded the judiciary has not succeeded. Its decision to entrust the function of constitutional interpretation and constitutional review to the House which is not institutionally and functionally suited to discharge the task is also problematic. In as much as the Ethiopian approach can be commended for the novelty of the system, it is not a commendable system of constitutional review as it does not have characteristics that make it a good part of a well-designed constitutional system. [62]

[61] Discussions at the Constitutional Assembly, December 1994 as cited in Ibrahim, cited above at note 17, p.69.

[62] For a detailed critical examination of the current system of constitutional review see Yonatan, cited above at note 3.

"In The Beginning": Reflections on the Early Years of the Addis Law School

James C. N. Paul•

Introduction

This is not a detailed history of the beginning of the Law School. Rather it is, primarily, a discussion of the principles on which it was founded. I believe those principles may still be of interest, even as the school now confronts very serious pressures and problems which affect its ability to meet its obligation to train professional lawyers dedicated to the rule of law. As will be evident from what follows, the Law School, during the decade 1963-74 was a collective enterprise. Its successes were due to the combined efforts of a dedicated, international faculty and our students of this period. I remain forever grateful to these colleagues and friends. Indeed, their continuing affection for the law school is now evident from the fact that, on the occasion of the school's 40th anniversary, we (the faculty of 1963-74) joined in a project to create a Fund, now totaling around $125,000, to help the school develop teaching materials and research in the fields of human rights law and the rule of law – subjects which, I hope will remain basic goals of legal education in Ethiopia, even in times of adversity.

Launching the Enterprise

During the years 1960-62 I visited Ethiopia several times, first on my own initiative as an Eisenhower Fellow commissioned to study the development of legal education in Anglophonic Africa, and then on missions for the Peace Corps. These trips inspired a continuing affection (despite my ignorance) for Ethiopia and a deep interest in the steps then underway to codify and "modernize" its legal system and, in light of these changes, the need to develop a university law school.

During this time I corresponded with Don Levine (then working on his masterpiece, "Wax and Gold".) He encouraged my interest, and I wrote a short paper expressing my thoughts which I sent to a few acquaintances in Addis. Indeed, I learned that, upon the founding of Haile Sellassie University, the Emperor (as Chancellor) had pressed for the immediate creation of a law school; and, in 1962, despite my slender qualifications, I was invited by Lij Kassa Wolde Meriam, then President of HSIU, to become its founding Dean.

Three factors led to my acceptance. First, my wife, Peggy, was enthusiastic about the project and about living in Ethiopia and the chance to expose our young children to a different culture. Second, I was granted a generous leave of absence from the University of Pennsylvania (where I was a tenured Professor). Third, the Ford Foundation indicated a willingness to help the enterprise - though no final commitment had been made.

• Professor of Law and the Founding Dean of the Law School

We arrived in Addis in June 1963. The rain season had begun. Lij Kassa was out of the country. The university lacked an Academic and a Business Vice President to advise me on what to do. There was neither a university budget nor a plan for the new Law School. The "Duke Bet," designated as the home of the Law School, was locked, and apparently, the key was lost. There was no furniture, not even a chair, in that strange structure – (the Duke *Bet*), nothing but a substantial amount of dust. When I sought help to get the building in shape I quickly learned about the concept of "ishi negga."

Despite this discouraging beginning, the picture soon brightened. The Ford Foundation quickly responded to my urgent plea for an immediate, substantial grant to help pay for the moving expenses of the initial faculty who I had already recruited; for the cost of starting a library, for a mimeograph machine and for other essential items. Lij Kassa returned and, at my request, invited the Emperor to dedicate the Law School as soon as we could put the Duke Bet in operation. In preparation for that occasion, there suddenly appeared an army of cleaners and carpenters and others carrying the furniture we needed. Books from the University Library were temporarily "borrowed" to fill up our empty shelves and make us look like a "going concern".

The first faculty contingent also arrived - an energetic, gifted group who, along with our memorable, scholarly friend, George Krzeczunowicz, supplied the hard work needed to make plans and start operations in just a few months. Together we made some decisions based on our basic assumptions about university legal education in general, and the principles we should follow to implement them in Ethiopia. I hope these early decisions may still be of some interest today.

Some Initial Formative Decisions

1. Determining the Size and the Academic Standards of the Law School

In 1963 there were, in Addis, less then a dozen, young Ethiopian graduates from foreign university law schools – notably a group from McGill University in Canada, plus a few, rather exotic, older professionally trained foreign judges and lawyers. Especially in light of the "modernization" of Ethiopian law, the need for many more professionally trained judges, government lawyers, and advocates was obviously urgent.

In theory, a case could be made for us to recruit a large entering class. However, several considerations led us to limit enrollment. We determined that entering students should have completed at least two years of university education with a superior academic record. That meant we had to lure good students away from other units of the university – an outcome which did not sit well with these faculties. Accordingly, our entering class was limited to about 30 – although that number grew in subsequent years when we began to recruit full time students from the military, police and various government offices.

We also believed a limited enrollment was particularly important at this time to establish appropriate academic standards. The determination of appropriate standards for any professional institution should depend on goals sought-- on the knowledge and skills required for its graduates. We resolved that graduates of the Law School should be at least

as well prepared, professionally, as the Ethiopian LLB graduates from foreign universities – such as the McGill group.

This called for rigorous classroom instruction of a kind which was new to most students, notably because some faculty used "Socratic" methods of teaching. Our program also called for the immediate preparation of teaching materials grounded in Ethiopian law that challenged students to use that law (and, where appropriate, relevant foreign sources) to resolve hypothetical cases and other problems related to the interpretation and implementation of this new body of law. Our program also called for intensive "hands on," individualized instruction in legal analysis, drafting and advocacy—training which seemed particularly important because there were no other institutions to provide practical, post-degree training.

In light of the above, we lacked faculty resources to teach a large student body. Rather, it seemed appropriate to adopt the "elitist" model described above. Certainly there are "large scale" university programs of legal education in other countries, notably in many civil law jurisdictions; but the legal systems of these countries also provide extensive, specialized post-degree training before university graduates can become notaries, advocates, judges, law teachers or other kinds of professionals. Later, when I became Academic Vice President of HSIU, I did argue that it was very important for the government to create regional universities in order, *inter alia,* to expand opportunity for legal education where there was also an urgent need for professionally trained lawyers.

However, that step would obviously depend on the adoption of new, long term government policies and budgets not then planned. In any event, I continue to believe that a country lacking a well trained judiciary and an independent, self regulated legal profession can ill afford to sacrifice quality for quantity. The effective development of the rule of law, as the foundation of any creditable legal system, requires competent, dedicated and independent judges and lawyers. Legal education committed to training them should never be provided "on the cheap," nor overwhelmed by numbers.

2. Outreach: Part Time Legal Education

At the outset we decided to establish an evening, part time program designed to provide an opportunity for LLB training to experienced, educationally qualified, government officials and military and police officers. We believed this program would serve important public needs, and certainly these older students would also provide us, a foreign faculty, with greater knowledge of Ethiopian circumstances relevant to our mission. Too, the evening program provided important contacts and links with the world outside the university, and, ultimately, a loyal and supportive alumni body. Indeed this program did prove to be a very valuable asset.

Entry requirements, academic standards, the curriculum, course materials and examinations for the evening LLB program were the same as those established for full time programs. No "mercy" was shown to those who fell behind - no matter how highly placed in government they might be. The popularity and success of the evening LLB program soon led to decisions to establish Diploma programs modeled on the LLB course but with

more liberal standards and a modified curriculum. One specialized diploma program was developed in cooperation with leaders of police to provide much needed training for their officers.

Before the founding of the law school, there also existed, thanks to the initiative of the McGill trained lawyers, a "Certificate" program which was taught in Amharic and designed to "familiarize" advocates, judges, and members of Parliament with the new codes. It was quite popular, and when the program was put under the aegis of the Law School this gave it added prestige, and linked it to our "outreach" mission. These programs provided, an interesting, if limited, practical response to local needs, and they ultimately provided us with a large, diverse alumni constituency - and friends.

Thus, the Addis Law School became something more than a traditional "Faculty of Law". It was a "sui generis" center for legal education. Indeed we even began to reach out further when we encouraged students, with the cooperation of the Ministry of Information, to present radio programs in the form of discussions about Ethiopian law, aimed at informing the general public about their rights and obligations. These efforts proved to be quite popular, attracting large audiences.

3. The Curriculum, Course Materials and Faculty Loads

Planning a curriculum is a subject that often consumes much faculty time. However the first step is to determine the principles and objectives which we thought should guide the development of our program – not on the details of particular courses. For example: (i) In view of the recent " modernization" of Ethiopian law it seemed important to devote time to the history and evolution of law and legal institutions in other regions, particularly in Civil Law and Anglo-American countries, and then to the problems of" transplanting" those systems to other regions of the world, notably Ethiopia. Too, the students should be introduced to modern philosophies of law (e.g. Austinian vs. Sociological), and to political theories particularly relevant to constitutional development. (ii) As noted above, some courses should emphasize methods of interpreting, legislation, critiquing legal doctrines and resolving hypothetical cases. We also thought that an additional objective should be to provide close supervision individual student work requiring research and writing different kinds of legal documents. (iii) The teaching of most courses should be based on faculty prepared teaching materials designed not only to teach Ethiopian law but to relate this "law in the books" to Ethiopian circumstances - and which included illustrative problems of interpretation and implementation of the codes and other legislation for class discussion. Preparation of these materials and revisions of them based on classroom experience and further research, required considerable faculty time – and, thus, teaching loads limited to one subject area. In light of the above, the organization and detailed content of each course should be left to the discretion of individual teachers – not dictated by the full Faculty.

4. The Journal of Ethiopian Law and its Relation to the Educational Program

During 1963, we also developed plans for publishing the bilingual JEL twice a year. Overall supervision was entrusted to an editorial board composed of both Ethiopian lawyers and judges and members of our faculty. The first two issues were produced in

1964. The Emperor, in an "Introduction" (which I helped to draft) emphasized the need for scholarly commentary and publication of significant, well reasoned court decisions in order to promote knowledge of Ethiopia's new legal system. His remarks helped to "legitimize" the Journal and to encourage its circulation. From its founding until it ceased publication in the 70's; the JEL did provide scholarly resources to the profession, faculty and students.

The JEL also provided a valuable kind of educational experience to the many students who volunteered time to work as "Assistant Editors" and as translators of sophisticated articles written in English and vice-versa for court decisions written in Amharic. Many students also became co-authors (with faculty members) – or authors in their own right – of articles. Other articles were written by distinguished members of the judiciary and government lawyers. Further, the JEL served an "outreach" function. It was well received by many advocates, judges and in government circles as well. In 1965, we invited readers of the Journal to become "patrons" (financial supporters) of it – promising that their names would be published in each issue. This effort proved successful during the Journal's early years. It helped to expand its readership as well as pay for its publication costs.

5. The Library

The importance of the Law Library to the quality of legal education need hardly be elaborated here. During the early years, we were fortunate to enjoy considerable assistance from our Ford Foundation grant and many foreign donors to help build a sizeable foundation collection.

Departing from my basic assignment in regard to this article, I offer here some personal thoughts (for whatever they are worth) on several additional principles which, I think, should guide the ongoing development of the library, especially in light of the important "role" now assigned to the Law School to develop graduate level education. Advanced legal education and, indeed, the intellectual development of new faculty members, should encourage study of political and legal theory, comparative law, the history of the transfers of legal systems into non-western countries, the concept and importance of the "rule of law" in both the private and public spheres and the problems of implementing these concepts in large socially diverse countries like
Ethiopia.

The collection should also aid exploration of theories about the different roles of law in promoting different concepts and strategies of development .e.g. the problems of state-managed development; the history of harms done to people by different kinds of state-managed, large scale infrastructure projects, (such as the building of dams) which have often resulted in the uncompensated, displacement of the rural poor and pastoral people; the roles of human rights in promoting "people" and "poverty" centered "human" development; the problems of creating an effective body of foreign investment and "private" international law; the importance of environmental law in Ethiopia and the development of effective methods to enforce it. Fortunately much of the literature on these new subjects now exists in electronic form.

6. Ethiopian University Service

This university wide program requiring students to serve, in rural areas – in various fields such as education, public health, agriculture, and local government - was initiated in 1967. I strongly supported it, believing that it would provide a valuable educational experience – notably because most of our students came from Addis or Asmara, and many were rather unfamiliar with the cultural and social diversity of the different rural areas of their country where most Ethiopians lived. Some of the faculty writings, based on field research, reported in the appended faculty bibliographies underscore this point.

It was my hope that, through the EUS programs, our students could be attached to local courts and governments in rural areas. Learning about the administration of law at "grass roots" levels was, and perhaps still is, an important dimension of legal education, and a subject, which, absent research materials, could not be taught in the classroom, nor by professional work in Addis. A good example of this is learning about the problems of enforcing women's rights, as codified by the UN Women's Convention (ratified by Ethiopia long ago). Alas these hopes for developing "grass roots" education were never realized. The Ministry of Justice "drafted" all our EUS students into government service in Addis – not in the Provinces. However, today, in light of development programs, emphasizing small – holder agriculture, and important human rights considerations concerned, e.g. with women's right and "participatory development" it seems to me that knowledge of "grass roots" legal development is still very important.

Interestingly, a group of able senior law students challenged the legality of the EUS program in the High Court, claiming that the University Charter did not authorize it. Despite the able arguments of the University's experienced counsel, and to my dismay (albeit tempered by admiration for the skills shown by our students), the High Court, in an opinion rendered by its foremost foreign judge, agreed with our students; he decided that the EUS was not an "academic" program and thus not authorized by HSIU's Charter. Although I disagreed with his opinion, I included it in my constitutional law sourcebook as a valuable illustration of doctrine of "ultra vires", then a rather novel concept. The students abandoned their case when the University appealed the High Court judgment, permitting the program to go forward until it was terminated with the coming of the revolution.

7. The Development of Professional Standards and Ethics

In the '60s, advocates and judges (with a few exceptions) had no formal training in professional organization, responsibilities and standards. There was no bar association, no code of professional ethics, nor an effective system of oversight and discipline. The concept of an independent, self regulated profession, an essential component of "rule of law," was lacking.

Accordingly, we took steps to develop knowledge of, and pride in, professionalism in the Law School. We requested the first entering class to form their own professional association and draft a body of rules establishing an Honor System - a code of governing the taking of exams, the use of the library and the preparation of student papers, and other conduct. This was a novel enterprise – unknown then, I believe, to Ethiopian education.

To its credit, the Law Student Association (LSA) also produced an annual "Law Day" program, which entailed both a guest lecture by a distinguished government official and a student presentation featuring, in a drama format, discussion of some novel legal issue - for example: a parliamentary debate on the constitutionality of the Penal Code's authorization of corporal punishment for theft; a depiction of a labor dispute which followed the history of a worker's case from a hearing and decision of the Labor Board through appellate review.

Another notable achievement of the LSA was the project to raise funds to construct "Law House" - a building designed to provide for student - managed programs and receptions and living quarters for senior students. Towards this end, starting with a gift of $10,000 from the Emperor, the LSA raised more than $80,000 during the period of my Deanship. The building was completed after I left Ethiopia. Alas, after the Derg took control of the campus, "Law House" was "expropriated" by the University and used for other purposes - an unlawful act which, I suppose, will never be redressed.

8. External Evaluations and Consultation with Outside Experts

During our second year, we arranged for an international team of distinguished law professors to visit the Law School, evaluate our progress and submit a report to the President. The team was requested to visit classes, meet with individual students, faculty members and university officials and the Minister of Justice. They also were invited to review the curriculum, teaching materials and examination papers - and assess the quality of these.. Thereafter, these evaluations occurred on a regular basis, and I think it is fair to say, that we were regularly given high marks.

I believe that assessments, and visits and consultations with individual foreign experts, are useful ways to review the development of new programs, particularly in some particular, novel subject area – such as "law and development." These visits can also be useful to bolster the Law School's standing within the university and the outside legal community – and to boost faculty morale. Moreover, especially in times of adversity, guest experts are usually quite willing to write strong reports to the university and the government emphasizing the need for more resources to support programs which are essential to maintain the academic quality of the Law School, and to condemn policies which undermine its quality. Reports by internationally recognized experts can also provide useful support in approaching donors for help in meeting specific needs.

9. The Faculty as a Key Resource

The quality of any academic institution is measured by the quality of its faculty - not only the quality of its classroom teaching, but also, the quality of its scholarship, notably (in Ethiopia) as reflected in the production of articles and teaching materials. During its formative years, the Law School was fortunate to have an international faculty who were both productive scholars and stimulating teachers. We were also, as noted, fortunate to be able to limit most faculty teaching loads to one subject area. A survey of the publication records of these colleagues attests to their extraordinary energy–not only in the preparation

of course books and texts but in the many JEL articles they wrote during their stay in Ethiopia, and, indeed, in the many, very useful articles which they wrote after they left the country. I believe that no other law faculty in Africa (or elsewhere) has left such an institutional legacy - such valuable resources for the teachers who succeeded them.

Some Concluding Observations

Much of the above account has focused on decisions made during time when I was Dean. But I wish to stress that the Law School continued to prosper during the able Deanships of my successors: Deans Quintin Johnstone and Cliff Thompson. They, too, enjoyed the support of a wonderful, productive faculty. Indeed, I hope my admiration for the efforts of these colleagues has been made very clear. Today we are all part of a close– knit tribe, which maintains an ongoing interest in the progress of the Law School.

I also remain very grateful for the generous support provided by the Ford Foundation and particularly to Frank Sutton (Vice President of the Foundation) who convinced the Foundation's trustees that support for legal education in Africa, and particularly in Ethiopia, was a worthy cause. In the '60s, other major, international donors thought that funding legal education was a "luxury", irrelevant to the country's "development"; but Frank believed that the building of a rule of law was indispensable to building both a sustainable democratic system and development policies which are accountable to the people.

In the '70s, in Africa, brutal military regimes, such as the Derg, seized power in many countries and attempted to destroy the rule of law in them. In the United States, a strident group of academics ridiculed the Ford Foundation's legal education assistance programs of the '60s, especially the Ethiopian program. We were told that we (the faculty who went to Ethiopia) were deluded "legal missionaries," that our assumptions about the importance of the "modernization" and the rule of law were based on ignorance of lessons taught by the "sociology of law" (an amorphous discipline which enjoyed popularity, if not much intellectual coherence, in those days). In Europe, Marxist legal academics portrayed us as "bourgeois enemies of socialist development". These were discouraging times both in Ethiopia (suffering under the Derg) and for many of us, the "deluded legal missionaries".

However, today, all this criticism of our efforts seems ill-informed, to say the least. International donors have now changed their tune. US AID and the World Bank support of legal education and rule of law projects in Ethiopia are examples of a change of heart which is better late than never. A large body of scholarly literature (based on considerable experience) stresses the importance of developing a "rule of law" and human rights law, as preconditions for building a sustainable system of democratic governance. Clearly, too, the rule of law is also essential to promote foreign investment and maintain accountable governance.

This new interest in support of legal education may, hopefully, be useful in helping today's Law School plan its ongoing development. In my view, planning legal education for the future should start by identifying basic principles and goals and then identifying particular programmatic decisions to implement them, and then estimating some of the costs required.

Perhaps the preceding discussion of the planning process we followed during the very early years of the Law School may be of some value to planning today for the future. Of course, presently, this exercise may seem academic, due to current policies of the government and the university. Yet it still may be useful for the Dean and faculty to articulate a plan showing what must be done to provide the kind of "quality" legal education urgently needed, in light of experience and present national aspirations. Too, a well thought out plan may provide an effective way to seek donor support in a time of donor interest. Donors should be pressed to support programs identified by the Faculty as a result of its careful planning, not programs cooked up by the staffs of donors.

Finally, let me come back to the faculty of the first decade. All of us are today, truly appreciative of the wonderful opportunity we enjoyed: to have lived in Ethiopia and learned something about its unique history and its cultures, and to have served the Law School during its exciting founding era.

Certainly my family and I still look back on those years with nostalgia. My work with the Law School provided the most challenging and rewarding period of my professional career, which has spanned over 50 years. The Law School will always remain dear to my heart.

Preface to the Second Printing of the Fetha Nagast

Peter L. Strauss*

Forty years ago, a modest Roman Catholic priest and scholar completed work on his English translation of the Fetha Nagast,[1] the traditional source of law for Ethiopia's Coptic Christian community and, thus, for its imperial courts as well. Fluent in most of the languages needed for the task,[2] Abba Paulos Tzadua had learned English when he was forced to flee his seminary for England (where he was ordained) during the Italian occupation; returning to Asmara to direct the Cathedral school, in the late '50's he earned degrees in Law and in Political and Social Sciences from the Catholic University of Milan. By 1967 he was in Addis Ababa (Where in 1977 he would become Archbishop) and had completed his translation. He asked James CN Paul, the founding Dean of Ethiopia's national law school, for help in finalizing it; and Dean Paul honored me, then a young lecturer at the law school, with the request to be his editor. Abba Paulos and I spent afternoons during the better part of a year discussing this storied document and the best way of rendering it into what remains, to date, its final language. A gentle, unassuming man of remarkable intelligence, Abba Paulos would rise through the Catholic hierarchy to the rank of Cardinal… the first Ethiopian to attain that rank in the history of his church. Remembered by Pope John Paul II in his homily as "a zealous priest and Bishop," a pastor of "outstanding concern for lay people," this translation is only a part of the rich legacy he left behind when, in 2002, he passed away.

Only in his absence would I dare to write an introduction to this printing of the Fetha Nagast. His scholarship shines through the translation itself, and through the original preface to the translation. What appears to have been his last published work was an essay on its history that is attached as an appendix to these paragraphs. Among my colleagues in Addis Ababa at the time, Peter Sand (a young German scholar) was the one who essayed independent scholarship on this remarkable manuscript. Deeply familiar with civil and Roman Law, as I am not, and with easy linguistic access to German and other European scholarship about the Fetha Nagast, he contributed important analyses of its origins that remain among its more important glosses, and that have greatly informed the paragraphs that follow. Finally, the reader interested generally in the history of law in Ethiopia must read Dr. Aberra Jemberra's remarkable book, **An Introduction to the Legal History of Ethiopia, 1434-1974.**[3]

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[1] "Fetha Nagast" is the spelling that will be used in this preface, corresponding to that chosen for this translation. The researcher will also find it referred to in the literature as "Fetha Negest" and "Fetha Negast," and in quotations the spelling used in the material quoted will be repeated.

[2] In addition to Ge'ez, the language of the traditional text, and his native Tigrinya, Abba Paulos was fluent in Amharic (the language of a local translation and much commentary), Arabic (the language from which the work had been translated into Ge'ez), Italian (the language of the existing European translation, by Guidi), Latin (Roman law sources) and, of course, English-thus permitting him ready access to most of the source documents of the Fetha Negast.

[3] Published by the African Study Center of Leiden University. The Netherlands (Lit Verlag, 2000).

As sub-Saharan Africa became a destination for European missionaries, merchants, and the colonizing soldiers who followed in their wake, it was surely wonderful to find a part of the continent that was already Christian in substantial part-that had, indeed, survived its own bloody encounters with Muslim antagonists… and that, through Egypt and its churches, enjoyed regular, if somewhat tenuous, contacts with rest of the Christian world. It may even have been some consolation to the European powers that, even during the Nineteenth Century's "scramble for Africa," remarkably failed to reduce the Ethiopian empire to colonial status that this part of Africa was Christian Africa on its own account. To have found there, in the Fetha Nagast, a document with an apparent European heritage, with roots in the same Roman law traditions as underlay the law of all Europe, suggested that Ethiopia might already be civilized, as Europeans understood what that meant. It produced a fascination with the Fetha Nagast, with translations and scholarly analysis quite stressing the northern connection.

There is general agreement that the Fetha Nagast had its immediate source in a compilation made in Arabic from the original Greek, for use of the Egyptian Coptic Church, by a thirteenth century Christian Egyptian jurist usually referred to as Ibn Al[4]-Assal. (Until recent times, the Ethiopian Coptic Church was a dependency of the Egyptian church and, at least in name, its prelates came from there.) Ethiopian tradition traces the Fetha Nagast's origins back as far as the 318 sages of the Council of Nicea, during the reign of the (Christian) Roman Emperor Constantine. Just when it came to Ethiopia and was translated into Ge'ez (the Ethiopian ecclesiastical language equivalent to Latin) is uncertain, but accounts that seem to have a fair grounding in historic fact have it brought up the Nile at the request of the mid-fifteen century emperor Zara Yacob, seeking a written basis for law by which to govern. What he received was a document at least as concerned with ecclesiastical as secular matters, and it may well have had more use in church than official circles. Indeed, on some accounts it was treated as a document only the elect were privileged to know of and consult.

Little is known about its actual use in connection with Ethiopian law-administration. There are accounts of consulting it in important criminal contexts from the moment of its arrival Dr. Aberra Jembere reports:

When exactly the Fetha Negest became an integral part of the Ethiopian legal system is not yet definitely established. Nor is it known when it started to be cited as an authority in the process of adjudication of cases by courts. …Even though the Fetha Negest cannot be said to have been codified on the basis of the objective realities existing in Ethiopia, it was put into practice as well as interpreted in the context of Ethiopian thinking, and all this has

[4] The history is well told in Richard Pankhurst, The Ethiopians (Blackwell 1998). Battles with English expeditionaries, the product of diplomatic "misunderstandings" in the middle of the century, resulted in the suicide of Emperor Tewodros, and the confiscation of many manuscripts of the Fetha Nagast (*inter alia*) for the British Museum; but the British had no ambitions to remain and leadership of the Ethiopian empire passed first to Yohannes and then to Menelik. When the Italians, who had occupied areas in what is now Eritrea, attempted to push south in 1895 to vindicate a treaty that only in its Italian version appeared to make Ethiopia a protectorate, their forces were routed at Adwa: the resulting peace treaty secured Ethiopia's independence until Italy's avenging invasion of 1935, demonstrating the failure of the League of Nations and preparing the globe for world war II.

given it an Ethiopian flavor. It was, however, formally incorporated into the legal system of Ethiopia only in 1908 by Emperor Menelik II, when he established ministries for the first time in Ethiopia. The law that established ministries and defined their powers and duties laid down the following as one of the functions of the minister of justice. "He shall control whether any decision has been given in accordance with the rules incorporated in the Fetha Negast."… The criminal provisions of the Fetha Negest were applied in Ethiopia until they were replaced by the 1930 Penal Code of Ethiopia.[5]

That code, like those produced in mid-century at the behest of Emperor Haile Selassie, took the Fetha Nagast as a starting point.

Perhaps, then, the principal importance of the Fetha Nagast, certainly today, is as a symbolic document … and that, at many levels. It strongly reflects the Christian heritage of the Ethiopian highlands that remains at the core of national character. And when Ethiopia's stature as an independent African monarchy helped to catalyse the emergence of the *ras tafari*[6] religion in Jamaica, the Fetha Nagast acquired new status as a revered book *outside* Ethiopia: in 2002 copies of this translation were printed for distribution within that religious community. For present purposes, the commitment of the Fetha Nagast to law is the more important. For those concerned with rule of law issues in a nation where those values have often enough been challenged, it stands for five and a half centuries of commitment to written law, and to the higher character of that law… reaching ruler and ruled alike. Like Magna Carta, like highest of the Roman law ideas on which it draws, it may be able to serve as a strong tap root, capable of withstanding the momentary winds of despotism and permitting the tree of freedom under law to re-enfoliate once they have subsided.

[5] Op.cit. P. 194
[6] Ras Tafari is the name by which Emperor Haile Sellassie was known prior to his ascendancy.

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መሐሪ ረዳኢ፣ የተሻሻለውን የቤተሰብ ሕግ ለመገንዘብ የሚረዱ አንዳንድ ነጥቦች፣ ቅጽ ሁለት፣ አዲስ አበባ፣ ኤፊሸንት ኘሪንቲንግ ኘሬስ፣ 1999 ዓ.ም 194 ገጽ ብር 30

ፊሊጶስ አይናለም በለጠ*

ይህ አጭር ጽሑፍ ረዳት ፕሮፌሰር መሐሪ ረዳኢ በጻፉት "የተሻሻለውን የቤተሰብ ሕግ ለመገንዘብ የሚረዱ አንዳንድ ነጥቦች" ቅጽ ሁለት መጽሐፍ /አዲስ አበባ 1999 ዓ.ም/ ላይ የቀረበን ትችት የያዘ ነው። መጽሐፉ በተመሳሳይ ርዕስ የተጻፈው የቅጽ አንድ ቀጣይ ሲሆን በዋናነት የተሻሻለውን የቤተሰብ ሕግ/አዋጅ ቁጥር 213/92 ለመገንዘብ እንዲረዳ የተዘጋጀና አብዛኛውን የቤተሰብ ሕጉን ክፍል/አንቀጽ 123 እስከ 323/ ያካተተ ነው። የመጽሐፉ አራቱም ምዕራፎች የህፃናትን ጉዳይ መሠረት ያደረጉ ናቸው።

በመጀመሪያው ምዕራፍ ህፃናት ከአባታቸው መወለዳቸውን ማረጋገጥ የሚቻለው በሕግ ግምት፣ አባት ነው የተባለው ሰው ልጅነቱን በመቀበሉ፣ እና በፍርድ ቤት ውሣኔ አባትነትን እንዲታወቅ በማድረግ መሆኑን ሰፊ ገለፃ ያደረጉበት ሲሆን ከእነዚህ ሦስት መንገዶች ውጭ ልጅነትን ስለማስረዳት በሚለው የሕጉ አተገባበር ምክንያት መወለድ የሚረጋገጥበት አራተኛ መንገድ እንደሌለ አስምረውበታል። ፀሐፊው የአባትና የልጅን መብት ባጣጣመ ሁኔታ የመካድ ክስ ስለሚቀርብበት ሁኔታ በማንና መቼ ሊቀርብ እንደሚችል ልጅነትን ለመቀበል የአባትን፣ የልጁን እናትና የልጁንም ሚና በተመለከተ እንዲሁም የአባትነት ግጭት የሚፈታበትንና የልጅነት ማስረጃዎችንም በተመለከተ ጠበቅ ባለ ሁኔታ መታየት ያለበት ስለመሆኑ ሰፊ ማብራሪያ ሰጥተውበታል። ልጅነትን ለመካድ በቀጥታ ስለሚቀርብ ክስ በሕጉ አንቀጽ 168 ላይ መሠረት በማድረግ /ገጽ 18/ የሰጡት ማብራሪያ በፍርድ ቤቶች ልጅነትን የመካድ ክስ ፍርድ ቤት ሳይፈቅድ በማናቸውም ሁኔታ ሊቀርብ አይችልም የሚለውን የተለመደ አቋም እንዲፈተሽና እንዲታረም ግንዛቤን የሚፈጥርና በእጅጉ የሚረዳ ነው።

በሁለተኛው ምዕራፍ የጉዲፈቻን ትርጉም ታሪካዊ አመጣጥ ስለጉቻ ስምምነትና ፎርም፣ የጉዲፍቻ ተደራጊውን ልጅ መብቶችን እንዲሁም ስለመንግሥትና የእንለማውታን ድርጅቶች በጉዲፈቻ ስምምነት ያላቸውን ሚና በተመለከተ የቤተሰብ ሕጉን ከዓለም አቀፍ የሕፃናት ኮንቬንሽንና ከማህበራዊና ኢኮኖሚያዊ እውነታዎች ጋራ በማነፃፀር አብራርተዋል። ነገር ግን በዚህ ምዕራፍ የመጨረሻው ገጽ ላይ የቤተሰብ ሕጉን

ከህፃናት መብት ኮንቬንሽን መጽደቅ በኋላ የወጣ መሆኑን መሠረት በማድረግ በኢትዮጵያ ፍርድ ቤቶችና አስፈፃሚ አካላት አሠራር ተፈፃሚነት ሊኖረው የሚገባው ከኮንቬንሽኑ ይልቅ የተሻሻለው የቤተሰብ ሕግ ነው ብለን እናምናለን በማለት የደመደሙበት ሃሣብ በፌዴራሉ ሕገ መንግሥት አንቀጽ 9/4/ እና 13/2/ ለዓለም አቀፍ ስምምነቶች ከተሰጣቸው ቦታ እና ትኩረት ጋር የሚስማማ አይመስለኝም። በቅርቡ በፌ/ጠ/ፍ/ቤት ሰበር ሰሚ ችሎት በ/ሰ/መ/ቁ 23632 ጥቅምት 26 ቀን 2000 ዓ/ም በፀዳለ ደምሴ እና ክፍሌ ደምሴ መካከል ከቤተሰብ ሕጉ ይልቅ ለዓለም አቀፍ ስምምነት የበላይነት በመስጠት ከተረጉመው ጋርም የሚስማማ አቋም አይደለም። ዋናው ነገር መወሰድ ያለበት ለህፃናቱ ዓበይት ደህንነትና ጥቅም ቅድሚያ መስጠቱ ላይ ነው።

በመጽሐፉ ምዕራፍ ሦስት ለህፃናት ማደጊያ፣ ለትምህርት፣ ለጤናቸው፣ ለመጠለያቸው ለደህንነታቸውና ጥቅማቸው መጠበቂያ የሚሆን ቀለብ የማግኘት መብታቸውንና

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* በፌዴራል ከፍተኛ ፍ/ቤት ዳኛ እና በቅድስት ማርያም ዩኒቨርስቲ ኮሌጅ ህግ ፋክልቲ የገሚስ ጊዜ መምህር

የመስጠቱ ግዴታ የእነማን መሆኑንና ስለግዴታው መጠን፣ ግዴታውም ቀሪ የሚሆንበትን ሁኔታ በዝርዝር አብራርተዋል። በመጨረሻው የመጽሐፉ ምዕራፍ አካለ መጠን ያላደረሱ ልጆችን በሞግዚት ጥበቃ የማድረጉን አስፈላጊነት፣ አሳዳሪና ሞግዚት ስለሚሾምበት ሁኔታ ስለስራው ግዴታና ኃላፊነት/ተጠያቂነት እንዲሁም ሥልጣኑ ቀሪ ስለሚሆንበት ሁኔታ በዝርዝር ማብራሪያ አድርገውበታል።ይህ የመጽሐፍ ክፍል በፍርድ ቤት አከራካሪ ስለሆኑ አንዳንድ ጉዳዮች ለምሳሌ ሞግዚቱ የህፃኑን የማይንቀሳቀስ ሃብት በፍርድ ቤት ፈቃድ ወይም ያለፈቃድ መሸጥ ይችላል? አይችልም? ስለሚለው ጭብጥ የፍርድ ቤቶችን ክርክሮችና ውሣኔዎችን ዋቢ ያደረገ ማብራሪያ ቢጨመርበት የበለጠ ጠቀሜታ ይኖረው ነበር። በጥቅሉ በዚህ ክፍል የቀረበው ትንተና ከተግባራዊ ጠቀሜታውና የሕጉ ዝርዝሮች አንፃር ሲፈተሽ መጠኑ አነስ ያለ ነው።

ፀሐፊው በመጽሐፉ አራቱም ምዕራፎች አጠቃላይ የመነሻ ሃሳቦችን በማካተት የሕግ ባለሙያ ለሆነም ለአልሆነም በሚገባ ቋንቋ በጽሑፉ ከሚነሱት ጭብጦች ጋር ተዛማጅነት ያላቸውን የዘመኑን ሣይንስ ከሃገራችን ነባራዊ ሁኔታ ጋር ባገናዘበ ሁኔታ ማህበራዊ ፣ ታሪካዊ፣ ተፈጥሮአዊ ሁኔታዎችን /እንድምታዎችን/ እንዲሁም የቀደመውን ህግ እና በአንዳንድ የጽሑፉ ክፍሎች ደግሞ የፍርድ ቤት ጉዳዮችን አስፈላጊ በሆነበት ቦታ ሁሉ በመጥቀስ ያቀረቡት ንፅፅራዊ ገለፃ በእጅጉ ማራኪና በመጽሐፉ መግቢያ ያለሙትን ግብ ያስገኘላቸው ነው ለማለት ይቻላል። ፀሐፊው የተሻሻለው ሕግ የቀድሞው ሕግ ያልሸፈናቸውን ሁኔታዎች መሸፈኑን እና ለህፃናት መብት የተሻለ ጥበቃ ማድረጉን በዝርዝር አሳይተዋል። ፀሐፊው ስለልጅነት ማስረጃ /ገጽ 65-81/ የሰጡት ማብራሪያ በጭብጡ ዙሪያ በፍርድ ቤቶች በሚታዩ ክርክሮች ውሣኔ አሰጣጥ የሚታየውን የላላ/የለቀቀ/ የሕግ አተረጓጎም ልማድ ለማስቀረት /ቀዳዳ ለመድፈን/ የሚያስችል ነው።

መጽሐፉ ከመጀመሪያ እስከ መጨረሻው በፊዴራሉ ሕገ - መንግሥት አንቀጽ 36 እና በዓለም አቀፍ የሕፃናት ኮንቬንሽን አንቀጽ 3 የተደነገገውን የሕፃናት መሠረታዊ መብቶች፣ ደህንነትና ጥቅም ቅድሚያ መስጠትን ትኩረት የሰጠና ይህንንም በመርህነት በመቀበል ዝርዝር ገለፃዎችን ያደረገና ለሕግ ተማሪዎች ፣ ለፍርድ ቤቶች ፣ ለሕግ አስፈፃሚም ሆነ በህፃናት መብት ዙሪያ ለሚሠሩ/ለሚንቀሳቀሱ አካላት ሁሉ ተግባራዊ ጠቀሜታው ከፍተኛ የሆነ እንደ መሠረት ድንጋይ የሚያገለግል ተጨማሪ ምርምር ለሚያደርጉም መነሻ ሊሆን የሚችል ነው። ፀሐፊው ከላይ የተገለፀውን ለህፃናት መብት ቅድሚያ መስጠት እንደ መርሕ ተከትለው እያለ ግን በመጽሐፉ ገጽ 54 በፍ/ቤት ውሣኔ አባትነት እንዲታወቅ ስለማድረግ በሚለው ዋና ክፍል ሥር ገለፃቸውን ሲያጠቃልሉ በቤተሰብ ሕጉ ያልተካተተውን ከውል ውጭ ኃላፊነትን ሕግ የይርጋ ድንጋጌ በመጥቀስ ለቤተሰብ ሕጉ አንቀጽ 143 አፈፃፀም ልጅነትን ለማስወሰን የ2 ዓመት የይርጋ ጊዜ መገልገል እንደሚቻል ያሳሰቡት በሀገራችን ካለው የማህበረሰቡ ልጅነትን ለማስወሰን ክስ የማቅረብ ባህል /እውነታ/ የዳበረና የተለመደ ካለመሆኑም ባሻገር ለህፃኑ ዓበይት ጥቅምና ደህንነት ቅድሚያ ከመስጠት አንፃር የሚያስማማ አይደለም። ከአጠቃላይ ከፅሁፋቸው አላማና ከአቋማቸው ጋርም አብሮ አይሄድም። እንደእኔ ሃሳብ ግን ቢያንስ ህፃኑ 18 ዓመት እስከሚሞላው ድረስ የልጅነት ይታወቅልኝ አቤቱታ የማቅረብ መብቱ ያለ ይርጋ ጥያ□ ሊጠበቅለት ይገባል። የቤተሰብ ሕጉም ይርጋውን በዝምታ ማለፉ አግባብነት አለው የሚል አቋም አለኝ። በተጨማሪም በመጽሐፉ ጥቂት በማይባሉ ክፍሎች(ለምሳሌ. በገጽ 11፣15 ፣ 20፣ 38 እና66) ይመስለኛል፣ ሊባል ይችል ይሆናል፣ ይገመታል . . . በሚል የተጠቀሙት ግምታዊ አገላለጾች የጽሑፉን እርግጠኝነትና ክብደት የሚቀንስ ያስመስልባቸዋልና ቃላቱን ወይም ሀረጎቹን ባይጠቀሙ ይመረጥ ነበር።

በአጠቃላይ ግን የመጽሐፉ ይዘትና አፃፃፍ ዘዴ፣ በመጽሐፉ የተካተቱትን ጭብጦች ከመረዳት አልፎ ለሌሎች ተመራማሪዎችም እንደ ምሳሌ የሚወሰድ በመጽሐፉ ርእስ ከተመለከተው "አንዳንድ ነጥቦች" አልፎ ብዙ ነጥቦችን ያካተተና የሚያስገነዝብ የፀሐፊውን ግብም ያሟላ ነው ለማለት ይቻላል።

የመጽሐፍ ትችት

መሓሪ ረዳኢ፣ የተሸሻለውን የቤተሠብ ህግ ለመገንዘብ የሚረዱ አንዳንድ ነጥቦች፣ ቅጽ አንድ፣ አዲስ አበባ፣ ንግድ ማተሚያ ድርጅት፣ 1995 ዓ.ም. 189 ገጽ ብር 25

ማርታ በለጠ*

ቤተሰብ የአንድ ማህበረሰብ ዋና አካል ሲሆን ለዚህ አካል ሊሰጥ የሚገባውን ጥበቃ አብዛኞች ሀገሮች በህጎቻቸው ይደነግጋሉ። ወደ ሀገራችንም በምንመጣት ጊዜ የቤተሰብ ጉዳይ ከፍትሃ ነገስት ጊዜ ጀምሮ በተለያዩ ህጎች ከለላና ጥበቃ ሲደረግለት ቆይቷል። በ1952 ዓ.ም. በሥራ ላይ የዋለውም የፍትሐ ብሔር ህግ ለቤተሰብ ጥበቃና ከለላ በማድረግ ለረጅም ጊዜ ሲያገለግል ቆይቷል። በአንዳንድ ክልሎች አሁንም ድረስ በማገልገል ላይ ይገኛል። ሆኖም ግን አንዳንድ በህጉ ውስጥ የሚገኙ አንቀጾች ኢትዮጵያ ካፀደቀቻቸው አለም አቀፍ ስምምነቶች እንዲሁም ከ1987 ዓ.ም. ጀምሮ በሥራ ላይ ከዋለው የአገሪቱ ህገ መንግስት ጋር የሚቃረን በመሆኑ እንዲሁም ደግሞ ህጉ አሁን ማህበረሰቡ ከደረሰበት የእድገትና የአስተሳሰብ ለውጥ ጋር አብሮ የማይሄድ በመሆኑ ህጉን ማሻሻል አስፈላጊ ሆኖ ተገኝቷል። በመሆኑም የፌዴራሉ የህግ አውጪ አካል በ1992 ዓ.ም. የተሻሻለውን የቤተሰብ ህግ አጽድቆ ተግባራዊ አድርጓል።

በዚህ ጽሁፍ ለመዳሰስ የሚሞክረውም መጽሃፍ ይህንን በቤተሰብ ህጉ ዙሪያ የተደረገውን አዲስ ለውጦች በመመርኮዝ አንዳንድ ማብራሪያዎችን የሰጠ ሲሆን የጽሃፉም አዘጋጅ በአዲስ አበባ ዩኒቨርሲቲ የህግ ፋኩልቲ በመምህርነት እንዲሁም በፍትህና የህግ ስርአት ምርምር ኢንስቲትዩት ስር በተቋቋሙት የፌዴራል ህጎች ማሻሻያ የስራ ቡድኖች የቤተሰብ ህግ ባረቀቀው ኮሚቴ ውስጥ በአባልነት ያገለገሉ ናቸው።

መጽሐፉ በስድስት ምዕራፎች የተከፋፈለ ሲሆን ከመግቢያው ለመረዳት እንደሚቻለው የመጽሐፉ ዋና ዓላማ በተሻሻለው የቤተሰብ ህግ ዙሪያ ለግንዛቤ የሚረዱ ነጥቦችን ለመጠቆም እንዲሁም በአገሪቱ ህግ ላይ የተፃፉ ማብራሪያዎችና ትችቶችም ጥቂት በመሆናቸው በዚህ ህግ ዙሪያ ትችት ለመስጠትና ለመነሻ የሚሆኑ ሃሳቦችን ለማቅረብ ነው። የመጀመሪያው ምዕራፍ የአዋጁን ቅርጽ በተመለከተ በነጠላ አዋጅነት መልክ የወጣበትን ምክንያት የአዋጁ ተፈጻሚነት በአዲስ አበባ እና በድሬዳዋ ከተሞች ብቻ የተወሰነ መሆኑን እንዲሁም የአዋጁን ይዘት ከፍትሃ ብሄር ህጉ ጋር በማነጻጸር ያብራራል። ወደ ሁለተኛው ምዕራፍ በመንደመጣበት ጊዜ የጋብቻ አፈጻጸምም ስርዓቶች ዓይነትና ሊሟሉ የሚገባቸው በሕጉ የተገነገጉ ሁኔታዎችን የሚያብራራ ሆኖ እናገኘዋለን። ጋብቻ በተጋቢዎች መካከል የሚፈጥረው ግላዊና በገንዘብ በኩል የሚኖረው ውጤት በሦስተኛው ምዕራፍ የተብራራ ሲሆን ቀጣዩ ምዕራፍ ጋብቻ ለማፍረስ ምክንያት የሚሆኑት በሕጉ የተቀመጡትን ሁኔታዎች እንዲሁም የጋብቻው መፍረስ የሚያስከትለውን ውጤት ያትታል። መጽሐፉ ጋብቻ ለመፈጸሙ ለማስረዳት ስለሚቀርቡ ማስረጃዎች ምንነት እንዲሁም ሕጉ ጋብቻ

*በአዲስ አበባ ዩኒቨርሲቲ የህግ ፋኩልቲ መምህር

ሳይፈጸም እንደ ባልና ሚስት አብረው ለሚኖሩ ሰዎች የሰጠውን ከለላ በማብራራት ያበቃል፡፡

መጽሐፉ ለህግ ተማሪዎች፣ ባለሙያዎችና በቤተሰብ ህግ ዙሪያ ጥናት ማድረግ ለሚፈልጉ ሰዎች ሊያገለግል ይችላል፡፡ እንዲሁም መጽሐፉ በአማርኛ መፃፉ የተጠቃሚዎችን ቁጥር ከማስፋቱም በተጨማሪ መጽሐፍ ቀለል ባለ አቀራረብና ቋንቋ በመዘጋጀቱ ይዘቱን ለመረዳትም የህግ ባለሙያ መሆን የግድ አይልም፡፡

በመጽሐፉ ውስጥ ለመንደርደሪያነት የሚያገለግሉ ነጥቦች የተካተቱ ሲሆን የተሻሻለው ህግ በሚወጣበት ወቅት የነበሩትን ከተለያዩ የማኅበረሰቡ አካሎች ይንፀባረቁ የነበሩትን ሃሳቦች ጠቅለል ባለ መልኩ መያዙ በህጉ ዙሪያ ለሚደረጉ ጥናቶች ጠቃሚነት ይኖረዋል፡፡ በተጨማሪም የህግ ትርጓሜ በሚያስፈልግባቸው ጊዚያቶች የህግ አውጪው ዓላማ ምን እንደነበረ ለማስገንዘብ ይረዳል፡፡ ከፍትሐ ብሔር ህጉ ለውጥ የተደረገባቸው አንቀጾችና ምክንያታቸው መቅረቡ ለዚህ ተግባር አጋዥ ይሆናል፡፡

በአጠቃላይ መጽሐፉ ከላይ የተገለፁት ጥቅሞች ሲኖሩት አንዳንድ መሻሻል ሊደረግባቸው የሚገባ ነጥቦችም ይኖራሉ፡፡ በዚህ ረገድ የመጽሐፉን ቅርፅ በምንመለከትበት ጊዜ ስለጋብቻ ምዝገባ የሚደነግገው የህጉ ክፍል እና ጋብቻን ለማስረዳት ስለሚቀርቡ ማስረጃዎች በተመለከተ በተለያየ ክፍል ተፅፈው እናገኛቸዋለን፡፡ በዋነኛነት ጋብቻን ለማስረዳት የሚቀርበው ማስረጃ የጋብቻ ምስክር ወረቀት ሲሆን ይህ ደግሞ ጋብቻን ከማስመዝገብ ግዴታ ጋር ተያይዞ የሚታይ ጉዳይ ነው፡፡ በመሆኑም በመጽሐፉ ክፍል 2.4. እና በምዕራፍ አምስት የቀረቡት ሃሳቦች ተነጣጥለው የማይታዩ ስለሆኑ በሚቀጥለው ዕትም ላይ በአንድ ክፍል እንዲቀርቡ ቢደረግ መልካም ነው፡፡

ወደ ይዘቱ በምንገባበት ጊዜ የሁለተኛው ምዕራፍ የጋብቻ አፈፃፀም ስርዓት አይነቶችንና ጋብቻ ሲፈፀም ሊሟሉ የሚገባቸውን በህጉ የተደነገጉ ሁኔታዎችን የሚያብራራ ሆኖ እናገኘዋለን እንዲሁም ደግሞ በሌሎች ሀገራ ህጎች ጋብቻ የሚለው ቃል የተሠጠውን ትርጓሜ ሲያቀርብ የኢትዮጵያ ህግ ለቃሉ ትርጓሜ ያልሰጠበትንም ምክንያት ያቀርባል፡፡ ሆኖም ግን መጽሐፉ ለተለያዩ የማኅበረሰቡ ክፍሎች የህግ ተማሪዎችን ጨምሮ አገልግሎት እንዲሰጥ የታሰበ ከመሆኑ አንፃር ከተለያዩ የህጉ አንቀጾች በመነሳት ጋብቻ ምን ተብሎ ሊተረጎም እንደሚችል የናሙና ትርጓሜ ቢሰጥ መልካም ይሆናል፡፡

ከዚህ በተጨማሪ በገጽ 45 የግርጌ ፅሁፍ 39 በማታለል የተፈፀመን ጋብቻ የቤተሰብ ህጉ የማያካትት ቢሆንም በስህተት የተፈፀመ ጋብቻ የሚለው ስር ይወድቃል የሚል አስተያየት በጸሐፊው ተሰጥቶአል፡፡ ነገር ግን ስህተት እና ማታለል (Mistake and Fraud) የተለያየ ትርጓሜ የሚሰጣቸው ሃሳቦች ሲሆኑ የሚፈለግባቸውም የአዕምሮ ሁኔታ የተለያየ ነው፡፡ በተጨማሪ በዚህ መልኩ ህጉን መተርጎም የህግ አውጪው አካል ለጋብቻ መፈፀም እንደቅድመ ሁኔታ ካስቀመጣቸው መስፈርቶች ተጨማሪ መስፈርት ማስቀመጥ ይሆናል፡፡

በሌላ መልኩ መጽሐፉ በገጽ 30 ጋብቻን ለመፈፀም መሟላት ካለባቸው ሁኔታዎች አንዱ ስለሆነው በብቸኝነት ለመኖር የተወሰነ ጊዜ ያወሳል። ይህን ቅድመ ሁኔታ በተመለከተ ዓላማው ከልጅች ማንነታቸውን የማወቅ መብት አንፃር መታየት ያለበት መሆኑን እና በሴቶች አላግባብ የሆነ ተፅእኖ ለማሳደር አለመሆኑን አትኩሮት ተሰጥቶ ተገልጿል። ይህ ደግሞ በአንድ አንድ ወገኖች የሚነሳውን ክርክር በጥሩ መልኩ የሚመልስ በመሆኑ ተገቢነት ያለው ነው።

መፅሐፉ ጥሩ የሆነ የመንደርደሪያ ነጥቦችን ያቀረበና የህጉን አወጣጥ ታሪካዊ ሂደት የሚያሳይ ቢሆንም በዳሳሹ እይታ የመፅሐፉ ዋና ድክመት የሚጠበቀውን ያህል ትችት ይዞ አለመገኘቱ ነው። ከላይ ለመግለፅ እንደተሞከረው የመጽሐፉ አንደኛው ዓላማ በተሻሻለው የቤተሰብ ህግ ዙሪያ ትችቶችን መስጠት ነው። ነገር ግን ይህ ዓላማው በመጽሐፉ ውስጥ በበቂ ሁኔታ ሲንፀባረቅ አይስተዋልም።

በአጠቃላይ በአገሪቷ ህግ ዙሪያ የተጻፉ ማብራሪያዎችና ትችቶች በአብዛኛው ካለመኖሩ አንጻር የዚህ መጽሃፍ መጻፍ በጣም ጥሩ ጅምር ነው። እንዲሁም ደግሞ በምጽሃፉ ተጠቃሚ ሊሆኑ የሚችሉትን የህብረተሰቡን ክፍሎች በምንመለከትበት ጊዜ የመጽሃፉን ሚና ያጎላዋል።

Book Review

George Anderson, Federalism: An Introduction (Special Advance Conference Edition). Oxford/New York: Oxford University Press, 2008. Pp. viii+85. Price not specified.

Tsegaye Regassa[•]

For anyone looking for a primer on federalism, *George Anderson's Federalism: An Introduction* is a good find. For those of us looking for a concise presentation of the meaning, values, types, variants, and modes of operation of a federal system in a comprehensive manner without however getting too technical or sophisticated—so that our undergraduate students of federalism can relish on it—the publication of Anderson's little book comes as a good news that brings a sigh of relief. Fresh, current, and comprehensive (without being detailed), it is reminiscent in many ways of Ronald Watts' now classic book on *Comparing Federal Systems* (2nd ed.) (1999)[1]. Its comparative reach, without however calling itself to be a book on comparative federalism, is one of the best qualities of the book. Within the pages of a small book (only 85 pages), all the basic information on all the federal and quasi-federal countries in the world is summarized, often in the many boxes that appear to have been prepared for this very purpose.

This "little book on federalism" is everyone's guide to federalism and all that it implies. As such it is written with the common man, the non-expert, in mind, it appears. In deed the author meant it for practitioners of federalism—"politicians, government officials, journalists, members of governmental and international organizations and concerned citizens—who have practical interest in federalism, probably focused on federalism in their own or other specific countries."(Preface, p.vii). Needless to say, it is not a typical academic book directed to scholars of federalism although they benefit from reading it. Nor

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[1] Ronald L. Watts, *Comparing Federal Systems* (2nd ed). Montreal: McGill-Queens University, 1999, is deservedly classic not only for its comparative reach but also for trying to study federalism not just normatively by looking into the design of federations in constitutions and laws but also by looking at their operations in practice. Daniel J. Elazar's *Federalism and the Way to Peace* (Kingston: Queens University, 1994) is a more theoretical book with a similar significance. Elazar's other book, *Exploring Federalism* (Tuscaloosa,AL: University of Alabama, 1987) is another interesting work on the comparative genre. One cannot however neglect the work by Ivo Duchacek's *Comparative Federalism: The Territorial Dimension of Politics* (rev. ed). (Lanham, MD: University Press of America, 1987) in this connection. In more recent years, the *Handbook of Federal Countries* such as the one edited by Ann L. Griffiths in 2005 (Montreal: McGill-Queen's for the Forum of Federations) and Michael Burgess's *Comparative Federalism: Theory and Practice* (London: Routledge, 2006) have proved to be very helpful for students of federalism. Anderson's book will be part of this list of great books on federalism but will stand out as unique for its conciseness and comprehensiveness.

are its audience exclusively experts or academicians. But to say this is not to discount its importance; in fact, it is because of this that the book needs to be acclaimed.

Having been written by the current president of the Forum of Federations[2] the book seems to have benefited from the global and comparative perspective that the position of the author brings to it. In a total of 10 chapters, the author effectively strikes a balance between the need to become comprehensive and concise. Accordingly, in chapter 1 he gives us a brief overview of federalism (its gaining increasing importance in the world 40% of the population of which lives in federal polities; its varieties and contexts; and key common features of federal systems such as a written, supreme, and rigid constitution interpreted by a neutral body; autonomy of states; bicameralism with a representative upper house; etc.). Chapter 1 also contrasts/compares federal systems with devolved unitary regimes (pp.5-6). In chapter 2, in the main, the origins and evolutions of federalism are discussed. Coming together, alias aggregation/integration, and devolution are considered the paths that lead to the "birth" of a federal polity. In an attempt to describe the "waves" of federalism that have been seen in history, Anderson discusses old federations (which could otherwise be called classical[3] or mature[4]) of the late 18th to early 20th century, postcolonial federations (of Africa, Asia, and Asia-Pacific), post-communist federations (of East and Central Europe and former USSR), post-conflict federations (of the type in Bosnia, Ethiopia, the Sudan, Congo, etc), federations emerging out of a strong unitary past (e.g. Belgium, Spain, South Africa, etc), and transnational[5] federations (e.g. the EU). In chapter 2, Anderson also tries to see the link, if any, between federalism and democracy.

The issue of the method used in forming the units that constitute a federal union (be it states, provinces, cantons, *lander*, regions, republics (*oblasts*), territories (*krais*),

[2] Ronald L. Watts, *Comparing Federal Systems* (2nd ed). Montreal: McGill-Queens University, 1999, is deservedly classic not only for its comparative reach but also for trying to study federalism not just normatively by looking into the design of federations in constitutions and laws but also by looking at their operations in practice. Daniel J. Elazar's *Federalism and the Way to Peace* (Kingston: Queens University, 1994) is a more theoretical book with a similar significance. Elazar's other book, *Exploring Federalism* (Tuscaloosa,AL: University of Alabama, 1987) is another interesting work on the comparative genre. One cannot however neglect the work by Ivo Duchacek's *Comparative Federalism: The Territorial Dimension of Politics* (rev. ed). (Lanham, MD: University Press of America, 1987) in this connection. In more recent years, the *Handbook of Federal Countries* such as the one edited by Ann L. Griffiths in 2005 (Montreal: McGill-Queen's for the Forum of Federations) and Michael Burgess's *Comparative Federalism: Theory and Practice* (London: Routledge, 2006) have proved to be very helpful for students of federalism. Anderson's book will be part of this list of great books on federalism but will stand out as unique for its conciseness and comprehensiveness.

[3] The US, the Swiss, the Canadian, the German, and the Australian federations of the late 18th and early 20th centuries are viewed as the classical of modern federations. See, for instance Ronald Watts, *Comparing Federal Systems* (2nd ed).Montreal and Kingston: McGill-Queen's University Press, 1999.pp.2-3

[4] See Arthur MacMahon (ed), *Federalism: Mature and Emergent.* New York: Doubleday & Company, 1955, for the reference to the old federations as the mature federations.

[5] Anderson does not use the term "transnational" to refer to the EU as a federation.

autonomous areas (*okrugs*), etc) is discussed in chapter 3 in a section fittingly titled "the political geometry of federations". Very thorny issues such as the redrawing of state boundaries, choice of capital cities and their administration, etc are also discussed in this chapter albeit briefly. In chapters 4 and 5, Anderson discusses the important topic of power division (political and financial, respectively). Chapter 6 deals with political institutions of the "central", alias "federal", government such as the legislative organs and the executive offices with the concomitant challenges of ensuring representation of all states (or groups) represented in these institutions of the "centre".

"The legal pillars of federalism" (such as the constitution, rules on its interpretation, on emergency powers, on constitutional amendment, on (human) rights, and the courts) are discussed in chapter 7. In this chapter, Anderson makes the interesting point that "the legitimacy of the courts is a key issue", especially in the light of "the importance of the judicial interpretation of the constitution" (p.62). Chapter 8 discusses intergovernmental relations. Here, the point is made that interdependence and interaction between the orders/planes[6] of government exist as a consequence of which models of relations (coercive versus consultative) should be carefully selected. The institutions and processes used to manage the intergovernmental relations are also discussed in this chapter.

Chapter 9 is about the challenge of diversity. The title itself is quite telling: "Unity and Diversity". The challenge of preserving political unity in a federation, especially in the face of demographic diversity, is given a deserved attention. A diverse array of methods used to meet the demands of diversity (such as repression, exclusion, assimilation, or embracing diversity, etc) is identified with the obvious preference, of course for embracing diversity. Anderson also underscores the importance of "building out (devolution)" and "building in" (representation at the "centre") as the way to go about managing the challenge of diversity if we have to take "a balanced approach to diversity" (pp72-74). The sensitive "question of secession" is also discussed in this chapter. The fact that granting secession as a constitutional right is unusual in the practice of countries is readily pinpointed. That "Ethiopia's constitution is unusual in providing a formal right to secession" is also made mention of (pp.77-78). Perhaps it is because of this unique nature of the Ethiopian federation that Ethiopia is frequently mentioned (at least 6 times) in this chapter alone.

The last chapter, chapter 10, is more or less a wrap up of the theme of the entire book. It identifies the major strengths (e.g. its potential for democratizing a polity, for accommodating diversity, etc) and weaknesses (e.g. its being as much susceptible to

[6] See Joseph F. Zimmerman, "National-State Relations: Cooperative Federalism in the Twentieth Century", *Publius: The Journal of Federalism* 31:2 (Spring 2001) on the use of the terms "orders" and/or "planes" to refer to the realms of government in federations. John Kincaid's "From Cooperative to Coercive Federalism," *The Annals of the American Academy of Political and Social Science* 509 (May 1990): 139-152 is more explicit on the use of the term "planes".

conflict, corruption, breakdown of democracy, as other systems of governance, etc) of federalism, its growing relevance in recent years, and the conditions needed for the success of federalism. Apropos of the latter, it is stressed that "respect for the rule of law, a culture of tolerance and accommodation between population groups, and significant elements of shared identity" (p.81) are identified as factors that serve as hotbed for the success of federalism. While Anderson also mentions the need for appropriate institutional arrangements, he implies (with the rhetorical questions he asks) that leaders have immense influence in turning a federal system a success or a failure (p.81). He thus seems to imply that leaders can hugely contribute to the "making or breaking" of a federation.

The book is written in clear and simple language that makes it very accessible. To the uninitiated reader of federalism, this book is read with the ease that an introductory and non-condescending book is read. The boxes, which are 25 in total, make reading easy by giving the uninitiated reader a break while also giving the nosy reader a mass of facts detailing and exemplifying the assertions stated in the text. By way of instantiation, the book often refers to one or other federal and/or quasi-federal polity(ies) from among the world's (28) federal and/or quasi-federal polities existent today[7]. Thus, either to illustrate some common attributes of federal systems or to provide examples of some unique features, countries are referred to along with brief information about those countries' systems, laws, institutions, procedures, etc. To an Ethiopian reader, it is pleasing to see her/his country's federal system—the attributes it shares with other jurisdictions as well as its unique features—is descriptively presented in a comparative context. For those who would like to see the references to Ethiopia, they can only refer to pp. 2, 10, 17, 18, 45, 47, 48, 49, 57, 65, 72, 73, 75, 76, 78, and others, especially the boxes. This, it is hoped, will help such readers to put the Ethiopian federation in perspective.

Nevertheless, the Ethiopian reader cannot but notice some inaccuracies regarding the Ethiopian federation or some of the institutions. For instance, on page 47, Anderson makes mention of Ethiopia as one of the federations (alongside Austria, Belgium, Canada, Germany, and India) which "have unequal representation by constituent units, with weight given to population differences". As any observer of the Ethiopian federation would readily note, in Ethiopia, states are not directly represented in the federal houses. While people as a mere conglomeration of 100,000 individuals are represented in the lower house (called the House of Peoples' Representatives, HPR), "Nations, Nationalities, and Peoples" are represented--not equally, of course—in the upper house (the House of the Federation,

[7] The countries that have adopted a federal or quasi-federal arrangement, as listed even in Anderson's book under review (p.2), are: Argentina, Australia, Austria, Belau, Belgium, Bosnia-Herzegovina, Brazil, Canada, Comoros, Democratic Republic of Congo, Ethiopia, Germany, India, Iraq, Malaysia, Mexico, Micronesia, Nigeria, Pakistan, Russia, St Kitts and Nevis, South Africa, Spain, Sudan, Switzerland, United Arab Emirates, United States of America, and Venezuela.

HOF)[8]. On page 48, Anderson maintains that in Ethiopia (like in Switzerland), "constituent-unit legislatures decide how to select their members of the national upper house." In a similar vein, he states, on page 57, that "[i]n Ethiopia, the House of the Federation, elected by the state legislatures, has final authority, subject to legal advice from judges". While his first assertion (on p.48) is correct, the second is not, especially when seen in the light of article 61(3) of the constitution which holds that "members of the HOF shall be elected by the State Councils. The State Councils may themselves elect representatives to the HOF, or they may hold elections to have the representatives elected by the people directly." It is thus important to note that the route to membership in the HOF is not only through indirect election, i.e., election by the state legislatures, but also through direct popular elections as determined by the state legislatures. Of course when we see the practice so far, Anderson's statement seems to fare well as no state legislature saw the need for direct popular election of its members of the HOF. Consequently, all the members of the HOF are elected by the state legislatures[9].

Anderson also commits a minor error when he makes his observation that the HOF, "subject to legal advice from judges", has the final interpretive power in times of constitutional disputes. This is perhaps because he overlooks the (textual) fact that not all members of the Council of Constitutional Inquiry (CCI) are judges. According to article 82 of the constitution, the membership of the CCI is made up of the President and Vice President of the Federal Supreme Court, six legal experts (who may or may not be judges), and three members of the HOF. So, while the CCI is predominantly a body of legal experts, these experts are not necessarily judges[10].

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[8] Article 61 of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE) stipulates to the effect that: "1. The House of the Federation is composed of representatives of Nations, Nationalities, and Peoples. 2. Each Nation, Nationality, and People shall be represented in the House of the Federation by at least one member. Each Nation or Nationality shall be represented by one additional representative for each one million of its population."

[9] One recognizes that direct popular election of the members of the HOF is significant in terms of providing the opportunity for the electorate to elect a person whom they think best represents their interests. The indirect election by the state legislatures might result in the election, by the dominant party in the legislatures, of someone who is more loyal to the party than to the electorate.

[10] Article 82(2) of the FDRE Constitution stipulates that the 11 members of the CCI are: the President and Vice-President of the Federal Supreme Court; six legal experts with "proven professional competence and high moral standing"; and three members of the HOF designated by the HOF. It is obvious from this that the six experts are not required, as a matter of necessity, to be judges. In actual fact, the profile of the current members show that none other than the two presidents of the Federal Supreme Court are judges. The names of the members are the following: 1) Ato Kemal Bedri (President of the Federal Supreme Court and Chairman of the CCI); 2) Ato Menberetsehay Tadesse (Vice-President of the Federal Supreme Court and Vice-Chair of the CCI); 3) Ato Degfe Bula (currently also the Speaker of the HOF); 4) Ato Kuma Damaqsa (Currently Minister of Defense and a member of the HOF); 5) Ato Mulugeta Ayalew (currently Deputy Chief Administrator of the Amhara National Regional State); 6) Dr Fasil Nahum (Legal Advisor to the Prime Minister); 7) Dr Hashim Tewfic (Minister détat, Ministry of Justice); 8) Ato Hassen Ibrahim (member of the HOF); 9) Ato Abay Woldu (member of the HOF?); 10) Ato Beyene Biltu (??); and 11) Ato Getahun Kassa (formerly Dean of the Mekelle Law School and currently Executive Director

Anderson also makes the observation (on page 49) that the HOF "plays no role in normal legislation." While this is generally true, to say "no role" is to state it too strongly as it does have some, although little, role in legislation. But perhaps one can ignore this as this is an extremely minor point. In the chapter dealing with the challenge of diversity, Anderson makes the observation that "Ethiopia has *two major indigenous languages, as well as 11 minor and many tribal ones:* there is no official language and all enjoy equal recognition in principle."(Page 76, italics mine). A question that quickly comes to mind is: what criterion is used to establish the fact that some languages are major and others are minor? A corollary question would be: which are the two major languages, and which are the 11 minor ones? Why are the rest "reduced", if that is the right word, to the status of being "tribal" languages? It is important to underscore that in Ethiopia, the constitution makes no distinction between "major" and "minor" languages; nor does it use the rather pejorative word "tribal" to refer to any of the languages of Ethiopia. Instead, it guarantees that "All Ethiopian languages shall enjoy equal state recognition"[11] and that Amharic is the working language of the federal government.[12] It is hoped that these comments are taken note of for the second edition of this important book. These minor comments regarding inaccuracies aside, this is a fine book.

A representative list of relatively current books on comparative federalism in the "Further Readings" section is a plus, and the reader can only revel in finding it there.

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of the Ethiopian Human Rights Commission). As is indicated above, none of the members, other than the Presidents of the Court--who are ex-officio members and chair and vice-chair of the CCI—are judges. This has been confirmed on 26 February '08 through an interview with Ato Daniel, the Acting Head of the Secretariat of the HOF.

[11] Article 5 (1) of the FDRE Constitution.

[12] Article 5 (2) of the FDRE Constitution.