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Cases and Case Comments

Editorial

This year marks the forty-fifth anniversary of the Journal of Ethiopian Law. Despite occasional hiccups, the Journal of Ethiopian Law has maintained its status as the leading scholarly publication of issues arising in relation to national and international laws relevant to the legal, political and social life in Ethiopia. Each year the Journal of Ethiopian Law receives numerous submissions. Over the years, the Journal has continued its tradition of excellence by publishing only submissions that passed through the most rigorous process of peer-review and evaluation for their quality and relevance.

This volume contains two exclusive contributions in addition to the traditional content of theoretically oriented research articles, cases in a form of reports and commentaries and book reviews. The first exclusive contribution is the *Professorial Inauguration Lecture* by Professor Tilahun Teshome. In December 2009 the Board of Governors of Addis Ababa University promoted Associate Professor Tilahun Teshome to the rank of Professor in recognition of his long years of service and scholarship. Professor Tilahun is a veteran professional who has served as a presiding judge of the Supreme Court before joining the Faculty of Law at Addis Ababa University.[1] He has served the Faculty as Dean and Editor-in-Chief of the Journal of Ethiopian Law. Professor Tilahun Teshome is the first Ethiopian ever to be elevated to the rank of Professor in the history of the Faculty. On behalf of the Editorial Board and the editors of the Journal of Ethiopian Law, I would like to extend my heartfelt congratulations to Professor Tilahun Teshome for his extraordinary achievement.

The second new contribution in this volume is *a list of bibliography* of *publications on Ethiopian Law*. The objective of the list is two-fold. First, the list can be taken as a show-case of the research efforts by former and current faculty members and students. Second, the list can also serve as a source of information for researchers on Ethiopian Law. However, it is worth noting that the bibliography is incomplete both in terms of the list of publications and the list of scholars who have published on Ethiopian Law. Future volumes of this journal will come out with more publications and scholars. I thank Ato Muradu Abdo and Professor Peter Sand for compiling and editing the list of bibliography.

Last but not least, I would like to thank the Office of Cooperation and Cultural Service of the French Embassy in Ethiopia for its financial assisantce for the

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[1] Please see the *Reflection* column of this volume to read the biography of Professor Tilahun Teshome.

publication of the current and previous volumes. I would also like to thank the following people who were referees for the research articles in the current and previous volumes: Ato Zekerias Keneaa, Professor Tilahun Teshome, Ato Molla Mengistu, Ato Aman Assefa, Dr. Girma W/Selasie, Ato Israel Tekele, Ato Nuru Seid and Ato Getahun Kassa.

Girmachew Alemu (Ph.D.)
Editor-in-Chief
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The Right to Bail in Ethiopia: Respective Roles of the Court and the Legislature

Wondwossen Demissie*

Introduction

An arrestee's right in release pending a criminal proceeding is of great importance. In highlighting the significance of this right, it has been explained that the arrestee's fundamental interest in liberty is "second only to life itself in terms of constitutional importance."[1] An arrestee's right to pre-conviction release is related with the presumption of innocence. The U.S. Supreme Court indicated the strong link between the right to bail and presumption of innocence when it stated that "unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[2] Moreover, detention may prejudice the arrestee's ability to prepare his defense which increases the likelihood of conviction. In fact, studies indicate that "some defendants unable to make bail are, for that reason alone, more likely to be convicted--- and more likely to be sentenced to jail."[3]

An equally important interest is that of the public. Once a person suspected to have violated the law is arrested, the community has a legitimate interest in ensuring that the person will continue to be subjected to the criminal process and eventually to punishment if found guilty. Another interest of the public that calls for continuity of the arrestee's detention is the risk that he, if released, may intimidate or otherwise make witnesses change their mind or destroy other evidence. Moreover, the public has an interest in insuring that a person released pending trial will not commit another offence. These public interests demand an adequate assurance that neither of these risks will materialize following release of the arrestee.

The bail system – a system which allows the arrestee to be released upon complying with conditions the court sets –is introduced to accommodate both interests.[4] The system provides an opportunity for the suspect to be out of jail pending his trial. And, the condition to be set by the court will be a disincentive for the released suspect not to

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* Lecturer, Addis Ababa University, Faculty of Law. He holds LLM from the University of Michigan Law School (2004), and LLB from the Addis Ababa University Law Faculty (1998). Contact: wondwossend@yahoo.com I am grateful to W/o Eleni Tekalegne and Ato Muradu Abdo for constructive comments on earlier drafts. The assessors of this article deserve appreciation.

[1] Van Atta v.Scott, 613 P.2D 210, 214 (Cal. 1980) in J. Dressler (3rd ed.), *Understanding Criminal Procedure* (2002), p.636.

[2] Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951) in L. Weinreb (ed.), *Leading Constitutional Cases on Criminal Justice*, (2001), p. 859.

[3] Hans Zeisel, Bail Revised, 1979 in J. Dressler, cited above at note 1, p. 637.

[4] "Bail: An Ancient Practice Reexamined," Yale L. J. vol. 70 (1960), pp. 966-70 in S. Fisher, *Ethiopian Criminal Procedure: A Source Book* (1969), p. 151

abscond, destroy evidence or commit another offence, safeguarding the interests of the public.

This system is recognized under the Constitution of the Federal Democratic Republic of Ethiopia (hereinafter FDRE Constitution) and International Human Rights Instruments, which are integral part of Ethiopian law.[5] The right is not recognized in absolute terms though. Restrictions on the right are envisaged by the same instruments.

This article attempts to raise two issues related to the right to bail in Ethiopia. The first is whether a law providing for list of offence(s) the suspects of which are not to be released on bail would be in conformity with the FDRE Constitution and relevant Human Rights Instruments. The issue is basically related to the role of courts and the legislature in determining cases where the right to bail is to be restricted. Whether the court should weigh the evidence of the public prosecutor, during a bail hearing, with a view to see if the prosecutor has a *prima facie* case is the second major issue addressed in this article.

The article begins with a brief summary of rulings by the Federal High Court and the Federal Supreme Court followed by the Recommendation of the Council of Constitutional Inquiry(hereinafter the Council) on the issue. Then the legislative background of the laws that prohibit bail is examined with a view to give the context within which the laws were enacted. The writer evaluates the merits of the justifications given by the lawmaker to pass the laws and arguments forwarded by the courts and the Council to uphold the constitutionality of the laws. Finally, the author presents three reasons to conclude that such laws are not in conformity with the FDRE Constitution and relevant human rights instruments that provide for the right to bail. With the view addressing the second major issue stated above, the article presents a brief account of rulings of the Federal High Court and Federal Supreme Court on the issue. Then the writer offers two reasons to conclude that weight of evidence of the prosecutor should be one of the relevant factors to rule on question of bail.

I. Relevance of Type of Offence in a Bail Hearing

Arguably,[6] one of the relevant factors[7] in a bail hearing is the type of offence that the arrestee is suspected of having committed. The issue of bail regarding persons arrested in connection with vagrancy and corruption is governed by the Vagrancy Control Proclamation No. 384/2004 (hereinafter Vagrancy Control Proclamation) and the Revised Anti-corruption Special Procedure and Rules of Evidence Proclamation No.

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[5] See Article 9(4) of the FDRE Constitution. For particular provisions of the Constitution and the International Human Rights Instruments see notes 41, 42 and 43 below.

[6] What makes the relevance of the type of an offence that the arrestee is suspected of to the question of bail arguable are treated in the following pages.

[7] Article 59 of the Criminal Procedure Code indicates status of investigation being another relevant factor. Similarly, Article 67 of the Code provides for list of factors that may influence court's decision on whether bail is to be granted.

434/2005 (hereinafter the Revised Anti-Corruption Special Procedures and Rules of Evidence), respectively. The question of bail in other cases is exclusively regulated by the Criminal Procedure Code. All the three laws that have just been mentioned incorporate provisions that make the offence the arrestee is suspected of a relevant, perhaps a decisive, factor in a bail hearing.

Art.6 (3) of Vagrancy Control Proclamation states:

A person who is reasonably suspected of being a vagrant --- *shall not* be released on bail. [Emphasis added]

Art.4 (1) of the Revised Anti-Corruption Special Procedures and Rules of Evidence provides:

> An arrested person charged with a corruption offence punishable for more than ten years *may not* be released on bail.[8] [Emphasis added]

Art. 63(1) of the Criminal Procedure Code on its part states:

> Whosoever has been arrested *may be* released on bail where the offence with which he is charged does not carry the death penalty or rigorous imprisonment for fifteen years or more and where there is no possibility of the person in respect of whom the offence was committed dying.[9] *[Emphasis added]*

What makes these legal provisions similar is that if a person is charged with an offence which fits into one of the provisions the court does not have power to grant bail. As the laws provide for a blanket and automatic denial of bail, the court is obliged to refuse bail. There is a debate both among academics[10] and in the real world[11] as to the constitutionality of the above mentioned legal provisions. Strikingly, both sides of the debate rely on the authority of Article 19 (6) of the FDRE Constitution which provides:

> Persons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person.

The first position is that the right of arrested persons to be released on bail, though a

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[8] One is suspected of a corruption offence punishable for not more than ten years does not guarantee his release on bail for he may be denied on grounds listed down under Article 4(4) of the Revised Anti-Corruption Special Procedure and Rules of Evidence.

[9] That the conditions required under this provision for release on bail are met does not necessarily mean that the suspect will be released on bail for he may still be denied of bail on grounds provided under Article 67 of the 1961 Criminal Procedure Code of Ethiopia

[10] Since the promulgation of the law, I always have students of Criminal Procedure on the side of each position. For more, refer to Wuletaw Mengesha, The Constitutionality of the Anti Corruption law with regard to bail, (unpublished) Addis Ababa University Law Library, 2002

[11] Two prominent cases where this issue was raised are discussed in the following pages.

principle, is not absolute. The issue of whether an arrestee should be released on bail is to be decided by law. The law may provide for factors to be taken into consideration by a court where it entertains the issue of bail or it may specifically list down particular offences which are not bailable. According to this position, the above stated laws which provide for automatic denial of bail to persons charged with particular types of offences are perfectly consistent with article 19(6) of the FDRE Constitution.

The second position is that whether a suspect should be released on bail is to be decided based on law but that law can only provide for factors that the court may use as guidelines while making a ruling on the question of bail. Proponents of this argument contend that the law envisaged under Article 19(6) of the FDRE Constitution may not provide for a mandatory prohibition of bail leaving no option for the courts except denying bail. According to this position, the laws that provide for mandatory denial of bail clearly contradict with article 19(6) of the Constitution and other relevant provisions of the Human Rights instruments ratified by Ethiopia.[12]

1. Court Rulings

The above issue had been raised before and addressed by our courts. Hereunder are two prominent cases where the issue was extensively debated. In the case between *Federal Ethics and Anti Corruption Commission v. Assefa Abrha et al,*[13] the suspects were charged with a corruption offence. The law in place at the time when this case was instituted provided for absolute prohibition of bail for a person who is arrested on suspicion of having committed a corruption offence.[14] The defense lawyers argued that the law providing for a blanket prohibition of bail is in contravention of Article 19(6) of the FDRE Constitution. Hence the court is supposed to set it aside. The Commission's prosecutor, on his part, argued that the accused persons are not entitled to be released on bail for there is a clear law against it. The prosecutor added that the argument of the defense lawyers as to the unconstitutionality of the law that prohibits bail is not acceptable since the Constitution provides for the denial of bail in exceptional circumstances.

The trial court noted that the law which prohibits bail in cases of corruption offences being clear does not call for interpretation. The court further indicated that it could not see any reason to refer the matter to the Council of Constitutional Inquiry since it had no doubt on the constitutionality of the law. The court went on stating that article 19(6) of the FDRE Constitution envisages cases where the right to bail may be denied by court based on exceptional conditions stipulated by law. As indicated by the court, the

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[12] For the details on with which international instruments may the laws that provide for mandatory denial of bail may contradict refer to pages 18-22.

[13] Federal Ethics and Anti Corruption Commission v. Assefa Abrha et al (Criminal file No 7366, Federal Supreme Court, November 5, 2001) (unpublished)

[14] Article 51 (2) of Proclamation No. 236/2001 added through amendment by Proclamation No. 239/2001 states "A person who is arrested on suspicion of having committed a corruption offence shall not be released on bail."

exceptional circumstances envisaged under the Constitution are found in different laws. For corruption offences, the court stated, a special law prohibiting bail is enacted. To the court, for the purpose of the case at hand, the promulgation of the special law that prohibits bail to those who are suspected of corruption offence fulfils the requirement of exceptional circumstance as envisaged by the FDRE Constitution. In the face of such a clear law, the court concluded, it has no option but to apply it. Hence, the court dismissed the application of the defense lawyers as baseless.[15]

Similarly, the question of the constitutionality of the law that provides for automatic denial of bail was raised during the bail proceeding in the case between *the Federal Public Prosecutor v Engineer Hailu Shaoul et al.*[16] The public prosecutor in the first count charged the accused persons for attempting to commit outrages against the FDRE Constitution and the constitutional order in violation of Articles 32(1) (a) (b), 38, 34, 27(1) and Article 258 of the Criminal Code. It was clear that the offences the accused persons were charged with are punishable with life imprisonment or in exceptional circumstances with death. Furthermore, some people were killed in connection with the riots which were alleged to have been organized by the accused persons.[17]

Despite the fact that some of the accused persons seemed to concede that Article 63 of the Criminal Procedure Code,[18] as it stands, does not allow bail in such cases, they applied to the Federal High Court to be released on bail. In support of its power to grant their petition,, despite Article 63 of the Criminal Procedure Code, they argued that both the FDRE Constitution and International Human Rights Instruments ratified by Ethiopia give the power of deciding on question of bail to the court. Moreover, by stating that the FDRE Constitution does not allow the right to bail to be prohibited by law they tried to persuade the court to set Article 63 of the Criminal Procedure Code aside to the extent that it provides for automatic denial of bail.

The prosecutor, on his part, argued that Article 19(6) of the FDRE Constitution envisages instances where right to bail may be denied in accordance with the law. Furthermore, the prosecutor brought to the attention of the court the Recommendation of the Council of Constitutional Inquiry that there is no unconstitutionality in

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[15] Same position was taken by the Federal High Court and Federal Supreme Court in the case of Federal Ethics and Anti Corruption Commission v. Tilahun Abay etal.

[16] Federal Public Prosecutor v Engineer Hailu Shaoul et al, (Criminal File No. 43246, Federal High Court, December 4, 2005) .The case arose in connection with the riots that occurred following the 2005 Ethiopian election. In this case the Federal Public Prosecutor framed seven counts against the leaders and members of the Coalition for Unity and Democracy, journalists and civil society activists. The prosecutor dropped one of the counts during trial.

[17] The Independent Inquiry Commission established by Proclamation No. 478/2005 reported that 193 people were killed in connection with the disorder that occurred following the 2005 Ethiopian election.

[18] On the debates relating to the interpretation of Article 63 of the Criminal Procedure Code refer to Taye Nigatu, "በዋስ የመፈታት መብትና ተፈፃሚነቱ በኢትዮጵያ" , *Wonber*, June 2007, pp.38-49

prohibiting bail by law.[19]

The Court found Article 9(3) of International Covenant on Civil and Political Rights (hereinafter ICCPR) and article 19(6) of the FDRE Constitution to be relevant to the issue. By applying these provisions, it could only deduce that release on bail pending trial is the rule and denial of bail the exception. The court rejected the argument that bail cannot be denied by law since the court was of the view that the argument does not hold water in view of article 19 (6) of the FDRE Constitution which, as far as its understanding goes, clearly allows the court to deny bail based on circumstances prescribed by law.

2. Position of the Council of Constitutional Inquiry [20]

In the case of *Federal Ethics and Anti Corruption Commission v.* Tilahun Abay *etal,* the accused persons, following the rejection by the Federal Supreme Court of their application for the law which prohibits bail to be set aside, petitioned the Council of Constitutional Inquiry to recommend the nullity of the law to the House of Federation. Article 51 (2) of the Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 236/2001,[21] the constitutionality of which is challenged, reads: "A person who is arrested on suspicion of having committed a corruption offence shall not be released on bail."

The petitioners conceded that the proclamation did not allow them to be released on bail. Their claim was that the proclamation is not consistent with the FDRE Constitution since it absolutely prohibits bail for persons arrested in connection with corruption offence. They advanced three reasons in support of their claim. First, the proclamation, by prohibiting bail, violates the underlying principle of 'presumption of innocence' which makes it inconsistent with Article 20(3)[22] of the FDRE Constitution.

Second, the phrase "in exceptional circumstances prescribed by law" under Article 19 (6)[23] of the FDRE Constitution anticipates the lawmaker to provide for circumstances

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[19] The prosecutor is referring to the ruling given by the Council in connection with the case of Assefa Abrha and et al v. Federal Ethics and Anti-Corruption Commission where the Council rejected the application for the nullity of the law that prohibits bail to those suspected of corruption. The summary of the Council's decision is presented in the following couple of pages.

[20] Its position is derived from its recommendation on the issue of constitutionality of the law that prohibits bail. The issue was brought to its attention by defence lawyers of Ato Tilahun Abay and others who petitioned the Council to recommend to the House of Federation the nullification of the law, which prohibits bail exclusively on the basis of the offence one is suspected of.

[21] See above at note 14 on how this provision of the proclamation was included through amendment.

[22] The relevant part of Article 20 (3) reads: "During proceedings accused persons have the right to be presumed innocent until proved guilty according to law".

[23] See above on page 4 for the full text.

based on which the court may decide to grant or deny bail. It does not envisage cases where the lawmaker identifies a single offence or offences and prohibits bail for persons suspected of such crime(s). Hence, the proclamation by labeling a corruption offence as non-bailable goes against the aforementioned meaning of Article 19(6) of the FDRE Constitution. Furthermore, the proclamation, by making the question of bail non-justiciable, deprives the court of its judicial power on the matter contrary to Article 19(6) and Article 37 of the FDRE Constitution. [24]

Third, Article 13 of the FDRE Constitution requires the three organs of government both at federal and state level to respect and enforce human rights clauses of the constitution and these clauses to be interpreted in light of principles incorporated under the human rights instruments adopted by Ethiopia. The ICCPR, which forms part and parcel of Ethiopian law, under its Article 9(3), states that it shall not be the rule that persons awaiting trial be detained in custody. To the contrary, Article 51(2) of the Anti-Corruption Special Procedure and Rules of Evidence Proclamation No.236/2001 (as amended) stipulates that a suspect in custody should be denied bail as a rule. This makes Article 51(2) inconsistent with Article 13 of the FDRE Constitution.

The issue framed by the Council was "whether or not Article 51(2) of Proclamation No. 236/2001 (as amended) which prohibits bail for arrested persons suspected of corruption offence is consistent with the FDRE Constitution?"

From the relevant provisions of the FDRE Constitution, the ICCPR and the African Charter on Human and Peoples' Rights the Council deduced that the right to bail is directly related with the right to liberty. The Council noted that the former is a means to secure the latter for those who are arrested on suspicion that they have committed a crime. A law that restricts the right to bail, said the Council, has a direct effect on the right to liberty. To the Council, the reading of Article 19(6) and Article 17[25] of the FDRE Constitution indicates that no one is to be deprived of liberty except on grounds and in accordance with the law. The Council emphasized that though the right to liberty calls for the pre-trial freedom of a person suspected of an offence, none of the human rights instruments provide for an absolute right to liberty. Like many other rights, the Council observed, it is subject to restriction. Both the FDRE Constitution and international human rights instruments envisage instances where a suspect may remain in custody.

The Council made a reference to the American experience on the matter. It stated that in all American State courts may deny bail to accused persons *"when* the proof is evident or the presumption is great that the accused committed the offence." The

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[24] Article 37(1) states: "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 body with judicial power."

[25] Article 17(1) states: "No one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law." Article 17(2) provides: "No person may be subjected to arbitrary arrest, and no person may be detained without a charge or conviction against him."

Council also stated that homicide is a non-bailable offence in all American States. Furthermore, the Council indicated, in some of the States, magistrates are not allowed to grant bail for accused persons suspected of grave offences or where the accused persons were convicted for other crimes previously. In some other states, a list of non-bailable offences are provided by law. The Council also consulted the Federal Bail Reform Act of 1984 which, as understood by the Council, prohibits bail for those persons arrested in connection with serious offences.[26]

The Council identified two major points from Article 19(6) of the FDRE Constitution which provides "in exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person." First, the court has two options where an application for bail is made before it: to accept or reject the application. The other point is that the court chooses one from the two options on the basis of the circumstances provided by law.

The Council observed that denial of bail being an exception to the rule of pretrial conditional release, the law maker and the courts have a responsibility to take maximum care while enacting and interpreting laws relating to restriction of liberty to ensure that release on bail remains the principle. Apart from such restriction, the Council emphasized, there is no ground to say that the law maker cannot single out an offence or offences and declare it/them non-bailable. According to the Council, the right to bail is to be restricted in accordance with "special circumstances prescribed by law." The council noted that these special circumstances may be provided by law in two different ways. First, by providing factors based on which a police officer or public prosecutor may object to the granting of bail and the court may deny bail. The second form of restricting the right to bail is by listing down non-bailable offences. The Council cited Article 67 of the Criminal Procedure Code as an example for the first type and Article 63 of the Code for the second.

The Council noted that enacting a law that declares a given offence as non bailable does not make the question of bail non-justiciable. In the final analysis, the Council argued, it is the court that decides whether or not bail is to be granted in a given case. That is so because it is the court that decides whether or not there is adequate reason to suspect and arrest someone in connection with a corruption offence and whether or not the facts alleged by the prosecutor constitute corruption. Hence, the Council could not see any reason to recommend the nullification of the proclamation, the constitutionality of which is challenged.

3. Examining Apriori Legislative Denial of Bail

3.1. Examining the Legislative Background

A reference to the legislative history of the laws which prohibit bail is made with a

[26] For the observation of the writer on the Council's understanding of the American Law on the matter refer to page 32-33.

view to get information as to what led the legislature to enact such laws. The history of the Anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation No. 239/2001 shows three grounds that led the legislature to come up with the law that instructs the court to deny bail[27]. First, the legislature was convinced that corruption is not of a lesser gravity than other offences the suspects of which were not entitled to release on bail[28]; second, the proposed law was believed to ensure that suspects would be tried and serve their sentence, if found guilty and; third, the proposed law was found to be the only effective means to avert the danger of corruption that the country had faced.

When we refer to the legislative background of the Vagrancy Control Proclamation,[29] researches conducted by the Federal Police Commission are said to have established that the crime of dangerous vagrancy, increasing from time to time, had reached at the stage where the peace and security of the society was clearly in danger. Moreover, the researches are said to have shown that both the substantive[30] and procedural laws were ill-suited and not responsive to the threat that the crime of dangerous vagrancy had posed against the society. The major procedural law identified to have created a problem in the government's effort to control the crime is that part of the Criminal Procedure Code dealing with bail. That is so because, despite the fact that the crime had posed a serious danger against the society, Article 63 of the Criminal Procedure Code does not deny bail to persons suspected of dangerous vagrancy. Nor did, as the practice is said to have revealed, the court deny bail by virtue of Article 67 of the Code.[31] In addition, the researches are said to have shown that when suspects of vagrancy were released on bail, on several occasions they intimidated witnesses and /or continue to commit other offences. Even where suspects of dangerous vagrancy who were released on bail were arrested again and brought before courts of law in connection with similar offences, the courts, without giving due attention to the fact that these persons were suspected of more than one crime of vagrancy, are said to have ordered their release on bail. This, in turn, is said to have made it difficult to get the suspects convicted and had caused loss of public confidence in the criminal justice system. These practical problems are said to have triggered the idea of prohibition of bail by law.

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[27] **የፀረ ሙስና ልዩ ስነስርዓትና የማስረጃ አዋጅ ቁጥር 236/93 ለማሻሻል የወጣ ረቂቅ አዋጅ መግለጫ፣ የኢፌዴሪ ሁለተኛው የህዝብ ተወካዮች ምክር ቤት አንደኛ አመት የስራ ዘመን የፀደቁ አዋጆች የህዝብ ይፋ ውይይቶችና የውሳኔ ሃሳቦች፣ ጥራዝ ሁለት (1993 ዓ.ም.)**

[28] Though not expressly indicated, the lawmaker must have been referring to those offences the suspects of which are not allowed to be released under Article 63 of the Criminal Procedure Code. At the time when Proclamation No. 239/2001 was passed it was only Article 63 of the Criminal Procedure Code that prohibited bail exclusively based on the offence the arrestee is suspected of.

[29] **አደገኛ ቦዘኔነትን ለመቆጣጠር የተዘጋጀ ረቂቅ ህግ መግለጫ፣ የኢፌዴሪ ሁለተኛው የህዝብ ተወካዮች ምክር ቤት አራተኛ ዓመት የስራ ዘመን የፀደቁ አዋጆች የህዝብ ይፋ ውይይቶች እና የውሳኔ ሃሳቦች ጥራዝ 3 (1996 ዓ.ም.)**

[30] Lack of a clear definition of the crime of dangerous vagrancy is said to be the problem of the substantive law.

[31] Refer to note 52 as to the content of Art. 67 of the Code

Before passing the law that prohibits bail, efforts were made to see if prohibition of bail by law contravenes any principle that the FDRE Constitution or relevant international human rights instruments uphold. Moreover, the lawmaker consulted the laws of the United States of America and regional human rights conventions[32] to get information on how the question of bail is treated in different systems. The law maker was convinced that such law is perfectly compatible with the FDRE Constitution and the human rights instruments which are of relevance to Ethiopia. Furthermore, according to the lawmaker there are laws in the US, both at federal and state level that prohibit bail on the basis of the offence that one is suspected of. Also, it is the lawmaker's belief that the European Human Rights Convention, under Article 5 (1) (c), expressly allows denial of bail with a view to control dangerous vagrancy.

Convinced that the proposed laws are compatible with the FDRE Constitution and other human rights instruments and in keeping with the experiences of other legal systems and acknowledging its significance in the fight against the crimes, the law maker passed the laws that prohibit bail to those who are arrested on suspicion that they have committed crimes of corruption and/or dangerous vagrancy.

As can be understood from the legislative history[33] of the two laws that ban the right to bail, two common factors led the law maker to enact both laws. First, the lawmaker believed that a ban on the right to bail ensures that suspects of the offences will stand trial and serve their sentence, if found guilty. Second, the lawmaker was convinced that a law which prohibits bail to suspects of such offences is indispensable to control the crimes. Let us see the merits of the two justifications turn by turn.

3.1.1 The 'necessary to prevent the suspect from fleeing' reason

Obviously, denial of bail offers reasonable guarantee that suspects, once arrested will not flee. However, as indicated at the beginning of this article, putting a suspect in jail pending investigation or/and trial, as the case may be, is against the suspect's interest in liberty and goes against the principles of 'presumption of innocence' and 'prohibition of punishment before conviction.' Also, it has been indicated above that the idea of bail (conditional release) was introduced to accommodate the individual's interest in liberty and the society's interest to see to it that the suspect will stand trial and serve his sentence, if found guilty. Despite this merit of the bail system, the lawmaker decided that in these two particular cases bail should be prohibited by law to ensure that suspects do not abscond.

The problems that led the lawmaker to ban bail for those suspected of corruption on the one hand and for those suspected of dangerous vagrancy on the other are different.

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[32] The document on the legislative history of the Vagrancy Control Proclamation indicates that the African Charter on Human and Peoples' Rights, American Convention on Human rights and European Convention for the Protection of Human Rights and Fundamental Freedoms were consulted.

[33] See above at notes 27 and 29

Prohibition of bail for suspects of corruption is said to have been necessitated by the fact that corruption is not of a lesser gravity when compared to other offences the suspects of which are not allowed to be released on bail.[34] The justification for denial of bail to suspects of dangerous vagrancy is said to be the failure of the courts to apply the law properly. In the paragraphs that follow we will see how the proposed solution of denial of bail would not be the appropriate solution to the problems that are said to have necessitated these laws.

A. Gravity of Crime of Corruption as a Justification

The conventional way of measuring the gravity of a crime is the punishment attached to it.[35] The punishment for the crime of corruption ranges from simple imprisonment of one year to twenty five years of rigorous imprisonment.[36] It follows that a person suspected of corruption which is as serious as crimes the suspects of which are not allowed to be released on bail will not be released on bail. A case in point is that of Ato Tamirat Layne[37] who was denied bail on the ground that the corruption offence he is suspected of is punishable with fifteen years rigorous imprisonment. If the lawmaker is of the opinion that every offence which falls within the category of corruption is as serious as those offences which are not bailable, the appropriate measure to be taken is to amend the substantive law and increase the punishment for corruption so as to make it the same as the punishment attached with the non bailable offences. Such amendment will automatically make every corruption offence non-bailable making the proposed law of bail redundant and hence unnecessary. However, if the law maker simply makes every type of corruption offence non bailable without increasing the punishment (without making all corruption offences as grave as non bailable offences), then it is hardly possible to see how the gravity of the offence can be used as a justification to make such offences non-bailable

The revision[38] made on Proclamation No. 236/2001 (as amended) suggests that gravity

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[34] See above at note 28.

[35] H. Barbara, *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory, (*1996), pp.43-46

[36] Articles 407 and ff. of the 2004 Criminal Code. For the punishments attached to corruption before the enactment of the Criminal Code refer to Special Penal Code of 1974.

[37] public prosecutor v Ato Tamirat Layne etal, (Criminal File No. 1/1989, Federal Supreme Court) (unpublished)

[38] Its history shows that the amendment was made to avoid the problem that the previous law is said to have created on the investigation process. As its history shows, practice had revealed that the law which prohibited bail for everyone suspected of corruption did negatively impact the investigation activity. To have reliable evidence/information before arresting some one who is suspected of corruption is particularly important since he will remain in custody once arrested. To get adequate evidence that warrants arresting the suspect had been found to be very difficult. First, calling witnesses to give their testimony while the suspect is at large is not likely to be fruitful for the witnesses may fear possible intimidation and reprimand. Second, since most suspects of corruption are civil servants, collecting reliable evidence needs access to their office which is hardly possible without their knowledge. Moreover, the fact that the investigating

of the offence was wrongly used as a ground to make all corruption offences non bailable. Under the Revised Anti-Corruption Special Procedures and Rules of Evidence it is not suspects of all sorts of corruption offences that are ineligible for bail. It is only those who are suspected of corruption offence punishable with more than ten years of imprisonment who are not allowed to be released on bail. Still a corruption offence which is punishable with more than ten years but less than fifteen years is not as serious as offences which are not bailable under Article 63 of the Criminal Procedure Code. Had that been the case, there would have been no need to have a special law as Article 63 would have covered the case.

B. Misapplication of law by courts as a justification

The problem that is said to have led the lawmaker to pass a law that prohibits bail to suspects of dangerous vagrancy is different. The law maker understood that the crime is not as serious as crimes which are non-bailable under Article 63 of the Criminal Procedure Code and hence suspects of such offences could not be denied bail under this provision. However, the legislature, on the basis of the researches which were allegedly conducted by the Federal Police Commission, concluded that in many occasions suspects were wrongly released on bail on the face of adequate reasons/grounds to deny bail under Article 67 of the Criminal Procedure Code. For the legislature, the solution to this problem was to pass a law that obliges the court to deny bail.

Even assuming that the research based on which the legislature passed the Vagrancy Control Proclamation is well founded; the legislature's approach does not seem to be right. There are both legal and administrative solutions to rectify the problem said to have been disclosed by the research. Though, under Ethiopian law,[39] the prosecutor does not have right to appeal from a court ruling that grants bail, he may petition for cassation where he believes that a court has erred in applying/interpreting the law. The records of the Cassation bench of the Federal Supreme Court, however, do not show that such efforts were made by the public prosecutor. In the absence of studies that indicate the ineffectiveness of petition for cassation, the problems said to have been identified by the Federal Police Commission cannot be attributed to the judiciary as an institution. Rather, it is to be attributed to individual judges.

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police officer is required to have reliable evidence to arrest someone in connection with corruption makes confession of the suspect not to be a useful source of information. There is no indication as to whether the revision/amendment was motivated by the concern for liberty. See above at note 27.

[39] The cumulative reading of Articles 75 and 184 of the Criminal Procedure Code shows that the public prosecutor is not allowed to appeal from the ruling of the court that grant bail. That is not so where the case relates to corruption as Article 5 of the Revised Anti-Corruption Special procedure and Rules of evidence Proclamation expressly allows the prosecutor to appeal from a ruling that grants bail. In the case of Amhara National Regional State Justice Bureau v. Sergent Mekonnen Negash (File No. 35627), the Cassation Division of the Federal Supreme Court interpreted Article 75 of the Criminal Procedure Code to allow the prosecutor to appeal.

Moreover, the decision of the legislature to take the power of the judiciary to itself on the ground that the court is not exercising it properly, if at all that is the case, is neither logically sound nor wise. What if there is concrete evidence to the effect that accused persons against whom there is adequate evidence that warrants their conviction are acquitted? Will the legislature pass a law the effect of which is to convict suspects without a hearing or will it adjudicate the case? What if there are indications as to the fact that sentences passed on criminals are not proportional with the crime they are convicted for? Will the legislature take care of sentencing convicted persons?

When the legislature discovers such problems it is supposed to resort to other solutions instead of usurping the judiciary's power. The legislature should focus on the root causes of the problem and devise a mechanism that is appropriate to address the problem. If the problem is related with capacity, it is advisable to design capacity building measures; If there are indications that the judges made erroneous rulings deliberately or by gross negligence or because of incompetence there are administrative mechanisms such as subjecting the judge to disciplinary measures through the Judicial Administration Council.[40] On top of these, the legislature, while overseeing activities of the judiciary, can pay particular attention to such problems identified through research and give the appropriate instruction to the institution to address the problem by itself.

3.1 2. The 'necessary to control the crime' reason

Another common ground invoked to justify the law that prohibits bail is that such law is an indispensable means to control the crimes of corruption and dangerous vagrancy and protect the public from the harm caused by these crimes. The legislative history of the laws that ban the right to bail do not show how denial of bail serves as an absolutely necessary means to control the crimes. The legitimate purposes of denying bail are to ensure the suspect's attendance during trial, to prevent him from committing other offences and to prevent him from destroying evidence**.** If it is by preventing such risks from happening that the legislature intended such law to serve as a means of preventing the crimes, such laws would not escape criticism on the ground that they are one sided, disregarding the liberty interest of the suspects. If the lawmaker intended the laws to meet their objective -- controlling the crimes of corruption and dangerous vagrancy -- by inculcating a sense of fear among potential criminals or punishing suspects who in fact have committed the crime but against whom adequate evidence does not exist, the law that prohibits bail is made to meet its intended objective through illegitimate means, the issue of its effectiveness being another matter.

Since the laws have already been enacted despite the fact that they are not appropriate solutions to the problems that they are intended to deal with, now let us turn our attention to see whether or not these laws can be objected to on other grounds.

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[40] See Judicial Administration Council Proclamation Number 24/1996 and Article 79 of the FDRE Constitution

3.2. Examining the apriori legislative prohibition of bail in light of other concerns

The FDRE Constitution,[41] the Universal Declaration of Human Rights[42] and the ICCPR[43] in the light of which the Human rights chapter of the FDRE Constitution is to be construed[44] recognize the right to liberty and prohibit arbitrary arrest. According to these instruments, liberty is to be restricted only on such grounds and in accordance to procedures that are provided by law.[45]Absence of either or both conditions makes the arrest – restriction of liberty – arbitrary.

As correctly pointed out by the Council of Constitutional Inquiry[46], the right to bail has a direct relationship with the right to liberty. The right to liberty, in principle, requires the pretrial release of suspects. Bail being a means to secure the liberty of an arrested person, any law that restricts the right to bail prolongs the restriction of the right to liberty. It follows that bail is to be denied -- the continuation of restriction of liberty of the arrested person is to be ordered-- by the court only where there is a justification for the continuation and only in accordance with the procedures provided by law. If it is in the absence of either or both conditions that bail is denied the arrest resulting from the denial of bail will be arbitrary deprivation of liberty.

The Human Rights Committee, in its 1990 report, interpreted 'arbitrariness' as follows.

> Arbitrariness is not to be equated with 'against the law', but must be interpreted more broadly to include the elements of inappropriateness, injustice and lack of predictability such that remand in custody must not only be lawful but also reasonable in all circumstances. [47]

From such interpretation of the concept of "arbitrariness" follows that a restriction of liberty made on the basis of law may still be arbitrary arrest -- an arrest prohibited by the Constitution and relevant international human rights instruments -- in so far as the arrest made in accordance with the law is not reasonable or appropriate. The Council of Constitutional Inquiry has inferred from the Committee's interpretation of 'arbitrariness' that the law which restricts liberty shall, *inter alia*, fulfill the

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[41] Article 17 of the FDRE Constitution. .

[42]Article 9 of the Universal Declaration of Human Rights (http://www.un.org/overview/rights.html) last visited November 10, 2008.

[43] Article 9 of the International Covenant on Civil and Political Rights.

[44] Article 13 (2) of the FDRE Constitution .

[45] Apparently, the Amharic version of Article 17 of the FDRE Constitution seems to speak in terms only of procedural requirements

[46] Recommendation by the Council of Constitutional Inquiry on the issue of constitutionality of the law that prohibits bail (unpublished), cited above at note 20.

[47] The interpretation of the Human Rights Committee is significant in light of article 13(2) of the FDRE Constitution which requires its chapter three to be understood in conformity with international instruments.

requirements of *fairness, appropriateness and predictability.*[48] Hence, the constitutional provision safeguarding the right to liberty imposes restriction not only on the judiciary but also on the lawmaker.

That is, restriction of liberty through denial of bail, be it by the court or the lawmaker (by legislation), can be challenged for being arbitrary. Had the restriction been only on the courts, the existence of a law providing for denial of bail would have been adequate to disregard challenges on denial of bail made on the basis of that law.

Therefore, the conclusion of the Federal High Court, the Federal Supreme Court and the Council of Constitutional Inquiry[49] that denial of bail cannot be challenged where there is clear provision of law, based on which the denial is made, is not a valid one. The existence of a law is not sufficient for the arrest not to be arbitrary. Because the existence of a law that authorizes denial of bail *per se* does not make the denial immune from being arbitrary, the appropriateness and fairness of the arrest resulting from the denial of bail needs to be examined before taking a position on its arbitrariness.

The assessment on the fairness and appropriateness of the law that prohibits bail is to be made in light of relevant criteria, such as whether the law has the features envisaged by the Constitution, the purpose the law is meant to serve, and the implication of release on bail, release being the rule under the FDRE Constitution and relevant international human rights instruments.

3.2.1. Constitutional Requirements

Article 19(6) of the FDRE Constitution provides that "persons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or---" This provision recognizes the right of arrested persons to bail as a matter of principle while envisaging restriction on it in rare situations. It allows denial of bail only in exceptional cases and according to circumstances provided by law. The term 'circumstance', which is supposed to be provided by the law that restricts the right to bail, refers to a fact or condition.[50] There are two features that the circumstances to be provided by law, as envisaged under article 19(6) of the FDRE Constitution, are supposed to have. First, the circumstances should make the court deny bail only rarely -- hence qualified by the term "*exceptional.*" For the denial of bail to occur only rarely the circumstances to be provided by law should be those which result in denial of bail where the denial is justified by its purpose. That is, it is only factors which would indicate that releasing the suspect on bail is risky for any of the justifications of denial of bail—risk of absconding, interfering with the integrity of the criminal proceeding,

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[48] Recommendation of the Council of Constitutional Inquiry, cited above at note 20.

[49] This conclusion of the Council contradicts its own premise that for an arrest not to be arbitrary apart from being effected in accordance to the law the fairness and appropriateness of that law need to be established

[50] Bryan A. Garner (ed), *Black's Law Dictionary* 7th ed., 1999, p.236.

and security of the society—that should be provided by the law as grounds for denial of bail.

As properly indicated by the Council,[51] the FDRE Constitution allocates different roles to the lawmaker and the court in the denial of bail. The roles of the court and the legislature can be identified from the phrase "in exceptional circumstances prescribed by law the court may deny bail ---" which appears under Article 19(6) of the FDRE Constitution. The lawmaker is supposed to enact legislation providing for facts which may serve as grounds for denial of bail. And the court decides whether such facts exist in each case before it. In other words the circumstances should be designed in such a way that they give the court a final say on whether bail is to be granted or denied.

Denial of bail under Ethiopian law can be categorized in two categories. To the first category belong Article 67 of the Criminal Procedure Code[52] and Article 4(4) of the Revised Anti-Corruption Special Procedure and Rules of Evidence[53] which list down factors that the court should take into account while considering question of bail. According to these provisions, the court will on a case by case basis decide whether bail should be allowed or not. These provisions list down possible factors that the court should take into consideration while conducting a bail hearing. By evaluating the case at hand in the light of the factors listed there under, the court will decide on the issue of bail. These provisions are consistent with Articles 17 and 19(6) of the FDRE Constitution in that if the provisions are properly applied they would result in denial of bail only in rare occasions, in which case denial is legitimate. Moreover, under these provisions, the respective constitutional roles of the lawmaker and the court on the question of bail are maintained.

Under the second category fall Article 63 of the Criminal Procedure Code, Article 4(1) of the Revised Anti-Corruption Special Procedure and Rules of Evidence, and Article 6 of the Vagrancy Control Proclamation which, instead of providing facts based on which bail may be denied, provide that suspects for certain types of offences are not entitled to be released on bail. The Federal Supreme Court and the Council of Constitutional Inquiry treated these provisions as providing for '*legal circumstances*' and considered them as being within the ambit of Article 19(6) of the FDRE Constitution. It is hardly possible to say that such laws provide for 'circumstances' envisaged under Article 19(6) of the FDRE Constitution. Circumstance, as indicated above, refers to facts as distinguished from laws. These legal provisions do not indicate facts to be considered during a bail hearing.

The lawmaker, by enacting these laws, has made a decision that persons who are

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[51] Recommendation of the Council of Constitutional Inquiry, cited above at note 20.

[52] According to Article 67 of the Code an application for bail shall not be accepted where: a) the applicant is of such a nature that it is unlikely that he will comply with the conditions laid down in the bail bond; b) the applicant, if set at liberty, is likely to commit other offences; c) the applicant is likely to interfere with witnesses or tamper with the evidence.

[53] Provides same grounds for denial of bail as does Article 67 of the Criminal Procedure Code.

arrested on suspicion that they have committed offences referred to by these laws are not to be released on bail. These provisions by instructing the court, to deny bail whenever a suspect is charged with offences referred to there under, deprives it of its constitutionally granted power. These laws satisfy neither the requirement that the law provides 'circumstances' as grounds for denial of bail nor the requirement that the law empowers the court to have a final say on whether the arrested suspect should be released on bail or not.[54] Hence, the laws providing for list of offences as non bailable are not the kind of laws envisaged under article 19(6) of the FDRE Constitution.

3.2.2. Purpose of bail

An item of evidence which would convince a reasonable police officer to suspect someone's involvement in the commission of crime suffices to restrict the liberty of the person against whom there is a suspicion.[55] The presumption of innocence, no punishment before conviction and other interests of the accused call for the pretrial release of the person who is arrested on suspicion**.** There is a risk that if the suspect is released, he may abscond so that he will not stand trial, and serve his sentence; interfere with the evidence to be presented against him (destroy those accessible to him, make witnesses change their mind etc.). Thus, a bail system which allows the suspect to be out of custody on condition that he brings a personal guarantor or deposits a sum of money that would assure the public that the aforementioned risks do not materialize is introduced.[56] The right to bail is not recognized in absolute terms for there may be cases where the condition of release does not safeguard these interests of the public. That is, recognizing the right to bail as an absolute right may have the effect of many offenders absconding, destroying the prosecutor's evidence, and committing other offence all of which would have the potential to cripple the criminal justice system.[57]

Hence, bail is rightly to be denied, where it does not reasonably assure the public that the aforementioned risks would not materialize. For the law that prohibits bail to be fair and appropriate it should be designed with such purposes in mind. In so far as the prohibition of bail, though made in accordance with the law, is not justified by any of the aforementioned grounds, the law based on which bail is denied could not be considered as fair and appropriate. In this case, the restriction of liberty resulting from the denial of bail made on the basis of such law would be an arbitrary arrest -- one which is prohibited under the constitution[58] and international instruments[59] to which

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[54] The Council of Constitutional Inquiry is of the opinion that such laws do not deprive the court of its power to decide on bailability in a given case. Refer to page 11 above.

[55] Articles 25, 26, 50 and 51 of the Criminal Procedure Code.

[56] There may be cases where a suspect may be released on his own personal recognizance. Weaver, L. Abramson, J. Burkhof and C. Hancock, *Principles of Criminal Procedure* (2004), P. 262.

[57] Had there not been for such risks every arrested person would have been released on bail as there is no other justification for denial of bail.

[58] Article 17 (2) of the FDRE Constitution.

[59] Article 9 of the UDHR (http://www.udhr.org/UDHR/default.htm) and Article 9 of the ICCPR, see above at note 43

Ethiopia is a party.

It is practically difficult, perhaps impossible, for the lawmaker to anticipate, while making the law, cases where a suspect, if released on bail, would abscond, tamper with the evidence of the prosecutor or commit a crime, and conclude that bail should not be allowed in such cases exclusively on the basis of the offence he is suspected of.

To relate the discussion with the issue at hand, it is not possible to conclude that any one suspected of corruption offence punishable by more than ten years of imprisonment or vagrancy or an offence punishable by 15 years or more or by death penalty or an offence which jeopardizes victim's life would abscond if released on bail. Nor is it possible to conclude that any one suspected of any of the aforementioned offences would tamper with the evidence of the prosecutor or would commit another crime if released on bail. Because there is a risk that some suspects, if released on bail, may abscond or tamper with evidence of the prosecutor or be tempted to commit other offences the right to bail should not be recognized as an absolute right for suspects of any type of offence including the aforementioned ones. Where there is no way of knowing, on the basis of the offence which one is suspected of, who may abscond and who may not; who may tamper with the evidence of the prosecutor and who may not; who is likely to commit a crime and who is not (the only relevant factors to the question of bail), it is not reasonable to rule out release on bail *apriori*.

Such complete prohibition of bail by law, as is the case under Article 63 of the Criminal Procedure Code, Article 4(1) of the Revised Anti-Corruption Special Procedure and the Rules of Evidence, and Article 6 of the Vagrancy Control Proclamation, is not justified by any one of the acceptable grounds for denial of bail. There can be cases where persons suspected of the aforementioned offences may comply with the conditions of bail and appear before a court when so required.[60] Denial of bail for persons who would have complied with condition of bail had they been released is not fair. However, application of the aforementioned provisions would definitely have such result which makes the law authorizing the restriction of liberty of such persons unfair and the restriction, made in accordance with such laws, arbitrary.

It follows that a law which prohibits bail for persons arrested on suspicion that they have committed a given type of offence, exclusively on the basis of the crime they are suspected of, is either based on an unwarranted premise – that if such person is released one of the risks stated above would occur – or it denies bail for purposes that are not legitimately supposed to be served through denial of bail.

The best way to minimize[61] the probability of denial of bail to a suspect who would

[60] Attachment with the community, family ties, asset and the fact that he has not committed the crime he is suspected of may have the effect of making the suspect to comply with the bail conditions.

[61] Even where the power is given to the court there is a possibility for persons who would have complied with bail conditions had they been released to be denied bail. After all, there is no

have complied with condition of bail had he been released is to leave the determination of whether bail should be granted or not to the court. The court has proximity to facts of particular cases which puts it in a better position to make a more plausible and fair decision on question of bail as compared to the lawmaker who can deal only with hypothetical cases. In recognition of this, it seems the Constitution enshrines a division of responsibilities between the two arms of the government on the question of bail. The tasks are allocated based on the specialization of the two institutions. The role of the legislature is to provide circumstances which may serve as guidelines for the courts while entertaining the issue of bail. That of the courts is to decide whether, on the basis of the guidelines provided by the lawmaker and facts at hand, bail should be allowed or not -- the final say being in their hands.

3.2.3. Release on Bail is the Principle

As we have seen above, both the ICCPR and the FDRE Constitution declare pretrial release on bail as the norm and detention pending trial as the exception. This was affirmed by both the Federal High Court[62] and the Federal Supreme Court.[63]

The position that the lawmaker can enact laws that order the courts to deny bail, which is espoused by the prosecutors and endorsed by the courts and the Council of Constitutional Inquiry, would face another challenge if viewed from another angle. If this interpretation were to be accepted, how would the lawmaker be checked not to come up with as many restrictive laws as the number of crimes known in the Criminal Code, eventually eroding the right to bail? In other words, what safeguards the principle of right to bail from becoming an exception if there is no restriction on the lawmaker? Is it self restraint on the part of the lawmaker that guarantees the right to bail to remain the norm?

The fear raised here is not a hypothetical one. In addition to Article 63 of the Criminal Procedure Code, we have already witnessed two laws restricting the right to bail exclusively based on the offence allegedly committed. Different interest groups are advocating for a law that prohibits bail to different category of suspects. African Child Policy Forum (ACPF) [64] has been promoting the idea of denial of bail to those suspected of having committed certain crimes against children. Similarly, the Ethiopian Women Lawyers' Association (EWLA)[65] is advocating the idea of denial of bail for those suspected of having committed certain crimes against women. A draft policy document of the Federal government[66] reflects this trend. It incorporates the ideas

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scientific mechanism to know who would comply and who would not with the bail condition.

[62] Engineer Hailu Shaoul et al v. Federal Public Prosecutor, cited above at note 16.

[63] Assefa Abrha etal v. Federal Ethics and Anti Corruption Commission, cited above at note 13.

[64] Ayalew Melaku, የዋስትና መብት አፈፃፀም በህፃናት ላይ የወሲብ ወንጀል ፈፅመዋል ተብለው ከሚከሰሱ ሰዎች አንፃር a study sponsored by African Child Policy Forum , May 2006 (unpublished)

[65] Workshop organized by Ethiopian Women Lawyers Association, November 8, 2008, Nigeste Saba Hotel, Addis Ababa.

[66] መንጀል ፍትህ አስተዳድር ፖሊሲ ነሃሴ 2000

promoted by ACPF and EWLA. Furthermore, the policy document provides for denial of bail to those suspected for terrorist acts.

If the right to bail is to continue to be the norm, which I think is the spirit of the Constitution, Article 19(6) of the FDRE Constitution[67] should be construed to prohibit the lawmaker from passing laws that would result in abridgment of the right to liberty. Article 19(6) of the FDRE Constitution is meant to safeguard the interest of the accused from illegitimate arrest by the government through any one of its three organs. If article 19(6) is to be construed as not imposing any restriction on the legislature, the restriction on the court imposed by this constitutional provision will have no significance in protecting the right of the accused persons as the lawmaker may dictate the court abridging the right to bail of the accused which was meant to be protected by this very provision. The purpose of the provision would be served if it is construed to have allowed the lawmaker to list down circumstances to be used as guidelines by the court instead of deciding by itself bailable and non-bailable cases.

If the drafters of the Constitution had intended to grant the lawmaker the power to deny bail by law, the Constitution would have been worded "unless otherwise provided by law, persons arrested have the right to be released on bail" or phrases with the same effect would have been used instead of its present wording. The difference between this way of drafting the law which would give unfettered power to the law maker and what is provided under Article 19(6) of the FDRE Constitution is obvious. In the former, the lawmaker is free to restrict the right at any time whereas in the latter case the lawmaker does not have such freedom. In other words, under Article 19(6) of the FDRE Constitution, the accused is entitled to judicial determination of bail. Hence, no law should circumvent the judicial process.

The Council of Constitutional Inquiry, in its recommendation[68] on the constitutionality of the Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 236/2001 (as amended), indicated that the law which expressly prohibits bail for persons suspected of certain category of offences does not deprive the court of its power to decide on whether or not persons suspected of such offences are to be released on bail. According to the Council, the court may exercise its power to decide on question of bail in two ways. It may, during a bail hearing, assess whether or not the prosecutor has a *prima facie* case and if it finds no *prima facie* case, the court has the option to order conditional release of persons suspected of such non-bailable offences. Moreover, the Council indicated that the court determines whether or not the facts alleged on the charge constitute the non-bailable offence. That is, the court may release accused persons on bail though charged for non- bailable offence if the court does not see the facts stated on the charge as constituting the non-bailable offence.

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[67] According to Article 13(2) of the FDRE Constitution, this provision has to be construed in light of Article 9(3) of the International Covenant on Civil and Political rights. As to the relevance of Article 9(3) of the ICCPR see below at p.30.

[68] Recommendation of the Council of Constitutional Inquiry, cited above at note 20.

Apparently, the Council's argument seems convincing. But when one looks at the argument very closely he can easily notice that it is erroneous. In both instances that the Council sees as avenues for the court to exercise its judicial power on question of bail, there would be no need to make the release conditional. If the prosecutor does not have a *prima facie* case, it has been indicated in this writing[69] that strictly and logically speaking there is no need to conduct trial. Hence there is no point in making the suspect's release conditional. The issue of bail arises only where there is a *prima facie* case[70] as it is only then that there would be a need to secure the attendance of the arrested person for his trial. Also, where the facts stated on the charge do not match with the offence that the prosecutor alleges to have been committed, there is no probability of the accused person to be convicted[71] as charged, making the trial of the accused person unnecessary. Therefore, in both cases where, as observed by the Council, courts could exercise their power on question of bail in cases related to non-bailable offences, there is no need to make the release of the accused conditional**.** It is in cases where the accused should be released unconditionally that the court is said to have the power to release the accused conditionally. This does not make sense.

3.3. Foreign Experience

Interestingly, in *Caballero v. UK*[72], the European Court of Human Rights was faced with exactly the same question -- whether or not the law which does not allow a judge to grant bail to those who are suspected of particular type of offence is a valid law. The relevant part of Section 25 of the Criminal Justice and Public Order Act 1994 of UK, the validity of which was challenged by the applicant, provided *inter alia* that "a person who was charged with rape having previously been convicted of such an offence or culpable homicide, should not be granted bail."[73]

The material part of Article 5 of European Convention on Human Rights, in light of which the court was asked to evaluate the validity of the Act, provides as follows:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law. ---
   (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent

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[69] See below at pp. 37-38.

[70] The position of the Council clearly implies that the court would not have power to decide on question of bail where the prosecutor has a prima facie case.

[71] Though there is a possibility for the court, as per Article 113 of the Criminal Procedure Code, to convict an accused for an offence he is not charged with that is not an obligation of the court.

[72] Caballero v. United Kingdom, in S. Trechsel, *Human Rights in Criminal Proceedings*, (2006), p.511

[73] Caballero v. United Kingdom quoted by the High Court of Justice in Northern Ireland Queen's Bench Division in the Matter of an Application by Sean Pearse McAuley for Judicial review, http://www.courtsni.gov.uk

his committing an offence or fleeing after having done so ---

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

In *Caballero v. U.K.*, the applicant had previously been convicted of homicide and was then charged with attempted rape.[74] No doubt that the applicant's case falls under Section 25 of the Criminal Justice and Public Order Act 1994. The European Commission of Human Rights observed that "---the possibility of any consideration by a judge of the pretrial release of the applicant and of, accordingly, his release on bail had been excluded in advance by the legislature."[75] The Commission held by majority that the domestic law which compels the judge not to grant bail is a violation of article 5(3) of the Convention[76] for it deprives the judicial officer of its judicial power. During the proceeding before the European Court of Human Rights, the UK government adopted the Commission's view and the Court accepted this concession.[77] Both the Commission and the Court interpreted the phrase "---*a judge or officer authorized by law to exercise judicial power*" under Article 5(3) of the European Charter of Human Rights as empowering the judge to determine, by reference to legal criteria, whether or not the detention of the person who appears before him/her is justified. The European Court interpreted the convention provision, emphasizing on the italicized part, as requiring that the judge has the power to make a binding order for the detainee's release.[78] The same phrase is found under Article 9(3) of the ICCPR, an integral part of Ethiopian law,[79] and said to be source of article 5(3) of the Charter.[80]

Article 9 (3) of the ICCPR reads:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject

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[74] Ibid.
[75] Ibid.
[76] S. Trechsel, cited above at note 72, pages 510-511.
[77] Ibid. S. Trechsel was of the opinion that the position taken by the Commission and the Court is wrong. He criticized the position on the ground that it is a mistake to say that there is no room for the judge to release a suspect in such cases. In his view, the judge still has to examine whether there is a reasonable suspicion that the person concerned has committed the crime. It is interesting to note that his position is the same as that which was taken by the Council of Constitutional Inquiry.
[78] Schiesser v. Switzerland; Ireland v. United Kingdom; Assenov v. Bulgaria in S. Trechsel, cited above at note 72, P.510
[79] FDRE Constitution, Article 9(4).
[80] S. Trechsel, cited above at note 72, p.508

to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

During the bail hearing in the case of *Engineer Hailu Shaoul etal v. the Federal Public Prosecutor,*[81] the Federal High Court found this Convention provision as relevant to the issue of bail. However, the court emphasized on the second statement in the convention provision to conclude that the provision merely indicates release on bail being the principle and refusal of bail the exception. The court did not see any other relevance of the convention provision to the issue. Regrettably, the Federal High Court did not even consider the second part of the provision as relevant to the issue of whether or not prohibition of bail by law is allowed.

When we refer to procedural laws of other states, the type of the offence with which the suspect is charged does not serve as an exclusive ground to deny bail. In Canada, those suspected of an offence have the right not to be deprived of reasonable bail without just cause.[82] The right to bail may not be denied exclusively on the basis of the offence which the accused is suspected of. Rather, the prosecutor has to establish the necessity of continued detention on the primary ground that detention is necessary to ensure attendance of the accused at trial or on the secondary ground that detention is necessary for the protection or safety of the public including any substantial likelihood that the accused will, if released, commit a criminal offence or interfere with the administration of justice.[83]

In the United Kingdom, there is principle of release on bail. But, where the suspect is charged with murder, attempted murder, manslaughter, rape, attempted rape or one of the serious sexual offences and if he has previously been convicted in the UK of one of these
offences or of culpable homicide he has to convince the court that there are circumstances which justify release on bail. He has the burden to establish those circumstances and if he discharges the burden, the court will release him on bail. It is the court that finally decides on the question of bail. The law maker simply provides for the guidelines. [84]

In France, seriousness of the offence is not relevant for the purpose of a bail hearing. It is only for reasons related with the integrity of administration of justice that bail may be denied. Even then, it is the magistrate who, after holding an adversary hearing, decides on whether pretrial detention is the only way to ensure the integrity of the administration of justice.[85] Similarly, in Israel, the seriousness of the offence, in and of

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[81] Federal Public Prosecutor v Engineer Hailu Shaoul et al, cited above at note 16.
[82] Section 11(e) of the Canadian Charter of Rights and Freedoms as quoted in C. Bradley(ed.), *Criminal Procedure: A Worldwide Study*, 1999, p.71.
[83] Canadian Criminal Code Sections 515 (10) in C. Bradely, cited above at note 82, p.70.
[84] J. Sprack, *A Practical Approach to Criminal Procedure* (10th ed., 2004), p.96
[85] The French Code of Criminal Procedure, Article 145-2, in C. Bradley, cited above at note 82, p.165

itself, cannot serve as a ground to deny bail. An accused is to be detained pending trial only upon a finding by the court that the accused, if released on bail, is likely to tamper with evidence, harass future witness of the prosecutor, abscond or commit other offences.[86]

The relevant law of South Africa does not provide a list of offences persons suspected of which are not allowed to be released on bail. Nor does it provide for punishment as a relevant factor to decide on question of bail. In principle, every offence is bailable irrespective of the punishment attached to it. Because bail is not an absolute right, the prosecution may object to a release on bail. But the onus is upon him to convince the court that release is not in the interest of justice. Release is said to be not in the interest of justice where there is risk of absconding, interference with the investigation or witnesses, and commission of other crimes if the accused is released on bail. However, Section 60(11) of the Criminal Procedure Act of South Africa requires the accused to show that the interests of justice do not require his or her detention in respect of certain crimes such as murder, rape, robbery with aggravated circumstances, dealing in drugs.[87]

In the United States of America, an arrestee has the right to be released on bail. There is no single offence the suspect of which is to be denied bail solely because he is suspected to have committed such offence. The decision whether the accused is to be released or not depends on other factors. The judge is required to impose conditions of release so as to ensure return of the accused for trial, non-interference with the investigation activity and that he will not commit a crime. Denial of bail is valid when no condition is likely to assure the court that any of the aforementioned risks would not occur. [88]

The observations of the lawmaker and the statements of the Council of Constitutional Inquiry about the position of American procedural laws[89] on the issue do not seem to reflect the correct meaning of the laws. The American Criminal Procedural laws (both at federal and state level) do not prohibit one who is suspected of homicide from being released on bail solely because of that suspicion. Also, the Federal Bail Reform Act of 1984 does not in any way provide for denial of bail exclusively on the basis of the offence one is suspected of. Nature of the offence is just one of the several factors to be considered by the court during a bail hearing.[90]

The Federal Bail Reform Act simply introduces two rebuttable presumptions[91] against

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[86] Israeli Criminal Procedure Law of 1996, Section 21(a) (1), in C. Bradley, cited above at note 82, p.222

[87] C. Bradley, cited above at note 82, pp. 346-347.

[88] J. Dressler, *Understanding Criminal Procedure* (3rd ed., 2002), p. 642

[89] For the summary of the Council's ruling on the constitutionality of the Anti-Corruption Special Procedure and Rules of Evidence, refer to pp. 8-11 above.

[90] See the Federal Bail Reform Act § 3142 (e) and (f). Also refer to J. Dressler, cited at note 88 above, p.642

[91] Ibid.

accused persons. First, the accused is presumed too dangerous to be released if the prosecutor proves that the defendant has previously been convicted of one of the offences enumerated there under and that five years have not elapsed since the date of conviction or of release from imprisonment of the prior conviction. Second, there is a presumption that no conditions of release will reasonably assure that the defendant will not flee or commit a crime, if the judge determines that there is probable cause to believe that he committed one of the specified set of serious drug offences or an offence involving the use of or possession of firearms. Such presumptions are subject to rebuttal by the accused, in which case the court has the power to grant bail, are far from ordering the court not to grant bail by referring to the type of offence the accused is charged with.

The procedural laws in Argentina are different. Rules of Criminal Procedure at the Federal level as well as laws adopted in Argentine provinces provide that defendants charged with certain types of crimes cannot be released on bail. According to scholars, such laws, by depriving a person of his freedom before conviction violate Article 18 of the Constitution of Argentina which provides that "no inhabitant shall be punished without a previous trial."[92] Despite wide criticisms voiced against such blank denial of the right to bail, the Supreme Court has refused to invalidate any of those laws on constitutional grounds. The Supreme Court upheld a statutory provision making defendants charged with five or more separate crimes ineligible for bail.[93]

II. The Requirement for a *Prima Facie* case during a Bail Hearing

Another controversy that relates to question of bail in Ethiopia, in particular where the accused is charged with non bailable offence is whether the court should consider the weight of the prosecution's evidence at the time of bail hearing. During a bail hearing, suspects usually request the court to check if the state has a *prima facie* case[94] that shows the commission of the alleged crime and links him/her with the offence. The prosecution's position[95] is that the court is not supposed to go into assessing the evidence at the time of bail hearing.[96]

1. Court Rulings

This very issue was raised during the bail hearing in the case between *the Federal*

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[92] C. Bradley, cited above at note 82, p.36

[93] Ibid. Note that unlike Ethiopian Constitution, in the Argentine constitution there is no clear provision recognizing the right to be released on bail

[94] A prosecutor is said to have a prima facie case where he proves that there is a probable cause to believe that a crime was committed and that the defendant committed the crime charged.

[95] Cases where the prosecutor expressed such positions are discussed in the following pages.

[96] The Council of Constitutional Inquiry, in the case of the petition by Tilahun Abay etal , incidentally indicated that the court has the power to assess the evidence of the prosecution during a bail hearing. Refer to note 20 above.

Public Prosecutor and Engineer Hailu Shaoul et al.[97] The provisions under which the accused persons were charged are punishable with life imprisonment or death. The accused persons requested the court to consider whether the evidence produced by the public prosecutor is weighty enough to show a *prima facie* case against them to warrant denial of bail under Article 63 of the Criminal Procedure Code.[98] Some of them[99] argued that the court should not deny bail by simply referring to the criminal law provision alleged to have been violated by the accused. In stead, they argued, the court has to check whether or not the prosecutor has a *prima facie* case to support his allegation before denying bail; if the court does not engage itself in such exercise, it is hardly possible to say that the court decides on question of bail. According to the accused persons, let alone in criminal cases, even in civil cases, the party who brings action has to show a cause of action so that the court will accept his statement of claim.

The prosecutor, on his part, argued that Article 63 of the Criminal Procedure Code requires the court merely to refer to the provision alleged to have been violated and rule on bail on the basis of the punishment prescribed thereunder. The prosecutor further argued that no where does the law empower the court to weigh the evidence of the prosecutor at the stage of bail hearing; it is a matter to come later in the criminal proceeding.

The trial court rejected the argument of the accused persons for lack of legal basis. According to the court, whether the plaintiff has a cause of action or not is to be verified in civil cases for the law expressly requires so.[100] No where does the law require the court to do the same for criminal cases. In a criminal case, the court stated, it is the public prosecutor who weighs the evidence collected during investigation and decides if it is adequate to institute a charge.[101] According to the court, evaluating the evidence of the prosecutor during a bail hearing does not have a legal basis. The Federal Supreme Court confirmed the position of the Federal High Court indicating that to require the trial court to weigh the evidence of the prosecution at this stage is to wrongly require the court to take a position on the weight of the evidence of the prosecution at a preliminary stage.[102]

There are instances where the courts show extreme passivism by failing to assess whether the facts stated on the charge, if found to be true, would constitute the crime alleged to have been committed. In the case *Federal Ethics and Anti Corruption Commission v Assefa Abrha et al,*[103] the prosecutor charged 12 persons with corruption. Defense lawyer for the 11th and 12th accused persons requested the court to direct its

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[97] Engineer Hailu Shaoul etal v. Federal Public Prosecutor, cited above at note 16.

[98] Accused persons concede that Article 63 of the Criminal Procedure Code, the relevant provisions for the matter, does not allow them to be released on bail.

[99] Ato Daniel Bekele, Ato Netsanet Demissie and Ato Kasahun Kebede

[100] The court seems to have Article 231 of the 1965 Civil Procedure Code of Ethiopia in mind.

[101] The court refers to Articles 41 and 42 of the Criminal Procedure Code of Ethiopia.

[102] Daniel Bekele etal v Federal Public Prosecutor (criminal Appeal File No 22909, Federal Supreme Court, March 10, 2006) (unpublished).

[103] Federal Ethics and Anti Corruption Commission v Assefa Abrha et al, cited above at note 13.

attention to the alleged facts on the charge to have been committed by the two accused persons. The defense lawyer argued the alleged facts do not constitute corruption offence in which case the law[104] which denies bail to persons suspected of corruption should not apply to the accused. Accordingly, the defense lawyer pleaded the court to release his clients on bail. In response, the prosecutor stated that the lawyers are mistaken in appreciating the facts stated on the charge. The court ruled that since the prosecutor has alleged that the acts committed by each accused person, including the 11th and 12th accused persons, constitute or is related to the offence of corruption, it will not go into verifying the validity of the allegation to determine whether bail should be allowed or not. Despite such application of the defense lawyers, the court, without any inquiry into whether or not the facts, if proved, would constitute corruption, rejected their application for bail and continued the trial.

Similarly, in the case *Public prosecutor v Andarge Yalew etal v*,[105] some five persons were charged before the Federal High Court under Articles 58(1), 32(1) (a) and Article 523 of the 1957 Penal Code. The accused persons, through their lawyers, applied to the trial court that the prosecutor cited Article 523 not because the facts alleged in the charge constitute the crime referred to by that particular legal provision but to make sure that accused persons are not released on bail. They requested the court to see whether or not the facts on the charge, if found to be true, would constitute homicide in the second degree. The trial court did not accept the idea that the prosecutor's evidence be considered and evaluated during a bail hearing to decide whether bail is to be allowed. The appellate court[106] confirmed the lower court's ruling that for the purpose of bail what the court has to consider is the punishment prescribed under the law that the prosecutor has alleged to have been violated.

2. Examining the Requirement of a *Prima Facie* Case during a Bail Hearing

The position of the prosecution endorsed by both the Federal High Court and the Federal Supreme Court can be summarized as follows. To decide on question of bail, the court shall not assess whether or not the state has a *prima-facie* case to show the commission of a crime and the link that the crime has with the suspect; nor shall the court check whether or not the facts alleged in the charge, if proved, would constitute the offence alleged to have been committed. If the crime alleged to have been committed is non-bailable, the court will simply deny bail.

As will be shown in the following pages, this position is supported neither by the purpose of the bail system nor by the law of the country. Moreover, the international experience is not in favor of such approach.

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[104] The defense lawyers refer to Proclamation No. 236/2001 as amended.

[105] Federal Public prosecutor v Andarge Yalew et al.(criminal file No 1007/93, Federal High Court, 22 June, 2001) (unpublished).

[106] Andarge Yalew etal v. Federal Public prosecutor (criminal appeal file no. , Federal Supreme Court)

2.1. Purpose of Bail

The primary purpose of denying or setting bail is to ensure the attendance of the suspect at his trial and to serve his sentence if found guilty. From this follow two arguments. First, to deny bail with a view to ensure attendance of a suspect during trial, there should be indications that there will be a trial. It is by establishing a *prima facie* case that the prosecutor can show that there is a need to try the suspect with a view to formally and finally evaluate the validity of the prosecution's allegation through the trial process. If the prosecutor does not have a *prima facie* case that shows the commission of the crime or that relates the accused with the crime, strictly speaking there is no need to go to a full-fledged trial. In such cases, the society does not have a legitimate interest in the attendance of the suspect during his trial as no trial is necessary. In cases where the evidence of the prosecutor is not capable of establishing a *prima facie* case, one may even go to the extent of arguing that there is no need to make release of the suspect conditional since there is no need to try him.

Second, even if, for whatever reason, there is a need to conduct trial there is no reasonable risk that the suspect will flee. Where there is no *prima facie* case, a reasonable person would not fear possible conviction and punishment from which he wishes to escape. Lack of *prima facie* case shows either the suspect has not committed the crime or there is no adequate evidence that warrants his conviction. In both cases, there is no reasonable risk that the suspect, if released on bail, would escape for he does not fear conviction and punishment. There is nothing that tempts him to escape.

If, in cases related to offences which are said to be non-bailable, the court evaluates the evidence of the prosecution and grants bail where there is no *prima facie* case[107] and denies where there is, no legitimate societal interest is jeopardized. In any case, the court's involvement in such activities does not have the effect of releasing those against whom the prosecution has a minimal evidence that justifies conducting a trial. Therefore, the effect of the court's refusal to make an assessment of the prosecution's case is to deny bail even for those against whom the prosecution does not have such minimal evidence. This does not serve any interest of the society.[108] If releasing a suspect against whom the prosecution does not have a *prima facie* case does not prejudice the public's legitimate interest and if detaining those against whom there is no *prima facie* case does not serve any legitimate societal interest, what possible justification can one think of to explain the position that the court shall not weigh the evidence of the prosecution during a bail hearing? For what precise reasons would judicial scrutiny of the applicant's detention for the purpose of deciding bailability be objectionable? The author of this article finds it very difficult to think of any plausible answer for these questions.

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[107] As argued in the preceding paragraphs normally the suspect against whom the prosecution does not have a prima facie case should be released unconditionally.

[108] To conduct a trial which would certainly end up with acquittal of the accused is unacceptable wastage of time, resource and man power from the view point of the public in addition to causing unnecessary humiliation and anxiety to the accused.

One can not reasonably argue that the court is not competent to assess whether or not there is a *prima facie* case. How can the court which is competent to eventually decide on the adequacy of the prosecution's evidence to warrant conviction lack the capacity to determine whether or not there is a *prima facie* case? Such a position does not make sense. One may think that requiring the prosecutor to have a *prima facie* case to deny bail would be problematic where the issue of bail is entertained before investigation is completed as the prosecutor might not have all the evidence at hand at that time. This is a legitimate concern. The examination, if made while investigation is in progress, should necessarily be of a summary nature. If the investigation is at an early stage, it is quite possible that only rudimentary elements of evidence and information will be available. The court is not supposed to require the prosecutor to have strong evidence to deny bail. It does not mean, however, that the prosecutor's case should not be subject to a *prima facie* case test. One should bear in mind that the police officer is supposed to have some sort of evidence even at the time of arrest as the arrest is justified only where there is a reason to believe that the arrestee has committed an offence.[109]

2.2. Implications of Constitutional provisions

The argument of the prosecution, which is espoused by the court, emphasizes the absence of law that empowers the court to weigh the evidence of the prosecution during bail hearing. The Federal High Court in comparing its role in criminal cases with civil cases expressly stated that:[110]

> it is because the law expressly authorizes the court to verify whether or not statement of claim, in a civil case, shows a cause of action that it has to do the same unlike in criminal cases where there is no provision that allows it to evaluate the evidence of the prosecution during a bail hearing.

A similar argument was made by the Federal Supreme Court.[111]

Relevant provisions of the FDRE Constitution do not seem to support the position of the courts and the prosecutor. In support of the court's responsibility to examine whether or not the prosecution has a *prima facie* case, while dealing with the issue of bail, two arguments can be advanced. First, the constitutional right of the arrested person to be brought before court of law within 48 hours and to be informed of the reason for his arrest imposes a duty on the court, before which the arrestee appears, to check if the state has a probable cause against the suspect. Second, the duty of the court to enforce the right to liberty of suspected persons calls for the court's examination of the prosecution's reason for arresting the suspect

2.2.1 The right to be given specific explanation of the reason for arrest

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[109] See above at note 55.
[110] Federal Public Prosecutor v Engineer Hailu Shaoul etal, cited above at note 16.
[111] Daniel Bekele et al v. Federal Public Prosecutor, cited above at note 102.

Article 19 of the FDRE Constitution provides:

1. Persons arrested have the right to be informed promptly, in a language they understand, of the reasons for their arrest and of any charge against them.[112]

2. Persons arrested have the right to be brought before a court within 48 hours of their arrest. ---. On appearing before a court, they shall have the right to be given prompt and specific explanation of the reasons for their arrest due to the alleged crime committed.[113]

No matter what the offence the arrested person is suspected of, he has a constitutional right to be brought before court within 48 hours. Another constitutional right follows his appearance before the court -- the right to be given prompt and specific explanation of the reasons for his arrest -- one of the explanations[114] for the right to appear before court within the prescribed time. One may rightly wonder as to what is new about Article 19(3) of the FDRE Constitution in light of Article 19(1). If, by virtue of Article 19 (1) of the FDRE Constitution, persons arrested are entitled to know the reason for their arrest at the time of arrest,[115] what other *"reason for arrest"* is envisaged under Article 19(3)? The only logical explanation is the following. Under Article 19(1), the officer who is making the arrest is responsible to let the arrested person know the reason for his arrest, which is simply telling him the offence of which he is suspected. Under Article 19(3), the court before which the arrestee appears is supposed to tell the arrestee that there is adequate reason for his arrest in connection with the crime that he is suspected of. The latter requires more than telling him the mere reason for his arrest. It entitles the arrestee to be told that there is a reason that warrants his detention in connection with the offence he is suspected of.

This distinction is clearer in the Amharic version of the aforementioned constitutional provisions.[116] The phrase "--- **ወዲያውኑ ፍርድ ቤት እንደቀረቡ በተጠረጠሩበት ወንጀል ለመታሰር የሚያበቃ ምክንያት ያለ መሆኑ ተለይቶ እንዲገለፅላቸው መብት**

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[112] The Amharic version goes as follows.-"**መንጀል ፈፅመዋል በመባል የተያዙ ሰዎች የቀረበባቸው ክስና ምክንያቶቹ በዝርዝር ወዲያውኑ በሚገባቸው ቋንቋ እንዲነገራቸው መብት አላቸው።**

[113] The Amharic version goes as follows. "**የተያዙ ሰዎች በአርባ ስምንት ሰዓታት ውስጥ ፍርድ ቤት የመቅረብ መብት አላቸው።** ---። **ወዲያውኑ ፍርድ ቤት እንደቀረቡ በተጠረጠሩበት ወንጀል ለመታሰር የሚያበቃ ምክንያት ያለ መሆኑ ተለይቶ እንዲገለፅላቸው መብት አላቸው።**

[114] Protection against ill treatment by the police is another justification for requiring arrested persons to be brought before court promptly. Although techniques have been developed which make it possible to inflict severe pain or suffering without leaving scars or other traces, there may still be a relatively good chance of finding evidence of ill-treatment on the body within one or two days.

[115] Article 56 (2) of the Criminal Procedure Code, by requiring the police officer who is to effect the arrest to read the arrest warrant to the person to be arrested tries to ensure that the arrested persons know the reason of his arrest at the moment of arrest.

[116] See above notes112 and 113.

አላቸው።።" Article 19(3) clearly shows that the arrested person has the right to know and the court has the responsibility to inform him that his arrest is justified by some reasons or facts which link him with the crime. The existence of the reason that justifies arrest can be verified by the court only through assessing the evidence collected by the investigating police officer. Unless the court has the power to evaluate the evidence of the police with a view to determine whether the officer has reason to suspect the arrested person has committed a crime, it will not be able to tell the arrested person that there is a justification to arrest him. Moreover, the right of the suspect under Article 19(3) would not have any content nor would it be different from the right under Article 19(1) of the FDRE Constitution, which makes it redundant, if it simply entitles the arrested person to be told the offence for which he is suspected.

While applying Article 5 (1) (c) of the European Convention on Human Rights which provides the right to be brought promptly before court, the European Court of Human Rights indicated the purpose of the right to be "the protection of the individual against arbitrary interferences by the state with his right to liberty."[117] The Court stated:[118]

> Deprivation of liberty--- is such a grave interference with a person's fundamental rights that administrative authorities responsible to the executive are only competent to make a provisional decision to detain a person; as soon as possible thereafter, the decision must be scrutinized and confirmed by the judiciary, who has been able to meet the detainee in person. This obligation remains even if there exists an arrest warrant issued by a judicial authority.

In connection with this convention provision, Trechsel states "during this first hearing, the representative of the judiciary will have to make a *prima facie* evaluation of whether the conditions for detention under paragraph 1(c) are fulfilled."[119]

2.2.2. Court's Duty to Enforce Right to Liberty

The position that in criminal cases it is the prosecutor, but not the court, which determines whether there is a *prima facie* case or not amounts to a blatant disregard of Article 13 of the FDRE Constitution. This constitutional provision imposes shared responsibility on all the three organs of the government in the enforcement and protection of the human rights part of the FDRE Constitution. One of these rights is the right to liberty recognized under Article 17 of the FDRE Constitution. This constitutional provision prohibits arbitrary arrest -- an arrest made not on grounds and/or procedures as are established by law. The provision safeguards one's right to liberty not to be restricted without substantive and procedural due process of law. From the cumulative reading of Articles 13 (1) and 17 of the FDRE Constitution one can conclude that with regard to respecting and protecting the right to liberty both the public prosecutor and the court do have their own role to play at different levels.

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[117] S. Trechsel, cited at note 72 above, p.506
[118] Id, pp.505-506
[119] Id., p.506

Article 17 is applicable not only at the moment of effecting arrest; it continues to apply throughout the time of arrest/detention. That is, for the continued detention to be justified, it needs to meet both procedural and substantive requirements. This right is available irrespective of the crime of which the arrestee is suspected. When an arrested person, no matter what offence he is arrested for, is brought before court of law within the prescribed time after arrest -- the first time the issue of bail is likely to be raised -- the court may order the arrest to continue -- through denial of bail -- if and only if the continuation of the arrest is not to be arbitrary for lack of either or both substantive or/and procedural requirements. Article 19 (3) of the FDRE Constitution steps in here. This provision, by entitling the arrested person to be informed of the reason for his arrest, reinforces the court's responsibility of enforcing and respecting the right to liberty under Articles 17 and 13 (1) of the FDRE Constitution. The court, if it denies bail, has to explain to the arrestee why he is arrested and why the arrest shall have to continue. In other words, the court should be convinced of the existence of indicators as to the commission of the crime and the suspect's involvement in the same. That is possible only through assessing evidence of the prosecution.

If there are no such indicators (no *prima facie* case exists) the court will have nothing to say to the arrestee as to the reasons for his arrest in which case it is supposed to grant bail, if not unconditional release. Denial of bail, in such cases, is a clear violation of the suspect's right to be free from arbitrary infringement of his liberty. This would be a failure on the part of the court to discharge its duty to enforce the constitutional right of the suspect to be free from arbitrary arrest.

The contention here is not to deny the prosecutor's role in assessing its own evidence. It too has responsibility in ensuring the suspect's right to liberty. By virtue of Articles 41 and 42 of the Criminal Procedure Code the public prosecutor is required to weigh his evidence to decide on whether or not a charge has to be instituted. If the case relates to a person who has not been released on bail, for there is a *prima facie* case, the decision of the prosecutor on whether to frame a charge or not is critical to the protection of the right to liberty of the suspect. If he decides to bring a charge, the suspect will remain detained. If the prosecutor decides not to frame a charge believing that he does not have adequate evidence to warrant conviction, the suspect will be released. Hence, the prosecutor should carefully weigh the evidence at hand so that the detention does not continue without a cause.

3. Foreign Experience

The idea that pretrial detention (denial of bail) is to be allowed only after considering the existence of a *prima facie* case is almost universally accepted. Just to cite few, in the United States, one of the factors to be considered during a bail/detention hearing is the *substantiality of the government's evidence* against the arrestee.[120]

[120] See § 3142(g) of the Bail reform Act of 1984 as quoted in L. Weinreb (ed.), *Leading Constitutional Cases on Criminal Justice* (2001), p.862.

In Canada, bail is to be denied where detention is necessary in order to maintain the confidence in the administration of justice provided that, *inter alia*, the prosecutor's case is apparently strong.[121] Under Israeli law, the accused cannot be detained in the absence of *prima facie* evidence that substantiates the accusations specified in the indictment.[122] Israeli Supreme Court, in the case of *Zada v. Israel*, has gone to the extent of declaring that "the prosecution's evidence must be subjected to a serious scrutiny that goes far beyond the examination of the evidence in rulings concerning direct dismissal of charges."[123] Article 384(1) of the Italian *Code Penal Procedure* expressly provides that there must be serious circumstantial evidence of guilt, not mere suspicions, for one suspected of crime to be detained. This standard was elaborated by the Supreme Court of Italy. According to the court, "where the circumstantial evidence would lead one to reasonably conclude that the crime charged occurred and that the suspect committed it," the statute is satisfied.[124]

Conclusion

As far as the lawmaker is concerned there is no constitutional issue with *apriori* legislative denial of bail to category of suspects, be it on the basis of the offence or the punishment attached to the offence they are suspected of. For the legislature, such law is in perfect conformity with the FDRE Constitution and relevant human rights instruments. Also, the Federal Courts do not see any reason to abstain from applying such law. Furthermore, the Council of Constitutional Inquiry could not see any reason to object to the application of the law. They support the law on a simple ground that restriction of the right to bail is envisaged under Article 19 (6) of the FDRE Constitution. Both the lawmaker and the Council found such law to be compatible with the international experience as well. As the Federal Government's unpublished policy document on criminal justice indicates there is a plan to include additional offences with in the category of non bailable ones.

Obviously, an arrestee's constitutional right to bail is not an absolute right. Both the FDRE Constitution and relevant human rights instruments which recognize the right allow its restriction in so far as it is made in accordance with law. A close reading of Article 19 (6) of the FDRE Constitution shows that the law which authorizes denial of bail does not necessarily make the denial made in accordance with such law constitutional. There are two features that the law should have so that the restriction authorized by the law will be that which is envisaged by the Constitution. First, the law should provide for circumstances – facts as distinguished from list of offences—that

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[121] Section 515(10)(c) of the Criminal Code of Canada as quoted in C. Bradley, cited above at note 82, p.71

[122] Criminal procedure Law, section 21(a)(1) as quoted in C. Bradley, cited at note 82 above, p.222

[123] Zada v. state of Israel, 50(2) P.D. 133 (1995) as quoted in C. Bradley, cited at note 82 above, p.222.

[124] Cass.I, sent 1090, (March 9, 1992) as quoted in C.Bradley, cited at note 82 above, p248.

may result in denial of bail only exceptionally. To use the words of the Constitution, it should provide for '*exceptional circumstances*' which would result in denial of bail only in rare situations. In other words, the possible grounds for denial of bail should not be so wide that it results in abridgment of the right. Second, the law should be drafted in such a manner that whether these circumstances—grounds for denial of bail--provided by law exist or not is to be determined by court of law on a case by case basis. The law that regulates restriction on the right to bail is, therefore, supposed to list down factors that the court should take into consideration during a bail hearing. Any law which provides for summary and automatic denial of bail to those suspected of particular types of offences is not envisaged by the Constitution. Such law puts handcuffs on courts of law and deprives them the power they are constitutionally entrusted with to judge whether or not an arrestee who is brought before them should be released on bail. Such law, apart from not being in conformity with the constitutional right of the arrested person to be released on bail, does not serve the legitimate purpose of denial of bail.

When Article 6 of the Vagrancy Control Proclamation, Article 4 of the Revised Anti-Corruption Special Procedure and Rules of Evidence, and Article 63 of the Criminal Procedure Code are assessed in light of the two features that the law envisaged by Article 19(6) of the Constitution is supposed to have, they meet neither condition. By providing the type of the offence or the punishment attached to the offence as a ground to deny bail, they fail to meet the requirement that circumstances be grounds for denial of bail. By providing for apriori refusal of bail where the court is obliged to summarily deny bail to certain category of arrested persons, without evaluating each case on its own in light of factors that support and militate against release on bail, but exclusively on the basis of the offence they are suspected of, the laws fail to satisfy the requirement that the court should have a final say on question of bail.

Nor are these laws found to be in conformity with the overwhelming international experience. As far as this writer understands, both the lawmaker and the Council of Constitutional Inquiry erred in appreciating the true meaning of the laws of other states and provisions of regional and international human rights instruments relating to the issue of *apriori* denial of bail. Perhaps, the laws that provide for *apriori* denial of bail might not have been passed by the lawmaker had it appreciated the true meaning of the foreign laws which it referred to. None of the foreign laws and the provisions of regional and international human rights instruments that were referred to by the Council and the lawmaker allow summary denial of bail. Under these foreign laws and conventions there is always room for the court to decide whether or not bail is to be granted on the basis of facts to be established by the parties, i.e. the prosecutor and the suspect.

As can be inferred from the cases consulted in this article, when it comes to the issue of relevance of the weight of prosecutor's evidence during a bail hearing, our courts are of the opinion that the law does not allow them to weigh the prosecutor's evidence at this stage of a criminal proceeding. In the face of Articles 13 (2), 17, and 19(1) and (3) of the FDRE Constitution, the position that there is no law which authorizes a court to

weigh the evidence of the police officer or the prosecutor during a bail hearing does not hold water. Rather, discharging its duty envisaged under the aforementioned constitutional provisions in a responsible way requires the court to weigh the evidence of the prosecution. If the court simply refers to the punishment prescribed by the provision alleged to have been violated as a sole basis for a ruling on issue of bail, in effect it is the prosecutor, by citing provisions relating to bailable or non-bailable offences, but not the court, that decides whether an accused should be released on bail or not. The court's abstention from weighing evidence of the prosecution, with a view to determine whether there is a *prima facie* case, during a bail hearing does not serve any legitimate purpose. The extreme passivism, the cases consulted for this research have disclosed, amounts to a manifest disregard of judicial responsibility. There is no reason for the court to wait for the evidence of the prosecutor to decide whether the facts alleged in the charge constitutes corruption or not. The evidence will only show whether the facts as alleged have been committed by the suspects. The public prosecutor has to allege in the charge the existence of facts indicating that someone is killed if he has to file a homicide case. It seems absurd if a court was to deny bail in the absence of such fact in the charge (if, for instance, the facts alleged in the charge indicate the commission of bodily injury) merely because the prosecutor's charge states that the accused person is suspected for homicide. Because the FDRE Constitution imposes a heightened responsibility on the courts to respect and enforce rights of accused persons, they should ensure that the prosecution has a *prima facie* case before denying bail to the accused.

Multimodal Transportation of Goods under Ethiopian Law

Tsehai Wada*

Introduction

Commercial transportation of goods is no doubt the backbone of every economy, for without it no economy can thrive to the expected level. Accordingly, goods may be transported on the back of individuals or animals, on trucks, rails, by air, or on board sea going vessels A look at the history of transportation from the technological point of view shows that it has advanced quite rapidly in time so as to accommodate the necessities of commerce at the local as well as international levels. Accordingly, means of transportation have become fast in speed and large in size as a result of which it is now possible to transport large quantities of items from one corner of the world to another within a short time either by one form of transport alone or a combination of these at a speed and efficiency which was unthinkable some decades ago.

Commercial transportation of goods involves many parties. These are mainly the consignor/ shipper, the consignee, and the carrier. It may also involve freight forwarders, warehousemen/ port operators, stevedores, etc. Thus, any transportation law has to regulate the relationship between these parties. It also goes without saying that such a law needs to balance the interests of all parties involved and keep pace with every technological advances. Currently, the most widely used means or modes of transportation of goods are trucks, rails, airplanes and sea going vessels. These modes of transport are governed by separate laws and each branch of law has developed in its own direction.

Goods may be transported in different forms of packages or in bulk. Accordingly, it is now common to consolidate cargoes in pallets or containers. Of all the technological advances that called for the restructuring of means of transport in design as well as capacity, the container holds the first tier. As a result of this technological achievement, trucks, rail way cars and ships are now designed and built to accommodate heavy cargoes consolidated in containers. Given the volume of cargoes consolidated in containers, there arose the need to transport goods without any need of opening their containers at transit ports except for the port/place of destination, i.e. hinterland point. This last demand for the transport of containerized cargoes again called for the readjustment of the legal regime as a result of which, the common form of unimodal transportation of goods under different documents is replaced by multimodal transport in which cargoes can move under one document only, though the modes of transport can be more than one. Thus, the different transport laws that developed in their own directions have to give way to or accommodate the new development.

Ethiopia enacted the first transport law in 1960. Accordingly, the Commercial Code of

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the Empire of Ethiopia[1]governs carriage of goods by land and air[2], and the Maritime Code of the Empire of Ethiopia[3] governs carriage of goods by sea. Given the technological and legal advances made in transportation, the country felt that it has to align its laws along this line of development and recently enacted a number of laws[4]. Of all these legislations, the proclamation that amended the law of carriage of goods by land and the multimodal transport proclamation have introduced fundamental changes and thus the reason for writing this article[5].

This article is divided into five parts. The first part attempts to shed light on the technological developments in transportation, with special emphasis on the container revolution. The second and the third parts deal with major features of unimodal and multimodal transportation laws and the legal regime that governs transportation in Ethiopia, with special emphasis on the recently enacted legislation, respectively. The fourth part attempts to shed light on the major provisions of the newly enacted multimodal transportation law and the fifth part briefly touches on the practice. The article closes with conclusions.

1. The Evolution of Transport Technology

It is not the main thrust of this article to discuss at length all the routes through which transportation technology has passed. However, it appears proper to shed light on this, *albeit* briefly just for the purpose of building a bridge between the law and the practice. To begin with, one can easily note the fact that transportation has passed through different phases and we have now reached at a stage where we find multiple modes of transport that cater for our needs of movement. So we have individuals as well as animals that carry goods on their backs as well as fast and large trucks, rail cars, air planes and ships that serve the same purpose. Though rockets are not currently in use for the transportation of commercial goods, they are, however, the most advanced means of transport.

The volume of goods that need to be transported is growing through time. This in turn has necessitated the invention of large and fast means of transport. However, apart from

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[1] Negarit Gazeta, Extraordinary Issue NO. 3 of 1960

[2] Note – per Art. 563 of the Commercial Code, carriage by land includes the transportation of persons, baggage, or goods by inland waterways, such as rivers, canals or lakes.

[3] The Maritime Code Proclamation, 1960, Proclamation NO. 164 of 1960, Negarit Gazeta, Extraordinary Issue NO. 1 of 1960.

[4] These legislation are: the Dry Port Administration Enterprise Establishment Council of Ministers Regulation No. 136/2007; A Proclamation to Amend Carriage of Goods by Land Proclamation No.547/2007; Multimodal Transport of Goods. Proclamation No.548/2007 [hereafter the proclamation; Maritime Sector Administration Proclamation No.549/2007 and Proclamation Defining the Liability of the Dry Port to the Consignee, Proclamation No. 588/2008.

[5] Note – Given the fact that carriage of goods by land is a vast area that demands an independent treatment, this article will deal with quite a few provisions of this law which have some relevance with the subject at hand, i.e. multimodal transportation, only.

the advances made in transport technology, the consolidation of cargo in packages has also brought about a profound change through time. Accordingly, of all the innovations, the container has brought about fundamental changes in carriers' technology, port operations, etc. Containers are in short, large metal boxes in which cargoes can be stuffed and transported. Given the strength of the materials from which they are made, they protect cargoes from pilferage and physical damages. The business and legal developments necessitated by the container revolution are aptly described by two writers as follows:

> Before the container revolution, cargo moved leisurely from truck or train to ship's tackle, across the oceans, and then onto rail car to truck. A carrier would inspect every item for damage, sign a receipt, and issue its own bill of lading, setting forth the terms of its carriage and the limits of its liability. If problems arose, the shipper would know where to turn… [Sic]This separation [of distinct services by different carriers] was changed, however, by the container revolution, by the integration of sea and land carriage that followed…Carriers now offer door-to-door service under a single bill of lading. Vehicles are driven directly onto RO-RO ships, barges full of cargo are lifted onto oceangoing LASH vessels and nearly everywhere in the world, [and] individual cartons can be stuffed into containers that are not opened again until arrival at final destination.[6]

It is interesting to note that containers are not new inventions. Research conducted in this area indicates that "the concept of a container for the transportation of goods was first articulated by Dr. James Anderson in England in 1801... [sic] and the [inventor was] granted a patent in Great Britain in 1845 for a plan involving the transfer of containers from road to narrow-gauge rail cars and from horse drawn vehicles to railcars"[7]. The use of containers in the US goes back to 1911 in the form of personal – or household – effects van; while modern usage of containers for ocean transportation started in the early 1940's.[8] The extensive use of containers then demanded the restructuring of rail cars, trucks as well as ships as a result of which all means of transport are now capable of transporting containers of every size and large ships can transport barges, which are in short very large containers. It should be noted here that the container revolution has affected not only the design and structure of means of transport but also port operators, for ports were required to build warehouses as well as other facilities to cater for containers. This has again given rise to the building of intermodal container transfer facilities (ICTFs) in close proximity to ports[9].

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[6]Jack G. Knebel and Denise Savoie Blocker, United States Statutory Regulation of Multimodalism, , *Tulane Law Review*, Vol. 64, Nos.2 &3, December 1989, 544

[7] Richard W. Palmer and Frank P. DeGuilio, (hereinafter, Palmer and DeGuiloi, Terminal Operations and Multimodal Carriage: History and Prognosis, *Tulane Law Review*, Vol. 64, Nos.2 &3, December 1989, p.285

[8] Ibid, p.286.

[9] Id.p.300.

The container revolution not only helped the safe transportation of goods but also their speedy dispatch and receipt , by decreasing the time taken in loading and unloading cargoes at ports, as illustrated in the following table.[10]

	1950s Break-bulk liner	1970s Containership
Tons handled per working day	1 000	19 000
Days - loading and discharging	28	6
Tons carried	11 000	57 000

2. The Law's Journey from Unimodalism to Multimodalism

Depending on the type/s of contract of carriage to be concluded between a consignor and a carrier, goods may be transported by a single carrier or series of carriers of one type only or different modes. The classical or traditional form of such contract is the unimodal form of transport contract wherein a single carrier carries goods from one point of dispatch to the point of destination. If the carrier is a ship, these two points are naturally two different ports. If the carriers are, however, trucks, railcars or airplanes, the points are hinterland locations or sea or air ports. Given the fact that each mode of transport is governed by its own law, i.e. contract of carriage by land – trucks or rail – air or sea, the bases of liability, limits of liability, defenses and time limits are governed by each law separately. It has been noted above that each law has developed in its own way and these issues are regulated differently in each law. Thus, when goods are damaged or lost, a consignor or consignee in a unimodal transport contract needs to prove safe delivery of the cargo to the carrier at the point of dispatch and loss or damage upon receipt of the goods at the point of destination, and it is up to the carrier to claim exoneration depending on the list of defenses provided under the relevant law or contract, in the absence of which, it will be liable to the extent provided under the law or the agreement.

Multimodalism, has, however, changed all these and made it easier for all parties involved in a transport contract to deal with their businesses in a simple manner wherein all transactions will be centralized in a single document and a single party will take liability for whatever may happen to cargoes. Thus:

> From the operational stand point, multimodalism is the product of the widespread use of containers for the carriage of cargo and of technological advances that permit their integrated use of various modes of transportation….Multimodalism is characterized by the integration and coordination of various modes of transportation, commonly by means of a

[10] Clulow, Jeb Anthony, *Multimodal Transport in South Africa,* LLM dissertation, University of Cape Town, posted on website on 20 July, 1998, accessed on March 24,2009. Though the author has mentioned that the statistics in the table was prepared by Graham and Hughes, the source material is not shown anywhere. Moreover, the dissertation has no page number.

> metal shipping container, providing point of origin to point of destination transportation under a single set of shipping documents and based on a single through – freight rate charged to the shipper, regardless of how many modes of transportation are employed or how many carriers are involved. In the true multimodal movement, the shipper need only deal with one party to arrange for the entire shipment.[11]

The legal issues to be raised in cases of unimodal transport are simple compared to what may arise if the contract is for multimodal transport. In the latter case, goods are carried by at least two or more means of transport, say for example, trucks and ships, cars and ships or air planes, etc. Depending on circumstances, a given cargo can be transported by all modes of transport. Such types of contracts are facilitated through freight forwarders, carriers or multimodal operators. A freight forwarder may then act as the agent of the shipper and enter into series of contracts of carriage with each carrier which are subject to their respective legal regimes. Under such types of contracts, goods will be transported at the cargo owner's risk, i.e. without any personal liability on the freight forwarder. An alternative contract can be for a carrier to enter into a contract of carriage for that leg of transport and act as an agent of the shipper for the rest of the journey. In such a case each carrier's liability will be determined under the respective relevant law.[12] Thus:

> The third possibility is for a combined transport[13] operator to negotiate a single contract for multimodal transport on a door-to-door basis. Under such a scheme, the combined transport operator would remain solely responsible to the cargo owner for the safety of the goods during transit, having negotiated separate contracts for the different legs with individual unimodal carriers. The essence of such an arrangement is that the cargo owner would not be in contractual relations with individual 'actual carriers' and his rights and liabilities would depend solely on the terms of the combined transport contract.[14]

Since different laws-local as well as international - prescribe different mandatory limits of liability, any attempt to unify them has failed so far. As a result of this, the UNCTAD Convention on Multimodal Transport that was adopted in May, 1980 has not

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[11] Palmer and DeGuiloi , Supra Note 7, PP. 283 -285.

[12] Wilson, John F, *Carriage of Goods by Sea*, Longman Pearson Education, Fourth Edition (2001) p. 241.

[13] The expression "multimodal transport" was introduced prior to the UNCTAD Multimodal Convention of 1980, mainly for political reasons…the term "multimodal transport is basically the same as "combined transport" which is the terminology of the ECE resolution. During the preparatory work within the framework of UNCTAD, the previous term " combined transport " was changed into " multimodal transport" to draw distinction between the former work within organizations that were considered to be dominated by industrialized countries and the achievements of UNCTAD, See, Herber, Rolf, The European Legal Experience with Multimodalism, Tulane Law Review, Vol. 64, Nos.2 &3, December 1989, p.616

[14] Wilson, J. F, Supra Note 12, p.241.

yet gained recognition among the major ship owning states. The International Chamber of Commerce (ICC) Rules for a Combined Transport Document (1975) appear to be favored by those states that have found the UNCTAD convention uncomfortable. However, these rules of the ICC are not mandatory.

One of the controversial issues raised in relation with multimodal transportation is limitation of liability. Accordingly, liability may be limited either by taking that leg of journey in which a damage or loss has occurred or fixing the limit irrespective of the type of the place where this occurred. As explained below, the former is known as the "network system" and the latter, the "uniform system":

> As multimodalism has developed, carriers have adopted two approaches to the issuance of multimodal bills of lading. Historically, most ocean carriers have issued bills of lading that provide for liability of carriers based on a "network system" of applicable liability regimes. Under this scheme, the law applicable to each segment of the transportation …governs the liability of each connecting carrier. Also the rights of indemnity and contribution between carriers are governed similarly. Under these circumstances, each carrier limits its liability to the segment that it performs, and the applicable law is said to travel with the cargo[15] ……in some instances, in contrast to the network system of liabilities, multimodal bills of lading may provide that the issuing carrier assumes liability throughout the entire period of transportation.[16] [This is known as the uniform system].

3. The Transportation Laws of Ethiopia: An Overview

3.1 Sources of the laws

The first transportation laws of the country were enacted in 1960, in the Commercial and Maritime codes[17]. Accordingly, Book III, Titles I and II of the Commercial Code – Arts.561 - 603 deal with contracts of carriage by land and Arts. 604 - 653 deal with carriage by air. The Maritime Code, though totally devoted to the shipping business in general, deals with charter party agreements under Arts.126 – 179, contracts of carriage supported by a bill of lading, under Arts. 180 - 209 and carriage of passengers, under Arts.210 -228.

Carriages of goods and passengers on land and air, as indicated above, form part of the Commercial Code. Unlike the other areas of the Code, the drafters of the Code have not sufficiently indicated the sources of these provisions. What is indicated either by way

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[15] This system is also known as the chameleon system, because the multimodal transport operator changes colour, as it were, each time the mode of transport by which the contract is performed changes. Clulow, Supra Note 10.

[16] Palmer and DeGuillio, Supra Note 7, pp. 327 -328.

[17] Negarit Gazeta – Extraordinary Issues No.3 of 1960,_Proclamation No.166 and 164 of 1960, respectively.

of sources or general contents of the titles is sketchy. Accordingly, the following can be gathered by way of source from the only material written in this regard:[18]

It appears that originally, the drafter - of the Commercial Code - had no intention of incorporating maritime law in the Code, for it is after the completion of other parts of the code that he expressed that "[his] task has been expressly extended to the maritime law". In this respect, and on the issue of whether the Maritime Code should be enacted as a separate code or form part of the Commercial Code, he opted for the former because of the "particularism" of the maritime law. With regard to the source, though the drafter did not expressly mention it, it seems that he favored the adoption of international conventions, particularly the one signed in Brussels in 1924, but with the necessary care to protect the country's interests[19]. On another occasion, the second drafter mentions that adopting solutions contained in international conventions is advantageous, and "this is the same idea behind the provisions of the Maritime Code…"[20]

With regard to carriage of goods and passengers by land, the second drafter, though not expressly, again indicates that the sources of this part of the law are: the French draft law prepared by the French Commission for the Reform of the Commercial Code, the Swiss Code of Obligations, the Italian Civil Code, the European conventions on carriage by railway- latest drafts (Berne, 1952) - and the Warsaw Convention on Carriage by Air[21].

As far as carriage by air is concerned, the second drafter has expressly mentioned that the source is, the Warsaw Convention of 1929 as revised by the Protocol of The Hague, 1955, which in his words, is reproduced word for word.[22]

3.2. Main features of the transportation laws of Ethiopia[23]

Though it is not the purpose of this article to deal with each feature of transportation law in general or any particular transport law in particular, an attempt will be made hereunder to shed light on the most important provisions of the Ethiopian law on, bases of liability, defense to liability and limitation of liability, for these are issues that have much relevance to the subject at hand. Moreover, these issues are most controversial in the area and more points of difference are manifested on these issues than the rest.

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[18] Winship, Peter, -editor and translator - *Background Documents of the Ethiopian Commercial Code of 1960*, HSIU, Faculty of Law, (1972).

[19] Ibid, pp. 5&8, Preliminary Report on the Preparation o the Commercial Code of Ethiopia, submitted to the Imperial Commission for the Codification of the Ethiopian Law, Jean Escarra, Paris, 18 January 1954.

[20] Ibid, p.84, Jauffret, March, 1958.

[21] Ibid, pp. 82 & 83.

[22] Id. P.84.

[23] Note – All the three forms of transportation cover the transport of passengers as well as goods. Given the scope of the article, however, transport of passengers is not dealt with in this article.

3.2.1. Bases of liability

As regards carriage by land, as noted above, the part of the Commercial Code that dealt with the area is now repealed and replaced by Proclamation No. 547/2007. According to Article 21 this proclamation, a carrier is liable for the total or partial loss of the goods and damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery. Moreover, according to Article 32 a carrier is liable for damage caused by his willful misconduct or that of his agents or servants or other persons whose services he makes use of. Similarly, according to Article 630 of the Commercial Code (herein after the CC) an air carrier is liable for the loss of or damage to goods due to an occurrence having taken place whilst such goods were carried by air.[24] Article 633 of the CC provides an air carrier is also liable for delay.

Though the Maritime Code does not contain an express provision to this effect, the different duties imposed on a carrier show all the same that such a carrier has the duty to exercise due diligence to: make the ship seaworthy, properly man, equip, and supply the ship; make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, before and at the beginning of the voyage; and properly and carefully load, handle stow, carry, keep, care for and discharge the goods carried(see Articles 138 and 196 of the Maritime Code). It thus, goes without saying that a carrier will be liable for loss or damage resulting from want of such a standard of diligence or care. Moreover, Art.180 (3) of the Maritime Code provides that "[provisions regarding…bill of lading] shall apply from the time when the goods are loaded to the time when they are discharged from the ship" and this suggests that the carrier is liable for damage or loss between these times.

3.2.2. Defenses to liability

In the case of carriage by land, a carrier is not liable for loss, damage or delay arising from: the wrongful act or neglect of the claimant, the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier, inherent vice of the goods and force majeure (see Art.22, Proclamation No.547/2007).[25] As far as an air carrier is concerned, it will not be liable for loss or damage occasioned due to: irregular, inaccurate or incomplete statements [furnished] by the shipper. It will also avoid liability if proof of the fact that he or his agent has taken all measures necessary for averting the damage or those measures could not be taken, and the

[24] According to Art. 631, the duration of liability includes, the time within which the goods are in the carrier's custody, whether at the airport or in the air craft or in any other place not being an airport where the air craft may have to land, but does not include carrying by land, sea or river taking place outside an airport.

[25] Note – There seems to be an error in translation here, for according to the authoritative Amharic text, the phrase "…a wrongful act or neglect of the carrier…." reads as "…by the fault of the consignor or consignee…." and it seems that the latter is correct.

existence of an inherent defect of the goods carried can be adduced (see Arts.617 (2) and 629(2), 634 and 641, respectively of the CC).

Compared to any other carrier, a sea carrier is given a wide range of defenses that can exempt it from liability for loss or damage. Accordingly, a sea carrier is exempted from liability for loss or damage resulting from: act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship; fire, unless caused by the actual fault or privity of the carrier; perils , dangers, and accidents of the sea or other navigable waters; act of god; act of public enemies; arrest or restraint of princes, rulers, or people, or seizure under legal process; quarantine restrictions; act or omission of the shipper or owner of the goods, his agent or representative; strikes or lockouts or stoppage or restraint of labour for whatever cause, whether partial or general; riots an civil commotion; saving or attempting to save life or property at sea; wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods; insufficiency of packing; insufficiency or inadequacy of marks; latent defects not discoverable by due diligence; and any other cause arising without the actual fault or privity of the carrier, or without the fault of or neglect of the agents or servants of the carrier- Art.197 of the Maritime Code.

3.2.3. Limitation of liability

Under Proclamation No.547/2007, the liability of the carrier by land in the case of loss or damage is limited to the value of the goods at the place at which they should be delivered [if this is known] and if this is not known, by reference to the value of goods of the same kind and quality. This value or liability cannot however exceed SDR 835 per package or other shipping unit or SDR 2.5 per kg, whichever is the higher[26]. According to Article 27 of the above proclamation, the same applies to goods whose nature and value have been declared and made an integral part of the contract albeit; the SDR limitation does not appear to apply here. Article 29 of the same proclamation shows that in the latter case a claimant can claim a higher compensation where the value of the goods or a special interest in delivery has been declared. It should be noted here that according to Article 32 willful misconduct of the carrier or its agents can take away the carrier's right to limit his liability under the above conditions.

As far as the air carrier's right to limit liability is concerned, in respect of goods, it cannot exceed Birr 40 per kg[27]. When the sender of the goods had, however, expressly specified that he has a special interest in their delivery and paid such surcharges as may be required, the carrier has to pay the agreed compensation unless he can show that

[26] It will be interesting to note that the repealed law, i.e. the Commercial Code, did not provide for a specific limitation of liability. This was rather left to the agreement of the parties with a caveat that it should not be so disproportionate to the value the goods carried as to make the carrier's liability negligible. See Art.594

[27] The current exchange rate of Birr to USD being 1:11, this limit is equivalent to 3.63 USD per kg.

such compensation exceeds the sender's actual interest – (see Arts.637(1 -3) of the Commercial Code). Article 635 of the Commercial Code provides that the court may reduce or waive the carrier's liability where the carrier can show that the damage was caused in whole or in part by the injured party himself.[28] The global statutory limitation of liability under the Maritime Code is, one thousand Ethiopian Dollars per package or basis of unit normally serving for the calculation of the freight(see Art.198 of the Maritime Code).[29]

By way of conclusion, it helps to note that at present, the rate of exchange of SDR to Birr – the Ethiopian currency – is 16.76, buying and 17.07, selling.[30] Given this, the limit of liability for surface transport, per Article 27 (2) of Proclamation No.547/2007 and taking the buying rate only, will be close to 13,994 and 41.9 Birr respectively. The per kilogram rate is a little bit above the limitation in case of air transport and the limitation under the Maritime Code is too low.

4. Main features of the Ethiopian Multimodal Transport Law

To begin with, Ethiopia had no multimodal transport law or a comprehensive law pertaining to multimodal transport of goods till 2007. The legal provisions of the Commercial and Maritime Codes that come close to this type of transportation are Arts. 600 [CC][31] –on carriage by land –652 and 653 [CC][32] on air transport – and Art.

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[28] Note – It is not clear whether this applies to carriage of goods or passengers. Moreover, the court's power to waive liability under such circumstances can be taken as a defense.

[29] For further details on package limitation, see Wada, Tsehai, Package Limitation under International Conventions and Maritime Code of Ethiopia: An Overview, Journal of Ethiopian Law, Vol. XXI, pp. 114-137. Though this article was unilaterally and arbitrarily mutilated right before it went to printing, it somehow gives a fair idea about package limitation and associated legal issues. Note also that this figure is currently, approximately 99 USD. According to the official and authoritative Amharic version o f the code, the limit of liability is 500 Birr, which is approximately 45 USD.

[30] Commercial Bank of Ethiopia, at www.combanketh.com, exchange rate on March 24, 2009.

[31] Art. 600 – Liability of successive carriers.

1- Deals with contract of carriage of persons.
2- In respect of goods or registered baggage, the sender may claim against the first carrier and the addressee may claim against the last carrier. The sender and addressee may in addition, claim against the carrier in charge of that part of the carrying during which the loss, whether total or partial, the damage or the delay occurred.
3- The carriers mentioned in sub-art. 2 shall be jointly and severally liable to the sender and addressee.

[32] Art. 652 – Liability of successive carriers.

1. In cases of carriage by air undertaken by successive carriers, the provisions of this Title shall apply to each carrier who carries passengers, baggage or goods and the carrier shall be deemed to be a party to the contract of carriage where such contract relates to that part of carrying to be effected under that carrier's responsibility.
2. Deals with carriage of passengers.
3. In respect of goods or registered baggage, the sender may claim against the first carrier and the addressee may claim against the last carrier. The sender and the addressee may

204[Maritime Code][33] on carriage by sea. Though, multimodal transport is simply the transportation of goods by at least two or more modes of transport, most of these articles do not provide for such combinations. The commonality between the articles is simply that goods can be carried by successive carriers but not necessarily by two modes of transport. Thus, the successive carriers can be identical modes or otherwise.

However, Art.653 of the Commercial Code stands different, for it specifically deals with "combined transport", which is the other name for multimodal transportation. The article reads as follows:

1. In cases of combined carriage effected partly by air and partly by other means of transport, the provisions of this Title shall apply in the carrying by air only.
2. The parties may make provisions on other means of transport in the provisions of this Title regarding carrying by air.

It should be noted here, that the above quoted article seems to follow the network formula and provides for the liability of the air carrier only and as regards loss or damage that occurs on other modes of transport these are left to the parties' agreement. By way of conclusion, it may be said that the articles cited above, do not cover the different issues that could be raised in multimodal transport. Even the closest article quoted above does not regulate issues such as basis, defenses and limits of liability. For all these reasons, enacting a new legislation is a timely solution to tackle legal issues that may arise in this ever increasing type of transport.

Bearing the above facts in mind, the Ministry of Justice has established a committee to revise the Commercial Code and the work is still in progress to date. This Committee had submitted a draft and collected comments in 2000 and one of the chapters dealt with transport law in general and "combined and successive carriage of goods" in particular, under Title 3, Art.603. It suffices to mention that the positions as well as the contents of the draft are completely different from the current multimodal transport law discussed below. The part of the draft which dealt with land carriage is also different from the recently enacted law on the subject[34].

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in addition claim against the carrier in charge of that part of the carrying during which the loss whether total or partial, the damage or the delay occurred.

4. The carriers mentioned in sub – art. (3) shall be jointly and severally liable to the sender and addressee. [Note that the two articles are verbatim copies of each other].

[33] Art. 204 – Through Bill of Lading

1. A person who issues a through bill of lading shall alone exercise the rights and incur the liabilities arising out of the various stages of transit until the completion of the carriage. He shall be responsible for the acts of the successive carriers whom he has appointed in his place.
2. Each carrier so appointed shall only be liable for the damage during the time that he was responsible for the goods.

[34] D.Ponsot, August 29, 2000, *Title 3 Combined and Successive Carriage of Goods.* Soft copy in file with the writer. Given the differences in the draft legislation of 2000 and the recently enacted law, it appears that there was no any concerted work between the drafters of the

The precursor to the enactment of the current multimodal transport law is presumed to be the agreement signed between the governments of Ethiopia and Djibouti on November 18, 2006. This agreement states ,*inter alia*, that one of the chief motives that necessitated the agreement is, the need to put in place an expeditious and unhindered traffic of cargo so as to avoid unnecessary delays in the movement of cargo in transit as well as congestions in the Port – of Djibouti; the chief objective is to establish a door to door cargo transit service by improving the performance of the Port of Djibouti, thus facilitating trade for the mutual benefit of the contracting parties; and that the parties have the obligation to establish and harmonize a strict regulatory framework as well as procedures for an effective implementation of the multimodal transport system.35 As mentioned in the agreement, it will enter into force when ratified by the respective governments according to their constitutional requirements36. Accordingly, the agreement entered into force on the Ethiopian side by the Ethio – Djibouti Multimodal Transport System Agreement Ratification Proclamation No.520/2007.37 As a follow up to this agreement Ethiopia enacted the Multimodal Transportation of Goods Proclamation No.548/2007 on September 4, 2007.

The new multimodal transport law is by and large a verbatim copy of the Multimodal Convention of 1980. It appears that the law was drafted by the Ministry of Transport and Communication and submitted to the legislature through the Council of Ministers. Though it is not yet known whether all stakeholders, such as the Chambers of Commerce have participated in the process, a document in file with the writer[38], (hereinafter the document), evinces that at least one stakeholder, i.e. the Ethiopian Shipping Lines, has participated in the process and in fact recorded its reservations.

The document details the necessity of having a new law that caters for the ever increasing volume of goods transported by ships and the inefficiency of the cargo handling system through unimodal transport system in which goods are unloaded at ports and left there for a long time. It also emphasizes the fact that the country being a

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Ministry of Justice and Transport and Communication. It is presumed that the future Commercial Code will not deal with transportation law.

[35] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Djibouti on the Implementation of the Multimodal Transport System. Incidentally this agreement also provides that the Government of Djibouti has pledged to allocate loading and unloading area for a cargo transported under a multimodal transport system and to use an electronic data exchange system in order to ensure an efficient communication- See Art. 5(7) of the Agreement.

[36] Art.9 (1) of the Agreement.

[37] The Proclamation was enacted on April 24, 2007.

38 The document is entitled as "An Explanation on the Draft Multimodal Transport Law" and written in Amharic. The following contents of the document are the writer's translation.

Note – the writer has made efforts to locate other materials pertaining to the subject matter but all these were in vain, due to lack of access and cooperation on the part of some individuals who are thought to be intimately involved in the drafting process.

land locked country is forced to incur unnecessary expenses by way of port dues and suggests that enacting a new multimodal transportation law will help solve these problems by enabling operators move cargoes on warehouse to warehouse or door to door basis as opposed to the port to port transportation.

The drafters of the proclamation also noted that the transport laws of the country are incompatible with those conventions that govern the respective modes of transport and that the country is not a party to any one of these conventions. They also reiterated that the existing transport laws should first be amended/ revised before enacting a multimodal transport law. The maritime law of the country that is modeled after the Hague Rules is a case in point as its revision has been shelved for decades. Despite these hurdles, the drafters recommended the enactment of the proclamation based on the UN Convention on Multimodal Transportation, 1980, and that necessary adjustments should be made on some of the Convention's provisions. It is also recommended that the maritime law will / shall be revised based on the Hamburg Rules and this Convention is taken as a model for the proclamation. Though it is not clear, how much it has helped in inspiring any of the proclamation's provisions, the document shows that the drafters have "attempted to look at the multimodal transport law of India".

As pointed out above, Ethiopian Shipping Lines has recorded its reservations on the draft law and the major points raised by the national carrier are *inter alia*: that the cargo interest of the country prevails over the carrier's interest and that the country supports the Hamburg Rules; most of the ships that the enterprise charters / leases have European origin as a result of which they are mainly governed by the Hague / Visby rules and that the enactment of the law will create a situation of conflict of laws; and that the enactment of a revised maritime law should precede any attempt to enact a multimodal transport law. It appears that the drafters hoped that the maritime law would be enacted based on the Hamburg Rules and that till such time done a multimodal transport law compatible with these rules had to be enacted and this is done.

The new proclamation contains 46 articles. Though a detailed discussion of every article is beyond the scope of this article, the following sections, attempt to shed light on the most important provisions only.

4.1. Definitions

The proclamation defines 15 terms and phrases. Some of the most important definitions are the following:

1. International multimodal transport – means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery. The operations of pick-up and delivery of goods carried out in the performance of a unimodal transport contract, as defined in such contract,

shall not be considered as multimodal transport. [Art. 2(1)]

To begin with, this provision as well as most other provisions of the proclamation are verbatim copies of the relevant parts of the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May, 1980)[hereinafter referred to as the Convention]. Accordingly, this provision is a verbatim copy of Art.1 (1) of the Convention[39] except for the omission of the condition that "the places of taking in charge and delivery should be in different countries". As the proclamation is a national law that deals with persons within its jurisdiction, limiting the definition to such types of persons and the contracts they make is logical for the law cannot govern contracts made outside its jurisdiction or that have no tie with the country[40]. This being so, however, it is not clear why the term "*international*" is put as a qualifier. In the case of the convention mentioned above, the transport has to be form one country to another. However, it is not clear why the transport should also be *international* under the proclamation too. Whatever the case, it appears that local multimodal transport contracts are outside the purview of the proclamation, because the qualifier term demands that the transport contract should be *international* as opposed to local/domestic. Thus, the definition covers cargoes generated in the country and transported to foreign lands and cargoes imported into the country from foreign locations.

One last puzzling issue with regard to the *international* nature of the transaction is the omission of the term "international" from the last leg of the provision. The Convention provides that "…a unimodal transport contract….shall not be considered as an *internationa*l multimodal transport" [emphasis added] while the proclamation omits the term international, though the phrase defined is "*international* multimodal transport" but not "multimodal transport" in general. This inconsistency is seen in both versions, i.e. the Amharic and the English. It appears to be a slip of the pen than anything else, for nothing can explain the inconsistency. As a local law, the definition should have simply skipped the term "*international*" and made the elements of the definition

[39] Art.1 (1) of the Convention reads as follows: "*Internationa*l multimodal transport" means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal operator to a place designated for delivery situated in a different country. The operations of pick-up and delivery of goods carried out in the performance of a unimodal transport contract, as defined in such contract, shall not be considered as *international* multimodal transport. [Emphasis added].

[40] The parties that are normally involved in such types of contracts are: the multimodal transport operator, the carrier, the consignor and consignee. The jurisdiction clause of the proclamation indicates that the plaintiff can institute actions at the principal place of business or, in the absence thereof, the habitual residence of the defendant; the place where the contract is made, provided that the defendant has there a p lace of business, branch, or agency [agent?] through which the contract was made the place of taking charge or delivery, or any other place designated in the contract – Art. 41. Incidentally, this is a verbatim copy of Art.26 (1) of the convention. Tough, the provision provides for local jurisdiction, it also goes without saying that these places have to be in Ethiopia.

applicable to all types of contracts – international as well as local. Interestingly enough, one of the proclamations enacted on the same day as the Multimodal Transport of Goods Proclamation, i.e. Maritime Sector Administration Proclamation No. 549/2007, defines multimodal transport as "the carriage of goods by at least two different modes of transport, on the basis of multimodal transport contract , from a place at which the goods are taken in charge by the multimodal transport operator to another place designated for delivery, *situated in a different country*" – Art.2(9) – [emphasis added][41]. Given the fact that there is a strong presumption that both laws were drafted by the same group or executive organ, the difference in the elements of the articles intended to define the most important phrase, i.e. multimodal transport, cannot be justified on any ground. Whatever the case, the reason why local multimodal transport is left out from the purview of the law is not clear and it would have been preferable to include this field of business within the scope of the laws, for it is just a matter of time till the business takes root and demands legal cover.[42]

2. Multimodal transport operator [hereunder MTO]– means any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport contract and who acts as a principal , not as an agent participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract- Art.2(2).

3. Multimodal transport contract [hereunder MTC] means a contract whereby an international multimodal transport operator undertakes, against payment of freight, to perform or to effect the performance of a multimodal transport - Art2 (3). The counterpart of this provision in the Convention reads as follows: "Multimodal transport contract means a contract whereby a multimodal transport operator undertakes, against payment of freight, to perform or to procure the performance of international multimodal transport" [Art.1(3)]. At a closer look, there are differences between the elements of the two provisions. According to the Convention, the contract has to be an international multimodal transport contract, while the operator is just an ordinary multimodal operator, but not necessarily an international multimodal operator. Under

[41] The phrase "multimodal transport" is used twice in the proclamation, once to indicate that one of the objectives of the Authority is to "seek ways and means for the promotion and development of multimodal transport …."Art. 5(3) and again to show that it has the power to "issue license to persons desiring to engage in multimodal transport business, renew such license and supervise their operation" –Art.6 (7).

[42] This writer is fully aware that the proclamation is primarily intended to solve the transport problems of the country and more particularly, that it is a land locked country as of 1991 and that it needs to move its cargoes as fast as possible. The port congestion at its main transit port Djibouti and the unnecessary port dues to be paid have necessitated the enactment of this law as well as the establishment of dry ports at hinterland locations. Though this is a wise and timely move, the writer's contention is that, the law should also have encompassed non - international/local multimodal transportations, which do not need to be transported in and out of the country as is the case in so many other coastal or land locked countries and this could have been made by deleting the term "international" from the definition.

the proclamation, however, the situation is vise versa, i.e. the contract is an ordinary contract while the operator has to be an international operator. Moreover, the term "procure" is omitted from the proclamation's definition and replaced by the phrase "to effect the performance of …" It is not clear whether it is a proof of creativity in legal drafting or slip of the pen again. Whatever the case and in the absence of any convincing reason for not copying the provisions of the convention as they are, it would have been better to copy them *in toto*, for this helps in the unification of laws, which is one of the fundamental rationales of such Conventions as the one under discussion. Moreover, the changes made in the proclamation can be potential grounds for future litigations.

4.Multimodal transport document[hereafter MTD] means a document which evidences a multimodal transport contract, the taking in charge of the goods by the multimodal transport operator, and an undertaking by him to deliver the goods in accordance with the terms of that contract - Art.2(4).

5. The term "goods" is defined as any property including live animals as well as containers, pallets, or similar articles of transport or packaging, if supplied by the consignor. This definition though a verbatim copy of Art.1 (7) of the Convention has added "live animals". Though, the probable rationale for such an addition is not known, it may be assumed that it is necessitated by the exclusion of live animals from the coverage of carriage of goods by sea under the Maritime Code[43].

The other terms defined in the proclamation are: shipper, consignee, person, delivery, endorsee, endorsement, Special Drawing Right, mode of transport and dangerous goods. Except for the terms "consignor and consignee" all other terms are not found in the Convention. Though many of these terms are known by those engaged in the field and some are taken from other laws, the following terms, however, attract one's attention:

- The term "consignor" found in the Convention is replaced by the term "shipper" in the definitional part of the proclamation. This term is not, however, used in the other operative parts of the proclamation in a consistent manner. Accordingly, in the English version of the law, and under Arts.3 (3), 5 (7), 8 (1) (f), 15(3), 28, 35 (twice), 37 (twice), and 43, the proclamation makes use of the term "consignor" instead of "shipper". The same inconsistency is observed in the official Amharic version too. Accordingly, the term is expressed in two ways and this are: a sender and one who delivers goods, when taken literally. In the absence of any convincing reason/s, it would have been

[43] Art. 180 (4) of the Maritime Code provides that [special provisions regarding contract of carriage supported by a bill of lading] shall not apply to the transport of live animals and goods as are being carried on deck under the contract of carriage. This writer does not see any problem in modifying the definition so as to include live animals.
Note – in addition to the above, the probable reason may also be the country's engagement in the export of live animals to Middle Eastern countries.

preferable to make a consistent use of one of the terms than what is seen at the present.

- "Taking charge" means that the goods have been handed over and accepted for carriage by the multimodal transport operator. This definition is so important in that multimodal transport documents are issued when the MTO takes charge and since such documents are negotiable, - as discussed below - banks can accept such documents for their transactions even if these are not shipped documents or put differently goods are not yet put on board a ship- as in the case of sea voyage.
- "Mode of transport" is defined as carriage of goods by road, air, rail, or sea. These being the currently available means of transport, it is mentioned here for the purpose of comprehensiveness and not out of any other concern.

4.2. Scope of application

The relevant article of the proclamation, i.e. Article 3, provides that its provisions apply to all multimodal transport contracts after conclusion of which an MTD is issued and their application is mandatory and a consignor has the right to choose between multimodal and unimodal transport.

4.3. Documentation

Part two of the Convention that deals with documentation is wholly reproduced in the proclamation with some modifications, but under a different title that reads as "Issue [*sic*] of Multimodal Transport Document". This part deals with, *inter alia*, the duty of the MTO to issue MTDs either in a negotiable or non negotiable form; the necessity of having the signature of the MTO in handwriting, printing in facsimile, stamping, in symbols, or any other mechanical or electronic means; the issuance of a non-negotiable MTD by making use of any mechanical and electronic means or other means preserving a record of the particulars; the duty of the MTO to issue a readable document containing the particulars so recorded; the negotiability of MTDs and that it is to be considered in the eyes of the law as a document of title; the different contents of an MTD and reservations that should be made on the document when the MTO suspects that the particulars offered by a consignor are suspect; and the liability of the MTO for intentional misstatement or omission. All these issues are similar to those legal conditions provided under different laws, such as the Commercial Code on commercial – (negotiable) instruments and the Maritime Code on negotiability of bills of lading. For this reason alone, no comment will be offered in this article regarding this part of the proclamation. Notwithstanding this remark, it seems appropriate to mention that the proclamation has created a new legal situation in the country and this is the non-applicability of the legal standards of a written document.

Regarding the legal standards of written contracts, the Civil Code provides the following:

Art. 1727 – Written form

1. Any contract required to be in writing shall be signed by all the parties bound by the contract[44].
2. It shall be of no effect unless it is attested by two witnesses.

Article 4 (4) of the proclamation has repealed the application of Article 1727(2) and this in effect means that an MTD will have all the necessary legal effects though it is not attested by any witness. It appears that the proliferation of legal issues in courts pertaining to the attestation of written contracts by witnesses has motivated the introduction of such an exception to the rule. The Cassation Bench of the Supreme Court has ruled on the issue maintaining that such requirements are not mandatory even to insurance contracts which are required by law to be made in writing[45]. Given the fact that transport contracts need speed to be entered into and performed, such a requirement serves no purpose other than frustrating the transaction. In this regard, the legal recognition of the non-applicability of attestation is a ground breaking legal phenomenon that needs to be emulated by other similar laws.

In addition to the above, the proclamation provides under Arts. 4(3) and 5 that signatures can be made by electronic means and that an MTD may be issued by making use of electronic means. The electronic means mentioned here *most probably* suggests the use of the internet for the conclusion of transport contracts –online business transaction. Though it cannot be certainly said that it is the intention of the legislature, if the above cited articles are meant to apply to such types of contracts, this is again a ground breaking legal phenomenon. It helps to note in this regard that the current trend is towards a paperless cargo movement as opposed to the traditional issuance and movement of papers between parties.

Though it is not yet a full fledged practice throughout the world, a recent practice shows that paperless cargo movement has the tendency to replace the traditional mechanism. Accordingly, an experimental data freight system in Sweden uses the following procedures:

> The basic information concerning the shipment is supplied by the shipper and fed into the carrier's computer at the port of loading when the cargo is received

[44] Note – though an MTD is a written contract in the legal sense, it is not required to be signed by both parties, but by the MTO only. See Arts. 4-13 of the proclamation. As per Arts. 4 and 12, the consignor submits particulars to be filled in an MTD and the MTO inserts such particulars in the document and issues an MTD. The former will be liable for inaccuracy.

[45] In the case Salini Nex Joint vs. Awash Insurance Company, Cassation File No. 23003, the Supreme Court of the Federal Democratic Ethiopia, had ruled that contracts for short periods of time including those required to be in writing are not required to be made in writing nor be attested by two witnesses.

> by him. The carrier will add supplementary information pertinent to himself, including the amount of freight due, 'clean bill' notation if appropriate or otherwise the relevant clausing. The computer will then print out a data freight receipt containing all the information fed into it, and this will be certified as a first printout and handed to the shipper. All the particulars in the computer will then be transferred to the carrier's second computer at the destination port, where, advance notice of the arrival of the cargo will be dispatched to the consignee together with a further copy of the data freight receipt. As the procedure is based on the waybill model, problems relating to the disposal of the goods during transit will not arise and consequently the consignee will only be required to identify himself in order to obtain delivery of the cargo.[46]

It is argued that such a mechanism affects the transferability of the document and that such documents will not be considered as documents of title to goods. These fears are however, mitigated by the fact that:

> …the procedure will provide adequate security for a commercial credit if the financing bank is identified as the consignee. In such a situation, the seller of the goods would obtain payment from the corresponding bank on shipment of the goods followed by presentation of the certified computer printout of the data freight receipt, provided that the latter is satisfied with the requirements imposed by the bank.[47]

The problem of transferability can also be solved by providing the shipper with 'a private key' to access such material and control the goods while they are in transit.[48] Given the level of technological advances achieved so far, the use of electronic data interchange (EDI) and the issuance of electronic bills of lading will naturally permeate the Ethiopian transport system in the near future[49]. Thus, regulating this inevitable

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[46] Wilson John, F, Supra Note 12, p.171.See also William J.Coffey, Multimodalism and the American Carrier, Tulane Law Review, Vol. 64, Nos.2 &3, December 1989, p.589. According to Coffey, "Electronic Data Interchanges (EDI) of transportation information have and will continue to be a substantial factor in multimodal trade. The bill of lading and similarly formatted documents, such as the dock receipt, will be prepared and transmitted among various parties to the transaction by EDI means. The applicable tariffs will, in the near future, filed and accessible by EDI, shippers can already access many carrier information bases through systems such as Sea-Track, made available by Sea-Land, to obtain real-time status reports on their shipments. Freight payments can be made by EDI means through systems such as the Sea-Pay system, greatly expediting release of goods. Similar systems using EDI have been implemented by the US Customs Service, again leading to more expeditious clearing of the goods".

[47] Ibid.

[48] Id. P.172. For details, see CMI Rules for Electronic Bills of Lading, which can be incorporated into MTCs when the parties so agree.

[49] As per Art5(7) of the agreement signed between Ethiopian and Djibouti, mentioned above at Note 35, the Government of Djibouti has pledged to use an electronic data exchange system in order to ensure an efficient communication. In the absence of a reciprocal pledge on the part of Ethiopia, this may not be taken as the only rationale behind the inclusion of the phrase "electronic means" in the proclamation. However, it may "cautiously" be argued that the

phenomenon is a timely issue not only with regard to multimodal transport, but also in all other forms of transport. By way of conclusion, though, as noted above, it is hard to conclude with certainty that the legislature had this in mind, it is also possible to argue that the use of 'electronic means' should include EDI and the issuance of electronic bills of lading.

4.4. Bases of liability

It should be noted from the outset that Articles 16 and 17 of the proclamation on basis of liability are verbatim copies of the relevant part of the Convention. According to paragraph 17 of the preamble of the Convention, the liability of the MTO is based on the principle of presumed fault or neglect. This principle is a direct replica of the United Nations Convention on the Carriage of Goods by Sea, 1978, otherwise known as the Hamburg Rules (see Article 5(1)). It is this principle that sets apart the Hamburg Rules from other similar international instruments, such as the Hague and Visby Rules as well as the source of disagreement among the conflicting interests of ship owning and cargo generating countries.[50]

Under the proclamation, an MTO is liable for loss or damage to goods as well as delay. The period of liability for the purpose of loss and damage, starts at the time when it takes the goods in its charge and ends upon their delivery to the consignee or other persons authorized or entitled to demand delivery - Arts.15 and 16. Delay, occurs when goods have not arrived at their destination, either on the expressly agreed date, or in the absence of such agreement, within the time which it would be reasonable to require of a diligent MTO, having regard to the circumstances of the case. Goods which have not arrived within 90 consecutive days following the date of delivery determined according to the aforementioned dates are treated as lost goods (see Article17 (2 and 3)).

In light of the above provisions, an MTO is absolutely responsible for loss or damage to goods unless it can invoke any one of the defenses to be discussed below. It should, however, be noted that a claimant for compensation arising out of loss, damage or delay has to give notice to the other party within a fixed time. Accordingly, as stipulated on Article 32, in cases of apparent loss or damage, a claimant has to give notice in writing not later than the working day after the day when the goods were handed over to it. According to Article 33 (1) [51]in cases of non apparent loss or damage notice should be given within seven consecutive days.[52] Article 33(2) provides that notice is not required when the state of the goods upon delivery has been subject of a joint survey or inspection by both parties. In the case of delay, the claimant has to

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agreement is a possible source.

[50] For further details on the limit of liability under international conventions for carriage of goods by sea, see, Wada, Supra Note - 29.

[51] Note – failure to give notice creates a presumption that goods have been received well as described in the MTD – See, Arts. 32 and 33(1).

[52] According to Art.24 (2) of the convention, the duration is "six consecutive days".

give notice within 60 consecutive days, in the absence of which it will lose its right to claim any compensation (see Article 34).

If the claimant for loss or damage is the MTO, Article 35 provides that the claimant has to give notice within 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods, whichever is later, in the absence of which, it will be presumed that it has not sustained loss or damage due to the fault or neglect of the consignor, his servants or agents. It helps to note that as provided under Article 36 if the last date of notice falls on a day which is not a working day at the place of delivery, such period shall be extended to the next working day, and Article 37 provides that notice can be served on the consignor or the MTO or those working on their behalf. Moreover, an MTO is not liable for its acts or omissions only, but also for the acts and omissions of its servants or agents when they are acting within the scope of their employment contract or other persons whose services it makes use of when they are acting in the performance of the contract (see Article 16).[53]

4.5. Defenses

As noted above, the liability of the MTO is based on the principle of presumed fault or neglect. Accordingly, Article 17 (1)[54] provides that an MTO can be relieved of liability when he proves that he, his servants, or agents or any other person whose services he makes use of took all measures that could be required to avoid the occurrence and its consequences. This defense is general and what matters is the "reasonableness" of the measures taken to avert loss, damage, or delay which is subject to interpretation.[55]

The proclamation contains an article which does not form part of the Convention, which is its source, and it reads as follows:

Art.18 Exemption from liability

> The *carrier* shall however be relieved of liability if the loss, damage or delay was caused by the wrongful act or neglect of the claimant, by instructions of the claimant given otherwise than as a result of a wrongful act or neglect on the part of the carrier, by inherent vice or [sic…of] the goods or through force majeure. [Emphasis added]

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[53] Note – basis of liability discussed above, pertains to the liability of the MTO, but not that of the consignor or consignee. The latter's liability will be discussed under defenses available to an MTO.

[54] The Sub Article reads as follows: "The [MTO] shall be liable for loss resulting from loss of or damage to goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in Article 15(1) above, unless the [MTO] proves that he, his servants or agents or any other person referred to in Art.16 took all measures that could reasonably be required to avoid the occurrence and its consequences."

[55] Note – the proclamation's basis of defense is general, while that of the different transport laws is detailed and express.

This article[56] seems to be out of place for different reasons. First, the exemptions listed can be availed by of a "carrier" alone, but not necessarily by an MTO. As noted above, an MTO may not necessarily be a carrier. If at all it is a carrier, it may perform one leg of the transport only but not all. Second, the term "carrier" is general and denotes all modes of transport. Thus, given the fact that each mode of transport is governed by its own laws, and that the proclamation is mainly concerned with the rights and liabilities of MTOs but not carriers, providing a provision that is designed to a particular carrier – surface transport in this case – serves no purpose other than creating confusion. It is interesting to note here that the official Amharic version of the article is consistent with its English counterpart as a result of which, it cannot be said that the error is committed as a result of slip of the pen.

Second, one of the defenses expressly provided in the proclamation is "fault of a consignor" or a shipper, according to the proclamation's naming. Accordingly, Article 28 provides that an MTO is relieved from liability for loss caused by the fault or neglect of the shipper, his servants or agents acting within the scope of their employment. As has been noted above, Article 18 states that the wrongful act or neglect of a claimant or causes that emanate from its instructions can relieve an MTO from liability. Depending on circumstances, a shipper can also be a claimant. If this is so, relieving an MTO for identical reasons, but under two separate articles makes one of the articles redundant. This situation is created as a result of the insertion of Article 18, discussed above, which is not part of the Convention. For all these reasons, deleting[57] Article 18 *in toto* is the only rational way out to make the proclamation consistent and avoid redundancy.

In addition to the different grounds of exemption, Article 19 of the proclamation also provides that in cases of concurrent causes of loss, damage or delay some of which are not attributable to it, an MTO will be liable for that part or ratio of loss, damage or delay only. Moreover, Article 25 explains those agents, servants or other persons whose services an MTO makes use of can avail these defenses if an action is brought against them.

4.6. Limitation of liability

In any transport contract, a shipper is required to establish a *prima facie* case by showing receipt in good condition to a carrier or an MTO as the case may be, and delivery in bad condition, i.e. loss or damage – partial or total – or delay while receiving the cargo at the destination. As shown above, a carrier or an MTO can be exempted from liability on a number of grounds. If a carrier or an MTO, however, fails to prove these, then it should be made liable to the full extent of the loss incurred. In transport law, however, this is not so. Accordingly, carriers as well as an MTO are

[56] Note – the provision is a verbatim cop of Art.22 of Proc. No.547/2007, on Carriage of Goods by Land, discussed above.
[57] This is to suggest that an amending legislation should be enacted.

entitled to limit their liabilities even when they cannot interpose a successful defense. The right of an MTO to limit its liability is discussed below.

As per Art.20(1) of the proclamation, the liability of an MTO shall not exceed SDR 835 per package[58] or other shipping unit or 2.5 per kilogram of the gross weight of the goods lost or damaged, whichever is higher.[59] With regard to loss resulting from delay, Article 21 provides that an MTO's liability is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the MTC.

Though the relevant article of the Convention, i.e. Article 18 (1), does not provide the prerequisite under which an MTO can lose its right to limit its liability, its parallel, Article 20 (1) of the proclamation provides that package limitation applies where the nature and value of the goods have not been declared by the consignor before such consignment have been taken in charge by the MTO. Though it is not a new invention as such, for a similar exception exists under Art.198 (3) of the Maritime Code of Ethiopia, its inclusion helps to preempt disputes that may arise in this regard and this is commendable.

The Convention provides that, "notwithstanding the [above], if the international multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of MTO shall be limited to an amount not exceeding 8.33 units of account [SDR] per kilogram of gross weight of the goods lost or damaged". This limitation is, however, omitted from the proclamation. Given the fact that the probable rationale behind the provision is that much of the world cargo is transported by sea, ships should benefit from the lower limitation of liability and when the carriage does not include a sea or waterways carriage, other carriers should be liable not to the same extent as the former but to another limit which is higher. This exception should have, been reflected in the proclamation. Whatever the reason, a consistent application of the convention's formulae would have been preferable, for they are not provided without reason.

It has been noted above that the limitation of liability of an MTO may take two forms.

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[58] As per Art.20 (2) of the proclamation, " where a container, pallet or similar article of transport is used to consolidate goods, the packages or other shipping units enumerated in the MTD as packed in such article of transport are deemed packages or ship ping units. Except as aforesaid, the goods in such article of transport are deemed one shipping unit .b. in cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the MTO, is considered as one separate shipping unit."

[59] This sub article a verbatim copy of Art.18 (1) of the Convention, except for a few changes in numbers. Article 18 (1) reads as follows: "When a multimodal transport operator is liable for loss of or damage to the goods [sic] his liability shall be limited to an amount not exceeding 920 units of account per package or other shipping unit or SDR 2.75 units of account per kilogram of the gross weight of the goods lost or damaged, whichever is the higher." It should be noted here that under the proclamation, the unit of account in the case of packages and weight are reduced by 85 and 0.25 units of account [SDR] respectively, for unknown reasons.

These are: the uniform and network systems. In principle, the Convention's as well as the proclamation's bases of liability are based on the uniform system. It should, however, be noted here that this formula applies only when the place of damage or loss is not known. If this is known, however, both the Convention and the proclamation follow a different formula. Accordingly, as per Article 20 (1) of the proclamation:

> When the loss or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable law provides a higher limit of liability than the limit stipulated under sub article 1 of this article, then the limit of the MTO's liability for such loss or damage shall be determined in accordance with the provisions of the relevant law applicable in relation to the mode of transport during which the loss or damage occurred.

This provision is a verbatim copy of Article 19 of the Convention. As far as the application of the Convention is concerned, it is presumed that the second alternative formula is adopted to accommodate the solutions of other conventions or local laws that give better benefits to a shipper or consignee and there can be several conventions and laws in this regard. However, in the Ethiopian situation, there cannot be several transportation laws, for all transport laws in the Commercial and Maritime Codes are national laws, meaning regional states in Ethiopia cannot enact their own transport laws[60]. Third, as shown above, none of the separate transport laws of Ethiopian provide for a higher limit of liability than the proclamation[61]. Moreover it is shown above that the country is interested in formulating a uniform limitation of liability and this may be carried forward to air and sea transport. Thus assuming that the provision is meant to apply to local transport laws but not foreign transport, for the law cannot apply beyond the Ethiopian jurisdiction, it would have been preferable to delete this provision and apply a uniform formula instead.

Article 27 (1) and (2) of the proclamation provides that the MTO as well as its servants, or agents or other persons of whose services he makes use for the performance of the MTC are not entitled to limit their liabilities if it is proved that the loss, damage or delay in delivery resulted from their respective acts or omissions done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss or damage or delay would probably result. This, as usual is a verbatim copy of Article 21 of the Convention. Despite this fact, it is not clear why the phrase "Notwithstanding the provisions of [the above sub article]" in the Convention is changed into "without prejudice to the [above provisions]" in the proclamation. Given the importance of such preconditions in legal parlance, care should have been taken while changing such an important legal position. Whatever the case, the convention's position appears to be

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[60] Art.55 (2) of The Constitution of the Federal Democratic Republic of Ethiopia provides that …the House of Peoples Representatives shall enact specific laws on the following matters: (c) Air, rail, water and sea transport.

[61] Note that the highest limit of liability is provided under Art.27 (2) of Proclamation No.547/2007, mentioned above and this is equivalent but not more than that provided under the proclamation under discussion. See Note No. 30, Supra.

more logical than that of the proclamation.[62]

According to Article 23 of the proclamation, limits of liability exceeding those provided [in the law] may be fixed in the MTD by agreement between the MTO and the consignor. This in short means that what is provided under the law is the minimum liability which cannot be reduced even by the agreement of the parties[63].

4.7. Miscellaneous[64]

4.7.1. General average – Article 38 of the proclamation is as usual a verbatim copy of Article 29 (1) of the Convention. The articles provide, in short, that adjustment in general average apply to MTCs. The proclamation has, however, omitted Sub-Article 2 of the Convention for unknown reason.[65] It appears that the omitted provision is important to determine the liability of a party to general average contribution and it is not without reason that it has been included in the convention. Thus, its omission is unwarranted.

4.7.2. Lien right of the MTO – Though the Convention is silent on this point, Article 39 of the proclamation provides that an MTO shall have a lien right on the goods and any documents relating thereto for all sums payable to it under the contract , including storage fees and cost of recovering these sums. The express acknowledgement of this right is commendable, for it preempts any dispute that may arise in this regard.

5. The Practice

The Ethiopian Shipping Lines, which is the national carrier, has been issuing different bills of lading. One of these is the "Bill of Lading for Combined and Port to Port Shipments". According to this bill of lading, "combined transport" arises when the place of receipt and/or place of delivery are indicated on the face hereof and "port to port" shipment when the carriage called for in this bill of lading is not combined transport - Clause 1- Definitions. Under Clause 5(b), entitled "Carrier's responsibility",

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[62] Note – The Amharic version also provides for the same precondition.

[63] It helps to note that the limitation of liability of a dry port operator is "equivalent to the price of the good and where the price of the good was not expressed in the document at the time of delivery, the extent of liability shall be on the basis of the weight of the good per kilogram SDR2.5"., Art.5 (1) of Proclamation No. 588/2008.

[64] The dangerous goods provisions of the proclamation –Arts.29-31- are not much different from their counterparts in the Maritime Code –Art. 200. Thus, they are not discussed here. Moreover, the limitation of actions provision –Art40- which provides that actions shall be barred within two years, is self explanatory so as not demand any further discussion.

[65] Art.29 (2) reads as follows: "With the exception of Art.25 [limitation of actions] the provisions of this Convention relating to the liability of the MTO for loss of or damage to the goods shall also determine whether the consignee may refuse contribution in general average and he liability of the MTO to indemnify the consignee in respect of any such contribution made or any salvage paid."

the bill provides the following:

> Combined transport - Where the carriage called for by this bill of lading is combined transport then, the responsibility of the carrier with respect to:
> I. The transportation to the port of loading named herein and/or from the port of discharge named herein will be as follows:
>
> a. Except in the United States of America and in Canada if by road, rail or air, in accordance with the provisions respectively of the CMR, Convention on the Contract for the International Carriage of Goods by Road, (dated 19th May, 1956), the CIM (International Agreement on Railway Transports (dated 7th February, 1970) or the Convention on the Unification of relating to International Carriage by Air, (dated 12th October, 1929) as amended by the Hague Protocol dated 28th September, 1955.
> b. In the United States of America and in Canada, to procure transportation by carriers (one or more) authorized by competent authority to engage in transportation between such points, and such transportation shall be subject to the in land carrier's contracts of carriage and tariffs. The Carrier guarantees the fulfillment of such inland carriers' obligations under their contracts and tariffs.
> c. During any transportation by sea or water to the port of loading named herein and/ or from the port of discharge named herein, the carrier shall be responsible in accordance with the provisions applicable under Sub – Clause (A) herein, notwithstanding the reference in such sub – clause to sea going vessel.
>
> II. The time from and during loading onto any seagoing vessel up to and during discharge from that vessel or from another sea going vessel into which the goods shall have been transshipped shall be in accordance with the provision s of Sub – Clause (A) hereof.
>
> As to services incident to through transportation, the carrier undertakes to procure such services as necessary. All such services will be subject to the usual contracts of persons providing the services. The carrier guarantees the fulfillment of the obligations of such persons under the pertinent contracts.
>
> When the goods have been damaged or lost during through transportation and it cannot be established in whose custody the goods were when the damage or loss occurred, the damage or loss shall be deemed to have occurred during the ocean voyage and the carrier shall be liable in accordance with the provisions under Sub – Clause (A) hereof.

To begin with, the bill's definition of combined transport is not consistent with the traditional one, i.e. transportation by at least two modes of transport, though the other conditions – transportation to and from the port of loading and discharge, respectively, under Clause 5(I) - indirectly indicate the same. The combined transport service

envisaged in the bill is simply divided into two, and these are services in the USA and Canada and other countries and Ethiopian services fall under the latter. What makes the provisions quite interesting is the fact that no Ethiopian law is mentioned as a source of liability. In light of this major omission it will be hard to conclude that the bill's provisions are designed with Ethiopian customers in mind. Furthermore, the bill makes use of the network formula to determine liability, meaning if the place of loss or damage is known then liability will be determined according to the pertinent law, and if not (it appears) the carrier's liability will be determined according to the maritime law – Clause II- last paragraph. Given the fact that the limit of liability under the Maritime Code is disproportionately lower than those provided under the other laws, this provision is undoubtedly contrary to the mandatory application of the law and thus, void.

It is expected that the Ethiopian Shipping Lines will be the major MTO in the future if not the only one, for it is not clear whether other business organizations or public enterprises can or cannot engage in the field[66]. With this in mind, the national carrier has to amend the provisions of its bills so that they should accord with the new law on multimodal transport, in the absence of which it will violate Art.44 of the proclamation which demands that "the MTD shall contain a statement that the multimodal transport is subject to the provisions of the proclamation…" as well as Art. 42, which provides that "any stipulation in the MTC or MTD, shall be null and void to the extent that it derogates from directly or indirectly , from the provisions of the proclamation". It is hoped that a new bill of lading with all the necessary guarantees provided in the new law, and that will best serve the interests of cargo owners will be issued soon.

Conclusion

The enactment of the proclamation on multimodal transport is undoubtedly a timely response to the ever increasing volume of goods transported in different modes of transport. Moreover the proclamations that have established the Dry Port Administration Enterprise and the one that has established its limit of liability are intended to facilitate this sector of business and their enactment is also timely. Given the fact that the revision of the Commercial Code has been delayed for more than a decade, enacting such legislation without waiting for the total revision of the Commercial Code is commendable.

The new multimodal transport law has introduced fundamental changes to the existing transportation laws of the country. One of such changes is the increase in the limitation of liability which was so disproportionate in light of the interest of a shipper or a consignee. Moreover, given the fact that the Ethiopian currency had been highly devalued in the course of time, the limitations were simply tokens as opposed to

[66]As per Art.6(7) of Proclamation No.549/2007, the Authority has the power to "issue to persons desiring to engage in multimodal transport business , renew such license and supervise their operation – Art.6(7). This is an indication that other businessmen can join the business at their option.

anything close to the real value of goods lost or damaged. Since the limitations are close to the international legal standards, shippers and consignees are no more disadvantaged by outdated laws and this is a victory to this group. Notwithstanding all these merits, however, the air and shipping laws of the country – enacted in 1960 – are not yet touched. This situation undoubtedly creates discrepancy between the transport laws of the country and their revision should be given utmost priority.

Since the multimodal transport law is a new law, this writer did not come across a single court case decided on any one of the issues discussed above. Despite this, courts and litigants will undoubtedly start to grapple with the different issues contained in multimodal transport contracts in the near future and this writer believes that this article - as a modest contribution to legal discourse - will help all those engaged in the field have a fair idea about the area of law. With this in mind, it will be helpful to rectify some of the "limitations" reflected in the proclamation, before they start to pose issues of interpretation and it is hoped that this will be so, for the benefit of all that may be affected.

Designing the Regulatory Roles of Government in Business: The Lessons from Theory, International Practice and Ethiopia's Policy Path

Solomon Abay*

1. The Concepts, Arguments and Theories in Regulation

1.1. The Concept of Regulation

Regulation is an expanding concept whose definition needs to include its nature, subject matter, instruments, techniques and enforcement.[1] Distinction is often made between economic and social regulation, the former referring to the attempt to correct the allocation shortcomings of the market and the latter to the attempt to realize humanitarian welfare goals.[2] In both, regulation can be defined: i) as the making and enforcing of rules by governmental actors; ii) as the direct intervention of the state irrespective of the forms of intervention; or iii) as all forms of influence affecting behaviour from whatever source and for whatever purpose.[3] Hence, some consider regulation as the controlling, by a governmental agency, of the activities of economic agents that, if not controlled, will be performed sub-optimally or outside individual and collective bargaining.[4] Some others take it as intentional restriction of someone's choice of activity by any entity not directly involved in the performance of the activity.[5] Others take it as governmental means of reconciling the conflicts between freedom and

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[1] It may be considered as a type of legal instrument; an intentional or goal directed process of controlling, governing, directing, enabling, coordinating, influencing or ordering; a process of interaction between actors; or a process of self-correction. It may be initiated by state institutions, non-state institutions, economic and social forces, technologies, actors and regional and extra-national institutions. It may be enforced by ministries, departments, agencies, associations, committees, firms, individuals, communities, networks, courts, supra-national bodies, and the market. It may include rules, norms, institutions, cognitive frames, cultures, systems and networks directed at firms, individuals, markets, the family and the government. Its instruments may be legal, quasi-legal, non-legal, universal, sectoral, bilateral, financial and non-financial rules or trust. See Julia Black, "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World," in Black J., Current Legal Problems, 2001, at pp. 134-135.

[2] See Thimm, B., Regulation and Regulatory Transformation in European Insurance markets (Doctoral Dissertation, Ludwig-Maximilians-Universität München, 1999), at pp. 56, 59-69.

[3] See Julia Black, 2001, supra note 1, at p. 129.

[4] See Thimm, 1999, supra note 2, at pp. 37, 40-55.

[5] See Kabir, R., Security Market Regulation: An Empirical Investigation of Trading Suspension and Insider Trading Restriction (Dissertation nr. 91-1, Faculty of Economics and Business Administration, University of Limburg, Maastricht, the Netherlands, 1990), at p. 103.

control, hierarchy and equality, and continuity and change to set order in an economic society.[6] Others also take it as adjusting or steadying the motion of an activity at various stages for specific purpose whosoever may do that.[7]

The concept of regulation is also analysed in centred and decentred approaches.[8] The centred approach couples regulation exclusively with government while the decentred one uncouples it from there. The decentring idea is expressed in a number of ways. It is expressed 1) as internal fragmentation of the governmental tasks of regulatory policy formation and implementation; 2) as a proposition that governments do not, and should not, have a monopoly on regulation but that regulation does, and should, occur within and between social actors outside the government; 3) as decoupling of regulation from government to self-regulators and the post-regulatory regulation of self-regulation; 4) as restraint of governmental action by the pressure of non-governmental actors; 5) as shrinking of the size of government through power decentralization; 6) as removal of government and administration from the centre of society, i.e. as shift from hierarchical to horizontal relationship between the two; or 7) as a changed understanding of the nature and relationship of society and government that government is no more the only capable and effective commander and controller.[9]

The shift from centred to decentred understanding of regulation has implications on the role of government in society, on the cognitive framework in which regulation is viewed, and on the design of regulation.[10] It is a changed understanding of the nature and relationship between society and government that has a number of features.[11] First, it recognizes the complexity of the interactions between the actors and systems in society. The interactions are complex and intricate and the actors are diverse in their goals, intentions, purposes, norms and powers. Secondly, it recognizes the fragmentation and diverse construction of knowledge. No single actor can have the knowledge required to solve complex, diverse and dynamic problems and the overview necessary to employ all the instruments needed to make regulation effective. Information is also constructed through closed sub-systems (like politics, administration and law) which develop images in accordance with their own lenses while decision makers construct images of their environment through their own cognitive frames. Thirdly, it shows the fragmentation of the exercise of power and control. There is increasing recognition that government does, and should, not have monopoly on the exercise of power and control; that the latter are fragmented between societal actors on one hand and between societal actors and the government on the

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[6] See Samuels et. al., "Regulation and Regulatory Reform: Some Fundamental Conceptions," in Samuels, W.J. And Schmid, A.A., Law and Economics: An Institutional Perspective (Kluwer. Nijhoff Publishing, Boston. Hague. London, 1982), at p. 252.

[7] See Machan, T. R., "Should Business be Regulated?" in Regan T. (Editor), Just Business: New Introductory Essays in Business Ethics (Mcgrow-Hill, Inc., New York et. al., 1984), at p. 209.

[8] See Julia Black, 2001, supra note 1, at pp. 103-146.

[9] See Id., at pp. 103-105.

[10] See Id., at pp. 145-146.

[11] See Id., at pp. 106-112.

other hand; and, hence, that there are both formal and non-formal ordering in an economic society. Fourthly, it recognizes the autonomy of societal actors. There is increasing recognition that several societal actors continue to develop or act in their own way and that no single actor can hope to dominate other actors through unilateral regulation. Fifthly, it recognizes the existence and complexity of the interaction and interdependence between societal actors on one hand and between societal actors and the government on the other in the process of regulation. The case is not that society has problems and government has solutions but that each has both problems and solutions, hence, being mutually dependent on each other for resolution. Both government and regulation result from interaction and interdependence. Sixthly, it shows the demise of the public-private distinction and the rise of rethinking on the use of formal authority in governance and regulation. Both governance and regulation are taken to be outcomes of webs of influences which can operate in the absence of formal governmental or legal sanction. They are considered as manifestations in 'hybrid' organizations or networks that combine governmental and non-governmental actors in a variety of ways. Finally, it shows a normative proposition that regulation has to be hybrid, multifaceted and indirect. This means that regulation should combine governmental and non-governmental actors, use a number of different strategies simultaneously or sequentially, and be a process of co-ordinating, steering, influencing, balancing and redesigning interactions between actors and systems.

The decentred understanding shifts the locus of regulation from the government to other multiple places and implies that policy-makers should know: 1) that there is no clear dichotomy between state regulation and non-state regulation but a continuum between them; 2) that instrument mix is important in regulation both because problems have multiple causes many of which are unknown and regulation has unintended consequences, hence necessitating the combination of a range of regulatory instruments to minimize or self-correct the unintended consequences; 3) that regulatory design has to be contextual (i.e. responsive to the context in which it will be operating) as one set of solutions will not fit all problems; 4) that governments should not steer directly but create conditions in which actors steer themselves in the direction the governments want them to go; and 5) that the task of government regulation in the post-regulatory world should be regulating self-regulation.[12]

Other conceptions also use regulation to refer not only to the conventional forms of government command and control but also to the forms of social control by third parties that seek to harness both the government and the regulated businesses.[13] They believe in the dynamic symbiosis between the regulatory actions of the government, the regulated businesses and the third parties.[14]

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[12] See Id., at pp. 112-113, 128-144.

[13] See Gunningham N. and Grabosky P., Smart Regulation: Designing Environmental Policy (Oxford University Press, New York / Oxford, 1998), at p. 4; and Ayres I. and Braithwaite J., Responsive Regulation: Transcending the Deregulation Debate (Oxford University Press, New York - Oxford, 1992), at pp. 3-4.

[14] See Ibid.

1.2. The Concepts of Government Regulation, Self-Regulation and Self-Governing Market

If one recognizes the decentred idea of regulation, then societies comprise a number of regulatory systems that can be categorized into government regulation, self-regulation and the market.

Government regulation exists when governmental institutions make and sanction rules for the market by deriving their authorities from the government.[15] Its subject matter may be social, by focusing on such concerns as protecting citizen or worker health and safety, accomplishing environmental and aesthetic goals or promoting civil rights objectives, or economic, by focusing on legally enforceable guidelines and direction that are regarded as means for legitimate commercial endeavour.[16] Self-regulation can mean soft law including unilateral rules and standards of firms, bilateral arrangements between firms and the government, collective arrangements between firms, collective arrangements between the government, firms and other actors (including auditors, technical committees, NGOs, community groups and the like), and private contracts between individuals and firms.[17] It exists when private sector agencies make rules, and sanction failures by disciplinary action, by deriving their authorities from acceptance of the rules by their members and delegation.[18] Some governmental surveillance may also exist to ensure the presence of self-regulation.[19] However, self-regulation is generally understood as a system of private ordering.[20] The market itself can also be taken as a regulatory system as it governs individual behaviour and the structure of opportunity sets within which choices are made.[21] It exists, not as equivalent of non-regulation, but as a regulatory system where private power operates.[22] It is also seen, not as one that can be fully run by government wishes, but as one that stands on its own and seeks recognition by policy-makers.[23] Some also see government regulation and the market as functional equivalents for the belief that private power will be operative in both.[24] Others also argue that "private sector and public sector regulations are interrelated ... [and] ... that the presence of effective private regulation [can] eliminate [...] the need

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[15] See Kabir, 1990, supra note 5, at p. 5.
[16] See Machan, 1984, supra note 7, at p. 209.
[17] See Julia Black, 2001, supra note 1, at pp. 121, 113-121.
[18] See Kabir, 1990, supra note 5, at p. 6.
[19] See Finsinger et. al., Insurance: Competition or Regulation? - A Comparative Study of the Insurance Markets in the United Kingdom and the Federal Republic of Germany (Report Series No. 19, the Institute for Fiscal Studies, London, 1985), at p.17.
[20] See Cafaggi, F. (ed.), Reframing Self-Regulation in European Private Law (Kluwer Law International, the Netherlands, 2006); and Schepel H., The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets (Hart Publishing, Oxford and Portland, Oregon, USA, 2005) for the self-regulatory systems in Europe and the US.
[21] See Samuels et. al., 1982, supra note 6, at pp. 252 - 254.
[22] See Ibid.
[23] See Julia Black, 2001, supra note 1, at pp. 114-128.
[24] See Samuels et. al., 1982, supra note 6, at p. 255.

for public regulation".[25] Hence, both government and non-government regulation can be taken as ways of tuning the social and opportunity set structure and the distribution of income, wealth, interest and power in a society.

This study opts for the wide understanding of regulation to refer to both the governmental and non-governmental interventions that attempt to order the economic and social affairs of a society with a view to achieving defined objectives. It also considers the market as a regulatory system by itself, believes that regulation should always be dynamic, and sees that regulation may be concerned with the organization of an industry (as a market structure regulation) and the behaviour of actors (as a market conduct regulation).

1.3. The Concepts of Deregulation, Regulatory Reform and Regulatory Transformation

If one understands regulation widely, deregulation and regulatory reform will not necessarily mean less control and greater freedom. They just constitute facets of the structure of order and may only mean i) change in the pattern of freedom and control, hierarchy and equality, and continuity and change; ii) change in the organization and control of the economic system, the distribution of opportunity sets, income, wealth and welfare, and the power structure; and iii) change in the uses to which the government is put, in the interests which the government should support and in the control of the government itself.[26] Hence, deregulation or regulatory reform should mean change from one to a different system of regulation from whichever system of regulation one starts.[27]

Regulation, deregulation and regulatory reform are, therefore, functional equivalents.[28] They are taken to be continuing facets of power play over the system of rules, the control of government and the use of government to protect interests and to channel economic performance.[29]

The concepts of 'regulatory transformation' and 're-regulation' are also often used to refer to the process of change from one form of regulation to another.[30]

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[25] See Kabir, 1990, supra note 5, at p. 6.
[26] See Samuels et. al., 1982, supra note 6, at pp. 256.
[27] See Ibid.
[28] See Id., at pp. 262.
[29] See Id., at pp. 262-264.
[30] See Nemeth, K., European Insurance Law: A Single Insurance Market? (European University Institute Working Papers Law no. 2001/4, Badia Fiesolana, San Momenico, Italy, 2001), at pp. 18-20.

1.4. The Arguments for and against Government Regulation

The arguments for and against government regulation have come from several disciplines that deal with three interrelated issues, namely i) the relationship between law and society, ii) the relationship between law and economic conduct, and iii) the relationship between business and government.

The legal and social theories on the relationship between law and society used to take positive law as a reflection of custom and morals whose function is to maintain order by establishing and enforcing rules and resolving disputes.[31] The classical (Greek) legal tradition focused on societal custom and morality.[32] The Natural law tradition emphasized on reason and human nature.[33] The legal positivist tradition focused on the distinction between the positive law made by government and the law that exists in society (as custom or morality).[34] The custom-culture or historical tradition focused on the legal importance of custom and tradition.[35] The law and social organization tradition focused on the influence of social organization on the form and content of law.[36] The selective mirror tradition took law as reflection of certain customs, morals and economic and non-economic values and interests within a society.[37] The instrumentalist tradition took law as instrument of achieving societal interests.[38] The selective mirror and instrumentalist traditions also paved the way for evolution of legal theory from traditional doctrinism to post-modernism and the economic analysis of law.[39] All the aforementioned theories of law and society did not show the autonomy of the legal discipline from the political, economic, moral, sociological, historical and other disciplines.[40] They have asserted that the legal and non-legal disciplines are inseparable despite the differences in their focus and that one has to take law in general, and regulation in particular, as a multidimensional phenomenon that develops, not in a self-contained and autonomous, but in an interdisciplinary manner (i.e. as a phenomenon affected by economic, political, historical, philosophic, psychological, social, religious & other developments).[41] The development of the theories has also pointed out that the understanding in the legal discipline has to shift from the traditional social order function of law to the instrumentalism of law and regulation to meet objectives.

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[31] See Tamanaha, B. Z., A General Jurisprudence of Law and Society (Oxford University Press, 2001), at pp. 1-50.
[32] See Ibid.
[33] See Ibid.
[34] See Ibid.
[35] See Ibid.
[36] See Ibid.
[37] See Ibid.
[38] See Ibid.
[39] See Ibid.
[40] See Cotterrell, R., The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy (2nd ed., Lexis Nexis, UK, 2003).
[41] See Ibid.

The legal and economic theories on the relationship between law and economic conduct are relatively recent. Though rooted as early as the time of Adam Smith and Jeremy Bentham, the discipline of law and economics was shaped as intellectual discipline in the 1960s and 70s when i) economists criticized the approach of legal scholars as formalists who view law only in terms of its own internal logical structure and ii) jurisprudence started to move from legal formalism and logical reasoning to legal realism and instrumentalism of law (and from the use of traditional legal concepts such as fairness and justice to the use of economic concepts and principles such as efficiency in the analysis and evaluation of law, legal institutions and processes).[42]

The political and economic theories on the relationship between business and government have existed as of the second half of the 18th century. The classical political economists advocated for laissez-faire beginning the 1770s.[43] The Marxian theory tried to explain the plight of capitalism and advocated for government planning and action beginning the 1840s.[44] Economists advocated for government intervention by reasons of monopolies, externalities, public goods and income inequalities at microeconomic level and by the Keynesian analysis of aggregate demand and subsequent developments at the macro level beginning the 1940s.[45] Free market movement rose again in the 1960s.[46] Government intervention was then favoured by reason of market failures in the 1970s.[47] The role of government to shape the economy was also recognized, and its extensive use opposed, in the 1980s and thereafter.[48] The

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[42] The discipline of law and economics is concerned with the application of economic theory to examine the formation, structure, processes and economic impact of law, legal institutions and processes to see if these are economically justified. It is based on the logic that laws affect economic performance by changing incentive structures and behavior. Its organizing principles lie in micro, welfare and institutional economics and include the concepts of circular flow of economic activity, exchange, self-interest, perfect competition, Pareto efficiency (in production and exchange), and Kaldor-Hicks efficiency (also called wealth maximization or compensation principle) and the idea of using institutions (governance mechanisms) as alternative means of contracting to reduce transaction costs (the Coase theorem). See Mercuro, N. and Medema, S. G., Economics and the Law: From Posner to Post-Modernism (Princeton University Press, New Jersey, 1997), at pp. 3, 13-24, 51; Hirsh, W. Z., Law and Economics: An Introductory Analysis (2nd ed., Academic Press, Inc., 1979/1988), at pp. 2-9; Backhaus, J.G. (ed.), The Elgar Companion to Law and Economics (Edward Elgar Publishing Limited, UK, 1999), at pp. 7-30; and Cseres K. J., Competition Law and Consumer Protection (European Monographs, Kluwer Law International, The Hague, 2005), at pp. 12-22.

[43] See Jhingan, M. L., The Economics of Development and Planning (35th Revised and Enlarged Edition, Vrinda Publications (P) Ltd., 2002), at pp. 66-94.

[44] See Id., at pp. 95-104.

[45] See Acocella, N., The Foundations of Economic Policy: Values and Techniques (English Version Translated From Italian By Brendan Jones, Cambridge University Press, USA, 1998), at p. xv.

[46] See Id., at p. 214

[47] See Id., at p. xv.

[48] See Id., at p. 214.

2008 financial and economic crisis has then triggered movements towards increasing the regulatory roles of governments in business (in at least the financial markets).[49]

The arguments in the law and economics and political economy disciplines have, therefore, ranged between two extremes. The classical political economists, standing at one end of the extremes, advocated for a laissez-faire economic system where government intervention shall not exist.[50] They considered the market as a system separate from, but connected to, politics and family life and believed in the capacity of markets to self-regulate.[51] They began with the market, followed a policy of laissez-faire, advocated that the market is not, and need not be, political and recognized a responsive role for the government.[52] They assumed a perfectly competitive system where the market is guided, not by government intervention and regulation, but by the "invisible hand" (i.e. the demand, supply and prices that base on self-interest) though they differ in the focus of their particular theories.[53] They had two important contributions, i.e. an argument for market self-regulation and a theory of value and distribution.[54] The traditional theorists considered the economy, by their argument for market self-regulation, as a system of independent and autonomous property owners, each pursuing his/her self-interest, each linked with the other through contract and each constrained only by the requirement that he/she should respect the property rights of

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[49] See the Information, Communiqués and Study Reports of the G-20 from its website: http://www.g20.org/index.aspx as accessed on December 01 2009; the World Bank World Development Report 2009, accessed from: http://www.worldbank.org/ on December 01 2009; the Annual Report of the WTO for 2009, accessed from http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep09_e.pdf on December 01 2009; the Annual Report of the Executive Board [of the IMF] for the Financial Year Ended April 30, 2009, accessed from http://www.imf.org/external/pubs/ft/ar/2009/eng/index.htm on December 01 2009; and Christoph Ohler, 2009, International Regulation and Supervision of Financial Markets after the Crisis (Universities of Jena and Halle, Working Papers on Global Financial Markets No. 4, March 2009).

[50] Political economy is a discipline that explores the responsibilities of the state with regard to the economy. Studies in political economy address two sets of questions. One set focuses on the idea of a self-regulating market and asks whether government (political) intervention into the economy enhances or impedes want satisfaction. The other set focuses on public agenda formulation and inquires into the nature of the relationship between private interests and public goals and the bearing of the one upon the other. See Caporaso, J. A. and Levine, D. P., Theories of Political Economy (Cambridge University Press, Reprint, 1993), at pp. 1-3.

[51] See Id., at pp. 3, 33-54, 217-218.

[52] See Ibid.

[53] Adam Smith is the foremost classical economist who advocated the idea of laissez-faire. He regarded every person as the best judge of his self-interest who, in furthering that interest, would also further the common good. He argued that every individual, if left free, will strive for maximizing his wealth; and hence all individuals, if left free, will maximize the common wealth. Some subsequent theories also assume a perfectly competitive economy [See summary of the theories of Adam Smith, David Ricardo, Thomas Robert Malthus, John Stuart Mill and Joseph Alois Schumpeter in Jhingan, 2002, supra note 43, at pp. 66-94, 105-113].

[54] See Caporaso and Levine, 1993, supra note 50, at pp. 33, 38-46.

others.[55] They argued, in this line, that a system of private persons pursuing their self-interests without overall regulation will lead to a set of voluntary transactions that satisfy the wants of those persons; that the market facilitates rearrangement of property according to the wants of property owners as long as individuals act both as buyers and sellers; that only individual hardship and failure can result from the market; that the market as a whole will not fail despite individual failures; that the market will assure the growth and full utilization of society's capital stock if its operation is placed into private hands and led by decisions based on profit motive instead of public regulation; and that the only roles of government in a society should be national defence, administration of justice and provision of public services that can facilitate commerce.[56] The modern theorists argued, by their value and distribution theory, that every society meets the material necessity of life through production and distribution of surplus using the system of division of labour, commodity exchange and price; that the form of this process varies from society to society; and that the market is only one among a number of social mechanisms for meeting the material necessity of life.[57]

The Marxian political economy, standing at the opposite extreme, advocated for a planned economic development where the role of government is crucial.[58] It explained history and the economic system materially as a struggle between different classes and groups in society caused by conflict between the modes and relations of production and believed that the role of government is crucial until such conflict vanishes in communism.[59] It showed how powerful political forces, hence political struggles, originate in the dynamics of capitalist economic processes and criticized the classical claim that markets can regulate themselves.[60] It believed that economic order results from the unplanned and uncontrolled acts of individuals and that control must ultimately reside outside the individual (i.e. in the state).[61] It argued that individuals within the economy pursue interests that are uniquely their own but that are not isolated and independent; that classes are set up and class consciousness develops as individuals understand the commonality of their interests; that classes translate the economic interests of their members into a political agenda; and that class interests become political interests in the struggle over state power.[62] It, like the classical view, recognized that the capitalist economy consists of accumulated commodities, individuals who own those commodities and exchange relations which connect the individuals.[63] It, however, believed that the market is not a mechanism for maximizing the private welfare of individuals generally but a means for facilitating the capitalists'

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[55] See Ibid.
[56] See Ibid.
[57] See Id., at pp. 46-54.
[58] See Jhingan, 2002, supra note 43, at pp. 95-104.
[59] See Ibid.
[60] See Caporaso and Levine, 1993, supra note 50, at pp. 3-4, 55-78, 218-219.
[61] See Ibid.
[62] See Id., at pp. 56-69.
[63] See Id., at pp. 58.

appropriation of surplus value and accumulation of capital.[64] The Marxian theory also developed three strands that took the transformation of individual economic interests into collective political interests at their core and explain the relation between the state and the economy differently, namely the revolutionary politics, the politics of class compromise (also known as social democratic politics) and the Marxian state theory.[65] The revolutionary politics strand believed that capitalist economy concentrates capital, creates unemployed and low-paid workers, polarizes classes, and leads to violent revolution.[66] The social democratic politics strand believed that the position of labor and capital can be altered peacefully instead of violent revolution if workers participate in interest groups, parties, and electoral-legislative processes and the economy is rationalized to the welfare of all citizens (workers and capitalists alike).[67] The Marxian state theory believed that the economy is full of irreconcilable conflicts between economic interests of classes; that this conflict will threaten social order; and that the state has to preserve social order by perpetuating the political interests of a class while oppressing another class.[68]

The neo-classical political economists (who are known as utilitarian) continued with the classical idea of business as a separable system from government, but applied utilitarian philosophy to analyze the problem of the nature and purposes of market economy and see the case for government intervention.[69] They argued that the aim of both the market as a set of voluntary private transactions and the government as a use of political authority should be utility maximization and that the relationship between government and business should be defined on the basis of the idea of market failure to maximize utility.[70] They started with the principle of utility that the morality of what we do is determined by the overall effect it has on the welfare or happiness of those affected by the outcome and, hence, that government regulation can be justified only if it brings better satisfaction of desires in a society than would result in its absence.[71] They believed that all individuals seek the highest degree of satisfaction of their wants, order their preferences, make rational choices and enter into exchange transactions to maximize their satisfaction out of constrained endowment; that group welfare is achieved through voluntary transactions based on individual rational choices; that free market allows maximum scope for free and voluntary exchange and efficient allocation of resources; and that the role of government should be doing what the market can not do such as the definition of property rights and the correction of market failures.[72] They measured the satisfaction of desires in society through the Pareto-optimality ideal according to which maximum satisfaction of desires means that one is made better off

[64] See Id., at pp. 60-63.
[65] See Id., at pp. 56, 69-78.
[66] See Id., at pp. 70-72.
[67] See Id., at pp. 72-74.
[68] See Id., at pp. 74-78.
[69] See Caporaso and Levine, 1993, supra note 50, at pp. 4.
[70] See Id., at pp. 4, 86, 219.
[71] See Machan, 1984, supra note 7, at pp. 218.
[72] See Caporaso and Levine, 1993, supra note 50, at pp. 79-99.

without making someone else worse off.[73] They believed that this optimality is achieved when the market, given reasonable estimates, leads to greater satisfaction of desires than would result otherwise. They, accordingly, argued that government regulation can be justified if it is shown that it will produce results that are closer to achieving Pareto-optimality than the results that would be obtained without it.

The Chicago School of Law and Economics acted along the line of the classical political economists and recognized a laissez-faire economic system governed by private law remedies that are subject to evaluation based on the efficiency test.[74] It, until World War II, focused on analysis of law based on the classical propositions that economic actors rationally pursue their economic self-interest, that competition is inherent within and intrinsic to economic life, and that market-generated outcomes based on free competition are superior to those resulting from government interference.[75] It, after the war, focused on demonstrating the nexus between competitive markets and their efficient outcomes.[76] It currently stands on three pillars.[77] First, it believes that individuals maximize their satisfaction in both their market and non-market behaviour. It assumes, by this, that individuals set their preferences, access and perfectly process information, rank all possible outcomes of their decisions according to their relative desirability, and engage in additional unit of activity when the additional benefit with that unit of activity exceeds or is equal to the additional cost. Secondly, it believes that legal policy can influence economic performance and the level of legality through adjustment of the prices reflected in legal rules. It assumes, by this, that individuals are responsive to price incentives in both their market and non-market behaviours and that legal rules set legal sanctions or legal consequences as prices for engagement in certain legal or illegal behaviour. Thirdly, it believes that legal rules and outcomes should be assessed based on their economic efficiency. It argues that the concept of justice in a social system founded on economic principles is congruent with the concept of economic efficiency, that economic efficiency should be tested through the principle of wealth maximization (also called the Kaldor-Hicks efficiency test or the compensation principle), and that the ethical basis of wealth maximization should be grounded in the principle of consent (i.e. voluntary market transaction).[78] It assumes that individuals would consent to wealth maximization

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[73] See Machan, 1984, supra note 7, at pp. 218; Caporaso and Levine, 1993, supra note 50, at pp. 82-85; Acocella, 1998, supra note 45, at pp. 23-50; and Cseres, 2005, supra note 42, at p. 16.

[74] The School originated in the 1920s and 30s and was shaped into its form in the 1960s and 70s. See Mercuro and Medema, 1997, supra note 42, at pp. 51-56; and Cseres, 2005, supra note 42, at pp. 22-28.

[75] See Ibid.

[76] See Ibid.

[77] See Mercuro and Medema, 1997, supra note 42, at pp. 57-59.

[78] It prefers the Kaldor-Hicks efficiency test to the Pareto formula. The Pareto efficiency test focused on the making of someone better-off without making any one else worth-off. The Kaldor-Hicks efficiency test dismissed the Pareto test by arguing that the promulgation of public policy and legal change will normally bring about winners and losers. It then proceeded with an alternative criteria of optimality that change from one state of the economy to another state that

(hence, to wealth maximizing policies, laws and changes) as long as there is sufficient probability that they will benefit from application of such policies, rules and changes in the long run even though they lose from the application of a certain policy or rule in the short run.[79] It also argues that the idea of wealth maximization based on consent or voluntary market transaction is valid both morally (as it builds on the virtues of utilitarian and Kantian tradition of human respect and autonomy) and pragmatically (as the world reality shows that societies where markets are allowed to operate freely are not only wealthy but also have more political rights, liberty, dignity and content).[80]

The Keynesian school of economics argued that the unregulated free market lacks valuable human sentiments: that it fosters callousness or insensitivity towards the plight of those who fail or who are unable to take part in the economic struggle.[81] It believed that market failure is deeper and more challenging to the institution of a private enterprise system than the Neo-classical approach considered and criticized the claims for market self-regulation.[82] It argued that the pursuit of self-interest is often self-defeating as workers' effort to increase demand for labour often leads to lower levels of employment and income and the community's effort to save more leads to less saving and investment; that market economies are not stable and will not make full use of resources available to them if they are left to their own devices; and that state intervention is called for to secure the macroeconomic conditions necessary to stabilize market.[83] It, accordingly, felt that regulation is necessary to prevent distraction of human ideals by unregulated businesses.

The Harvard School of Law and Economics rejected the price theory in classical political economy and believed that market performance is a matter of market structure (i.e. industrial organization).[84] It argued that market structure determines market conduct which in turn determines market performance, that market structure is influenced by conditions (including technology, types of goods, and the behaviour of buyers and sellers) and that government intervention is necessary to shape these. It believed that the creation of free competition is a goal by itself, that markets are not necessarily competitive, that a competition policy can have objectives beyond the efficiency objective, and that a far-reaching government intervention can be necessary to make the competition process workable. It also rejected the theoretical approach in classical political economy and emphasized on the need for analyzing the economic

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can favor some individuals at the expense of others also constitutes improvement to a society's welfare if i) the gains to the winners exceeds the loss to the losers and ii) the losers are potentially compensated so that they will accept the change and the gainers will remain better-off. [See Mercuro and Medema, 1997, supra note 42, at pp. 14-21; and Cseres, 2005, supra note 42, at pp. 16-17 for details].

[79] See Ibid.

[80] See Ibid.

[81] See Machan, 1984, supra note 7, at p. 214.

[82] See Caporaso and Levine, 1993, supra note 50, at pp. 4, 100-125, 219.

[83] See Id., at pp. 100-125.

[84] The proponents of the school started their arguments in the 1930s and the School took its shape in the 1950s. See Cseres, 2005, supra note 42, at pp. 42-45, 55-56 and 101-103.

results of a certain market structure or conduct based on the empirical study of real markets.

The Freiburg School of Law and Economics emphasized on the creation of open market with social justice and individual freedom in between socialism and western liberalism and the role of government to guarantee this.[85] It believed that government should set the framework for economic processes without taking part in the process by itself and that the aim should not exclusively be on guaranteeing efficiency but economic freedom. It focused on state ordered liberalism.

The Austrian School of Law and Economics considered the market as entrepreneurial discovery process where government intervention is hardly necessary.[86] It believed that competition is a dynamic process of discovery by entrepreneurs who create and coordinate their market, that the market orders itself automatically and spontaneously, and that government should not intervene but guarantee freedom. It focused on market ordered liberalism.

The Game theory considered the market and competition as strategic interaction between firms.[87] It emphasized on the strategic conduct of firms as opposed to the structure of the market and believed that the strategic conduct of firms affects the structure and performance of industry, that the welfare gain in a market is a matter of this strategic interaction, and that the role of government is to set the scope and conditions for the interaction, i.e. to correct the imperfections and behaviours that may cause welfare loss.

The Public Choice Theory rejected the idea that government officials are persons who seek to act for the common good or in the public interest and believed instead that they are rent seekers, i.e. persons who waste public resources by investing in political activities consistent with their own interests instead of investment in economically productive activities.[88] It believed that individuals do not exhaust their exchange in the marketplace but take it into the political process to enhance their utility; hence that society's scarce resources are allocated both by the market place and the political process by the same individuals who act in several capacities.[89] Its Axiomatic branch recommended the evaluation of collective choice-making processes based on welfare economics.[90] Its Conventional (Homo Economicus) branch argued that individuals (both in political and economic arenas) are utility maximizers and hence that governmental actors are motivated not by a desire to enhance public interest but by a

[85] The School was created in the 1930s. See Id., at pp. 83-88.
[86] The School was created in the 1920s and developed in the 1940s. See Id., at pp. 89-91.
[87] The School was developed in the 1940s. See Id., at pp. 65-67.
[88] The theory originated in the Mid 1950s. See Mercuro and Medema, 1997, supra note 42, at pp. 84-85.
[89] See Id., at pp. 86-87.
[90] See Id., at p. 85.

desire to enhance their own prospects.[91] Its Catallaxy (Contractarian) branch argued that differences in political process are resolved through market like voluntary exchange arrangements (i.e. spontaneous coordination); denied the existence of a standard (like the efficiency and welfare tests of Pareto and Kaldor-Hicks) by which one can evaluate the appropriateness of public policy or legal change; and believed that consensus among the governmental actors is much more important than the standardization of tests.[92]

The New Haven School considered the contemporary world as one where regulation and administrative law of a welfare state play increasingly prominent role and advocated the evaluation of regulatory and administrative actions on the basis of the concerns of efficiency and justice.[93] It believed that public action should be based on economic justification and that political institutions should be evaluated realistically by using the rational actor as the model of governmental behaviour.[94] It advocated for the making of efficiency and justice within a system that uses the mechanisms of both the market and the democratic political process and allows individual choice.[95] It recognized the virtues of the market in allocating scarce resources and believed that multiple sources of market failure necessitate some form of government intervention.[96] It recognized the role of both private law and regulatory rules and institutions to correct pockets of market failure in society and argued that legal-economic policy should be limited to correcting market failures, that market-failure-correcting policies should be evaluated and put into place based on cost-benefit analysis by taking the concerns of efficiency and justice into account, and that rule making and dispute settlement should be left to the parties as long as they can cooperate to do them and as long as such approach is socially beneficial and least costly.[97]

The Modern Republican Civic Tradition appealed to norms of democratic public decision-making that are broader than mere aggregation of individual private interests.[98] It envisioned a public arena where decision-making is through principled deliberation and reasoned dialogue by those who think wisely and abstract from their private position and experience for the common good.[99] It started with four central principles, namely deliberation, equality, universalism and citizenship and then argued that political participants subordinate their private interests to the public and common

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[91] See Id., at pp. 85, 87-94.
[92] See Id., at pp. 85, 94-96.
[93] The School originated in the 1960s and 70s. See Mercuro and Medema, 1997, supra note 42, at pp. 79-83.
[94] See Id., at pp. 79, 82.
[95] See Ibid.
[96] See Id., at p. 80.
[97] See Id., at p. 82.
[98] The tradition originated in the 1960s and culminated in the mid-1980s. See Mercuro and Medema, 1997, supra note 42, at pp. 97-98.
[99] See Id., at p. 98.

good through the process of collective self-determination.[100] It accordingly, took politics and government as spheres superior to the merely private concerns of the private sector.[101]

The School of Critical Legal Studies acted along the lines of Marxian theory and believed that law and legal institutions are just one aspect of the larger social structure whose role is to serve as tools of politics, ideology and historical contingency.[102] It argued that social engineering and liberal reforms can not attain justice merely by thinking in a capitalistic system; that reality is a cultural and social construct based on ideology; that legal and economic relations become meaningful within a shared construction of reality; and, hence, that attention should be given to alternative ways of thinking about legal and institutional structures and their impact on resource allocation.[103] It, accordingly, advocated for continued commitment to activism and transformational politics that will reject the consciousness and analysis of an existing system of capitalistic society.[104]

The School of Institutional Law and Economics believed that the economy is a system of relative rights and powers, that the interaction between individuals is a function of this system of rights and powers, and that law or government is a means i) to work out whose interests should count as rights, whose values should dominate, and who should make these decisions and, through the resolution of these issues, ii) to determine the allocation of not just rights but resources and hence income, wealth and power in a society.[105] It saw the importance of institutions (i.e. habits, custom, social patterns and legal and economic arrangements) that impact upon the performance of the economic system and believed in the interaction between law, government and the market to set order.[106] First, it believed in the existence of mutual influence between law, governmental action and the market; in the existence of tension between continuity and change; and in the importance of the policy choice process in resolving the tensions in the economic system.[107] Secondly, it took that the market is not only a universe of

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[100] It, by the concept of deliberation, referred to the support to emergent policies, laws and decisions by argument and reason rather than by the outcome of self-interested deals; by the concept of equality, to the elimination of disparities in political participation among individuals and social groups; by the concept of universalism, to the mediation of different approaches to politics and the different conceptions of public good; and by the concept of citizenship, to the guarantee to citizen participation in and control over political processes and national institutions. [See Id., at pp. 98-99].

[101] See Ibid.

[102] The School originated in 1977 and grew through the influence of legal realism, American Historiography and neo-Marxism. See Mercuro and Medema, 1997, supra note 42, at pp. 157-165.

[103] See Id., at pp. 165-170.

[104] See Id., at pp. 157-158 and 170.

[105] See Mercuro and Medema, 1997, supra note 42, at pp. 115-118. The School has originated in the 1920s and 30s (See same citation).

[106] See Id., at pp. 101, 107, 112-115.

[107] See Ibid.

commodities but also a universe of human relations where the identity of the players, the starting points of the game, the strategic behaviour, the choice of the participants, the conflict of competing interests and the consequent problems of order matter.[108] Thirdly, it took society as a venture for mutual advantage and resolution of questions of identity and conflict of interests and argued that the ultimate purpose of legal, governmental and economic processes is the resolution of the problem of order in society.[109] It then, considered the legal system or government as means to enhance the scope of coordination and argued that the presence of government within the legal-economic processes is inevitable to resolve scarcity-based conflicts in society by defining the structure of rights and the system of compensation.[110] It did not believe in a singular solution to the legal-governmental-economic issues based on such value premise as efficiency or wealth maximization but in the multiplicity of potential systems and solutions.[111] It took the determination of the system of rights and powers as the most crucial matter to handle and believed that this is a matter of choosing the interests to be accommodated and the persons who should loose and gain.[112] It also believed that determination of the system is a function of the relative pressures of those who are able to secure the promotion of their interests through government.[113]

The School of Neo-Institutional Law and Economics shared the view with the School of Institutional Law and Economics that institutions (i.e. rules of the game) are important factors in the determination of economic structure and performance and that institutional structures, institutional changes and economic performances influence each other.[114] It, however, focused on three central concepts (namely property rights, contracting, and transaction costs) at both the micro and macro levels and saw that institutions also fail.[115] It focused on the rights, bargains and transaction costs of individuals at the micro level and on the definition of the property rights system of the society, the political bargain over the system, and the costs of that bargain at the macro level.[116] It believed that both the political, social and legal rules that define the property rights for economic units and establish the basis for production, exchange and distribution (at the institutional environment level) and the governance structures that shape the cooperation and competition between them (at the institutional arrangement level) are important.[117] It believed that individuals pursue their self-interest rationally subject to constraints (such as the definition of property rights, transaction and information costs and the limited computational capacity of the human mind) and that

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[108] See Ibid.
[109] See Ibid.
[110] See Ibid.
[111] See Ibid.
[112] See Id., at pp. 118-129.
[113] See Ibid.
[114] The School originated in the 1960s. See Mercuro and Medema, 1997, supra note 42, at p. 130; and Cseres, 2005, supra note 42, at pp. 63-65.
[115] See Ibid.
[116] See Ibid.
[117] See Ibid.

institutional structures should be designed by government at the macro level to define the opportunity sets, facilitate the political and economic exchange that maximizes gain and wealth, set the form of economic organization and the framework for individual institutional arrangements, and enhance the society's wealth-producing capacity.[118] It also argued that measures at the macro level are not sufficient to ensure wealth-enhancing exchange relationships and, hence, that economic performance should be left to the exercise of each individual's interest within the macro framework.[119] Its transaction costs theory also considered the market and the firm as alternative mechanisms of decision making both of which are affected by costs, believed that the choice between the two institutions depends on their relative efficiency, and argued that the creation of any market structure that aims at reducing transaction costs should not be disallowed by government under the guise of competition regulation.[120]

The moralists in political economy asked if government regulation of business, with its punitive implications, is a morally justifiable way to deal with whatever is regarded as undesirable in a society's economic affairs.[121] They distinguished between government regulation and government management (or administration) and argued that government regulation of publicly owned spheres for reason of public interest is within the scope of government management, hence morally justified, while government regulation of privately owned spheres is more than government management, therefore lacking moral justification.[122] They, however, believed in the fluidity of the public-private sphere distinction and argued that no area of human life can be seen as protected from government management or administration unless there is limit to the concept of public interest.[123] They then argued that regulation that purports to solve problems that can be solved by private action is morally wrong.[124]

The state-centred approaches in political economy moved from the economic imperative to the state and considered the government as an entity having its own goals and seeking to control the economy, not simply to correct market failures or distribute wealth and power, but to impose purposes of its own.[125] They, therefore, argued that government should exist not because of market failure but because of its own goals.

Recent thinkers have, however, suggested that a good policy solution to the tension between those who favour strong government regulation and those who advocate free market is not choosing between the two but understanding the interplay between private and public regulation and steering the mix between the two with a view to

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[118] See Ibid.
[119] See Ibid.
[120] See Cseres, 2005, supra note 42, at pp. 64-65.
[121] See Machan, 1984, supra note 7, at pp. 210 -212.
[122] See Ibid.
[123] See Id., at p. 212.
[124] See Id., at pp. 229-230.
[125] See Caporaso and Levine, 1993, supra note 50, at pp. 5, 181-196 & 220.

involving both government and citizens.[126] Hence, some have believed in the importance of distinguishing between the political and the economic realms but warned on the dangers of making one of the two dominant over the other.[127] Others have believed that a good policy is one that accepts the need for symbiosis between state regulation and self-regulation and promotes responsive regulation in which case the forms and degrees of regulation should be attuned to the differing structures, motivations and objectives of an industry by taking into account the extent to which the industry makes private regulation work.[128] They have defined responsiveness not as a prescription of the best way to regulate but as an attitude of following a strategy of regulation that should depend on the demands of context, culture and history.[129] They have believed that regulation should be flexible, purposive, participatory and negotiable as opposed to autonomous and repressive.[130] They have also endorsed the idea of promoting private market governance through enlightened delegations of regulatory functions to public interest groups, to unregulated competitors of the regulated firms, and to the regulated firms themselves or their associations.[131]

Ayres and Braithwaite have, therefore, proposed adoption of a strategy that i) involves both governmental regulators, public interest groups and self-regulators in the regulatory process; ii) promotes self-regulation by industry and cooperation between regulatory agencies and regulated industries; iii) makes the regulatory style neither punitive nor cooperative alone but a tit-for-tat that mixes punishment and persuasion as the means of securing regulatory objectives; iv) escalates intervention between self-regulation and government command and includes a strategy of enforced self-regulation; v) avoids industry-wide intervention and regulates through partial intervention, i.e. through regulation of an individual firm or a subset of firms in the industry; and vi) ensures accountability of regulatory discretion through openness in regulation, adherence to law and assurance of citizen participation.[132] They have, accordingly, recommended a regulatory system which should depend much on self-regulation, persuasion and laissez fair and less on command regulation, punishment and industry-wide intervention.[133]

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[126] See Fine, B., "Beyond the Developmental State: Towards a Political Economy of Development," in Lapavitsas C. and Noguchi M. (eds.), Beyond Market-Driven Development: Drawing on the Experience of Asia and Latin America (Routledge Taylor & Francis Group, London-New York, 2005).

[127] See Ibid.

[128] See Ayres and Braithwaite, 1992, supra note 13; and Gunningham and Grabosky, 1998, supra note 13.

[129] See Ibid.

[130] See Ibid.

[131] See Ibid.

[132] See Ayres and Braithwaite, 1992, supra note 13, at pp. 5-6, 19-53, 54-157.

[133] They recommend a regulatory strategy which uses self-regulation, enforced self-regulation, command regulation with discretionary punishment and command regulation with non-discretionary punishment in decreasing order; an enforcement strategy which uses license revocation, license suspension, criminal penalty, civil penalty, warning and persuasion in increasing order; and an industry intervention strategy which makes laissez fair, fringe firm

Gunningham and Grabosky have also argued that a pluralistic, flexible and imaginative approach that combines all policy instruments and regulatory actors, tailors the instruments and actors to particular goals and circumstances, and harnesses the resources outside the public sector for regulation is advisable as it reduces the regulatory burden on government, saves public resources to situations where government intervention or assistance is most required, and enhances the capacity of businesses to seek cost-effective improvements.[134] They have indicated that the optimality of regulatory mix can be assessed by using the criteria of flexibility, certainty, integrity, practicality, responsibility, transparency, communication, effectiveness, equity, community acceptance, community participation and innovation.[135]

1.5. The Theories of Government Regulation

Once recognized, the specific nature of government regulation has also been analysed through three dominant theories, namely the public interest theory, the capture theory and the economic theory.[136]

The public interest theory, which was dominant until the 1970s, argued that government regulation is a response to public demand for correction of inefficient and inequitable practices of the actors in an unregulated market.[137] It assumed that markets are always apt to failure if left unregulated and that government can act efficiently.[138] Its validity declined in the 1970s and thereafter due to arrival of several other theories on the economics of regulation and rise of criticism to the making of distinction between public and private interest theories.[139]

The capture theory, which was dominant in the 1970s and 80s, argued that regulated parties capture government regulation through time so that regulation serves their

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intervention, dominant firm intervention, oligopoly tournament and industry-wide intervention in decreasing order. See Ibid, at pp. 35, 39 and 154.

[134] See Gunningham and Grabosky, 1998, supra note 13.

[135] See Id., at pp. 25-31.

[136] See Kabir, 1990, supra note 5, at pp. 3-5; Thimm, 1999, supra note 2, at pp. 70-83; and Uche, C. U., ''The Theory of Regulation: A Review Article," in Journal of Financial Regulation and Compliance, Vol. 9, No. 1, 2001 (Henry Stewart Publications, 1358-1988), at pp. 68-70. The theories have originated in the United States and spread to Europe and then to the rest of the world. See P. Görant T. Hägg, "Theories on the Economics of Regulation: A Survey of the Literature from a European Perspective," in the European Journal of Law and Economics (Electronic Version), Vol. 4, 1997, at pp. 337-357.

[137] See Kabir, 1990, supra note 5, at p. 3; Uche, 2000, supra note 136, at p. 68; and Thimm, 1999, supra note 2, at pp. 70-73.

[138] See Ibid.

[139] See P. Görant T. Hägg, 1997, supra note 136, at pp. 337-357; and Michael Hantke-Domas, "The Public Interest Theory of Regulation: Non-Existence or Misinterpretation?" in the European Journal of Law and Economics (Electronic Version), Vol. 15, 2003.

interest instead of the public interest.[140] It argued that regulation is response to the demand of regulated parties who want to escape competition and obtain government protection of their interests.[141] It was based on observation that the implementation of regulation serves the interests of a sub-group of society instead of a claimed majority.[142]

The economic theory, which grew beginning the early 1970s, argued that government regulation is the result of the forces of demand and supply between politically effective economic interest groups and the government.[143] It argued that government regulation is nothing but supply of rules of behaviour to the economic interest groups in consideration of the support the politicians may get from the groups and that the demand for regulation comes from the groups that seek the economic benefits the government can provide through regulation.[144] It differed from the capture theory by arguing that the 'capture' of the regulator is not only by the regulated parties as it is also by interest groups other than the regulated parties and that the 'capture' of the regulator is not accidental but a result of conscious exercise of the political behaviour of people which is not different from their choice-making behaviour in the market.[145]

All the three theories have, however, also suffered from criticism. The public interest theory was criticized for basing regulatory action on the fluid concept of public interest, for failure to fully explain the way public demand is transferred into regulatory action and for lack of empirical evidence supporting the public interest hypothesis.[146] The capture theory was criticized for linking regulation to the interest of the regulated parties only and for lack of complete explanation of the mechanism by which the regulated parties succeed in influencing the regulator despite the presence of more empirical evidence to its hypothesis than to the public interest hypothesis.[147] The economic theory was criticized for assuming that interest groups are able to influence

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[140] See Kabir, 1990, supra note 5, at pp. 4; Uche, 2000, supra note 136, at p. 69; and Thimm, 1999, supra note 2, at pp. 74-76.
[141] See Ibid.
[142] It grew as theory due to shift of scholarship from the idea of market failure to consideration of the collective decision making process itself. See Ibid.
[143] It grew as a theory following George Stigler's thesis of this idea in 1971. See Kabir, 1990, supra note 5, at pp. 4-5; Thimm, 1999, supra note 2, at pp. 76-83; and Meier, K. J., The Political Economy of Regulation: the Case of Insurance (State University of New York Press, 1988), at pp. 18-32.
[144] Richard Posner and Sam Peltzman sharpened this theory in 1974 and 1976, respectively, by way of criticizing on the works of Stigler. Posner argued that regulation is result of coalition between the regulated industry and the customer groups where the organized exploits the unorganized and Peltzman argued that regulation is concerned with the transfer of wealth between producers and consumers where the producer group is most likely to influence regulation. See Meier, 1988, supra note 143, at pp. 23-25.
[145] See Kabir, 1990, supra note 5, at pp. 5.
[146] See Thimm, 1999, supra note 2, at pp. 71-73; and Michael Hantke-Domas, 2003, supra note 139, at pp. 165-190.
[147] See Thimm, 1999, supra note 2, at pp. 74-75.

regulatory policies directly and denying the truth that such ability depends on the design of the political process and the precise form of administrative organization in a country.[148] The critics to it have argued that regulatory policy is more than just competition between interest groups, that it results from a complex interaction between industry groups, consumer groups, regulatory bureaucrats and political elites who have their own interests and that the opportunities available for each group depends on the political environment.[149] The use of each of these theories should, therefore, be made within the more general theories on the relationship between legal, economic and political processes that are discussed in the preceding section.

2. The Design, Rationale and Constitutional Basis of Regulation in International Practice

2.1. The Design of Regulation

Economic coordination and allocation of resources can be done through administrative planning, the market mechanism, or both. The difference between the planned, market and mixed economies lies in the mix of the former two approaches though it is arguable in practice that all economies are mixed as the two approaches cannot disappear entirely. The point is that economic activities and decisions are guided largely by the totality of objectives of the public sector in planned economies; largely by the market mechanism, competition policy, regulation and instruments of fiscal, monetary and trade policy (that correct or supplement the market mechanism) in market economies; and by both public objectives and the market mechanism in mixed economies.

The governments in centrally planned economies dominate the economy through direct ownership of the bulk of the modern sectors of the economy and direct control of both the product and factor markets.[150] They run state monopolies in both production and

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[148] See Id., at pp. 82-83.

[149] See Meier, 1988, supra note 143, at pp. 18-32, 84-87, 107-108, 134-136, 137-166, 167-171.

[150] All the ex-socialist economies used to do this (See, for instance, Zonis M. and Semler D., The East European Opportunity: The Complete Business Guide and Source Book (John Wiley & Sons, Inc., New York [etc.], 1992), at pp. 13-388; and Pomfret, R., Constructing a Market Economy: Diverse Paths from Central Planning in Asia and Europe (Edward Elgar, Cheltenham-UK and Northampton-USA, 2002), at pp. 9-25, 57). Some countries also still favour central planning by their constitutions (See the 1992 constitution of Cuba, at articles 1, 5-7, 9, 10, 12, 14-27, 45, 47-50, 60, 64, 75 & 98; the 1971 constitution of Egypt as amended in l 980, at articles 4, 17, 23-39, 86, 122, 123 & 138; the 1980 constitution of Guyana as amended in 1996, at articles 1, 9-11, 13-22, 24-26, 32, 38-40, 142 & 213-215A; the 1945 constitution of Indonesia, at articles 33 & 34 of the constitution and article 28G of the Second Amendment; the constitution of North Korea, at articles 1, 5, 8, 19, 20, 21-38, 63, 70, 72, 84, 91, 117, 119, 122 & 134; and the 1973 constitution of Syria, at the preamble & articles 1-3, 13-27, 36, 46, 47, 50, 71-73, 85, 91-94, 115, 118, 119 & 126-128. I have accessed the constitutions of these countries through the Constitution Finder database of the T.C. Williams School of Law of the University of Richmond available at http://confinder.richmond.edu/.

distribution and couple this with marginal and stifled private enterprise.[151] They take direct ownership and supply as the main forms of state intervention in the economy.[152]

The governments in the developed market economies, on the contrary, rely on competition, government regulation and some form of government ownership as instruments to guide economic activity.[153] They rely on competition policy to prevent excessive use of economic power by offering choice to purchasers, exposing an individual's power to restraint by rivals' power, and motivating companies to become more efficient.[154] They use competition laws to prevent and control the development of market imperfections when competition fails.[155] They use them to increase efficiency and innovation, control the abuse of economic power, keep the competition process within legitimate bounds, protect consumers, and restrain anticompetitive governmental and non-governmental actions.[156] They often make the competition laws less comprehensive instruments than economic regulation so that they will aim at policing aspects of the market that restrain competition, including the abuse of dominant position, the making of horizontal and vertical anticompetitive agreements, the creation of anticompetitive mergers, the imposition of patent and intellectual property related restraints to competition, and the implementation of unilateral market discriminations.[157] They also make them rely on the principles of private ownership, rivalry and profit maximization so that their enforcement will not need constant supervision, oversight, or command and control as in the case of regulation. They rely on direct government ownership to provide public goods.[158] They use regulation as an intermediate scheme between the competition and government ownership approaches.[159] They, by this, substitute the decision in the market place by judgments of the regulators and usually prescribe positive commands (i.e. activities for the regulated business) unlike competition laws that are usually limited to negative commands (i.e. prohibitions of conduct).[160] They usually use the regulations to promote

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[151] See Ibid.
[152] See Ibid.
[153] See Pierce, R.J.J.R. and Gellhorn, E., Regulated Industries in A Nutshell (3rd Ed.) West Publishing Company, St. Paul, Minn., USA, 1994), at pp. 7, 14-18; Gellhorn, E. and Kovacic, W. E., Antitrust Law and Economics in A Nutshell (4th Ed. West Group, 2001), at pp. 42-90; Areeda, P. and Kaplow, L., Antitrust Analysis Problems, Texts and Cases (5th Ed. Aspen Law & Business, 1997), at pp. 3-38; Calvini, T. and Siegfried, J., Economic Analysis and Antitrust Law (2nd Ed., Little, Brown and Company, Boston and Toronto, 1988), at pp. 1-67; Hovenkamp, H., Economics and Federal Antitrust Law (Handbook Series Student Edition, West Publishing Co., St. Poul, Minn, 1985), at pp.1-82.
[154] See Ibid.
[155] See Ibid.
[156] See Ibid.
[157] See Ibid.
[158] The non-market nature of these goods often implies that the decision on their provision has to be made in the political process. See Pierce and Gellhorn, 1994, supra note 153, at pp. 16-17.
[159] See Id., at p. 7.
[160] See Ibid.

efficiency, non-discrimination, equality, service reliability, fair dealing, honesty, informed decision making and safety.[161]

The idea of having competition regimes started to take shape in Northern America and Europe in the 19th century in response to the demands of democratisation and industrialization.[162] Both continents recognized the potential benefits of competition and potential harms of unrestrained economic freedom and decided to have competition laws as early as the middle of that century.[163] Their decisions to enact competition laws and the targets were also frequently influenced by economic, legal and political forces.[164]

The competition regime in USA grew through six periods following the Senator John Sherman's proposal of antitrust bill to the Senate in 1888.[165] The first period (from 1888 to 1911) gave ground to free competition and freedom of contract through public debate.[166] The second period (from 1911 to 1933) resulted in trade associations and cooperative competition.[167] The third (New Deal) period (from 1933 to 1948) brought about an idea of equality with the central theme of commitment to economic enterprise free from oppressive private economic power.[168] The fourth period (from 1948 to 1967) resulted in economic expansion, persistent collision between liberalism and oligarchy and claim for pluralism (in opposition to Joseph Stalin's totalitarianism).[169] The fifth period (from 1968 to 1980) brought about deregulation in favour of efficiency, property rights and equality based on free competition.[170] The sixth period (from 1980 to 1992) brought about deregulation in favour of corporate freedom from government as well as control.[171] Free competition (as freedom from both government regulation and private

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[161] See Id., at p. 11.

[162] Canada and the United States were the first countries that introduced competition law (in 1889 and 1890, respectively) while many European countries introduced their competition laws in the 1950s (after World War II) (See Gerber, D.J., Law and Competition in Twentieth Century Europe: Protecting Prometheus (Oxford University Press, Oxford, 2001), at pp. 1, 6; and World Bank, World Development Report 2002 (Chapter 7: Competition), World Bank, Washington, D. C., 2002, at p. 139).

[163] See Gerber, 2001, supra, at pp. 6 & 11.

[164] See Id., at pp. 425-429.

[165] See Peritz, R. J. R., Competition Policy in America: History, Rhetoric, Law (Oxford University Press, 1996/2000), at pp. 5-8 & 9-299.

[166] The Sherman's Bill was enacted into law in 1890 and the courts debated on its enforcement in the years between 1890 and 1911. See Ibid.

[167] See Ibid.

[168] The early New Deal focused on political cooperation and equality of citizens - whether owners, workers or consumers. The later New Deal focused on economic competition and consumerism. See Ibid.

[169] See Ibid.

[170] This period started with government illegitimacy and ended with populist deregulation. See Ibid.

[171] See Ibid.

economic power) was, therefore, part of the persistent concern on liberty, equality, private property and freedom of contract in the US throughout the above periods.[172]

The competition policy and its limits were also articulated in the country in two kinds of rhetoric.[173] The first rhetoric was concerned with commitment to individual liberty, free competition (from government power), freedom of contract, wealth maximization, private property right and freedom of speech.[174] The second was concerned with commitment to equality, majority interest, free competition (from excessive economic power), fair competition, consumer protection and entrepreneurship.[175] The first rhetoric prevailed from the Sherman Act debates up to the early New Deal and the second after the later New Deal.[176] Both kinds of rhetoric resulted in three logics on the relationship between the government and the private economic spheres.[177] The first logic considered the two as distinct spheres whose separation was to be guarded as the basis of a free society.[178] The second logic combined them into one by forcing one of the two to lose its distinctiveness in favour of the other.[179] The third logic recognized the distinctiveness of the two and saw some partnership between them.[180]

The making of competition law was imbedded in Europe in the movement towards liberalism and political freedom in the 19th century.[181] The continent saw concentration of political power in the ruling elites and extensive regulation of economic conduct by absolutist governments and organizations like guilds to preserve the wealth of the state or economic prerogative of the ruling elites until that century.[182] It conceived competition and its regime as institutions that can reduce class difference, check political and economic power (as part of the idea of rule of law), diminish poverty and create wealth as of the second half of that century.[183] Hence, Austria saw the first competition law proposal made to protect the competition process from politics and ideology in the 1890s and continued to discuss on them until they were blocked by political events as the century turned.[184] Germany took over the discussion started in Austria and enacted the first European competition law in 1923 in response to the post

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[172] See Gerber, 2001, supra note 162, at p. 3.
[173] See Id., at p. 301.
[174] See Ibid.
[175] See Ibid.
[176] See Ibid.
[177] See Id., at p. 302.
[178] This is the classical approach. See Ibid.
[179] This is the case with the arguments of the New Deal era which made the private economic sphere disappear in favour of the political (the government) sphere and the arguments of the Chicago School of Economics and the Public Choice Theory which made the political (the government) sphere disappear in favour of the private economic sphere. See Ibid.
[180] This is true of the late 20th century. See Ibid.
[181] See Gerber, 2001, supra note 162, at pp. 16-42.
[182] See Ibid.
[183] See Ibid.
[184] See Id., at pp. 6, 7, 43-114.

war inflation crisis.[185] The system of competition law was important in the economic and legal life in Germany during the 1920s, but was abolished in the 1930s.[186] The idea of having competition law was, then, discussed and followed by a number of German like competition legislation in many of the European states in the 1930s.[187] The movement was interrupted due to the Second World War. [188]

Many of the European governments, however, also used competition law as means of encouraging economic revival, strengthening the fragile freedoms and achieving political acceptance after the Second World War though they also had heavy regulatory frameworks that forced their competition laws to possess only marginal place in their general economic systems.[189] Germany developed an 'Ordoliberal' vision of society (a vision of society between complete liberalism and socialism) during the post war period and claimed that economic freedom and competition are sources not only of prosperity but also of political freedom, that they should form the "economic constitution" of society and that the law should protect and implement them by checking both political and private economic power.[190] It, then, used the competition regime as 'pillar' of a 'social market economy' during the post war period when its neo-liberal reformers succeeded to enact a competition law in 1957.[191] The EEC made competition a key instrument of economic integration when the European Economic Community (conceived through the European Coal and Steel Community Treaty of Paris of 1951) was created by the European Economic Community Treaty of Rome of 1957 and the member states of the EEC were required to align their regimes with the competition and freedom principles of the EEC Treaty.[192] The EU strengthened the economic and political importance of the competition regime through the principle of subsidiarity (of the Maastricht Treaty of February 1992) and the competition modernization reforms of 2004.[193] The EU competition regime also influenced the legislative developments in the

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[185] See Id., at pp. 7, 115-141.
[186] See Id., at pp. 7, 141-152.
[187] See Id., at pp. 7, 153-164.
[188] See Ibid.
[189] See Id., at pp. 7, 153-164, and 165-231.
[190] This is the influence of the Freiburg School discussed above. See Gerber, 2001, supra note 162, at pp. 7-8, 232-265; and Cseres, 2005, supra note 42, at pp. 83-88.
[191] See Gerber, 2001, supra note 162, at pp. 8 and 266-391.
[192] See Gerber, 2001, supra note 162, at pp. 8, 392-416; and Cseres, 2005, supra note 42, at pp. 92-96. The Member States of the EEC either introduced competition law for the first time (as was the case in Italy) or revised and strengthened their existing laws to align them with the EEC Model (as was the case in France and the Netherlands). The Ordoliberalism idea of the Freiburg School has served as the basis for both the EEC Treaty and the subsequent reforms until it gave some way to the competition theory of the Harvard School [See Cseres, 2005, supra note 42, at pp. 96-109].
[193] The Maastricht Treaty was agreed on the 11th of December 1991 and signed on the 7th of February 1992. It served as means of shifting from market (economic) integration to policy integration. The EU also moved to modernize the institutional and procedural matters of its competition regime in 2003 and materialized it by decentralizing the responsibility of competition enforcement to its Member States as of 01 May 2004. See EC, Council Regulation No 1/2003 of 16 December 2002 on implementation of the rules on competition laid down in

European Economic Area (EEA).[194] The European Economic Area Treaty (signed between the 15 EC Member States and Norway, Iceland and Liechtenstein on the 21st of October 1991 and entered into force in 1994) included rules on competition which closely followed the European Community Treaty of Rome and the European Community Merger Regulation.[195] The two regimes also paralleled institution wise[196]. The member States of both the EU and the EEA have, accordingly, adopted competition laws modelled upon the Treaty of Rome.[197]

Japan introduced its Unfair Competition Act in 1934 to comply with the 1900 unfair trade practices clause of the Paris Convention on Industrial Property of 1883; its Anti-monopoly Law (and Fair Trade Commission) in 1947 to foster entrepreneurship, competition, the protection of consumers and the democratic development of its economy along the American model; and its Free Gifts and Trade Misrepresentations Act in 1962 to correct local problems and foster the protection of consumers and fair competition.[198]

Most other countries of the world (including the transition and emerging market economies of Eastern Europe, Asia, Latin America and Africa) also introduced competition laws (while the US and many of the West European countries strengthened their existing competition regimes) following the privatizations, liberalizations and

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Articles 81 and 82 of the Treaty, in the Official Journal of the European Communities, (No. L1/1, 4.1.2003); EC, Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), in the Official Journal of the European Communities, (No. L 24, 29.1.2004); Celine Gauer et. al., Regulation 1/2003 and the Modernization Package fully applicable since 1 May 2004, in the EC Competition Policy Newsletter, Number 2, Summer 2004; EC, Competition (Antitrust, Mergers, Cartels … Overview and Legislation), retrieved in Nov. 2005 from: http://ec.europa.eu/comm/competition/index_en.html); and Cseres, 2005, supra note 42, at pp. 96-109.

[194] See Richard Whish, Competition Law (4th ed., Butterworths, Reed Elsevier (UK) Ltd, 2001), at pp. 52-53.

[195] See Ibid.

[196] See Id., at pp. 52-53 for brief comparison.

[197] The Treaty has influenced the Greek Act of 1977, the French Ordinance of 1986, the Austrian Act of 1988 (as amended), the Spanish law altered in 1989, the Italian Protection of Competition and the Market Act of 1990, the Belgian Protection of Economic Competition Act of 1991, the Irish Competition Act of 1991, the Finnish Competition Act of 1992, the Norwegian Competition Act of 1993, the Portuguese Decree of 1993, the Icelandic Act of 1993 (amended in 2000), the Swedish Competition Act of 1993, the Swiss Competition Act of 1996, the Dutch Competition Act of 1997, the Danish Competition Act of 1997 (and its new legislation of 2000), the UK Competition act of 1998, the 1999 changes to the German Merger Control and Competition Law, and the reforms on the 1970 Law of Luxembourg. See Richard Whish, 2001, supra note 194, at pp. 53-55; and EC, 2005.

[198] It also reformed the laws through time to make them suitable to local conditions. See Heath, C., The System of Unfair Competition Prevention in Japan (Kluwer Law International, the Hague /London/Boston, 2001), at pp. 3-289; and World Bank, 2002, supra note 162, at p. 139.

technology changes of the 1990s.[199] Many of them came to a growing neo-liberalist consensus that markets deliver better outcomes than state plan and management of the economy and recognized the importance of effective competition policy and law to shape business culture in the period.[200] They started to apply their competition regimes in almost all economic activities including those that were once regarded as natural monopolies or the preserves of the state (such as telecommunications, energy, transport, broadcasting, and postal services) as of the same period.[201] Hence, the majority of them placed the promotion of competition at the centre of their regulatory reforms and created competition authorities or made their regulatory agencies in charge of promoting competition besides their regulatory functions.[202]

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[199] See Richard Whish, 2001, supra note 194, at pp. 1-2; OECD, Regulatory Reform: Stock-Taking of Experience with Reviews of Competition law and Policy in OECD Countries - and the Relevance of such Experience for Developing Countries, (Note by the Secretariat to the Global Forum of the OECD, Paris, 12-13 February 2004), retrieved on December 20 2006 from: http://www.oecd.org/dataoecd/22/32/25501344.pdf; and Amann, E. (ed.), Regulating Development: Evidence from Africa and Latin America (The CRC Series on Competition, Regulation and Development, Edward Elgar, Cheltenham-UK and Northampton-USA, 2006), at pp. 1-301.

[200] See Richard Whish, 2001, supra note 194, at p. 1; World Bank, 2002, supra note 162, at p. 139; OECD, 2004, supra note 199, at pp. 2-14; World Bank and OECD, A Framework for the Design and Implementation of Competition Law and Policy (Washington and Paris, 1999), at p. v; Bahaa Ali El Dean and Mahmoud Mohieldin, "On the Formulation and Enforcement of Competition Law in Emerging Economies: The Case of Egypt," Working Paper 60, the Egyptian Center for Economic Studies, Cairo, September 2001, retrieved in March 2005 from: http://www.eces.org.eg/Downloads/ECESWP60.pdf, at p. 22; and Ajit Singh, "Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions," G-24 Discussion Paper 18, UNCTAD, New York, September 2002, retrieved in March 2005 from: http://www.unctad.org/en/docs/gdsmdpbg2418_en.pdf, at p. 6. The Neo-liberalist ideology was initiated by the Mont Pellerin Society, developed by Milton Friedman and Friedrich von Hayek, and implemented to some extent by Ronald Reagan and Margaret Thatcher [See Kuczynski P-P. and Williamson J., (eds.), After the Washington Consensus: Restarting Growth and Reform in Latin America (Institute for International Economics, Washington DC, 2003), at p. 326]. The reform process in Latin America and most developing countries was also enhanced by the Washington Consensus of 1989 [See Kuczynski and Williamson, supra, with focus on pp. 1-47, 265-331; and Fine, 2005, supra note 126, at. pp. 17-28].

[201] See World Bank and OECD, 1999, supra note 200, at p. v; Bahaa Ali El Dean and Mahmoud Mohieldin, 2001, supra note 200, at p. 22; Ajit Singh, 2002, supra note 200, at p. 6; World Bank, 2002, supra note 162, at p. 139; OECD, 2004, supra note 199, at pp. 2-14; and Amann, 2006, supra note 199, at pp. 1-301.

[202] See Ajit Singh, 2002, supra note 200; OECD, 2004, supra note 199; David Levi-Faur, "The Global Diffusion of Regulatory Capitalism," in David Levi-Faur and Jacint Jordana (eds.), The Rise of Regulatory Capitalism: The Global Diffusion of a New Order, in the Annals of the American Academy of Political and Social Science, Vol. 598, March 2005 (Retrieved in March 2005 from: http://www.fu-berlin.de/ffu/Promo-%20Regulatory%20Capitalism.pdf; and http://poli.haifa.ac.il/~levi/la1.pdf); and Hoekman, B. and Mavroidis, P. C., "Economic Development, Competition Policy and the WTO," Policy Research Working Paper 2917, World Bank, Washington, D.C., October 2002. (See also the OECD country reports on competition law developments from the OECD website).

The development of competition regimes did not, however, result in elimination of regulation. The two existed in the countries in varying mixes as a matter of both policy and the level of market development.[203] The ideology of neo-liberalism encouraged the creation of free markets while the processes of privatisation and deregulation also resulted in the introduction and spread of new forms of regulation and regulators along with the development of the competition regimes.[204] The changes resulted in the introduction of new division of labour between the state and society, increase of delegation of power, and adoption of new regulatory solutions and institutions that are diffused horizontally (i.e. from country to country and sector to sector), top-down (i.e. from the global or regional to the local) and bottom-up (i.e. from the local to the international or regional) though the countries adopted specific solutions that were not necessarily one and the same.[205] The idea of government through autonomous regulatory agencies, which existed originally as a central feature of the American administrative state, also got ground in Western Europe as governments changed and utilities were privatised and liberalized in the twentieth century.[206] The reforms in the two continents then influenced the regulatory solutions in many of the other countries of the globe.[207]

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[203] See OECD, 2004, supra note 199; Amann, 2006, supra note 199; David Levi-Faur and Jacint Jordana, "The Making of a New Regulatory Order," in David Levi-Faur and Jacint Jordana (eds.), supra note 202; Geradin D. et. al., Regulation through Agencies in the EU: A New Paradigm of European Governance (Edward Elgar, Cheltenham-UK and Northampton-USA, 2005); and Monica Prasad, The Politics of Free Markets: The Rise of Neo-liberal Economic Policies in Britain, France, Germany, and the United States (The University of Chicago Press, Chicago (etc.), 2006).

[204] See Ibid.

[205] They caused shift towards a system where the state steers and businesses take the responsibilities of giving service and innovation. They brought about a second level (indirect representative) democracy where citizens elect political representatives and the political representatives delegate authority to expert regulators which enjoy autonomy to formulate and administer policies. [See David Levi-Faur, 2005, supra note 202; Geradin et. al., 2005, supra note 203, at pp. 3-273; Monica Prasad, 2006, supra note 203; Gilardi, F., "The Institutional Foundations of Regulatory Capitalism: The Diffusion of Independent Regulatory Agencies in Western Europe," in David Levi-Faur and Jacint Jordana (eds.), supra note 202; Elkins, Z. and Simmons, B., "On Waves Clusters, and Diffusion: A Conceptual Framework," in David Levi-Faur and Jacint Jordana (eds.), supra note 202; Lazer, D., "Regulatory Capitalism as a Networked Order: The International System as an Informational Network," in David Levi-Faur and Jacint Jordana (eds.), supra note 202; Meseguer C., "Policy Learning, Policy Diffusion, and the Making of a New Order," in David Levi-Faur and Jacint Jordana (eds.), supra note 202; and Jacint Jordana and David Levi-Faur, "The Diffusion of Regulatory Capitalism in Latin America: Sectoral and National Channels in the Making of a New Order," in David Levi-Faur and Jacint Jordana (eds.), supra note 202].

[206] See Gilardi, 2005, supra note 205; and Geradin et. al., 2005, supra note 203, at pp. 3-273.

[207] This happened through information networking, policy learning, international agreements, desire to attract international capital, and need to make policy regimes compatible between trading partners. See David Levi-Faur, 2005, supra note 202; David Levi-Faur and Jacint Jordana, 2005, supra note 203; Jacint Jordana and David Levi-Faur, 2005, supra note 205;

The transition and emerging market economies of Eastern Europe, Asia, Latin America and Africa also mixed the techniques of economic management used in the free market and planned economies because of the dynamics of their transitions.[208] Their governments claimed to play active roles in the effort to bring about economic development and relied on different degrees of government ownership, regulation and competition.[209] They promised to reform their regulatory systems and to promote competition through time.[210] Their competition regimes, however, played marginal roles, in practice and their governments had to intervene to regulate more than the governments of the developed market economies because of little understanding of the uses, dynamics, costs and consequences of the competition regimes and resistance on the part of both the governments, the business community and the public.[211] The regulatory systems and competition laws adopted in many of these economies were also influenced by the systems of their trading partners though the outcomes did not equalize with the systems in the latter.[212] Hence, the solutions shaped in Northern

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Elkins and Simmons, 2005, supra note 205; Lazer, 2005, supra note 205; Meseguer, 2005, supra note 205; Gilardi, 2005, supra note 205; Geradin et. al., 2005, supra note 203, at pp. 3-273; and Monica Prasad, 2006, supra note 203.

[208] See Jhingan, 2002, supra note 43, at pp. 414-425; Pomfret, 2002, supra note 150, at pp. 1-8, 30-133; Amann, 2006, supra note 199; McMahon G. (ed.), Lessons in Economic Policy for Eastern Europe From Latin America (Macmillan Press Ltd., London and St. Martin's Press, Inc., New York, 1996); Akio Hosono and Neantro Saavendra-Rivano (eds.), Development Strategies in East Asia and Latin America (Macmillan Press Ltd., London and St. Martin's Press, Inc., New York - in association with UNCTAD, 1998), at pp. 1-65; Naím M. and Tulchin J. S., Competition Policy, Deregulation and Modernization in Latin America (Lynne Reinner Publishers, Inc., USA and UK, 1999); González J. A. et. al. (eds.), Latin American Macroeconomic Reform: The Second Stage (The University of Chicago Press, Chicago and London, 2003); Gleason, G., Markets and Politics in Central Asia: Structural Reform and Political Change (Routledge Taylor & Francis Group, London-New York, 2003); Schneider, B. R., Business Politics and the State in Twentieth-Century Latin America (Cambridge University Press, Cambridge, UK and others, 2004); and Boyd, R., et. al. (eds.), Political Conflict and Development in East Asia and Latin America (Routledge Taylor & Francis Group, London-New York, 2006).

[209] See Ibid.

[210] See Gerber, 2001, supra note 162, at p. 5; World Bank and OECD, 1999, supra note 200, at p. v; World Bank, 2002, supra note 162, at p. 139; OECD, 2004, supra note 199, at pp. 2-14; Bahaa Ali El Dean and Mahmoud Mohieldin, 2001, supra note 200, at p. 22; Ajit Singh, 2002, supra note 200, at p. 6; Boyd, et. al., 2006, supra note 208; Amann, 2006, supra note 199; and Pradeep, S. M., 2002/2003, "Competition Policy in Developing Countries: An Asia-Pacific Perspective," Bulletin on Asia-Pacific Perspectives 2002/03, United Nations Economic Commission for Asia and the Pacific (UNESCAP), Bangkok, 2002, retrieved in May 2005 from: http://www.unescap.org/pdd/publications/bulletin2002/ch7.pdf, at pp. 80 & 86.

[211] See Gerber, 2001, supra note 162, at p. 5; Pradeep, 2002/2003, supra note 210, at pp. 80 & 86; Schneider, 2004, supra note 208; Amann, 2006, supra note 199; Boyd, et. al., 2006, supra note 208; and Manzetti L. (ed.), Regulatory Policy in Latin America: Post-Privatisation Realities (North-South Center Press, University of Miami, 2000), at pp. 83-101 and 257-275.

[212] See David Levi-Faur and Jacint Jordana, 2005, supra note 203; Jacint Jordana and David Levi-Faur, 2005, supra note 205; Gilardi, 2005, supra note 205; Bahaa Ali El Dean and

America influenced the system in Latin America and those developed by the EU regime influenced the developments in Asia and the countries of Central and Eastern Europe.[213] The EU system also influenced the systems in the countries of the Mediterranean cost from Algeria to Turkey due to movement towards a "Euro-Mediterranean Economic Area" (which was intended to make such countries member to a Euro-Mediterranean (Association) Agreement).[214]

The general design of government intervention in many of the economies is also explained in terms of three competing approaches on the economic roles of government, namely the market-friendly, the developmental state and the market-enhancing approaches.[215] The market-friendly and the developmental state approaches consider markets and the government as rival institutions competing for controlling and coordinating the economy.[216] The market-friendly approach considers direct government intervention in specific industries as harmful or distortive of the allocation of resources.[217] It considers that most economic coordination can be achieved through the market mechanism and private sector organizations.[218] It believes that the role of government should be little more than pursuing macroeconomic stability to provide proper incentives for saving, investment and human capital accumulation and recognizes only government actions that facilitate the development and efficiency of markets such as provision of legal infrastructure for market transactions and goods subject to extreme market failure.[219] The developmental state approach believes that the market failures associated with the problems of coordinating resource mobilization, allocating investment and promoting technological catch-up at the developmental stage level are so pervasive that state intervention is necessary to remedy the problem.[220] It,

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Mahmoud Mohieldin, 2001, supra note 200, at pp. 8, 15-21; and Richard Whish, 2001, supra note 194, at p. 55.

[213] See Ibid.

[214] See Richard Whish, 2001, supra note 194, at p. 55; and Bahaa Ali El Dean and Mahmoud Mohieldin, 2001, supra note 200, at pp. 21-27.

[215] See Fine, 2005, supra note 126, at pp. 17-28; Masahiko Aoki et al. (eds.), The Role of Government in East Asian Economic Development: Comparative Institutional Analysis (The IBRD/World Bank, Clarendon Press, Oxford, 1997), at pp. xv – xvii, 1-35; Jaeho Yeom, "Economic Reform and Government-Business Relations in Korea: Towards an Institutional Approach," in Akio Hosono and Neantro Saavendra-Rivano (eds.), 1998, supra note 208, at pp. 139-143; Noguchi, M., "Introduction: Globalism and Developmentalism," in Lapavitsas and Noguchi (eds.), 2005, supra note 126, at pp. 1-12; Noguchi, M., "Can Asia Find its Own Way of Development? Corporate Governance, System Conflict and Financial Crisis," in Lapavitsas and Noguchi (eds.), 2005, supra note 126, at pp. 34-46; and Amann E. and Baer W., "From the Developmental to the Regulatory State: the Transformation of the Government's impact on the Brazilian Economy," in Amann, E. (ed.), 2006, supra note 199, at pp. 101-113.

[216] See Ibid.

[217] See Masahiko Aoki et. al., 1997, supra note 215, at pp. xv – xvii, & 1; and Jaeho Yeom, 1998, supra note 215, at pp. 141.

[218] See Ibid.

[219] See Ibid.

[220] See Masahiko Aoki et. al., 1997, supra note 215, at pp. xv – xvii, 1-35; Jaeho Yeom, 1998, supra note 215, at pp. 142; Fine, 2005, supra note 126, at pp. 17-28; Amann and Baer, 2006,

accordingly, believes that the government should govern the market.[221] The market-enhancing approach considers the market and the government not as mutually exclusive substitutes but as non-rivals that complement each other.[222] It recognizes both the comparative advantages of the private sector institutions over government, by focusing on their ability to provide incentives and to process information, and the limitations of the private sector institutions to coordinate themselves and to solve all market imperfections.[223] It, accordingly, recognizes the usefulness of government policy to improve private sector capacity, to solve coordination problems and to overcome market imperfections.[224] It considers government not as neutral arbiter exogenously attached to the economic system to correct the failures of private coordination but as an endogenous (integral) element of the system with the same informational and incentive constraints as the other economic agents in the system.[225] It also believes that a significant fraction of economic activity is coordinated neither by the market itself nor within a government bureaucracy but by decentralized private sector firms and intermediaries and that the role of government should be to promote, complement and coordinate the activities of these institutions.[226] It, therefore, takes government as promoter of private-sector development and coordination.[227] Hence, all the three approaches consider the market as the initial basis for economic organization and recognize that markets alone are imperfect.[228] They, however, differ in the mechanism for solving the market imperfections. The market-friendly approach believes that most market imperfections can be solved by private sector institutions.[229] It believes that coordination problems should be resolved by market-based institutions; takes markets and firms as the primary means of resolving coordination problems; and advocates that the role of government should be limited to the framing of competition and the provision of public goods.[230] The developmental state approach considers government intervention as a primary solution.[231] It believes that the government has better information and judgment than the private sector and that many important coordination problems should be resolved by it.[232] It, unlike the market-friendly approach which

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supra note 215, at pp. 101-113; and Silva P., "Government-Business Relations and Economic Performance in South Korea and Chile: a Political Perspective," in Boyd, et. al., 2006, supra note 208, at pp. 74-117.

[221] See Ibid.

[222] See Masahiko Aoki et. al., 1997, supra note 215, at pp. xv – xvii, 1-35; Jaeho Yeom, 1998, supra note 215, at pp. 139-143; Fine, 2005, supra note 126, at pp. 17-28; Noguchi, M., "Introduction: Globalism and Developmentalism", supra note 215, at pp. 1-12; and Noguchi, M., "Can Asia Find its Own Way of Development? ...", supra note 215,, at pp. 34-46.

[223] See Ibid.

[224] See Ibid.

[225] See Ibid.

[226] See Ibid.

[227] See Ibid.

[228] See Ibid.

[229] See Ibid.

[230] See Ibid.

[231] See Ibid.

[232] See Ibid.

recommends minimum government action to correct market failure, believes that market failures are so pervasive that they call for maximum intervention of the government.[233] The market-enhancing approach emphasizes on the use of government policy to promote private sector coordination.[234] It believes that government should not be responsible to solve coordination problems by substituting private order but to complement and foster the latter such as by facilitating the development of private sector institutions that can overcome the coordination failure.[235] It believes in the ability of the private sector to coordinate a large fraction of economic activity (whether across markets, within firms, by using intermediaries, or jointly with the government) and recognizes the potential for the government to facilitate the development of this ability.[236]

Hence, the Western European and Northern American governments lived as mercantilist totalitarian governments (exhibiting features of the developmental state approach) until both continents recognized the potential economic benefits of democratisation and competition in the 18th and 19th centuries.[237] They were transformed into market-friendly governments as their markets grew beginning the 19th century.[238] The Latin American states followed state-led industrialization and import substitution policies in accordance with the developmental state approach in the period between World War II and the late 1970s.[239] Most of them rushed into privatisation, free trade and financial liberalization as of the late 1970s because of weak institutional expansion of the developmental state approach and criticism of the approach for causing the debt crisis and hyperinflation of the 1970s.[240] They strived towards building regulatory capitalism along the line of the market-friendly approach following crisis of the developmental state approach and the advent of economic liberalism and democratic governance in the post 1970s.[241] They established new regulatory agencies

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[233] See Ibid.
[234] See Ibid.
[235] See Ibid.
[236] See Ibid.
[237] See Gleason, 2003, supra note 208, at pp. 9-10; Gerber, 2001, supra note 162, at pp. 1, 6-8, 11, 232-265; World Bank, 2002, supra note 162, at p. 139; and Peritz, 1996/2000, supra note 165, at pp. 5-8 & 9-299.
[238] See Ibid.
[239] See Jacint Jordana and David Levi-Faur, 2005, supra note 205; Schneider, 2004, supra note 208, at pp. 3-261; Boyd, et. al., 2006, supra note 208, at pp. 1-265; Amann, 2006, supra note 199, at pp. 101-176; Akio Hosono and Neantro Saavendra-Rivano (eds.), 1998, supra note 208, at pp. 1-14, 53-65, 69-86, 88-103, 106-120 and 122-136.
[240] See Ibid.
[241] See Ibid. [See Akio Hosono and Neantro Saavendra-Rivano, 1998, supra note 208; Schneider, 2004, supra note 208, at pp. 3-261; Boyd, et. al., 2006, supra note 208, at pp. 1-265; and Lapavitsas and Noguchi (eds.), 2005, supra note 126) for contrast between the Latin American and Asian experiences; Amann, 2006, supra note 199, at pp. 1-301 for contrast between the Latin American and African experiences; and Manzetti, 2000, supra note 211, at pp. 1-275 and Amann, 2006, supra note 199, at pp. 101-176 for the post-privatisation developments in Latin America].

and implemented reforms through diffusion of practices.[242] The socialist governments of Asia, Europe and the rest of the world took the developmental state approach along the lines of Marxism until the 1990s.[243] They, following the 1917 Revolution of Russia, nationalised their market institutions in favour of the state enterprise and made their governments responsible for all types of economic activity until that decade.[244] They were influenced gradually by the Western approach of market-friendly state following the reforms of the late 1980s and 1990s.[245] The USSR and its Republics allowed the taking of private economic initiative and reformed the economic roles of their governments by shifting from the Soviet corporate form (i.e. the state enterprise) to new commercial organizations in which the state retained ownership and managerial interests (i.e. the joint stock societies) as of the late 1980s.[246] China re-shaped the economic roles of its government within a blend of socialism and free market.[247] It

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[242] The idea of governance through autonomous regulatory agencies had historical roots in the region as early as the 1920s. But, the rise of such institutions was slow and limited to the financial sector in the 1980s while it was spectacular after 1992. Only 43 regulatory agencies existed in the region before 1979 while their number grew to more than 138 in the post 2002 period. [See Jacint Jordana and David Levi-Faur, 2005, supra note 205].

[243] See Pomfret, 2002, supra note 150, at pp. 2-3, 9-26; and Lucas, S. and Maltsev, Y., "The Development of Corporate Law in the Former Soviet Republics," International and Comparative Law Quarterly, Vol. 45, April 1996.

[244] Pre-revolution USSR knew private sector institutions in form of simple partnerships and joint stock societies. It abolished these institutions in 1918 following the 1917 Revolution and recognized only joint activity through the state enterprise (with the idea of 'operative management') in the period between 1918 and 1986. It recognized state enterprise managerial freedom in the 1960s due to 'economic law' movements. It launched its Perestroika in the second half of the 1980s. [See Lucas and Maltsev, 1996, supra note 243; and Pomfret, 2002, supra note 150, at pp. 2-3, 9-26].

[245] See Lucas and Maltsev, 1996, supra note 243, at pp. 386-388; Gleason, 2003, supra note 208, at pp. 1-149; and Pomfret, 2002, supra note 150, at pp. 1-8, 30-132.

[246] The initial USSR reforms of Perestroika marked recognition of individual labour and private economic activity through juridical persons relatively free from state control by adoption of the law of individual labour activity of 1986, the law of cooperatives of 1988 and the leased enterprise system that replaced the cooperative system in 1989. The full Perestroika, launched in 1990, marked full commitment to the end of the command economy by adoption of all union laws on ownership, enterprise and joint stock societies that i) recognized labour income; ii) replaced the communist concept of 'personal ownership' by the concept of 'ownership' by citizens; iii) introduced the concept of 'collective ownership' through 'joint stock societies'; and iv) introduced the use of individual/family/ and collective enterprises along with the 'joint stock societies'. The 1991 reforms allowed the creation of 'small enterprises' and undertaking of 'entrepreneurial activity'. The republics followed the all union reforms of 1990 and 1991 by adopting laws that allowed private economic activity in 1990 and 1991. The state enterprises continued with the concept of '(full) economic jurisdiction' until they were privatized into joint stock societies (that allowed state ownership and management participation). [See Lucas and Maltsev, 1996, supra note 243].

[247] See Pomfret, 2002, supra note 150, at pp. 54-57; ONG, K.T.W., and Baxter, C.R., "A Comparative Study of the Fundamental Elements of Chinese and English Company Law," International and Comparative Law Quarterly, Vol. 48, January 1999, at pp. 91-92; and

changed its system of privately owned companies into communist party-led state owned companies when it adopted the Marxist ideology in 1949 and followed a planned economic system in the 1950s, 60s and 70s.[248] It then shifted its emphasis from class struggle under traditional Marxism to struggle for economic development under 'open door policy' in 1978 and reintroduced the system of private business organization through enactment of a Joint Venture law in 1979, separate pieces of legislation for business entities between 1979 and 1994, and a National Corporation Law of China in July 1994.[249] It, through the Corporation Law of 1994, opted to adopt the business organizational structure of Western capitalism (mainly of the UK type) in a political and economic regime of Socialist-Market economy, to remove the state from direct management of business operations (though it continued to retain majority ownership in the largest enterprises), to restructure the organization and management of state-owned enterprises, to promote the development of small private enterprises and thereby to promote efficiency and productivity through competition.[250] It endorsed the Socialist-Market philosophy through amendment of its 1982 constitution in 1993, 1999 and 2004.[251] It, under the Socialist-Market philosophy and the Corporation Law of 1994, considered the private sector not as substitute for state industry but as necessary supplement to it and necessary evil to regulate closely.[252] The Socialist Republic of Vietnam followed the approach of China when it adopted its 1992 constitution.[253] Eastern Europe started to reject the system of central planning during the second half of 1989.[254] Both these and the other socialist countries around the world intensified their reforms towards the market friendly approach of the West in the 1990s and thereafter.[255] The governments of Eastern Asia that did not endorse the socialism (including Japan) focused on facilitation of private sector coordination along lines that look like the market enhancing approach.[256] Their economic developments were brought about through a shared growth process in which both the private (rural and urban) sectors of the economy and the administrative bureaus of the governments were coordinated, the latter acting as quasi-agents of private interests by absorbing and representing them in bureaucratic processes.[257]

Marukawa, T., "Evolutionary Privatisation in China," in Lapavitsas and Noguchi (eds.), 2005, supra note 126, at pp. 136-148.

[248] See Ibid.

[249] See ONG and Baxter, 1999, supra note 247, at pp. 92-93, 98.

[250] See Id., at pp. 93, 95, 97-99.

[251] See at articles 1, 3, 5-28, 42, 44, 45, 85, 86 & 89 of the constitution as amended.

[252] See ONG and Baxter, 1999, supra note 247, at pp. 97 & 102.

[253] See at articles 1, 2, 6, 15-29, 50, 57, 58, 61, 62, 67, 83, 84, 101, 103, 109, 110, 112, 114 & 116 of the constitution; and Pomfret, 2002, supra note 150, at p. 3-4.

[254] See Pomfret, 2002, supra note 150, at p. 26.

[255] See Lucas and Maltsev, 1996, supra note 243; and Pomfret, 2002, supra note 150, at pp. 30-132.

[256] See Masahiko Aoki et. al., 1997, supra note 215, at pp. 24-30, 41-131, 208-372; Akio Hosono and Neantro Saavendra-Rivano (eds.), 1998, supra note 208, at pp. 1-14, 17-34, 53-65, 144-154 & 157-173; and Lapavitsas and Noguchi (eds.), 2005, supra note 126, at pp. 1-12, 17-28, 34-46, 63-83 & 117-133.

[257] See Ibid.

The African governments intervened in their economies significantly in the 1960s because of perception that the post-independence African state had the responsibility to liberate the population from poverty, disease and illiteracy.[258] Many, however, questioned the sheer size of those governments following the rise of the liberalization schools in the developed countries in the late 1970s and early 1980s.[259] They criticized the state-led socio-economic system in the continent for being self-serving and destructive unlike the state intervention in the East Asian economies which played positive role.[260] They criticized it for failure to meet the goals of political and economic liberation and for being an institution to advance the economic interests of the ruling elite or to create patronage with certain politically influential social groups or segments of the population.[261] The IMF, World Bank and other powers led by USA, accordingly, sponsored and tested a structural adjustment program in many Sub-Saharan African countries in the 1980s and 1990s to curb the poor state-led socio-economic system and to replace the State by the Market mechanism.[262] The African markets, however, also failed to coordinate the economy.[263] They were criticized for i) juxtaposing the modern and the subsistent producer sectors; ii) for not enabling the peasantry to switch their production plans according to demands of the consumers and transfer their own needs into effective aggregate demand; iii) for being guided largely by international as opposed to domestic needs; iv) for marginalizing large segment of the population by making the allocation of resources elitist and serving the interests of the better-off minority; and v) for neglecting modernization of the subsistence sector.[264] Many, therefore, advised the African governments to reform themselves, restructure their markets and create partnership with the markets so that they will sustain the socio-economic development in the continent.[265] They recommended the creation of state-

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[258] See Kidane Mengisteab, "A Partnership of the State and the Market in African Development: What is an Appropriate Strategy Mix?" in Kidane Mengisteab and Logan, B. I., (eds.), Beyond Economic Liberalization in Africa: Structural Adjustment and the Alternatives (Zed Books Ltd, London and New Jersey, and The Southern Africa Political Economy Series (SAPES), South Africa, 1995), at p. 163.

[259] See Id., at pp. 164-178.

[260] See Ibid.

[261] See Ibid.

[262] The program included three groups of reforms, i.e. deflationary measures including the removal of subsidies and reduction of public expenditures; institutional changes including privatisation and decontrol of prices, interest rates, imports, and foreign exchange; and expenditure switching measures including devaluation and export promotion. See Id., at pp. 163-164.

[263] See Id., at pp.173-175.

[264] See Ibid.

[265] They recommended that the African states should undergo both economic and political democratization and avoid authoritarianism; establish a properly functioning domestic market; encourage mass and civil society participation in decision making; provide the peasantry with voice; access resources to the general population; correct the inequalities among ethnic groups and regions; narrow the gap between urban and rural areas; correct the dualistic development of the modern urban and the subsistent rural sectors; liberalize the economy cautiously; redefine their position in the international division of labour; and integrate internally, regionally and

market partnership (hence the market enhancing approach) as, on one hand, there is the need for reform towards market liberalization (as the African state, represented by state owned-enterprises, was self-serving and inefficient in meeting the needs of the population) and, on the other, the African economies lack the optimal conditions for efficient market operation in reality (hence requiring state intervention to institutionalize a workable market system and sustainable development).[266] They also recommended that the appropriate mix between state and market in each of the African countries has to be determined based on the level of diversification of the economy, the degree of transformation of the subsistent sector and the level of development of the private sector in each country.[267] The governments also tried to promote the development of their markets and to endorse the idea of state-market partnership since the advent of their reforms in the 1990s though they differed in their successes.[268]

2.2. The Rationale for Regulation

The planned economy is based primarily on a belief that the economy can be led best according to desirable objectives decided in the political process. The reason for its regulation is, therefore, mainly ideology. The market economy is, on the contrary, based on belief that competition maximizes consumer welfare both by increasing production and allocation efficiency and encouraging invention.[269] It believes that i) the market decides on what to produce, on how to allocate resources in the production process and on to whom to distribute the various products; that ii) competition among producers will determine the right producer of goods and services which will have the highest quality and the lowest price; and that iii) consumers can influence the decision on what and how much to produce through their willingness or refusal to buy.[270] It

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internationally. [See Kamidza R. et. al.., "The Role of the State in Development in the SADC Region: Does NEPAD Provide a New Paradigm?", Paper prepared for an International Conference hosted by the Third World Network (TWN) and the Council for Development of Social Research in Africa (CODESRIA) on "Africa and Development Challenges of the New Millennium", Accra, Ghana, 23 to 26 April 2002, retrieved on 25 July 2007 from: http://www.codesria.org/Links/conferences/Nepad/matlosa.pdf, at pp. 2-22; and Tawfik R. M., "NEPAD and African Development: Towards a New Partnership between Development Actors in Africa," Retrieved in July 2007 from: http://www.codesria.org/Links/conferences/general_assembly11/papers/tawfik.pdf, at pp. 1-13; Kidane Mengisteab, 1995, supra note 258, at pp. 164-181; and Kidane Mengisteab and Logan, 1995, supra note 258, at pp. 6-12, 292-294 & 163-268]. [See also World Bank, Can Africa Claim the 21st Century (Washington and Paris, 2000) for the reforms advocated by the African Development Bank, the African Economic Research Consortium, the Global Coalition for Africa, the United Nations Economic Commission for Africa and the World Bank as the century turned].

[266] See Ibid.

[267] See Ibid.

[268] See World Bank, 2000, supra note 265; and Amann, 2006, supra note 199, at pp. 179-301.

[269] See Pierce and Gellhorn, 1994, supra note 153, at p. 19-20, 42; and Ogus, A.I., Regulation: Legal Form and Economic Theory (Clarendon Press, Oxford New York, 1996), at pp. 29-54.

[270] See Ibid.

recognizes the use of government regulation and ownership only when there are flaws in the operation of competition that can not be corrected by antitrust laws.[271]

The developed market economies, therefore, used to justify the use of government regulation by i) the idea of market failure (which comprises the problems of monopoly, public goods, destructive competition, scarcity, externality, information deficit, bounded rationality and third party paying) and ii) the needs of economic co-ordination, macro-economic and social policy consideration, and protecting existing regulation.[272] They justified it by monopoly when economics of scale available for manufacturing a product or for providing a service were so large that the relevant market could be served at the least cost by a single firm. They justified it by the idea of public good when the market refused to supply these goods because of the non-profitability and free ride problems that follow the non-rivalry and non-excludable nature of the goods. They justified it by destructive competition when competition disabled firms from recovering their costs. They justified it by scarcity when unexpected scarcity caused excessive rent or windfall profit and generally changed the distribution of wealth. They justified it by externalities when the market led a firm to produce more detrimental effects to society than the benefits. They justified it by information deficit and bounded rationality when lack of information inhibited the making of prudent decisions and called for consumer protection. They justified it by the needs of coordination when the market failed to set standards and coordinate actions by itself as in the case of road traffic. They justified it by macro-economic and social policy considerations when the market failed to address the objectives of economic growth, stability and fair wealth redistribution. They justified it by the need of protecting existing regulation when competitors in an unregulated market threatened the actors in a regulated market and defeated the purposes of existing regulation. They justified it by the problem of third party paying and decision making when the decisions to buy a product, to pay for it and to derive the benefits of obtaining the product were made by different individuals and institutions instead of by same person as in the case of the doctor-patient relationship.

The transition and emerging market economies of Eastern Europe, Asia and Latin America also justified their government regulations by the dynamics of their transitions to the free market.[273] The economic reforms in such economies included the objectives of progressively shifting from a command to a market economy, exposing the domestic economy to the rigors of domestic and international competition and bringing about economic development.[274] The governments in the economies had to implement

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[271] See Ibid.

[272] See Pierce and Gellhorn, 1994, supra note 153, at pp. 43-69; and Ogus, 1996, supra note 269, at pp. 29-54.

[273] See McMahon, 1996, supra note 208; Akio Hosono and Neantro Saavendra-Rivano, 1998, supra note 208, at pp. 1-65; Naím and Tulchin, 1999, supra note 208; Jhingan, 2002, supra note 43, at pp. 414-425; Pomfret, 2002, supra note 150, at pp. 1-8, 30-133; González et. al., 2003, supra note 208; Gleason, 2003, supra note 208; Schneider, 2004, supra note 208; Boyd, et. al., 2006, supra note 208; and Amann, 2006, supra note 199.

[274] See Ibid.

several structural adjustment measures; reform their appearance in the markets; put the private sectors and the market mechanism at the center of the economy; and deregulate and re-regulate from time to time.[275] They had to redesign their participation in economic activities; correct and regulate the market in various ways; and plan and coordinate their competition, regulatory, trade, monetary and fiscal policies.[276] They had to shift their roles in the economy from direct ownership and control into the creation of conditions for effective operation of the market; the provision of infrastructure, goods and services which the market can not provide; and the implementation of corrective measures that are necessary to ensure stability, efficiency and fairness in the allocation of resources and distribution of wealth.[277] They, therefore, had to justify their interventions by the transitory nature of their economies, the existence of private and public actors in their markets, the presence of market imperfections and challenges to the market mechanisms they introduced, and the need for achieving several development objectives.[278] They, accordingly, needed a role which is more extensive and active than the role the governments in the developed liberal economies play and less extensive than the role the governments in the planned economies play as they had to both promote liberalism and face a number of imperfections and development challenges due to the newness of their markets.[279] The reforming African governments have also seemed to follow the path for similar reasons.[280]

2.3. The Constitutional Basis of Regulation

The scope and manner of government intervention in the sphere of private economic activities and the shape of regulation, competition and the decision of actors within the economic system are matters of economic constitutionalism that call for constitutional definition.[281] Most of the countries do not, however, deal with the economic roles of their governments in their constitutions expressly and directly despite their attempts to list some economic powers of the governments in the constitutions.[282] They usually focus on questions of political power, civil liberties, justice and the like in their constitutions and delimit the scope for government regulation of private affairs only indirectly by recognizing individual property and labour rights; endorsing the principles of freedom of contract, limited government, due process and rule of law; and

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[275] See Ibid.
[276] See Ibid.
[277] See Ibid.
[278] See Ibid.
[279] See Ibid.
[280] See World Bank, 2000, supra note 265; and Amann, 2006, supra note 199, at pp. 179-301.
[281] See Voigt S. and Wagener H. J. (eds.), Constitutions, Markets and Law: Recent Experiences in Transition Economies (Edward Elgar, Cheltenham-UK and Northampton-USA, 2002); and Gerber, 2001, supra note 162, at pp. ix.
[282] See Murrphy, W. F., and Tanenhaus, J., Comparative Constitutional Law: Cases and Commentaries (St. Martin's Press, Inc., New York, 1977), at pp. 261-307; and Voigt and Wagener, 2002, supra note 281.

encouraging economic individualism.[283] Scholars have also tended to consider constitutions as instruments of social contract for legitimising the state and its actions in terms of fairness, justice or efficiency until a new instrumentalist view rose recently to consider constitutions as economic coordination-devices.[284]

Hence, only forty countries around the world have expressly determined the economic roles of their governments by their constitutions. Thirty three of them have determined the economic roles of their governments expressly and delegated the power to make specific policies and plans to the latter on top of their recognition of private property rights and economic freedoms.[285] Twenty nine of these countries have adopted the free

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[283] See Ibid.

[284] I favor the "constitution as coordination-device" view as opposed to the "constitution-as-contract" view in the constitutional political economy parlance (See Voigt and Wagener, 2002, supra note 281, for discussion about these views and the case in the transition and emerging market economies).

[285] See the 1998 constitution of Albania, at articles 4 & 11; the 1993 constitution of Andorra, at articles 27-32; the 1992 constitution of Angola, at articles 7,9-14, 46, 88-90, 105, 110, 112 & 115; the 1995 constitution of Azerbaijan, at articles 13-16, 29, 30, 35, 38, 51, 59, 60 & 132; the 1994 constitution of Belarus, at articles 2, 13, 41, 44, 45, 47, 79, 83, 95, 100, 141 & 145; the 1988 constitution of Brazil as amended in 1992,1993 and 1995, at articles 1, 3, 5, 6, 7, 18, 21, 22, 24, 40, 48, 84, 164, 165, 170-204, 208, 209, 214, 218, 219, 225, 237, & 230; the 1991 constitution of Bulgaria, at articles 17-21, 48, 51, 52 & 105; the 1992 constitution of Cape Verde as amendment in 1999, at articles 65-68, 72, 75, 88-96, 196, 197, 215 & 217; the 1982 constitution of China as amended in 1988, 1993, 1999, and 2004, at articles 1, 3, 5-28, 42, 44, 45, 85, 86 & 89; the 1991 constitution of Columbia, at articles 1, 2, 5, 25, 26, 34, 38, 44, 47-50, 57-66, 332-344 & 365-373; the 1992 Constitution of Ghana, at articles 18, 20, 23, 34, 36, 37, 40, 76, 86, 87 & 89; the 1987 constitution of Haiti, at articles 35-39, 155, 156, 220, 224-226 & 245-252; the 1949 constitution of Hungary as amended until 2003, at articles 8-13, 17, 19, 32D, 33, 35, 70B, 70C & 70E; the 1950 constitution of India as consolidated up to the seventy-eighth amendment act of Aug 1995, at articles 37-39, 41, 43A, 47, 48, 52, 53, 73, 74, 298, 300A & 301-307; the 1979 constitution of Iran as amended in July 1989, at articles 1-4, 28, 29, 43-49, 71, 72, 81-83, 126 & 134; the 1937 constitution of Ireland as last amended 2002, at the preamble and articles 15, 28, 43 & 45; the 1992 constitution of Paraguay, at articles 69, 70, 86, 95, 103, 107-116, 176-178, 242, 243, 246 & 285-287; the 1987 constitution of the Philippines, at articles II (sections 1, 5, 9, 10, 11, 18-21, 28), III (sections 1, 9, 10), XII (sections 1-22) & XIII (sections 1-19); the 1976 constitution of Portugal, at articles 9, 47, 58-66, 71-72, 80-103, 161-163, 165, 188, 192, 200, 201 & 258; the 1929 constitution of Qatar, at articles 1, 4, 8, 26-29, 31, 62, 67, 120 & 121; the 1991 constitution of Romania, at articles 1, 33, 38, 41, 43, 46, 72, 88, 101, 102, 134 & 135; the 2001 constitution of Somaliland, at articles 11, 13, 19, 20, 31, 90 & 94; the constitution of Spain as last amended in 1992, at articles 10, 33-35, 38-43, 49-54, 97, 98, 128-133, 137, 138 & 149; the constitution of Sri Lanka as amended in 2000, at articles 20, 21, 25, 30, 52, 58, 65, 91, 137 & second schedule (Lists I and II); the 1987 constitution of Suriname as amended in 1992, at articles 5, 6, 24-27, 34, 36, 40-44, 50, 69-73, 115, 122 & 154; the 2005 constitution of Swaziland, at articles 15, 31, 33, 34, 57, 60, 61, 65, 67, 70, 71, 76, 196, 197, 207 & 211-218; the 1999 federal constitution of Swiss Confederation as amended in 2003 and 2004, at articles 2, 6, 26, 27, 33, 35, 36, 41, 44-56, 73, 74, 81, 89, 94-120, 126-135, 146, 164, 171-180, 186 & 187; the 1946 constitution of Taiwan, at articles 15, 16, 22, 53, 57, 59, 62, 83, 107-111, 142-169 (with its additional articles of July 1994, at articles 1, 9 & 10); the 1997

market principle expressly while two, namely China (under its 1982 constitution as amended in 1993, 1999 and 2004) and the Socialist Republic of Vietnam (under its 1992 constitution) have followed a policy of socialist market economy and the other two, namely the Islamic Republic of Iran (under its 1979 constitution as amended in July 1989) and the Yemen Republic (under its 1991 constitution) have adopted the free market principle under an Islamic Economic Jurisprudence.[286] The other seven have expressly determined the economic roles of their governments by making the system socialist or state controlled in the main and delegating the power to make specific policies to the government.[287]

Thirty five other countries have recognized private property rights and economic freedoms and authorized their parliaments or governments to determine the government economic roles by way of delegating the policy making and planning power.[288] Thirty

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constitution of Thailand, at sections 1-4, 12, 13, 48-50, 52, 54, 55, 57, 77, 81-90 & 211; the 1996 constitution of Ukraine, at articles 1, 3, 5, 11, 13-16, 23, 41-43, 46-50, 75, 85, 92, 95, 99, 100, 113, 114 & 116; the 1992 constitution of Vietnam, at articles 1, 2, 6, 15-29, 50, 57, 58, 61, 62, 67, 83, 84, 101, 103, 109, 110, 112, 114 & 116; the 1991 constitution of Yemen, at articles 3, 6-17, 19, 21, 26, 40, 71, 72, 94, 102, 103, 109 & 110; and the constitutional charter of Serbia and Montenegro, at arts 3, 8, 9, 11, 12, 33 & 43-45. I have accessed the constitutions of the countries indicated in this and the subsequent citations through the constitution finder database of the T.C. Williams School of Law of the University of Richmond available at http://confinder.richmond.edu/.

[286] See Ibid.

[287] See the 1992 constitution of Cuba, at articles 1, 5-7, 9, 10, 12, 14-27, 45, 47-50, 60, 64, 75 & 98; the 1971 constitution of Egypt as amended in May l 980, at articles 4, 17, 23-39, 86, 122, 123 & 138; the 1980 constitution of Guyana as amended in 1996, at articles 1, 9-11, 13-22, 24-26, 32, 38-40, 142 & 213-215A; the 1945 constitution of Indonesia as amended, at articles 33 & 34 of the constitution and article 28G of the Second Amendment; the constitution of North Korea, at articles 1, 5, 8, 19, 20, 21-38, 63, 70, 72, 84, 91, 117, 119, 122 &134; the 1973 constitution of Syria, at the preamble & articles 1-3, 13-27, 36, 46, 47, 50, 71-73, 85, 91-94, 115, 118, 119 & 126-128; and the 1977 constitution of Soviet Union, at articles 1-5, 10-27, 39, 40, 42-44, 70-73, 108-109, 128, 129 & 131.

[288] See the 1963 constitution of Afghanistan, at articles 29 & 37 (with the 2001 draft constitution at articles 380 & 600); the 1989-1996 constitution of Algeria, at articles 37, 83, 84 & 122; the 1853 constitution of Argentina as amended in 1860, 1866, 1898, 1957 and 1994, at articles 14, 14bis, 17, 19 & 75; the 1995 constitution of Armenia, at articles 8, 28, 33, 34, 74 & 89; the 2002 constitution of Bahrain, at articles 8-16, 88, 117 & 118; the 1972 constitution of Cameroon as amended in 1996, at the preamble, articles 5, 11, 14, 25, 26, 34 & 35; the 2003 constitution of Chechnya, at articles 3, 9, 31-34, 36-39, 70, 84 & 93; the 1992 constitution of Congo (Brazzaville), at articles 30-32, 36, 61, 62, 88-90, 103-105, 107, 122 & 152-155; the 1990 constitution of Croatia as consolidated in June 15, 2001, at articles 1, 48-58, 108 & 112; the 1960 constitution of Cyprus, at articles 9, 23, 25, 26, 54 & 118-121; the 1996 (draft) constitution of Eritrea, at articles 10, 21, 23, 32, 42, 46 & 55; the 1992 constitution of Estonia, at articles 10, 28, 29, 31, 32, 39, 86, 87, 111 & 112; the 1995 constitution of Ethiopia, at articles 13, 40-43, 55(10), 72, 73, 77(4), 77(6) & 85-92; the 1999 constitution of Finland, at articles 15, 18, 19, 62, 91; the 1958 constitution of France as amended in March 2003, at articles 11, 20, 34-39, 49, 50 & 69-71; the 1995 constitution of Georgia as amended in 2004, at articles 7, 21, 23, 30, 31, 37, 38, 48 & 69 (with the Constitutional Law of 6 February 2004 at articles 78, 79, 81, 95 & 96); the

four of them have made the delegation within the free market idea and one of them, namely Tunisia (under its 1959 Constitution as amended in June 2002) has made it under its Islamic Economic Jurisprudence.[289] Eleven other countries have recognized private property rights and economic freedoms and delegated only few specific economic powers to their parliaments or governments.[290] Two of these countries, namely the Islamic Republic of Pakistan (under its constitutional amendment Orders of 2002 and Act of 2003) and Saudi Arabia (under its 1992 constitution), have made this within the framework of their Islamic Economic Jurisprudence while the rest have assumed a secular free market.[291] Twenty nine other countries have recognized private property rights and economic freedom without saying anything on the economic roles of their governments.[292] Four other countries have delegated few economic powers to

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1949 Basic Law of Germany up to the 50th amendment of May 2002, at articles 12, 14, 15, 65, 70, 73-75, 88 & 91a; the constitution of Greek as amended in 2001, at articles 5, 17, 25, 73, 81-83, 106 & 107; the 1996 constitution of Equatorial Guinea, at articles 5, 26-29, 36, 44, 45, 47, 60 & 76; the 1990 Basic Law of Hong Kong, at articles 4-7, 11, 33, 36, 48, 59, 60, 62, 73, 102 & 105-135; the 1947 constitution of Italy, at articles 2, 4, 38, 41-47, 94-96 & 99; the 1946 constitution of Japan, at articles 13, 25, 27, 29, 73; the 1952 constitution of Jordan, at articles 11, 12, 23 & 45-51; the constitution of Kazakhstan, at articles 1, 6, 24, 26, 28, 39, 40, 53, 61, 64, 66 & 67; the 1983 constitution of Northern Cyprus, at articles 36, 46-50, 55-58, 66, 134 & 159; the 1996 Draft Basic Law of Palestine, at articles 8, 19, 20, 23, 47, 53, 60, 67, 86 & 87; the 1997 constitution of Poland, at articles 20-24, 46, 64-69 & 154; the 1993 constitution Russian Federation, at articles 7, 8, 9, 34-37, 39, 41, 80, 84, 106 & 114; the 1991 constitution of Rwanda, at articles 23, 30, 50, 51 & 78; the 1992 constitution of Slovakia, at articles 20, 35, 37, 39, 40, 55, 56, 86 & 119; the 1996 constitution of South Africa, as amended in 1999, at articles 22, 25, 27, 43, 44, 85, 104, 156, Schedule 4 parts A and B & Schedule 5 parts A and B; the 1994 constitution of Tajikistan, at articles 1, 12, 13, 32, 35, 36, 38, 39, 48, 49, 60, 64, 65, 73 & 75; the 1991 Charter of Tibet, at articles 3, 4, 5, 12, 15, 16, 18, 19, 20 & 93; the 1959 constitution of Tunisia as amended in 2002, at articles 1, 5, 14, 18, 34-38, 49, 58, 60 & 70; and the 1991 constitution of Zambia, at articles 11, 16, 44, 46, 47, 49, 50, 62 & 110.

[289] See Ibid.

[290] See the 1929 Constitution of Austria, at articles 10-12 & 149; the 1867-1992 Constitution Act of Canada, at articles 1, 36, 91 & 92; the 1980 constitution of Chile, at articles 1, 8, 19 (16-18 and 21-26), 20, 32, 60, 97 & 98; the 1949 constitution of Costa Rica, at articles 45-47, 50, 56, 64-66 & 73; the 2004 interim constitution of Iraq, at articles 4, 14, 16, 22, 24 & 25; the constitution of Pakistan (including the Seventeenth Amendment Act of 2003 and the Legal Framework Order of 2002), at articles 18, 23, 24, 29-31, 172, 173 & Fourth schedule to article 70(4); the 1952 constitution of Puerto Rico, at articles II (sections 9, 16, 20) & VI (sections 12, 13, 14, 19); the 1992 constitution of Saudi Arabia, at articles 5, 8, 14-22, 26-28, 31, 59, 67 & 75; the 1991 constitution of Slovenia as amended in 2000, at articles 33, 49, 50-52, 66-71, 74, 75 & 152; the constitution of Sweden as last amended in 1979, at Chap.1 (articles 1, 2, 3), Chap 2 (articles 1, 18, 20, 22, 23), Chap. 5 (article 1), Chap. 8 (articles 2, 3), Chap. 9 (12-14) & Chap. 10 (with the Riksdag Act amendment of 1974, at arts 6 and 7); and the 1787 constitution of USA (including the fifth, tenth and fourteenth amendments).

[291] See Ibid.

[292] See the 1981 Constitution Order of Antigua and Barbuda; the 1973 Independence Order of Bahamas, at articles 15, 27 & 122-124; the 1966 Independence Order of Barbados, at articles 11, 16, 103 & 104; the 1970 constitution of Belgium, at articles 16, 17 & 179; the 1981 constitution of Belize, at articles 15, 17, 112 & 113; the 1995 constitution of Bosnia and

their parliaments and governments without ruling both on the economic roles of their governments and the private property rights and economic freedoms of their citizens expressly though they have promoted the latter in practice.[293]

The countries that recognized the principles of economic freedom and democracy have also required that the interventions of their governments in the economy and, hence the restrictions to private economic freedom and competition, have to be justified by purposes which have to be accepted ultimately by the majority of their societies.[294]

Herzegovina, at articles I, II, III & VII; the constitution of Cook Islands, at art, 64; the 1992 constitution of Czech Republic, at articles 1 & 10; the 1953 constitution of Denmark, at articles 73-75; the 1978 constitution of Dominica as amended in 1984, at articles 1, 6, 95 & 96; the 1997 constitution of Fiji Islands, at articles 6, 40 & 44; the 1973 Constitution Order of Grenada, at articles 6, 92 & 93; the 1944 constitution of Iceland (as amended in 1984, 1991, 1995 and 1999), at articles 72 & 76; the 1975 Basic Law of Israel, at sections 1-3, 3b, 4 & 5 (with the 1992 Basic Law, at sections 1, 1a & 3 and the 1994 Basic Law, at sections 1-10); the 1962 Constitution Order of Jamaica as amended in 1999, a Part I chap. III and Part III; the constitution of Kenya as amended in 1997, at articles 75, 112 & 113; the 1814 constitution of Norway as last amended in 1995, at articles 1, 49, 75, 101, 105, 110 & 110c; the 1983 Constitution Order of St. Kitts and Nevis, at articles 8, 88 & 89; the 1978 constitution of Saint Lucia, at articles 6, 97 & 98; the 1979 Constitution Order of Saint Vincent and the Grenadines, at articles 6, 88 & 89; the constitution of Western Samoa, at article 14; the constitution of Solomon Islands, at articles 8, 110 & 130-132; the 1976 constitution of Trinidad and Tobago as amended in 2000, at articles 4 and 5; the constitution of Tuvalu, at articles 11, 20, 50-54, 61, 62, 73-75, 81, 84 & 85; the 1995 constitution of Uganda, at articles 5, 20, 26, 35, 40, 77, 79, 98 & 99; the 1998 Human Rights Act of United Kingdom; the 1983 Constitution Act of Vanuatu, at articles 5 & 33; the 1999 constitution of Venezuela, at articles 2 & 3; and the 1979 constitution of Zimbabwe as last amended in 1993, at articles 11, 16, 27, 31G, 31H, 32, 50, 112 & Schedule 6 (Section 112).

[293] See the 1900 constitution of Australia, at articles 51 & 92; the constitution of Palau, at article 1, section 2; the 1963 constitution of Singapore, at articles 22c, 22d, 22e, 37 & 112-115; and the 1875 constitution of Tonga, at articles 18, 30, 31, 45 & 104.

[294] Most of these countries have expressly endorsed the principles of economic freedom and democracy in their constitutions and urged for limitation of their governments by societal purposes (See the constitutions cited in supra notes 285, 288, 290 & 292). The market economy countries whose national constitutions did not expressly define the economic roles of their governments have also used these principles and their general social, political and economic policies to limit the economic roles of their governments (See Murrphy and Tanenhaus, 1977, supra note 282, at pp. 261-307; and Mandelbaum, M., The Ideas that Conquered the World: Peace, Democracy and Free Markets in the Twenty-First Century (Public Affairs, New York, 2003), at pp. 241-375). The Member States of the EU were expressly required by the Maastricht Treaty to adopt and coordinate their economic policies based on the principle of open market economy with free competition (See Thimm, 1999, supra note 2, at p. 37; and Chance, C., Insurance Regulation in Europe (Lloyd's of London Press ltd., London, 1993), at pp. 139-140). Most of the transition and emerging market economies have also tried to coordinate their economic, political and constitutional reforms in their efforts to build democracy and market economy (See Voigt and Wagener, 2002, supra note 281; Gleason, 2003, supra note 208; Schneider, 2004, supra note 208; Amann, 2006, supra note 199; and Teichman, J. A., The

They have believed that the interventions have to be justified by the involvement of some public interest in an economic activity and that they have to balance between public and private interests.[295] They have also believed that regulation must be reasonable and that regulatory decisions and actions must not be imposed arbitrarily.[296] They have, therefore, required that all economic legislation must have some rational relation to legislative ends and that the legislative ends must be legitimate.[297] They have also required that the economic legislation should demonstrate that its instruments are necessary and proper to meet the legislative ends and address the question of equal protection of businesses.[298] Their principle of representative democracy has also required that the economic legislation must be checked and the regulators account.[299] They have also used the principle to activate public discussion and criticism on the underlying basis of their legislative and regulatory actions so that their law makers, regulators and the public will understand the rationale behind the actions and the need for change.[300]

3. The Policy Path in Ethiopia

3.1. The Pre-1974 Regime

Ethiopia did not define the economic roles of its 'governments' in the period before 1930.[301] It passed through a history of feudal serfdom in which the kings and Kings of kings claimed absolute authority over the life and property of their subjects, acted as sovereign sources of all 'governmental' power (as heads of government, fountains of justice, commanders of the military and defenders of the Church), and appropriated surplus from the agrarian and emerging trade activities of the time by deriving their powers from convention.[302] Emperor Menilik II attempted at modernizing the country's economy through international concessions and domestic reforms in the period between

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Politics of Freeing Markets in Latin America: Chile, Argentina and Mexico (The University of North Carolina Press, Chapel Hill and London, 2001).

[295] See Pierce and Gellhorn, 1994, supra note 153, at pp. 73-87; Ogus, 1996, supra note 269, at pp. 29-46 & 55-71; Voigt and Wagener, 2002, supra note 281; Schepel, 2005, supra note 20, at pp. 1-35 & 225-414; and Cafaggi, 2006, supra note 20, at pp. xv-xxviii & 3-357.

[296] They, by the non-arbitrariness and reasonableness, have meant that the regulation has rational relation to legitimate regulatory ends and that the regulatory means chosen is sufficiently related to the ends. See Ibid.

[297] See Ibid.

[298] See Ibid.

[299] See Ibid.

[300] See Ibid.

[301] See Bahru Zewde, A History of Modern Ethiopia 1855-1991 (Second Edition, AAU Press and Research and Graduate Programmes Office, Addis Ababa, 2002, Originally Published in the UK in 2001 by James Currey Ltd.), at pp. 85-100.

[302] See Ibid.

the 1890s and the 1910s without formal constitutional definition of the economic roles of his government.[303]

The country started to define the economic roles of its government only during the reign of Emperor Haile Sellassie I between 1930 and 1974.[304] It evolved from feudal serfdom to an absolutist Imperial State when it adopted the first written Constitution of July 23 1931.[305] It consolidated the Emperor's powers and centralized the administration of state affairs in that constitution as a step forward from fragmented system.[306] It used the constitution as an instrument for securing national unity under centralized rule of the Emperor and for modernization of its state structure.[307] It also adopted a Revised Constitution in 1955 to respond to the changing political climate of the period between 1931 and the early 1950s and cemented the centralization and modernization processes and somehow separated the powers of the three branches of government, i.e. the parliament, the executive and the judiciary, for the first time.[308] Both the 1931 and the 1955 constitutions did not, however, define the economic roles of the Imperial government as they indicated only the state property, the individual rights to property and work, the powers of the Emperor to issue money as head of state, and the responsibilities of the Council of Ministers of the time to discuss and propose all matters of policy to the Emperor.[309]

The Imperial government tried to define its economic roles only by action. It adopted a ten years programme of industrial development in 1947 (as the first of its kind in the country's history) and three subsequent five-years development plans (i.e. a first five

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[303] It was in this period that Ethiopia saw the Railway concession to France (1894), the Bank of Abysinia concession to the Britain (1905), the first Ministerial Government including the head of customs and Negad Ras (Head of Trade) of Ethiopia (1907), the Itege Taitu Hotel (1907), the Menilik II School (1908), and the Menilik II Hospital (1910). See Id., at pp. 99, 100-108.

[304] See Id, at pp. 99-108.

[305] See Id., at pp. 137-148; IGE-MI, Ethiopia: Forty Years of Reign; Forty Years of Progress 1930-1970 (Ministry of Information of Imperial Government of Ethiopia, Addis Ababa, 1970), at pp. 29-32, 47; and Aberra Jembere, Legal History of Ethiopia 1434-1974: Some Aspects of Substantive and Procedural Laws (Doctoral Dissertation, Erasmus Universiteit, Rotterdam and Afrika-Studiecentrum Leiden, 1998), at pp. 165-170.

[306] See Ibid.

[307] See Ibid

[308] See IGE-MI, Ethiopia: Forty Years of Reign; Forty Years of Progress 1930-1970, supra note 305, at p. 47; Bahru Zewde, 2002, supra note 301, at p. 206; Aberra Jembere, 1998, supra note 305, at pp. 170-180; and IGE, Revised Constitution of Ethiopia Proclamation No. 149/1955, Negarit Gazeta, Year 15, No, 2, Addis Ababa, 4th November, 1955. The Emperor exercised multiple powers under the revised constitution. He had to approve all principal laws enacted by the parliament. He had to appoint and dismiss high government officials and to exercise broad executive functions. He had to exercise judicial power as overseer of justice. He self-restricted His power only when He made His Prime Minister head of government and increased his power by Order No. 44 of 1966. [See same citation].

[309] See IGE, Revised Constitution of Ethiopia Proclamation No. 149/1955, supra note 308, at arts. 32, 43, 44, 47, 71 and 130; Bahru Zewde, 2002, supra note 301, at pp. 140-143; and Aberra Jembere, 1998, supra note 305, at pp. 165-170.

years plan for the period from 1957 to 1961; a second five years plan for the period from 1962 to 1967; and a third five years plan for the period from 1968 to 1973).[310] It aspired to promote the socio-economic growth of the country through individual as well as governmental initiatives under both the programme and the plans and made the program focus on industrial development; the first five years plan on investment, capacity building, and modernization; the second five years plan on industrial activity; and the third five years plan on broad areas of socio-economic development.[311] It increased the impetus for private investment and industrial expansion during implementation of the plans and established a Planning Commission in 1970 to organize the planning machinery of the government and assist the investment and socio-economic progress of the country.[312] It encouraged the private ownership of businesses and regulated commercial activities through laws that were meant to lay down the basis for business expansion and development.[313]

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[310] See IGE-MI, Ethiopia Facts and Figures (Ministry of Information of Imperial Government of Ethiopia, Addis Ababa, 1960), at pp. 45-46; IGE-MI, Ethiopia: Forty Years of Reign; Forty Years of Progress 1930-1970, supra note 305, at pp. 91-94; and IGE, Planning Commission Order No 63/1970, Negarit Gazeta, Year 29, No. 19, Addis Ababa, 9th June 1970.

[311] See Ibid. Most of what the Imperial government did in the period from 1930 to 1947 was focused on the provision of communication infrastructure to link the country's provinces to the capital; on regulation of the country's tax system; and on educating the peoples of the country. It laid down the basis for the plans when it issued the programme. It also issued the second and third five year plans as part of a twenty year development framework. See IGE-MI, Ethiopia: Forty Years of Reign; Forty Years of Progress 1930-1970, supra note 305, at pp. 32 & 91-93.

[312] See IGE-MI, Ethiopia: Forty Years of Reign; Forty Years of Progress 1930-1970, supra note 305, at pp. 77 & 91-94; and the Planning Commission Order No 63/1970, supra note 310. It made substantial support to the textile, food, leather, cement, metal, glass and footwear sectors (See the former citation). See also Fraser I. S., "The Administrative Framework for Economic Development in Ethiopia," J. Eth. Law, Vol. III, No. 1 (June 1966), at pp. 118-150 for discussion of the planning machinery of the Imperial Government of the time.

[313] See the Law of Loans of 1924/25; the Decree on Commercial Registration of 25 August 1928; the Company law of 12 July 1933; the (draft) Bankruptcy law (of 12 July 1933); IGE, Imperial Goods Price Control Proclamation No 38 of 1943 (as amended by Proclamation No 53/1944); IGE, the Locally Produced Goods Price Control Proclamation No 53 of 1944; IGE, Commercial Code of the Empire of Ethiopia Proclamation No. 166/1960, Negarit Gazeta, Year 19, No. 3, Addis Ababa, 5th May 1960, at the preface and preamble; IGE, Business Enterprises Registration Proclamation No. 184/1961, Negarit Gazeta, Year 21, No. 3, Addis Ababa, 20 October, 1961; IGE, Domestic Trade Proclamation No 294/1971, Negarit Gazeta, Year 30, No 32, Addis Ababa, 3 September 1971; IGE, Domestic Trade License Regulations Legal Notice No 413/1971, Negarit Gazeta, Year 31 No 4, Addis Ababa, 22 November 1971; IGE, Regulation of Trade and Price Proclamation No 301/1972, Negarit Gazeta, Year 31 No 16, Addis Ababa, 17 June 1972 (which repealed the Price Control Proclamation No 38 of 1943 as amended and the Price Control Proclamation No 53 of 1944); Bahru Zewde, 2002, supra note 301, at pp. 137-148 & 189-201; and Winship P. (Editor and Translator), Background Documents of the Ethiopian Commercial Code of 1960 (Faculty of Law, Haile Sellassie I University, Artistic Printers, Addis Ababa, Ethiopia, 1974), at pp. 10-11 & 37.

It also recognized the need for regulating anti-competitive practices when it enacted the Commercial Code of May 1960.[314] It took lesson from the 1900 Paris Convention for the protection of Industrial Property (as amended in Lisbon in 1958) and prohibited unfair competition by the Code with a major objective of protecting the good will and preserving the businesses of traders.[315] It strengthened the competition regime by repealing its price control laws and enacting an Unfair Trade Practices Decree in 1963.[316] It used the unfair competition rules of the Code and the Unfair Trade Practices Decree to promote commerce and business stability until the value of both laws was lost with the advent of the 1974 Socialist Revolution.[317]

The Imperial government did not, however, establish independent market regulators as most of its tasks were developmental. Its institutions, including the competition law enforcer, were ministerial by nature.[318]

3.2. The 1974 to 1991 Regime

The military government of the country that came to power in 1974 abrogated the Imperial Revised Constitution of 1955 and centralized state power in the Provisional Military Administrative Council (PMAC) (the Dergue in Amharic) by enacting a Provisional Military Government Establishment (PMGE) Proclamation on September

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[314] See IGE, Commercial Code of the Empire of Ethiopia Proclamation No. 166/1960, supra note 313, at the preface.

[315] It prohibited all acts of competition that are contrary to honest commercial practice, including acts done to discredit the undertaking, products or commercial activities of a competitor and false statements made to mislead customers about these, by the code. It restricted commercial employees, commercial travelers, commercial representatives, commercial agents, and business hirers from undertaking commercial activities similar to those being carried out by the employer, principal or lessee during the currency of their relationship and allowed the inclusion of contractual restrictions in commercial agency and business lease agreements that may extend the application of this restriction to a period after termination of the agreements. It also restricted business sellers from undertaking commercial activities similar to those transferred to the buyers during a period of five years following the date of sale. See IGE, Commercial Code of the Empire of Ethiopia Proclamation No. 166/1960, supra note 313, at arts. 130-134, 30, 40, 47, 55, 144, 158, 159, 204 & 205; and Winship, 1974, supra note 313, at pp. 52-53.

[316] The decree prohibited unilateral actions, discriminatory activities, agreements, arrangements, informal understandings and monopolies that directly or indirectly harm free competition and/or the interests of the public including consumers, producers, dealers and others. See IGE, Unfair Trade Practice Decree No 50/1963, Negarit Gazeta, Year 22, No. 22, Addis Ababa, 2nd September 1963, at arts. 3(h) & 5.

[317] See the preface to IGE, Commercial Code of the Empire of Ethiopia Proclamation No. 166/1960, supra note 313; and the preamble to IGE, Unfair Trade Practice Decree No 50/1963, supra note 316.

[318] The Unfair Trade Practices Decree had to be enforced by the Ministry of Commerce and Industry of the time. See IGE, Unfair Trade Practices Decree No 50 of 1963, supra note 316, at arts. 3(h) & 5.

12, 1974.[319] It only aspired for a new constitution and used this and its nationalization proclamations as basic law for thirteen years.[320] It declared a Socialist Economic Policy in 1974 and made its Central Planning Offices responsible to manage the economy.[321] It, by the Declaration, coined a Motto of 'Ethiopia Tikdem' (Ethiopia First), declared an Ethiopian socialism ('Hiberettesebawinet') and considered the pursuit of private economic activity based on private gain as something contrary to community interests.[322] It defined the motto and the 'Hiberettesebawinet' to mean equality, self-reliance, dignity of labour, supremacy of the common good, and indivisibility of the Ethiopian unity in a socialist line.[323] It adopted a core principle of economic and social policy that the common good should precede the pursuit of individual gain.[324] It considered poverty, disease and ignorance as the main problems of the country and the prevention of economic exploitation and, hence, the public ownership and governmental guidance and control of the nation's economic resources, as the main means for solving the problems.[325] It decided to own and administer all the resources and activities crucial for economic development and to provide all the indispensable services to the community.[326] It allowed private sector activity only in so far as it would not impede the objectives of 'Ethiopia Tikdem' and 'Hiberettesebawinet'.[327] It allowed the establishment of cooperatives for agricultural activities and the carrying out of industrial, natural resource exploration and small scale enterprise development activities and the participation of foreign capital and know-how only in so far as all these were to contribute to the aforementioned objectives.[328] It took responsibility to assist and support the people in their efforts to mobilize labour, resources and ideas towards national economic development and aspired for fraternal and peaceful relation

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[319] See PMGE, Provisional Military Government Establishment Proclamation No. 1/1974, Negarit Gazeta, Year 34, No. 1, Addis Ababa, 12 September, 1974.

[320] See Ibid; PMGE, Provisional Military Government Establishment (Amendment) Proclamation No. 27/1975, Negarit Gazeta, Year 34, No. 23, Addis Ababa, 17 March, 1975; and Fasil Nahum, "Socialist Ethiopia's Achievements as Reflected in its Basic Laws," J. Eth. Law, Vol. 11 (1980), at pp. 83-88.

[321] See PMGE, Declaration [on Economic Policy of Socialist Ethiopia] of the Provisional Military Government of Ethiopia (Official English Translation from the Amharic), Addis Ababa, December 20, 1974; PMGE, Central Planning Commission Establishment Proclamation No 128/1977, Negarit Gazeta, Year 36, No. 29, Addis Ababa, 20th August 1977; PMGE, National Revolutionary Development Campaign and Central Planning Supreme Council Establishment Proclamation No 156/1978, Negarit Gazeta, Year 38, No. 4, Addis Ababa, 29th October 1978; PMGE, The Office of the National Committee for Central Planning Establishment Proclamation No 262/1984, Negarit Gazeta, Year 43, No. 13, Addis Ababa, 7th June 1984; Befekadu Degefe and Berhanu Nega, (Eds.), Annual Report on the Ethiopian Economy Vol. I (The Ethiopian Economic Association (EEA), Addis Ababa, 1999/2000), at pp. 284-296, 304-308; and Bahru Zewde, 2002, supra note 301, at pp. 236-248.

[322] See PMGE, Declaration [on Economic Policy of Socialist Ethiopia], supra note 321, at p. 7.

[323] See Id, at p. 8.

[324] See Id, at pp. 9-11.

[325] See Ibid.

[326] See Id, at p. 10.

[327] See Ibid.

[328] See Ibid.

and cooperation between Ethiopia and its neighbours.[329] It condemned colonialism, neo-colonialism and imperialism in those lines.[330] It nationalized all major means of production and distribution and all banks and insurers on January 01 1975; all industrial proprietorships and business organizations on February 03 1975; all rural land on March 04 1975; and all urban lands and extra houses on July 26 1975.[331] It consolidated the nationalization process by 1976 and adopted a programme of National Democratic Revolution on April 21 1976 to pave the way for establishment of a socialist society of the People's Democratic Republic of Ethiopia.[332] It formed a Union of Ethiopian Marxist Leninist Organizations on February 16 1977, an Organization of the Ethiopian Peasantry on April 27 1978, and a National Development Campaign and Central Planning Supreme Council (that would guide the day-to-day operation of the country's economy) on October 29 1978.[333] It restricted the making of private sector investment to small scale industries and handicrafts through these measures and other laws.[334] It enacted the Constitution of the People's Democratic Republic of Ethiopia on September 12, 1987 and introduced a mixed economic system through several laws that called for increased participation of the private sector along the socialist lines as of 1989.[335]

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[329] See Id, at pp. 10-11.

[330] See Ibid.

[331] See PMGE, Government Ownership and Control of Means of Production Proclamation No 26/1975, Negarit Gazeta, Year 34, No. 22, Addis Ababa, 11th March, 1975; and CSO, Peoples Democratic Republic of Ethiopia Facts and Figures (Central Statistical Office (CSO), Bole Printing Press, 1987), at p. 10.

[332] See Raúl Valdés Vivò, 1978, Ethiopia's Revolution (International Publishers, New York, 1977/1978), at pp. 101-110; and CSO, Peoples Democratic Republic of Ethiopia Facts and Figures, supra note 331, at p. 10.

[333] See CSO, Peoples Democratic Republic of Ethiopia Facts and Figures, supra note 331, at pp. 10-14.

[334] See PMGE, Proclamation Relating to Commercial Activities Undertaken by the Private Sector Proclamation No. 76/1975, Negarit Gazeta, Year 35, No. 18, Addis Ababa, 29th December 1975; PMGE, Regulation of Domestic Trade Proclamation No. 335/1987, Negarit Gazeta, Year 46, No. 24, Addis Ababa, 23rd June, 1987; and PMGE, Domestic Trade Regulations No. 109/1987, Negarit Gazeta, Year 46, No. 27, Addis Ababa, 27th August, 1987.

[335] See PDRE, Constitution of the People's Democratic Republic of Ethiopia Proclamation No. 1/1987, Negarit Gazeta, Year 47, No. 1, Addis Ababa, 12th September, 1987; PDRE, Small-Scale Industry Development Council of State Special Decree No. 9/1989, Negarit Gazeta, Year 48, No. 19, Addis Ababa, 5th July 1989 (re-enacted later as Small-Scale Industry Development Proclamation No. 30/1989 by Notice of Approval No. 8/1989, Negarit Gazeta, Year 49, No. 2, Addis Ababa, 5th October 1989); PDRE, Hotel Services Development Council of State Special Decree No. 10/1989, Negarit Gazeta, Year 48, No. 20, Addis Ababa, 5th July 1989 (re-enacted later as Hotel Services Development Proclamation No. 31/1989 by Notice of Approval No. 9/1989, Negarit Gazeta, Year 49, No. 2, Addis Ababa, 5th October 1989); PDRE, Joint Venture Council of State Special Decree No. 11/1989, Negarit Gazeta, Year 48, No. 21, Addis Ababa, 5th July 1989 (re-enacted later as Joint Venture Proclamation No. 32/1989 by Notice of Approval No. 10/1989, Negarit Gazeta, Year 49, No. 2, Addis Ababa, 5th October 1989); PDRE, Council of State Special Decree on Investment No. 17/1990, Negarit Gazeta, Year 49, No. 12, Addis Ababa, 19th May 1990; PDRE, Council of Ministers Regulations to Provide for the Issuance of License for Agricultural Activities Regulation No. 7/1990, Negarit Gazeta, Year 49, No. 17, Addis Ababa, 18th June 1990; PDRE, Industrial License Council of Ministers

The PMGE Proclamation did not define the economic roles of the military government as a basic law as it only consolidated all the state powers in the PMAC. Only the government made the definition through the Declaration of Socialist Economic Policy, the Proclamation on Government Ownership and Control of Means of Production, and the laws on private investment and commercial undertakings.[336] The 1987 Constitution, however, defined the economic roles of the government though along the lines of socialism.[337] It set up a system in which i) the National Shengo (i.e. the parliament) would determine the domestic and foreign policy (including the monetary and fiscal policy) and the long-term and short-term social and economic plans of the country; ii) the government would own the means of production along with cooperatives and private individuals (as law would define); guide the economic and social activities of the country through a central plan; guide the private ownership and activity of cooperatives and individuals for benefit of the national economy; guarantee private property, right to transfer private property, and individual labour (subject to the socialist policy); and pursue foreign policy under the socialist principles of peaceful coexistence, proletariat internationalism and non-alignment; and iii) both the government and the society would shoulder responsibility to expand health and social protection mechanisms.[338]

3.3. The Post-1991 Regime

The 1991 transitional government of the country abrogated the 1987 Constitution of the military government by adopting a Transitional Period Charter in May 1991.[339] It used the Charter as the basic law of the country until adoption of the Constitution of the

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Regulations No. 8/1990, Negarit Gazeta, Year 49, No. 18, Addis Ababa, 19th June 1990; PDRE, License for Tourist and Hotel Facilities Council of Ministers Regulations No. 9/1990, Negarit Gazeta, Year 49, No. 19, Addis Ababa, 22nd June 1990; and PDRE, Participation of Foreign Investors Council of Ministers Regulations No. 10/1990, Negarit Gazeta, Year 49, No. 23, Addis Ababa, 4th September 1990.

[336] See the Government Ownership and Control of Means of Production Proclamation No 26 of 1975, supra note 331; the Proclamation Relating to Commercial Activities Undertaken by the Private Sector No. 76 of 1975, supra note 334; the Regulation of Domestic Trade Proclamation No. 335 of 1987, supra note 334; and the Domestic Trade Regulations Proclamation No. 109 of 1987, supra note 334. The government enacted the Ownership and Control of Means of Production Proclamation following adoption of the Declaration and used it to define activities that were to be undertaken by the government, by the private sector, and jointly by foreign capital and the government by leaving only small scale activities to the private sector (See the Government Ownership and Control of Means of Production Proclamation No. 26/1975, supra note 331, at arts. 2, 3 & 4).

[337] See PDRE, Constitution of the People's Democratic Republic of Ethiopia Proclamation No. 1/1987, supra note 335.

[338] See Id., at the preamble and arts. 9-18, 21 & 27-30.

[339] See PDTCE, Transitional Period Charter of Ethiopia No. 1/1991, Negarit Gazeta, Year 50, No. 1, Addis Ababa, 22 July, 1991.

Federal Democratic Republic of Ethiopia of 21st August 1995.[340] The Charter paved the way for decentralization of state power between the central and regional governments.[341] It did not define the economic roles of the government but recognized the individual and collective rights of the nations, nationalities and peoples of the country and indicated the responsibility of the government to rehabilitate the war and drought ravaged areas of the country.[342] The transitional government defined its economic roles under a transitional economic policy adopted in 1991 and promised to reduce the scope of its economic activities in the interest of free market; to promote domestic and foreign private investment; to involve the national and regional administrations in the process of economic management; and to enhance popular participation in the design and implementation of development plans.[343] It then enacted laws that were designed to provide for the development and regulation of private investment and trade in different sectors.[344]

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[340] See FDRE, Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995, Federal Negarit Gazeta, Year 1, No 1 Addis Ababa, 21st August 1995.

[341] See TGE, Definition of the Sharing of Revenue Between the Central Government and the National/Regional Self-Governments Proclamation No. 33/1992, Negarit Gazeta, Year 52, No. 7, Addis Ababa, 20th October, 1992; and TGE, Definition of Powers and Duties of the Central and Regional Executive Organs of the Transitional Government of Ethiopia Proclamation No. 41/1993, Negarit Gazeta, Year 52, No. 26, Addis Ababa, 20th January 1993.

[342] See PDTCE, Transitional Period Charter of Ethiopia No. 1/1991, supra note 339, at arts. 1, 2, 14-17.

[343] See TGE, Ethiopia's Economic Policy during the Transitional Period (Official Translation, Addis Ababa, November 1991), at pp. 17ff. The specific reform objectives of the government included promoting domestic and foreign private investment; expanding the role of the private sector in whole sale and retail trade, industrial development, mining and tourism; increasing productivity and efficiency of public enterprises and monopolies; promoting inter-sectoral linkages, balanced regional industrial development and national technological capability; forming and accumulating capital; expanding economic infrastructure (through improvement and expansion of the road network, development of the transport and communication sectors, reduction of service costs, fostering of urban economic growth, promotion of environmentally sustainable energy-development, and building of manpower capacity); ensuring health, safety and environmental protection; conserving and rehabilitating natural resources; promoting international competitiveness in areas of comparative advantage; enhancing export quality, quantity and market; maintaining positive balance of payments; and maintaining carefully planned and properly coordinated monetary and fiscal policy [See the policy principles and objectives of the government of the time from http:/www.telecom.net.et./economy.htm].

[344] See TGE, Encouragement, Expansion and Co-ordination of Investment Proclamation No. 15/1992, Negarit Gazeta, Year 51, No. 11, Addis Ababa, 25th May 1992; TGE, Encouragement, Expansion and Co-ordination of Investment (Amendment) Proclamation No. 31/1992, Negarit Gazeta, Year 52, No. 5, Addis Ababa, 13th October 1992; TGE, Mining Proclamation No. 52/1993, Negarit Gazeta, Year 52, No. 42, Addis Ababa, 23rd June 1993; TGE, Mining Operations Council of Ministers Regulations No. 182/1994, Negarit Gazeta, Year 53, No. 84, Addis Ababa, 20th April 1994; TGE, License for Agricultural Activities Council of Ministers Regulations No. 120/1993, Negarit Gazeta, Year 52, No. 45, Addis Ababa, 10th July 1993; TGE, National Seed Industry Agency Proclamation No. 56/1993, Negarit Gazeta, Year 52, No. 47, Addis Ababa, 16th July 1993; TGE, Transfer of Technology Council of Ministers Regulations No. 121/1993, Negarit Gazeta, Year 52, No. 53, Addis Ababa, 31st July 1993;

The 1995 Constitution introduced federalism and authorized the Council of Ministers in government to formulate the socio-economic, fiscal and monetary policies and strategies of the country provided that the Council secures approval of the strategies and policies by the parliament (i.e., the House of People's Representatives).[345] It did not define the economic roles of the government as such but i) allowed the winning political party to constitute the government and formulate the socio-economic policies and strategies of the country; ii) recognized seven national policy principles and objectives on political, economic, social, cultural, environmental, external relation and national defence matters (along with several group and individual rights); and ii) required all government institutions to adhere to these principles and the rights defined in the Constitution.[346] It, by the principles, authorized and required the government of the winning party to formulate socio-economic policies and strategies that will ensure i) the benefit of all Ethiopians from the country's intellectual and material resources; ii) the equal opportunity of all Ethiopians to improve their economic conditions and the equitable distribution of wealth among them; iii) the provision of special assistance to nations, nationalities and peoples that are least advantaged in economic and social development; iv) the holding and administration of land and other natural resources for the common benefit and development of the peoples of the country; v) the participation of the peoples of the country in the formulation of national development policies and programmes; vi) the protection and promotion of health, welfare and living standards of the working population of the country; and vii) the aversion of natural and man-made disasters and provision of timely assistance in the advent of disaster.[347]

The federal government pursued the reform objectives started by the transitional government under this authority of the Constitution. It focused on structural adjustment

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TGE, Export Trade Duty Incentive Scheme Establishing Proclamation No. 69/1993, Negarit Gazeta, Year 52, No. 62, Addis Ababa, 18th August 1993; TGE, Domestic Trade (Amendment) Council of Ministers Regulations No. 123/1993, Negarit Gazeta, Year 52, No. 64, Addis Ababa, 7th September 1993; TGE, Radiation Protection Proclamation No. 79/1993, Negarit Gazeta, Year 53, No. 39, Addis Ababa, 22nd December 1993; TGE, Monetary and Banking Proclamation No. 83/1994, Negarit Gazeta, Year 53, No. 43, Addis Ababa, 30th January 1994; TGE, Licensing and Supervision of Banking Business Proclamation No. 84/1994, Negarit Gazeta, Year 53, No. 44, Addis Ababa, 31st January 1994; TGE, Licensing and Supervision of Insurance Business Proclamation No. 86/1994, Negarit Gazeta, Year 53, No. 46, Addis Ababa, 1st February 1994; TGE, Customs Clearing Agency License Issuance Council of Ministers Regulation No. 155/1994, Negarit Gazeta, Year 53, No. 47, Addis Ababa, 1st February 1994; TGE, Licensing and Supervision of Health Service Institutions Council of Ministers Regulations No. 174/1994, Negarit Gazeta, Year 53, No. 66, Addis Ababa, 16th February 1994; TGE, National Fertilizer Industry Agency Establishment Proclamation 106/1994, Negarit Gazeta, Year 54, No. 2, Addis Ababa, 1994; and TGE, Licensing and Supervision of Private Educational Institutions Council of Ministers Regulations No. 206/1995, Negarit Gazeta, Year 54, No. 14, Addis Ababa, 6th March 1995.

[345] See FDRE, Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995, supra note 340, at arts. 55(10), 77(6) & 77(4).

[346] See Id., at arts. 13, 40, 41, 42, 43, 72, 73 & 85-92.

[347] See Ibid.

as was the case with the transitional government and targeted at the objectives of attaining macroeconomic stability and equitable economic growth; maintaining prudent monetary and fiscal policy; controlling inflation; developing modern and sound financial system; encouraging saving and long-term investment; promoting private sector development; easing the investment law; building capacity; accelerating privatisation; implementing development programs in agriculture, infrastructure, education, health and population; reducing import tariffs; deregulating the external current account; furthering the liberalization of foreign trade in goods and services; diversifying export; integrating Ethiopia into the global economy; and strengthening the international competitiveness of the country in the years between 1996 and 2001.[348] It, accordingly, privatized two hundred six public enterprises and further revised the privatization, investment, trade registration, licensing, and tax laws in the period.[349]

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[348] See Ethiopia, "Ethiopia - Enhanced Structural Adjustment Facility Mid-Term Economic and Financial Policy Framework Paper, 1998/99-2000/01, retrieved on March 28 2000 from: http://www.imf.org/external/np/pfp/eth/etp.htm#IIIA; and Befekadu Degefe and Berhanu Nega, 1999/2000, supra note 321.

[349] See database of the Privatization and Public Enterprises Supervising Agency and FDRE, Privatization of Public Enterprises Proclamation No. 146/1998, Federal Negarit Gazeta, Year 5, No. 26, Addis Ababa, 29th December 1998; FDRE, Privatization of Public Enterprises (Amendment) Proclamation No. 182/1999, Federal Negarit Gazeta, Year 6, No. 4, Addis Ababa, 18th November 1999; FDRE, Investment Proclamation No 37/1996, Federal Negarit Gazeta, Year 2 No 25 Addis Ababa, 18 June 1998; FDRE, Investment Incentives Council of Ministers Regulations No. 7/1996, Federal Negarit Gazeta, Year 2, No. 29, Addis Ababa, 4 July 1996; FDRE, Investment Incentives (Amendment) Council of Ministers Regulations No. 9/1996, Federal Negarit Gazeta, Year 3, No. 2, Addis Ababa, 25 October 1996; FDRE, Investment (Amendment) Proclamation No. 116/1998, Federal Negarit Gazeta, Year 4, No. 42, Addis Ababa, 11th June 1998; FDRE, Investment Areas Reserved for Domestic Investors Council of Ministers Regulations No. 35/1998, Federal Negarit Gazeta, Year 4, No. 43, Addis Ababa, 12th June 1998; FDRE, Investment Incentives Council of Ministers (Amendment) Regulations No. 36/1998, Federal Negarit Gazeta, Year 4, No. 44, Addis Ababa, 12th June, 1998; FDRE, Investment (Amendment) Proclamation No. 168/1999, Federal Negarit Gazeta, Year 5, No. 49, Addis Ababa, 22nd April 1999; FDRE, Commercial Registration and Business Licensing Proclamation No. 67/97, Federal Negarit Gazeta, Year 3, No. 25, Addis Ababa, 6 March 1997; FDRE, Federal Government Commercial Registration and Licensing Council of Ministers Regulations No. 13/97, Federal Negarit Gazeta, Year 3, No. 28, Addis Ababa, 8th March, 1997; FDRE, Addis Ababa/Dire Dawa Administration Commercial Registration and Licensing Council of Ministers Regulations No. 14/97, Federal Negarit Gazeta, Year 3, No. 29, Addis Ababa, 10th March, 1997; FDRE, Commercial Registration and Business Licensing (Amendment) Proclamation No. 171/1999, Federal Negarit Gazeta, Year 5, No. 54, Addis Ababa, 8th June, 1999; FDRE, Mining Income Tax (Amendment) Proclamation No. 23/1996, Federal Negarit Gazeta, Year 2 No. 11 Addis Ababa, 15th February, 1996; FDRE, Income Tax (Amendment) Proclamation No 36/1996, Federal Negarit Gazeta, Year 2 No 24 Addis Ababa, 14th May 1996; FDRE, Customs Tariff Regulations No. 6/1996, Federal Negarit Gazeta, Year 2, No. 27, 4th July 1996; FDRE, Importation of Machinery and Goods on Franco-Valuta Basis Council of Ministers Regulations No. 8/1996, Federal Negarit Gazeta, Year 2, No. 36, Addis Ababa, 19th July 1996; FDRE, Re-Establishment and Modernization of Customs Authority Proclamation No. 60/1997, Federal Negarit Gazeta, Year 3, No. 18, 13th February 1997; FDRE, Sales and Excise Tax (Amendment) Proclamation No. 77/1997, Federal Negarit Gazeta, Year 3,

The political party in government (i.e. the Ethiopian Peoples Revolutionary Democratic Front - EPRDF) elaborated on the economic and social policy objectives of the country through a 'Direction of Revolutionary Democracy Development Lines and Strategies' issued in 2000.[350] It focused on the usefulness of private economic initiative (free market) as engine of economic growth and foresaw the market correction and developmental roles of the government by the Direction.[351] It reiterated Africa's failure to implement both the neo-liberal model of the industrialized economies and the developmental state model of the centrally planned economies; rejected the use of both models by considering the former as one that forces laissez-fair in a least developed economy and the latter as one that allows too much government intervention to the detriment of free market; believed in the need for selective government intervention in a country like Ethiopia; and appreciated the need for adopting the liberalism model of the East Asian market economies in the country as one that allows government intervention to speed up economic development.[352] It believed in the need for establishing partnership between the government and the developmental market actors in the domestic market and progressively integrating the Ethiopian economy with the international.[353]

The federal government translated the 'Direction' of the party into government policy and launched a strategy of Agricultural Development Led Industrialization by adopting a Rural Development Policies, Strategies and Programs; a Capacity Building Strategy and Programs; a Strategy of Matters of Building Democratic System in Ethiopia; an Industrial Development Strategy; and a Foreign and National Security Policy and Strategy in 2001 and 2002.[354] It, through these policies and strategies, elaborated on a

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No. 40, Addis Ababa, 3rd June 1998; FDRE, Stamp Duty Proclamation No. 110/1998, Federal Negarit Gazeta, Year 4, No. 36, Addis Ababa, 12th May 1998; FDRE, Customs Authority (Amendment) Proclamation No. 125/1998, Federal Negarit Gazeta, Year 4, No. 55, 30th June 1998; FDRE, Income Tax (Amendment) Council of Ministers Regulations No. 43/1998, Federal Negarit Gazeta, Year 5, No. 7, Addis Ababa, 13th November 1998; FDRE, Sales and Excise Tax (Amendment) Proclamation No. 149/1999, Federal Negarit Gazeta, Year 5, No. 29, Addis Ababa, 15th December 1999; FDRE, Petroleum Operations Income Tax (Amendment) Proclamation No. 226/2000, Federal Negarit Gazeta, Year 7, No. 8, Addis Ababa, 26th December 2000; and FDRE, Income Tax (Amendment) Proclamation No. 227/2001, Federal Negarit Gazeta, Year 7, No. 9, Addis Ababa, 4th January 2001.

[350] See EPRDF, Revolutionary Democracy: Development Lines and Strategies (Discussion Document, Amharic Version, Mega Publishing Enterprise, Nehasie, 1992 (August 2000)), at pp. v, vi, 3-32 & 123-239.

[351] See Ibid.

[352] See Ibid.

[353] See Ibid.

[354] See FDRE, Rural Development Policies, Strategies and Programs of the Federal Democratic Republic of Ethiopia (Amharic Version, Addis Ababa, Hidar 1994 Eth. C. (November 2001)); FDRE, Capacity Building Strategy and Programs of the Federal Democratic Republic of Ethiopia (Amharic Version, Addis Ababa, Yekatit 1994 Eth. C. (February 2002)); FDRE, Matters of Building a Democratic System in Ethiopia (Amharic Version, Addis Ababa, Ginbot 1994 Eth. C. (May 2002)); FDRE, Industrial Development Strategy of the Federal Democratic

number of economic and social policy objectives. The major ones were i) reducing the direct role of government in business; ii) encouraging the development of private sector; iii) promoting competition, economic efficiency and growth; iv) correcting market failure; v) providing goods and services which the market may not provide; vi) avoiding price and quality abuses; vii) ensuring consumer protection; and viii) integrating the Ethiopian economy with the global economy.[355] It promised to intervene into the economy only when there are reasons for market correction and steering (i.e. to coordinate activities of the market actors, correct market failures, and carry out activities that need to be carried out by the government).[356] It promised to enhance the market, and reduce its roles to activities that can not be done by the market, though it also continued to believe in the developmental roles of state enterprises and party-owned foundations because of the large size of market imperfection in the country compared to the developed market economies.[357] It then continued with the privatization and legal reform processes started in the pre-2001 period with a view to implementing the new policy. It, accordingly, privatized more than forty three public enterprises and further revised the trade registration, licensing and investment laws.[358]

Republic of Ethiopia (Amharic Version, Nehasie 1994 (August 2002)); and FDRE, A Foreign and National Security Policy and Strategy of the Federal Democratic Republic of Ethiopia (Amharic Version, Hidar 1995 (November 2002)). The government required the coordination of all the policies and strategies with the Rural Development Policies, Strategies and Programs (See the Rural Development Policies, Strategies and Programs of the Federal Democratic Republic of Ethiopia, at pp. 235-242; the Capacity Building Strategy and Programs of the Federal Democratic Republic of Ethiopia, at pp. 13-16; the Industrial Development Strategy of the Federal Democratic Republic of Ethiopia, at pp. 13-19; and the Revolutionary Democracy: Development Lines and Strategies, supra note 350, at pp. 123-239).

[355] See Ibid.

[356] See the Rural Development Policies, Strategies and Programs, supra note 354; the Matters of Building a Democratic System, supra note 354; the Industrial Development Strategy, supra note 354; and the Revolutionary Democracy: Development Lines and Strategies, supra note 350, at pp. v, vi, 3-32, 123-239.

[357] See Ibid. The developmental roles of government enterprises and the government's interest to establish them (in economic areas where private investors may not be willing to participate for various reasons) was re-stated in a subsequent law (See FDRE, Public Enterprises Supervising Authority and Industrial Development Fund Establishment Proclamation No 277/2002, Federal Negarit Gazeta, Year 8, No 24, Addis Ababa, 27th June 2002, at arts. 5(2) and 13(1(a) and (b)).

[358] See database of the Privatization and Public Enterprises Supervising Agency and FDRE, Commercial Registration and Business Licensing (Amendment) Proclamation No. 328/2003, Federal Negarit Gazeta, Year 9, No. 48, Addis Ababa, 17th April 2003; Commercial Registration and Licensing Council of Ministers (Amendment) Regulations No. 87/2003, Federal Negarit Gazeta, Year 9, No. 71, Addis Ababa, 22nd July 2003; FDRE, Commercial Registration and Business Licensing (Amendment) Proclamation No. 376/2003, Federal Negarit Gazeta, Year 10, No. 9, Addis Ababa, 13th November 2003; FDRE, Commercial Registration and Licensing Council of Ministers /Amendment/ Regulations No. 95/2003, Federal Negarit Gazeta, Year 10, No. 10, Addis Ababa, 21st November 2003; FDRE, Investment Proclamation No 280/2002, Federal Negarit Gazeta, Year 8, No 27, Addis Ababa, 2 July 2002; FDRE, Council of Ministers Regulations on Investment Incentives and Investment Areas Reserved for Domestic Investors No 84/2003, Federal Negarit Gazeta, Year 9, No. 34, Addis Ababa, 7

It also revised the tax laws with a view to modernizing and consolidating them and encouraging trade and investment.[359]

The federal government also continued with the re-establishment of sectoral regulators and assignment of regulatory functions which was started by the 1991 transitional government. It re-established the National Bank of Ethiopia (as regulator of the financial market), the Ethiopian Electricity Authority (as regulator of the electricity supply market), the Ethiopian Telecommunications Authority (as regulator of the telecom services and equipment supply market), the Ethiopian Civil Aviation Authority (as regulator of the air transport, aviation and related services market), the Transport Authority (as regulator of the road and rail transport and related services market), the Maritime Affairs Authority (as regulator of the marine transport and related services market), the Ethiopian Radiation Protection Authority (as regulator of the market for radiation services and use of radioactive materials), the Quality and Standards Authority (as standard setter for quality of goods and services), the Education Relevance and Quality Agency (as regulator of the quality and relevance of higher education), the Ethiopian Roads Authority (as regulator of the construction and use of highways and roads of the national network), the Ethiopian Drug Administration and Control Authority (as regulator of the manufacture, trade, use and trial of drug and medical equipments), the Ethiopian Revenue and Customs Authority (as regulator of

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February 2003; FDRE, Investment (Amendment) Proclamation No. 375/2003, Federal Negarit Gazeta, Year 10, No. 8, Addis Ababa, 28th October 2003.

[359] See FDRE, Value Added Tax Proclamation No. 285/2002, Federal Negarit Gazeta, Year 8, No. 33, Addis Ababa, 4th July 2002; FDRE, Income Tax Proclamation No 286/2002, Federal Negarit Gazeta, Year 8, No. 34, Addis Ababa, 4 July 2002; FDRE, Council of Ministers Income Tax Regulations No 78/2002, Federal Negarit Gazeta, Year 8, No. 37, Addis Ababa, 19 July 2002; FDRE, Council of Ministers Value Added Tax Regulations No. 79/2002, Federal Negarit Gazeta, Year 9, No. 19, Addis Ababa, 31st December 2002; FDRE, Excise Tax Proclamation No 307/2002, Federal Negarit Gazeta, Year 9, No. 20, Addis Ababa, 31st December 2002; FDRE, Turnover Tax Proclamation No 308/2002, Federal Negarit Gazeta, Year 9, No. 21, Addis Ababa, 31st December 2002; FDRE, Re-Establishment and Modernization of Customs Authority Proclamation No. 368/2003, Federal Negarit Gazeta, Year 9, No. 93, 11th September 2003; FDRE, Value Added Tax (Amendment) Proclamation No. 609/2008, Federal Negarit Gazeta, Year 15, No. 6, Addis Ababa, 25th December 2008; FDRE, Excise Tax (Amendment) Proclamation No 610/2008, Federal Negarit Gazeta, Year 15, No. 7, Addis Ababa, 25th December 2008; FDRE, Turnover Tax (Amendment) Proclamation No 611/2008, Federal Negarit Gazeta, Year 15, No. 8, Addis Ababa, 25th December 2008; FDRE, Stamp Duty (Amendment) Proclamation No 612/2008, Federal Negarit Gazeta, Year 15, No. 9, Addis Ababa, 25th December 2008; FDRE, Income Tax (Amendment) Proclamation No 608/2008, Federal Negarit Gazeta, Year 15, No. 15, Addis Ababa, 9th January 2009; FDRE, Council of Ministers Income Tax (Amendment) Regulations No 164/2009, Federal Negarit Gazeta, Year 15, No. 28, Addis Ababa, 24th March 2009; FDRE, Customs Proclamation No. 622/2009, Federal Negarit Gazeta, Year 15, No. 27, 19th February 2009; FDRE, Export Trade Duty Incentive Scheme Establishing Proclamation No. 249/2001, Federal Negarit Gazeta, Year 7, No. 19, Addis Ababa, 5th July 2001; FDRE, Export Prize Award Council of Ministers Regulations No. 126/2006, Federal Negarit Gazeta, Year 12, No. 41, Addis Ababa, 5th May 2006; and FDRE, Revised Export Trade Duty Incentive Scheme Establishing Proclamation No. 543/2007, Federal Negarit Gazeta, Year 13, No. 57, Addis Ababa, 4th September 2007.

customs clearing agents and controller of customs), the Ethiopian Broadcasting Authority (as regulator of the broadcasting services market), the Ethiopian Commodity Exchange Authority (as regulator of the commodity exchange market), the Ethiopian Investment Agency (as registrar and general regulator of investment), and the Environmental Protection Authority (as general regulator of the environmental effect of trade and investment).[360] It re-established the Privatization and Public Enterprises

[360] See FDRE, National Bank of Ethiopia Establishment (as Amended) Proclamation No. 591/2008, Federal Negarit Gazeta, Year 14, No. 50, Addis Ababa, 11th August 2008; FDRE, Banking Business Proclamation No. 592/2008, Federal Negarit Gazeta, Year 14, No. 57, Addis Ababa, 25th August 2008; FDRE, Licensing and Supervision of Micro-financing Institutions Proclamation No 40/1996, Federal Negarit Gazeta, Year 2, No 30, Addis Ababa, 5th July 1996; TGE, Licensing and Supervision of Insurance Business Proclamation No. 86/1994, supra note 344; FDRE, Electricity Proclamation No. 86/1997, Federal Negarit Gazeta, Year 3, No. 50, Addis Ababa, 7th July 1997; FDRE, Electricity Operations Council of Ministers Regulations No. 49/1999, Federal Negarit Gazeta, Year 5, No. 52, Addis Ababa, 20th May 1999; FDRE, Rural Electrification Fund Establishment Proclamation No. 317/2003, Federal Negarit Gazeta, Year 9, No. 35, Addis Ababa, 6th February 2003; FDRE, Telecommunication Proclamation No. 49/1996, Federal Negarit Gazeta, Year 3, No. 5, Addis Ababa, 28th November 1996; FDRE, Telecommunication Services Council of Ministers Regulations No. 47/1999, Federal Negarit Gazeta, Year 5, No. 20, Addis Ababa, 27th April 1999; FDRE, Telecommunications (Amendment) Proclamation No. 281/2002, Federal Negarit Gazeta, Year 8, No. 28, Addis Ababa, 2nd July 2002; FDRE, Ethiopian Civil Aviation Authority Re-establishment Proclamation No. 273/2002, Federal Negarit Gazeta, Year 8, No. 20, Addis Ababa, 14th May 2002; FDRE, Ethiopian Aviation Security Proclamation No. 432/2004, Federal Negarit Gazeta, Year 11, No. 17, Addis Ababa, 2nd February 2004; FDRE, Motor Vehicles and Trailers Identification, Inspection and Registration (Amendment) Regulations No. 74/2001, Federal Negarit Gazeta, Year 7, No. 35, Addis Ababa, 29th June 2001; FDRE, Transport Proclamation No. 468/2005, Federal Negarit Gazeta, Year 11, No. 58, Addis Ababa, 6th August 2005; FDRE, Maritime Sector Administration Proclamation No. 549/2007, Federal Negarit Gazeta, Year 13, No. 60, Addis Ababa, 4th September 2007; TGE, Radiation Protection Proclamation No. 79/1993, supra note 344; FDRE, Quality and Standards Authority of Ethiopia Establishment Proclamation No. 102/1998, Federal Negarit Gazeta, Year 4, No. 26, Addis Ababa, 3rd March 1998; FDRE, Quality and Standards Authority of Ethiopia Establishment (Amendment) Proclamation No. 413/2004, Federal Negarit Gazeta, Year 10, No. 58, Addis Ababa, 2nd August 2004; FDRE, Higher Education Proclamation No. 351/2003, Federal Negarit Gazeta, Year 9, No. 72, Addis Ababa, 3rd July 2003; FDRE, Ethiopian Roads Authority Re-establishment Proclamation No. 80/1997, Federal Negarit Gazeta, Year 3, No. 43, Addis Ababa, 5th June 1997; FDRE, Drug Administration and Control Proclamation No. 176/1999, Federal Negarit Gazeta, Year 5, No. 60, Addis Ababa, 29 June 1999; FDRE, Customs Clearing Agents Council of Ministers Regulation No. 108/2004, Federal Negarit Gazeta, Year 10, No. 65, Addis Ababa, 18th July 2004; FDRE, Customs Proclamation No. 622/2009, supra note 359; FDRE, Broadcasting Proclamation No. 178/1999, Federal Negarit Gazeta, Year 5, No. 62, Addis Ababa, 29th June 1999; FDRE, Broadcasting Service Proclamation No. 533/2007, Federal Negarit Gazeta, Year 13, No. 39, Addis Ababa, 23rd July 2007; FDRE, Ethiopia Commodity Exchange Proclamation No. 550/2007, Federal Negarit Gazeta, Year 13, No. 61, Addis Ababa, 4th September 2007; FDRE, Ethiopia Commodity Exchange Authority Proclamation No. 551/2007, Federal Negarit Gazeta, Year 13, No. 62, Addis Ababa, 4th September 2007; FDRE, Ethiopia Commodity Exchange Authority Establishment (Amendment) Proclamation No. 566/2008, Federal Negarit Gazeta, Year 14, No. 17, Addis Ababa, 8th February 2008; FDRE,

Supervising Agency (as facilitator of the privatization process and supervisor of government enterprises), the Public Financial Enterprises Agency (as supervisor of the government owned financial institutions), the Ethiopian Intellectual Property Office (as protector and regulator of the use of intellectual property), the Ethiopian Information and Communication Technology Agency (as coordinator of the development and use of Information and Communication Technology), and the Information Security Agency (as controller of the information network and use of information).[361] It re-established the Ministry of Trade and Industry as general registrar and regulator of trade (not assigned to other regulators) and couch of the privatization of public enterprises, the development of investment, the expansion of micro and small enterprises, the provision of services in trade, the establishment of chambers of commerce and professional associations in the trade and industry sectors, the provision of one-stop-shop service to investors, and the enforcement of competition law; the Ministry of Transport and Communications as general regulator of maritime and transit services and coordinator of the regulation of other transport and communication services; the Ministry of Works and Urban Development as standard setter for design and construction works, couch of the professional competence of engineers, architects and trans-regional water work and urban development operators, and regulator of the grades of contractors and consultants and the ownership, importation and exportation of construction machinery; the Ministry of Health as general controller of hygiene, health and pharmacy services, and drug administration; the Ministry of Mines and Energy as regulator of mineral exploration and mining operations (including the market for precious and ornamental minerals

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Coffee Quality Control and Marketing Proclamation No. 602/2008, Federal Negarit Gazeta, Year 14, No 61, Addis Ababa, 25th August 2008; FDRE, Investment Proclamation No 280/2002, Federal Negarit Gazeta, Year 8, No 27, Addis Ababa, 2nd July 2002; FDRE, Investment (Amendment) Proclamation No. 375/2003, Federal Negarit Gazeta, Year 10, No. 8, Addis Ababa, 28th October 2003; FDRE, Environmental Protection Authority Establishment Proclamation No. 9/1995, Federal Negarit Gazeta, Year 1, No. 9, Addis Ababa, 24th August 1995; FDRE, Environmental Protection Organs Establishment Proclamation No. 295/2002, Federal Negarit Gazeta, Year 9, No. 7, Addis Ababa, 31st October 2002; FDRE, Environmental Pollution Control Proclamation No. 300/2002, Federal Negarit Gazeta, Year 9, No. 12, Addis Ababa, 3rd December 2002; and the annex to FDRE, Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 471/2005, Federal Negarit Gazeta, Year 12, No. 1, Addis Ababa, 17th November 2005.

[361] See FDRE, Privatization and Public Enterprises Supervisory Agency Establishment Proclamation No. 412/2004, Federal Negarit Gazeta, Year 10, No. 57, Addis Ababa, 2nd August 2004; FDRE, Financial Public Enterprises Agency Establishment Council of Ministers Regulation No 98/2004, Federal Negarit Gazeta, Year 10, No. 31, Addis Ababa, 30th January 2004; FDRE, Ethiopian Intellectual Property Office Establishment Proclamation No. 320/2003, Federal Negarit Gazeta, Year 9, No. 40, Addis Ababa, 8th April 2003; FDRE, Ethiopian Information and Communication Technology Development Authority Establishment Proclamation No. 360/2003, Federal Negarit Gazeta, Year 9, No. 82, Addis Ababa, 22nd July 2003; FDRE, Information Network Security Agency Establishment Council of Ministers Regulations No. 130/2006, Federal Negarit Gazeta, Year 13, No. 5, Addis Ababa, 24th November 2006; and the annex to FDRE, Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 471/2005, Federal Negarit Gazeta, Year 12, No. 1, Addis Ababa, 17th November 2005.

produced by traditional and small-scale mining operations) and the storage and distribution of petroleum; the Ministry of Education as general regulator, standard setter and accreditation provider for higher education; the Ministry of Agriculture and Rural Development as general regulator of the making of foreign investment in agriculture, use of veterinary drugs and pesticides, and manufacture, trade, warehousing and quarantine of fertilizer, plants, seeds, animal and animal products, hide and skin, coffee and other agricultural products; the Ministry of Water Resources as regulator of the construction and operation of water works on trans-regional water bodies; the Ministry of Culture and Tourism as standard setter for tourism facilities; the Ministry of Labour and Social Affairs as registrar of trade unions and employers associations, couch of the implementation of occupational health and safety standards, and regulator of the provision of foreign employment services to Ethiopians; the Ministry of Justice as regulator of the federal court advocates and registrar of the religious, non-profit making and non-governmental organizations and associations that operate in Addis Ababa, Dire Dawa and more than one Region; the Ministry of Science and Technology as coordinator of science and technology projects; and the Ministry of Information as registrar and general regulator of the commercial press, media, advertisement and film shooting.[362] It also enforced a new competition law as of the

[362] See FDRE, Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 4/1995, Federal Negarit Gazeta, Year 1, No. 4, Addis Ababa, 23rd August 1995; FDRE, Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia (Amendment) Proclamation No. 93/1997, Federal Negarit Gazeta, Year 4, No. 5, Addis Ababa, 23rd October 1997; FDRE, Re-organization of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 256/2001, Federal Negarit Gazeta, Year 8, No. 2, Addis Ababa, 12th October 2001; FDRE, Reorganization of the Executive Organs of the Federal Democratic Republic of Ethiopia (Amendment) Proclamation No. 380/2004, Federal Negarit Gazeta, Year 10, No. 15, Addis Ababa, 13th January 2004; FDRE, Reorganization of the Executive Organs of the Federal Democratic Republic of Ethiopia (Amendment) Proclamation No. 411/2004, Federal Negarit Gazeta, Year 10, No. 56, Addis Ababa, 2nd August 2004; FDRE, Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia (Amendment) Proclamation No. 465/2005, Federal Negarit Gazeta, Year 11, No. 55, Addis Ababa, 30 June 2005; FDRE, Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 471/2005, Federal Negarit Gazeta, Year 12, No. 1, Addis Ababa, 17th November 2005; FDRE, Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia (Amendment) Proclamation No. 546/2007, Federal Negarit Gazeta, Year 13, No. 54, Addis Ababa, 21st August 2007; FDRE, Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia (Amendment) Proclamation No. 603/2008, Federal Negarit Gazeta, Year 15, No. 1, Addis Ababa, 24th October 2008; FDRE, Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia (Amendment) Proclamation No. 641/2009, Federal Negarit Gazeta, Year 15, No. 51, Addis Ababa, 16th July 2009; FDRE, Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia (Amendment) Proclamation No. 642/2009, Federal Negarit Gazeta, Year 15, No. 48, Addis Ababa, 10th July 2009; FDRE, Registration of Ships Council of Ministers Regulations No 1/1996, Federal Negarit Gazeta, Year 2, No. 9, Addis Ababa, 13th February 1996; FDRE, Capital Goods Leasing Business Proclamation No. 103/1998, Federal Negarit Gazeta, Year 4,

17th of April 2003 with a view to achieving the objectives of preventing and eliminating anti-competitive and unfair governmental and non-governmental trade practices; maximizing economic efficiency and social welfare in the supply and distribution of goods and services; and safeguarding the interests of consumers.[363] It prohibited all agreements, dominant positions and unilateral practices that will harm competition by the new competition law and continued to control the exercise of unilateral acts and practices that can harm good will and business by the 1960 commercial code.[364] It also committed to accelerate the growth of the private sector as a key partner to its most

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No. 27, Addis Ababa, 5th March 1998; FDRE, Freight Forwarding and Ship Agency License Issuance Council of Ministers Regulations No. 37/1998, Federal Negarit Gazeta, Year 4, No. 46, Addis Ababa, 19th June 1998; FDRE, Registration and Control of Construction Machinery Proclamation No. 177/1999, Federal Negarit Gazeta, Year 5, No. 61, Addis Ababa, 29th June 1999; FDRE, Fertilizer Manufacturing and Trade Proclamation No. 137/1998, Federal Negarit Gazeta, Year 5, No. 14, Addis Ababa, 24th November 1998; FDRE, Seed Proclamation No. 206/2000, Federal Negarit Gazeta, Year 6, No. 36, Addis Ababa, 6th June 2000; FDRE, Public Health Proclamation No. 200/2000, Federal Negarit Gazeta, Year 6, No. 28, Addis Ababa, 9th March 2000; FDRE, Animal Diseases Prevention and Control Proclamation No. 267/2002, Federal Negarit Gazeta, Year 8, No. 14, Addis Ababa, 31st January 2002; FDRE, Fisheries Development and Utilization Proclamation No. 315/2003, Federal Negarit Gazeta, Year 9, No. 32, Addis Ababa, 4th February 2003; FDRE, The Proclamation to Provide for a Warehouse Receipts System No. 372/2003, Federal Negarit Gazeta, Year 10, No. 2, Addis Ababa, 14th October 2003; FDRE, Film Shooting Permit Council of Ministers Regulations. No. 66/2000, Federal Negarit Gazeta, Year 6, No. 30, Addis Ababa, 28th March 2000; FDRE, Higher Education Proclamation No. 351/2003, Federal Negarit Gazeta, Year 9, No. 72, Addis Ababa, 3rd July 2003; FDRE, Technical and Vocational Education and Training Proclamation No. 391/2004, Federal Negarit Gazeta, Year 10, No. 26, Addis Ababa, 1st March 2004; FDRE, Customs Clearing Agents Council of Ministers Regulation No. 108/2004, Federal Negarit Gazeta, Year 10, No. 65, Addis Ababa, 18th July 2004; FDRE, Raw Hide and Skin Marketing System Proclamation No. 457/2005, Federal Negarit Gazeta, Year 11, No. 45, Addis Ababa, 15th July 2005; FDRE, Mining (Amendment) Proclamation No. 22/1996, Federal Negarit Gazeta, Year 2, No. 10, Addis Ababa, 15th February 1996; FDRE, Mining (Amendment) Proclamation No. 118/1998, Federal Negarit Gazeta, Year 4, No. 47, Addis Ababa, 23rd June 1998; FDRE, Mining Operations Council of Ministers (amendment) Regulations No. 124/2006, Federal Negarit Gazeta, Year 12, No. 24, Addis Ababa, 10th March 2006; TGE, Licensing and Supervision of Health Service Institutions Council of Ministers Regulations No. 174/1994, supra note 344; TGE, Licensing and Supervision of Private Educational Institutions Council of Ministers Regulations No. 206/1995, supra note 344; and FDRE, Coffee Quality Control and Marketing Proclamation No. 602/2008, supra note 360.

[363] See FDRE, Trade Practice Proclamation No 329/2003, Federal Negarit Gazeta, Year 9, No. 49, Addis Ababa, 17th April 2003, at the preamble and article 3.

[364] See FDRE, Trade Practice Proclamation No 329/2003, supra note 363, at arts. 4, 6, 10 & 11; and IGE, Commercial Code of the Empire of Ethiopia Proclamation No. 166/1960, supra note 313, at arts. 130-134. The competition law foresees the exemption, by the Trade Practices Commission, of only i) the commercial activities exclusively reserved by law for government, ii) the developmental enterprises that may have to be encouraged by government, and iii) the basic goods and services that may have to be subject to price regulation by government from its application (See the Trade Practice Proclamation No 329/2003, supra note 363, at articles 4 & 5). The government is revising the competition law currently.

recent economic growth and poverty reduction strategies.[365] It also launched a civil service reform program to enhance the quality and speed of the public services to the private sector and continued to work to integrate the country into the world trading system.[366] It, accordingly, seemed to live as a government of transition economy striving towards building the institutions of free market through less extensive roles than the roles of a government in a planned economy (as the move is towards free market) and more extensive and active roles than the roles of a government in a developed market economy (as there are a number of market imperfections and development challenges that can not be managed by the Ethiopian market).

The country, therefore, looked to be under a government that pursues the market enhancing approach with a view to building the institutions of free market (i.e. the market friendly system) in the long run. This characterization has, however, become fragile for three reasons:

Firstly, the Ethiopian government has largely remained to be administrative despite the policies and reforms. The institutions established by the government to act as independent market regulators are few and the bulk of government-business relationship is left to ministries that are administrative by nature. All the institutions

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[365] See Ethiopia, Poverty Reduction Strategy Paper, July 31, 2002, retrieved on Oct. 12 2006 from:http://www.imf.org/External/NP/prsp/2002/eth/01/073102.pdf;Ethiopia,Poverty Reduction Strategy Paper — Annual Progress Report 2002/2003, February 12, 2004, retrieved on Oct. 12 2006 from: http://www.imf.org/external/pubs/ft/scr/2004/cr0437.pdf; Ethiopia, Poverty Reduction Strategy Paper— Annual Progress Report 2003/04, January 30, 2006, retrieved on Oct. 12 2006 from: http://www.imf.org/external/pubs/ft/scr/2006/cr0627.pdf; FDRE (Ministry of Finance and Economic Development), Ethiopia: Building on Progress, A Plan for Accelerated and Sustained Development to End Poverty (PASDEP) (2005/06-2009/10) (Volume I, September 2006, Addis Ababa), retrieved on 10 June 2008 from: http://www.mofaed.org/macro/PASDEP%20Final%20English.pdf; FDRE (Ministry of Finance and Economic Development), Ethiopia: Building on Progress, A Plan for Accelerated and Sustained Development to End Poverty (PASDEP) (2005/06-2009/10) (Volume II, September 2006,Addis Ababa); FDRE (Ministry of Finance and Economic Development), Ethiopia: Building on Progress, A Plan for Accelerated and Sustained Development to End Poverty (PASDEP), Annual Progress Report 2005-2006 (June 2007,AddisAbaba); and FDRE (Ministry of Finance and Economic Development), Ethiopia: Building on Progress, A Plan for Accelerated and Sustained Development to End Poverty (PASDEP), Annual Progress Report 2006-2007 (December 2007,Addis Ababa), retrieved on 10 June 2008 from: http://www.mofaed.org/APR%202006%20and%202007/PASDEP%20Annual%20Progress%20Report%202006%20-%202007.pdf.

[366] See reports of the Ministry of Capacity Building of the country for the civil service reform program and Geboye Desta, Melaku. 'Accession for What? An Examination of Ethiopia's Decision to Join the WTO' Journal of World Trade 43, no. 2 (2009) (Kluwer Law International BV, The Netherlands), at pp. 347ff, for the process of Ethiopia's accession to WTO.

other than the National Bank of Ethiopia are also made accountable to ministries that are entrusted with general administrative and regulatory powers over the sectors in which they operate.[367] The competition law enforcement is also left to the Ministry of Trade and Industry which is administrative by nature.[368]

Secondly, the majority of market actors (i.e. the actors other than the financial institutions and the sectors for which special regulators are established) are not subject to market regulation, nor to the competition law, as though the system is laissez-fair.[369] They are required to meet the general trade registration and licensing requirements for the sector of activity during start up and rarely subjected to ongoing substantive and disclosure requirements and supervision by the licensing and regulatory institutions for purpose of trade regulation though they have to renew their licenses periodically.[370] They can also close or change their businesses, undergo amalgamation and dissolution processes (under the Commercial Code), and modify or return their licenses more freely than the financial institutions.[371] Both the sectoral regulators and the government

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[367] See FDRE, the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 471/2005, supra note 361.

[368] The decisions of the competition commission (which is known currently as Trade Practices Commission) are enforceable only after final approval by the Ministry of Trade and Industry (See the Trade Practice Proclamation No 329/2003, supra note 363, at articles 12-19).

[369] More than eighty nine point six (89.6) percent of the total traders and ninety three point six (93.6) percent of the business organizations registered with the Ministry of Trade and Industry are individuals and private limited companies, respectively, that are not subject to strict requirements under both the commercial code and sectoral legislation (See the trade registration data base of the Ministry).

[370] See FDRE, Commercial Registration and Business Licensing Proclamation No. 67/97, supra note 349; FDRE, Federal Government Commercial Registration and Licensing Council of Ministers Regulations No. 13/97, supra note 349; FDRE, Addis Ababa/Dire Dawa Administration Commercial Registration and Licensing Council of Ministers Regulations No. 14/97, supra note 349; FDRE, Commercial Registration and Business Licensing (Amendment) Proclamation No. 171/1999, supra note 349; FDRE, Commercial Registration and Business Licensing (Amendment) Proclamation No. 328/2003, supra note 358; FDRE, Authentication and Registration of Documents Proclamation No. 334/2003, Federal Negarit Gazeta, Year 9, No. 54, Addis Ababa, 8th May, 2003; Commercial Registration and Licensing Council of Ministers (Amendment) Regulations No. 87/2003, supra note 358; FDRE, Commercial Registration and Business Licensing (Amendment) Proclamation No. 376/2003, supra note 358; FDRE, Commercial Registration and Licensing Council of Ministers /Amendment/ Regulations No. 95/2003, supra note 358; TGE, the Encouragement, Expansion and Co-ordination of Investment Proclamation No. 15/1992, supra note 344; FDRE, Investment Proclamation No 37/1996, supra note 349; FDRE, Investment (Amendment) Proclamation No. 116/1998, supra note 349; FDRE, Investment Areas Reserved for Domestic Investors Council of Ministers Regulations No. 35/1998, supra note 349; FDRE, Investment (Amendment) Proclamation No. 168/1999, supra note 349; FDRE, Investment Proclamation No 280/2002, supra note 358; FDRE, Council of Ministers Regulations on Investment Incentives and Investment Areas Reserved for Domestic Investors No 84/2003, supra note 358; and FDRE, Investment (Amendment) Proclamation No. 375/2003, supra note 358.

[371] See ibid with the trade registration and licensing practices of the Ministry of Trade and Industry and sectoral regulators.

do not also set price, quantity and quality regulations except in few instances.[372] The competition law enforcement and creation of market competition have also remained to be unsatisfactory despite introduction of the competition law of 2003.[373] The financial institutions are, on the contrary, subject to strict nationality, legal form, initial capital, ownership spread, business plan, organizational structure and management quality related requirements during their start up and capital adequacy, reserving, provisioning, liquidity, solvency, functional separation, ownership separation, risk diversification, risk transferring, accounting, valuation, market conduct, information exchange, reporting, disclosure and fund guarantee related requirements during their operation.[374] They are closely supervised by the National Bank and have to get its prior permission to close or change their businesses and undergo amalgamation and dissolution processes.[375] The operators in some of the sectors for which regulators are established

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[372] The competition law reserves the power of the government to regulate the price and distribution of basic goods and services (See the Trade Practice Proclamation No 329/2003, supra note 363, at articles 22 & 23). Only the transport, fuel supply, electricity and telecom services are, however, subject to price regulation in practice. The production and sale of food is also hardly regulated in practice though the public health law anticipates that the quantity and quality of same will be subject to regulation by the Ministry of Health (See the Public Health Proclamation No. 200/2000, supra note 362, at articles 8-10). The quality and standards agency also enforces its standards on voluntary basis and makes only those that are related to products listed by law and have direct bearing on health, safety, weight and measurement compulsory (See the information from website of the Agency with the PDRE, Regulations of the Council of Ministers to Declare Ethiopian Standards Regulation No. 12/1990, Negarit Gazeta, Year 49, No. 25, Addis Ababa, 5th September 1990; the PDRE, Council of Ministers Regulations to Provide for Standards Mark and Fees Regulation No. 13/1990, Negarit Gazeta, Year 49, No. 26, Addis Ababa, 5th September 1990; and the PDRE, Weights and Measures Regulations Legal Notice No. 431/1973, Negarit Gazeta, Year 32, No. 13, Addis Ababa, 9th March 1973).

[373] The competition regime is affected by incompleteness of law, weak enforcement machinery, public sector dominance and absence of advocacy (See the Trade Practice Proclamation No 329/2003, supra note 363; the staff profile and annual operational reports of the Trade Practices Commission; the study reports of the Private Sector Development Hub of the Addis Ababa Chamber of Commerce and Sectoral Associations; and the study report of the Booz Allen Hamilton to USAID entitled: Ethiopia Commercial Law & Institutional Reform and Trade Diagnostic, January 2007, at pp. 58-65. Note also the more than two hundred state enterprises established in different sectors by regulations no. 6/1992 up to 104/1992, 105/1993 up to 118/1993, 124/1993, 127/1993 up to 154/1993, 156/1994 up to 180/1994, 184/1994 up to 196/1994, 199/1994 up to 203/1994, 204/1995, 205/1995, 207/1995, 208/1995, 210/1995 up to 216/1995, 10/1996, 18/1997, 26/1998, 28/1998-31/1998, 38/1998, 42/1998, 45/1998, 46/1998, 50/1999, 53/1999, 58/1999, 81/2003 up to 83/2003, 90/2003, 92/2003 up to 94/2003, 97/2004, 99/2004, 100/2004, 109/2004, 110/2004, 116/2005, 119/2005, 122/2006, 131/2007, 134/2007, 136/2007, 140/2007 and subsequent amendments).

[374] See TGE, Licensing and Supervision of Banking Business Proclamation No. 84/1994, supra note 344; TGE, Licensing and Supervision of Insurance Business Proclamation No. 86/1994, supra note 344; FDRE, Licensing and Supervision of Micro-financing Institutions Proclamation No 40/1996, supra note 360; FDRE, Banking Business Proclamation No. 592/2008, supra note 360; and the NBE Directives Number SBB/1/1994 through SBB/45/2008, SIB/1/1994 through SIB/28/2004, and MFI/01/1996 through MFI/17/2002.

[375] See Ibid.

(such as the electricity and telecom operators, the radiation and health service providers, and the manufacturers and distributors of drug and medical equipments) are also subject to some technical, quality and safety standards, codes, procedures and guidelines by the respective regulators while the air transport service providers are subject to national and international safety requirements.[376]

Thirdly, the federal government has clearly rejected the liberalism model of the advanced economies in its policies and strategies and the Prime Minister (and a number of the government officials) have re-argued in favour of the developmental state approach.[377] The Prime Minister has already argued that the free market idea is a failure in Africa and that the developmental state approach is one to re-favour.[378] The argument is shared by officials of the government and members of the leading political party (EPRDF) though it is not translated into a government policy officially.[379]

4. Conclusion

The choice of appropriate mix between government and business is a matter of interdisciplinary consideration and cost-benefit analysis. Ethiopia and other developing countries need to make it after consideration of the following points:

A. The role of government regulation in the economy is a function of stage of economic development. In a low state of economic development, the efficiency of markets, the capabilities of firms and the availability of intermediaries to solve coordination problems is limited and the scope for government to facilitate development can be significant. As the economy matures, however, the ability of the private sector improves and the scope for government intervention can be limited. The boundary between the private and government spheres and the mechanisms of economic coordination also largely depend on institutional features of the economy. The view that less government intervention is desirable as the economy develops should not also mean that every economy will eventually converge to a system in which coordination is achieved merely through the mediation of markets. The underdevelopment of private-sector institutions does not also automatically guarantee

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[376] See the directives of the Ethiopian Electricity, Telecommunications, Radiation Protection, Drug Administration and Control, and Civil Aviation Authorities from their websites.

[377] See the Rural Development Policies, Strategies and Programs, supra note 354; the Capacity Building Strategy and Programs, supra note 354; the Matters of Building a Democratic System, supra note 354; the Industrial Development Strategy, supra note 354; the Foreign and National Security Policy and Strategy, supra note 354; and the Revolutionary Democracy: Development Lines and Strategies, supra note 350, at pp. v, vi, 3-32, 123-239 for rejection of the model of liberalism of the advanced economies by the official policies of the government.

[378] See Meles Zenawi, 2007, African Development: Dead Ends and New Beginnings, Unpublished Extracts, retrieved in June 2007 from: http://www0.gsb.columbia.edu/ipd/pub/Meles-Extracts2-AfTF2.pdf.

[379] It has become common to hear about the developmental state approach in the key note speeches of government officials. The approach has also already become part of the recent business process re-engineering (BPR) action of the government.

the effectiveness of state activism or call for unconditional state intervention. The government must be capable of and motivated to perform the required coordination tasks in the public interest and its capability and incentives need to be shaped by the political-economy structure in which the government exists.

B. Both the market and the government can fail as regulatory systems. The problems of monopoly, public good, destructive competition, scarcity, externality, information deficit, bounded rationality, third party paying, price instability, involuntary unemployment, inflation, balance of payments disequilibria and so on; the need for economic co-ordination and protection of existing regulation; and the need for achievement of macro-economic and social policy goals such as growth, stability and equity (in wealth redistribution) call for government intervention. The problems of rent-seeking, waste, erroneous calculation, power abuse, capture and so on, however, also call for significant reduction of government intervention in business.

C. Neither the traditional command and control regulation nor the free market alone can provide satisfactory answers to the increasingly complex regulatory problems of the modern world. The experience in successful economies shows that the design of government intervention and regulation in an economy is a matter for continuous reform aiming at identification of the kind of division of labour between the market and the government that most suits the prevailing socio-economic circumstances. It has shown that exploration of the mix that combines market and non-market policy instruments and effectively harnesses the different regulatory participants with a view to meeting desirable regulatory objectives is important.

D. Fixing the mix between government and business requires that a country has to have clear vision and determination on the type of society to create. It also requires that the country indicates this vision and determination in its constitution and the heart of its system.

E. Most of the modern theories do not completely reject the governmental regulation of business. Only some like the classical and the Marxian political economists have recommended for the development of free market without government and government without market, respectively, and both have remained to be ideal. The other theories have often differed in their explanations of the interaction between market and government, in the extent to which they endorse governmental and non-governmental regulations and in the choice of the interests that justify each of these. Real life also shows that governments regulate despite the varying arguments against governmental regulation of business. The arguments based on treatment of the market and the government as mutually exclusive substitutes have also become traditional. The advice to developing countries also seems to be away from the extremes of the market-friendly and developmental state approaches to a market-enhancing approach so that the markets and governments will exist in partnership until the markets outweigh in the system.

F. The ideas of decentred and responsive regulation have implied the decoupling of regulation from government; the introduction of tripartite regulation by governmental regulators, self-regulators and interest groups; the post regulation of self-regulation (and the interest groups); and the making of regulation cooperative instead of adversarial. The centring of regulation in government is criticized for poor targeting of rules, rigidity, unilateral decision making, unintended outcome, weak motivation, information and instrument failure, and under and over-enforcement. The self-regulation and interest group options are also found to be affected by the level of prudence, capacity and ethics of the market actors and interest groups. They require the existence of business and social communities that i) possess cultural values which will allow little freedom to fraudulent activity and scandal, ii) can smoothly and effectively resolve conflicts of interests, iii) can shoulder the responsibility and impartiality which self-regulation requires, and iv) have members who possess deeply ingrained commitment to adhere to own codes of conduct. Ethiopia and the many developing countries lack this. The recommendation is, therefore, to have a system that will allow the pragmatic mixing of the three options through time.

G. Regulation faces constraints and costs no matter how it is justified. It can be constrained during its formation when particular interests succeed in influencing it in their favour. It can be constrained during its implementation when informational and administrative limits, conflicts of interest between the regulators and the regulated entities, and political considerations affect it. It can face enforcement costs when it involves rule formulation, institutional set up and compliance expenses and results in outcomes that may discourage innovativeness of the regulated institutions. The presence of these costs and constraints do not, however, imply the taking of position against regulation as their magnitude depends on the design of the regulatory system. It, however, implies that a cost-benefit assessment has to be done and the beneficial approach has to be chosen during regulatory design.

H. Any attempt to find out the right relationship between government and market should not, therefore, be based on dichotomy between the market and the government. It should not also aim at a single hard-and-fast solution for all problems as economic coordination and development (hence, the design of regulation) are continuous processes of system change in which society should try to discover better solutions from time to time. The policy should be to pragmatically mix between competition, government regulation, self-regulation and market discipline according to context. The system should also be one that allows the taking into account of national and international economic, political and social factors, the synthesis of solutions through interdisciplinary consideration, and the making of continuous review of solutions.

Ethiopia and many of the other developing countries should also make the general definition of government and business relationship topic for constitutional law as it is a matter of socio-economic system design. The developed market countries of Northern America, Western Europe and Japan have succeeded in making their systems free market without expressly defining the economic roles of their governments in their constitutions, but by i) assuming the free market principle, conferring private property

rights and recognizing the exercise of individual labour and economic freedoms by their constitutions, and ii) putting in place the necessary regulation. They have also benefited from stability of policies. The countries of Eastern Europe, Asia and other regions that have shifted their attentions from communism to the free market system have also assisted their transitions through clear definition of the economic roles of their governments in their constitutions on top of the recognition of private property rights and individual economic freedoms. Ethiopia and many of the other developing countries have, however, left the relationship between government and business to discretion of the executive in government and this has made their systems fragile due to political choices. The case for general constitutional definition of policy and the roles of government in business is, accordingly, high in them despite the need for pragmatism and flexibility.

Ethiopia should also make other improvements. First, it should not confuse between the administration and the regulation approaches and work towards creation and use of independent market regulators for the regulatory functions. Secondly, it should enhance the use of the competition mechanism and build the capacity for it as a matter of its free market policy. Thirdly, it should raise the capacity and interest to effectively intervene and regulate the markets for the matters in respect of which the competition mechanism fails to hold whether due to the nature of the matters or the market behaviour. All these are legitimate and expected from the current policy set up of the country.

THE AFFINITY BETWEEN
THE SALE OF GOODS PROVISIONS
OF
THE *FETHA NAGAST*
AND
MODERN *LEX MERCATORIA*

A Professorial Inauguration Lecture

By Tilahun Teshome

January 2010

"No modern legislation which does not have its roots in the customs of those whom it governs can have a strong foundation."
Preface by Emperor Haile Sellasie I to the 1968 edition of the *Fetha Nagast.*

"... that is the first precept of the law, that good is to be done and promoted, and evil is to be avoided. All other precepts of the natural law are based on this."
St. Thomas Aquinas.

I. Some Background Notes on the *Fetha Nagast*

Consciously or otherwise, many Orthodox Christians in Ethiopia take the *Fetha Nagast*, literally meaning" the Law of Kings" in Ge'ez, as the foundation of both the spiritual and secular law of the country. This is also what the Orthodox Church claims. But it was rather a knowledgeable Catholic Bishop, Abba Paulos Tzadua, who translated it into the English language in the mid Nineteen-Sixties. In his contribution on the *Fetha Nagast* to the 2005 *Encyclopaedea Aethiopica*, Abba Paulos Tzadua tells us that the *Fetha Nagast* is a book of law that has been in use in Christian Ethiopia since at least the 16th Century. Abba Paulos was a scholar with good training in theology, law and the social sciences and with a further mastery of several languages

including, Tigrigna, Ge'ez, Amharic, Italian, Arabic and English. Coupled with his personal dedication, these scholarly and linguistic exposures were instrumental in his effort to produce a magnificent translation of the hitherto unavailable English text of the Law Book. In his preface to the 2009 Second Print of the English version, Peter L. Strauss, the editor, describes Abba Paulos in the following words:

> *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".*

Abba Paulos writes that the Ge'ez version of the *Fetha Nagast* was derived from the Arabic compilation of an original work in Greek. This assertion has also been substantiated by Peter H. Sand in his Article *"Roman Origins of the "Ethiopian Law of Kings" (Fetha Nagast)"* that was published in Volume 11 of the Journal of Ethiopian Law. Abba Paulos further states that the book from which the Ge'ez translation was taken was known as *Magmu al-quwanin*, meaning a Collection of Cannons, written in the year 1238 by the Christian Egyptian Jurist called Abul-Fada il Ibn al-Assal as-Safi.

The exact time this Canon was brought to Ethiopia and the period of its translation to Ge'ez is not yet determined with any degree of certainty, though. Some say it was brought to the country's spiritual and legal landscape as early as the late thirteenth Century, while many others argue that it came much later. Citing most authoritative opinions on the subject, Abba Paulos contends that this was done during the reign of Emperor Zer'a Yaqob in the Sixteenth Century. But other historical sources reveal that Zer'a Yaqob was an Ethiopian monarch who ruled in the middle of the Fifteenth Century. This chronological flaw notwithstanding, he goes on and tells that the Arabic version was brought by a certain Egyptian native called Petros Abda Sayd, presumably a Coptic Christian, upon the request and at the expense of the Emperor, and was later translated into Ge'ez by Abda Sayd's son.

As regards the actual use of the *Fetha Nagast*, many agree that not much is known about it to date. Even though the Canon is as concerned with secular matters in as much as it does with spiritual and theological issues, its application outside the clergy and some important Imperial-Court affairs leaves much to be desired. There are no strong historical pieces of evidence that depict its use in the regulation of the behaviors of the common people, even in the areas of the country where values based on Orthodox Christendom are deeply entrenched. Strauss says that "on some accounts it was treated as a document only the elect were privileged to know of and consult". Indeed, it has long been more of a symbolic document reflecting the values and Christian heritage of most people in the Northern and Central Ethiopian highlands than a practical enunciation of legal postulates. This view has also been tangentially expressed in the following words of Emperor Haile Selassie I in his Preface to the 1960 Civil Code of Ethiopia:

> *In preparing the Civil Code, the Codification Commission convened by Us and whose work We have directed has constantly borne in mind the special requirements of Our Empire and Our beloved subjects and has been inspired in its labours by the genius of Ethiopian legal traditions and institutions as revealed by the ancient and venerable Fetha Nagast.*

Be that as it may, however, some research works indicate scattered usages and consultations of the *Fetha Nagast* while dispensing justice on important matters, especially in the areas of criminal and property law. In his book entitled *An Introduction to the Legal History of Ethiopia, 1434-1974*, Aberra Jembere has this to state in this regard:

> *It is not known when it [the Fetha Nagast] started to be cited as an authority in the process of adjudication of cases by courts... Even though the Fetha Nagast 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 given it an Ethiopian flavor.*

Content wise, the *Fetha Nagast* is divided into two main parts, fifty-one Articles (chapters) and One Thousand Eight Hundred and Seventy individual provisions. Part One, which deals with spiritual matters and theological issues, takes Twenty Two of the chapters and Eight Hundred one of the provisions. Part Two on secular affairs takes the other Twenty Nine chapters and One Thousand Sixty Nine individual provisions.

To come to the day's topic, it is around this second part of the *Fetha Nagast* and its relation to modern legal norms of commerce, otherwise referred to as the *Modern Lex Mercatoria* that the theme of my speech revolves. The expression *lex mercatoria* (literally meaning "the law merchant") has its origins in the ancient Roman notion of *Jus Mercatorum* that was meant to regulate commercial transactions although it was much elaborated and refined by developments in international trade over the centuries that followed the fall of the Roman Empire. No nation can, therefore, claim that it has the monopoly in its making. In a word, lex *mercatoria* originally referred to the body of laws developed through trade practices with a view to regulating commercial activities. In the words of Lord Mansfield, the 18th Century English judge who takes much of the credit for the development modern commercial law, it is said that "mercantile law is not the law of a particular country but the law of all nations".

The purpose of this speech is not to go deep into consideration of the inexhaustible domain of lex mercatoria as we understand it in modern trade, however. It is rather to make a modest attempt to investigate the commonalities of legal principles that we come across in a specific chapter of the *Fetha Nagast* with some universally accepted legal rules as they relate to the law of sales.

Allow me, therefore, ladies and gentlemen, to go into the theme of my speech.

II. The *Emptio-Venditio* Provisions of the *Fetha Nagast*

a. The Structure of the Chapter on the Sale of Goods

The chapter that pertains to sales transactions, i.e. Chapter XXXIII, is captioned as *"Sale, Purchase and Related Matters" (Be'inte te-sayto we-seyit we-zeteliwomu in Ge'ez)* with seven sections and 29 individual provisions. These seven sections deal with (i) essential conditions for the validity of a contract of sale; (ii) rules on transfer of risk in a contract of sale; (iii) trail and defects in the object sold; (iv) things that are not subject to a contract of sale; (v) improper practice in sales; (vi) modification of a contract of sale; and (vii) assignment of obligations arising out of a contract of sale. Many of the legal principles that we find in this Chapter are also available in the other sections that are meant to regulate juridical acts other than those stemming from a contract of sale.

b. Section One: On Essential conditions

That the expression *emptio-venditio* is the Latin equivalent of the act of buying and selling is not an idea unfamiliar to us lawyers. As is widely understood by many, the development of the theory of consensual contracts, especially the rules relating to contract of sale, are some of the best achievements of the civilian legal tradition whose origin dates back to the era of Roman Jurisprudence. This notion is as valid in our times as it had then been. Roman law had it that the sole basis for the validity of a contract of sale is the agreement of the parties to deliver the goods sold and to pay the purchase price, there being no need to subscribe to any particular form. Zimmermann, a scholar widely acclaimed for his study of Roman law, also contends that "the Roman law of sales has provided us with the basic tools for our modern analysis of this economically most important of contracts, and it has invariably shaped our way of thinking about sale, irrespective of whether certain individual rules were preserved or rejected."

Our Civil Code too, in this respect, defines a sales contract as a contract whereby one of the parties undertakes to deliver the thing and to transfer its ownership to another party in consideration of a price. As a contract, therefore, all the essential ingredients of a valid agreement are required to be met. These are those relating to capacity of parties, to the will of the parties to be bound by the sale (fulfillment of the *intentio obligandi* requirement), to the object of sale and to formal requirements of the law, if any.

The striking similarity between these ideas and the relevant rules contained in the *Fetha Nagast* can be seen from the reading of the very first paragraph of the Section dealing with its rules on *emptio-venditio*:

> *A purchase is not valid unless the seller and buyer may dispose of their own property – unless they make an agreement with knowledge and are not subject to guardianship.... Purchase and sale is completed only by the act of giving on the part of the seller who owns it and of receiving on the part of the buyer,*

without violence. Neither the giving of an object on the part of the seller, nor the receiving of it on the part of the buyer shall take place if they part before reaching an agreement on the price.

The phrase "not subject to guardianship" in the above stated rule is also an elucidation of the modern requirement for the existence of capacity for any one to enter into a juridical act, an act sustainable under the law. As is obvious in modern jurisprudence, capacity is a mechanism of safeguarding the weaker party in a legally created relationship and primarily relates to the age or state of mind of the one that is meant to be protected. In very vivid words, another chapter of the *Fetha Nagast* (Chapter XXXII) articulates the notion of capacity and guardianship as follows:

Guardianship is necessary for the one who is unable to distinguish in his mind that which is suitable for the perfection of his nature and good for his will, either because of an evil spirit which seduces him – this is the mad person – or because his brain is wrecked by disease – this is the feeble minded person who forgets his previous actions – or because his brain is not mature – this is the boy who has not attained the age of eighteen years – or because his condition becomes more feeble than previously by nature, because of the use made of his brain – this is the case when he grows old and approaches 100 years of age. (What a marvelous material for students of the Law of Persons!)

On the consent requirement for the validity of a contract of sale, the *Fetha Nagast* has rules relating to knowledge by the parties of the subject matter of the sale and to contractual freedom. Again presence of the required capacity is not the only pre-requisite for validity. It must be seen to it that those with capacity have freely expressed their consent in the transaction in order for it to be binding on them. It is this aspect of modern jurisprudence that the phrase "to make an agreement with knowledge" in the Canon depicts. Related to the idea of freedom of contract is the rule that protects the weaker party in the bargain from being coerced to enter into a contract as a result of violence exercised on him. The *Fetha Nagast* recognizes the validity of a sales contract only where it is not a result of violence. In fact, so strongly is duress resisted by the rules of the Canon that Chapter XXXV provides different alternatives to the victim, in as much the same way as the modern notions of void and voidable contracts do. Here is what it says:

If a man is compelled [against his will] to [agree to] sell his own property, to buy another's property, to lease his property, to hire another's property or to confess to another something which is not with him, he may either perform [the resulting contract] if he wishes, or refuse [to perform it] if he does not.

We may compare this statement with the stipulations made in the section of the Civil Code on Invalidation of Contracts (Articles 1808-1815).

Another interesting similarity with modern practice is the way disagreements are meant to be resolved where parties are at variance in relation to the price of the goods sold. In

this respect, it is specified under Article 2271 of the Civil Code that the price may be referred to the arbitration of a third party and that there shall be no sale where such third party refuses or is unable to make such an estimate. The *Fetha Nagast* too says that:

> *The parties shall not complete the contract unless another person acceptable to both is present, even if this person has not made the estimate. And if one of them agrees to the proposed terms of the contract, the consent of the other shall conclude it.*

As far as the object of sale is concerned, in Roman law, almost everything could be the subject of sale whether corporeal or incorporeal, including chattels, land, claims against third parties, inheritance rights and servitudes as long as the seller has the title to dispose it off. The rule in the *Fetha Nagast* too is coined with a much similar content to the adage *"Nome Dat Non Habet"* in which it is long recognized that one cannot transfer a right better than that of his own. On the other hand, just as Roman law and its modern successors do make distinctions between *emptio-venditio* (purchase and sale) and *locatio-conductio* (contract of hire) so does the *Fetha Nagast*. In this sense, while a contract made for the benefit of some other person's services or for the use of property belonging to another person is *locatio-conductio* the one made with a view to transferring not only the physical possession of the thing but also the title over it is that of *emptio-venditio*. In the Civil Code too (Article 2728), it is provided that the object hired shall remain the property of the lessor who has the right to claim it back at the end the term of hire. In a clear attempt to differentiate between an act of *emptio-venditio* and *locatio-conductio*, the Code specifies that "where it is stipulated that after a certain number of payments of the rent or hire, the lessee shall become the owner of the object, the contract shall constitute a contract of sale notwithstanding that the parties have termed it a contract of hire". This same idea of hire is prescribed in Chapter 28 of the *Fetha Nagast* in the following words:

> *Whosoever is entitled to dispose of his property may lend whatever he may dispose of and may hire whatever yields him profit, getting his property back in its original condition.*

On the payment of earnest, the *Fetha Nagast* recognizes earnest as one mode of proving the existence of a sales contract. It specifies that:

> *The receiving of earnest by the seller from the hand of the buyer brings about the conclusion of the contract of sale and purchase. If the buyer rescinds the sale, the seller keeps the earnest; if the seller rescinds he must pay double the earnest he received.*

Aren't the following words of the Civil Code direct reproductions of this rule?

Article 1883. – Effect of Earnest.

> The giving of earnest shall be proof of the making of the contract.

Article 1885. – Nonperformance of contract.

1. Unless otherwise agreed, the party who has given earnest may cancel the contract subject to forfeiture of the earnest given by him.

2. Unless otherwise agreed, the party who has received earnest may cancel the contract subject to repayment of double the amount received by him.

On the formal requirements of a contract of sale, it is stated in the *Fetha Nagast* that writing is not mandatory in such a contract.

> *Some contracts of sale and purchase are made in writing, and some without writing. A written contract in the possession of the buyer is valid if the document is attested by two, three or more witnesses... The contract should specify other related terms, the object for sale, the amount of the price, whether the price is to be paid immediately, and the date of payment, if it is on credit.*

This is equally the case in Roman law. According to the Justinain Institute, writing was not necessary in a contract of sale, but once it is agreed to make the contract in writing, it won't be binding unless it is signed by the parties. It is also the case in modern laws, including ours. As a rule, a sale of goods contract is not subject to any formality. Our Civil Code (Art. 1719) states that no special form is required for the validity of a contract unless it is provided otherwise. But once it is made in writing, the conditions that are required to be met are almost similar to the one we see in the quoted provisions.

c. Section Two: On Transfer of Risk

The idea of transfer of risk in modern contract law attempts to provide the answer to the question: - Which one of the contracting parties is responsible for the loss, damage, or deterioration in the value of the goods sold, that take place after the conclusion of the contract of sale but before these goods are effectively delivered from the seller to the buyer. This is what Planiol and Repert have also asked in their Treatise on the Civil Law. The problem is more common in sales contracts than most other transactions. According to the Civil Code (Art. 1758), a person legally bound to deliver something shoulders the risk of damage, loss or deterioration of that thing until such time that it is duly delivered to the other party. But his risk is transferred to the other party, if that party fails to take delivery of it as agreed. This rule has been elaborated further in the provisions of the Code on sales contracts. Similarly, the 1979 Sale of Goods Act of England in its Article 20 provides that:

> *Unless otherwise agreed, the goods remain at the seller risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not. But where delivery has been delayed through the fault of either the*

buyer or seller, the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault.

The rule is also regarded as one of the most important provisions governing contracts of sale in international trade. In this respect, Article 66 of the 1980 United Nations Convention on the International Sale of Goods (the CISG) provides that "loss or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller". The same is true in the case of the thirteen International Contract Terms, alias, INCOTERMS that are developed by the International Chamber of commerce (ICC) and are widely in use in today's international business transaction

It is again interesting to take account of the proximity of the rules of *Fetha Nagast* to the above principles of modern jurisprudence. Here is what it has to offer on the subject:

If the thing for sale is spoiled before the sale is completed, one must consider whether the object was in the hands of the buyer or not. If it is the buyer who has spoiled the object, he must keep it and pay to the seller the price agreed upon... If the object sold is destroyed in whole or in part, after the sale is perfected it belongs to the buyer and he must give the seller its price, even if it is destroyed the day he bought it.

Abba Paulos explains in the footnotes to this rule that in the first case the sale is not perfected but the buyer is presumed to have taken possession of the object for trail, while in the second one the sale has been perfected and the risk is thus transferred to the buyer following the Latin rule *res perit domino*. In contrast to this stipulation which is close to related ideas in modern jurisprudence, Roman law used to consider the buyer as the owner of the thing sold from the time the contract of sale is concluded. This ownership entitlement includes the right to own the natural fruits and increases of the thing that accrued before delivery but after the conclusion of the contract. The famous Digest of the Justinian Institute had it that the buyer shoulders the risk on the property even though that property was not delivered to him. He was likewise responsible for the expenses of keeping and preserving the thing prior to delivery. The seller was, however, obliged to take as much good care of the things sold as would a *bonus paterfamilias.*

d. Section Three: On Sale on Trial and on Defects

Sale on trail is not something unique to modern contracts. The Ethiopian Civil Code, for one, provides that where parties agree to sell and buy a thing on trial, the buyer shall, upon taking delivery, declare his intention to buy the thing with an agreed period of time, or within a reasonable period if no time is specified in the contract. Failure by the buyer to do so implies his acceptance of the sale with all the legal consequences ensuing there from. Nevertheless, the risks are still borne by the seller unless the buyer

confirms the contract or until the lapse of the period stipulated for acceptance (see Civil Code Arts. 2380-2383). Similarly, the *Fetha Nagast* states that where parties agree on a sale on trial:

> *The seller must give the buyer three days to put the object to trail, or more than three days if the object will not spoil [be spoiled] in a short time. The price of sale shall remain with the seller during the period of trial. But he shall not dispose of it without the permission of the buyer.*

On defective sale, the *Fetha Nagast* prescribes that:

> *If a defect is discovered before the sale is perfected, but the seller in making the contract was unaware of it, the buyer may either take or refuse to take it, as he chooses. However, he may not buy it at a reduced price unless the seller agrees... If a defect appears in the object after its transfer to the buyer, he may not sue the seller and tell him to retake the object but the seller must agree to a reduction of price for the defect which existed before the sale... If the buyer was aware of a previous defect in the object and could have sued the seller for this defect but failed to do so, his right to bring an action is cut off.*

This is congruent to one of the cardinal rules of modern sales law, which imposes on the vendor the obligation to supply warranty against latent defects. Our Civil Code has it that the seller's warranty obligation is due where the thing sold does not possess: (1) the quality required for its normal use; (2) the quality required for its particular use expressed in or implied by the contract; or (3) the quality or specifications agreed upon in the contract(see Civil Code Arts. 2287-2300). In relation to this K. W. Ryan, in his introductory book on the Civil Law, argues that this rule has its roots in ancient Roman law and that present day Civil law has done little to bring a change to it. He contends that the Digest of the Justinian Institute provided these remedies for all kinds of sales although it originally developed from measures that used to be taken in relation to sale of slaves and animals in ancient Rome as prescribed in the Edict of Curule. He goes on to say that "if the seller failed to declare any of a large list of latent defects at the time of sale, the buyer could at his option bring an actio redihibitoria for rescission of the sale; or an actio quanti minoris aestimatoria for reduction of the price. These principles have also found their ways in modern international contracts instruments such as the UNCISG (see Section III, Arts, 45-52 for details).

e. Section Four: On Things that are not subject to a contract of sale

This Section of the *Fetha Nagast* provides a long list of things that cannot be subjected to sale, including free persons (as opposed to slaves), charitable legacies, deposits entrusted to one's custody, things that cannot be delivered to the buyer, dead animals, flesh half-eaten by animals, things slain as sacrifice for idols, properties communally

owned and water flowing through public domain. This has also much to do with the old Roman law adage of *res extra-commercium* which holds that certain things are always out of the scope of private transaction and are not thus susceptible of being traded. In Roman law too, any contract of sale involving a free man (*Liberi hominus*) or a *res extra-commercium* such as those constituting the public domain (*res publicae*) is invalid. It is worth noting the provisions of Articles 18 and 19 of the Ethiopian Civil Code in this context in relation to the invalidity of acts on the integrity of the human body and also Article 1454 of the same on the inalienability of properties designated as constituting public domain in which it is stated that "property forming part of the public domain may not be alienated unless it has been declared no longer to form part of the public domain".

f. Section Five: On improper practices in sale

The rules of the *Fetha Nagast* on improper sales practices are meant to provide the ethical standards for sale and purchase, including those related to unconscionable dealings, the making of excessive profits, price manipulations and unfair trade practices. Just to quote one rule, the *Fetha Nagast* provides that:

> *It is forbidden to say to someone who bought from another on condition of trial: "Cancel the contract you have made and I will sell it to you at a cheaper price or at the same price he offered to you and my goods are better than his".*

May we, in this regard, remind ourselves of the provisions of Article 2056(1) of the Civil Code in which it is stated that "whosoever is aware of the existence of a contract between two other persons commits an offense where he enters into a contract with one of those persons thereby rendering impossible the performance of the first contract"? It is likewise provided under Articles 132 and 133 of the 1960 Commercial Code that any act contrary to honest commercial practices constitutes a fault and entitles the victim to claim compensation from the wrong doer.

g. Section Six: On Modification of a contract of sale.

Needless to state, a contract which has been duly consented to is binding. *Pacta sunt servanda* goes the old Latin adage. In sales law too, it is improper to make a unilateral variation of the price or modification of its terms. Taking the validity of this postulate, the *Fetha Nagast*, however, provides that where the thing sold is found to have a defect, it may be sold at a lower price than was originally agreed to. The buyer may also avail himself of the same right of reducing the price where a part of the object for sale is missing whereas he may totally rescind the contract if the object is completely destroyed. This is more or less the case in modern law. In our law, for example, it is specified in Articles 2344(2) and 2345(1) that a contract may not, in the ordinary course of events, be cancelled where the defect is of small importance; or where the sale relates to delivery of several things or a collection of goods and part only of these goods have been delivered. In such cases the buyer is entitled to a proportional

reduction of the price. In a similar approach, Article 50 of the UNCISG also prescribes as follows:

> *If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of delivery…*

h. Section seven: On assignment of obligations in a contract of sale

Most Civilians agree that the Roman law rule of *delegatio* embraces both the transfer of obligations from one debtor to another while the creditor remains the same; and the transfer of rights from one creditor to another while the debtor remains the same person. The latter gradually came to be designated as *assignatio*. This is what we find in the provisions of Articles 1962-1967 (on assignment of rights) and Articles 1976-1972 (on delegation of obligations) of our Civil Code. The principle of assignment is thus an act whereby a creditor transfers, in whole or in part, the rights that he has against a certain debtor with or without the consent of the person liable to answer for the claim. No consent of the debtor is necessary in our law, though. Logically speaking, delegation is the converse of assignment. It is a state of fact in which the debtor, with or without the knowledge of his creditor, entrusts his obligation to perform a contract to another debtor.

Both assignment and delegation have now been adopted by most jurisdictions, although with some variations as to their application. They have also been made a part of international contract instruments. The 2002 Principles of European Contract Law, a model contract law developed by the Commission on European Contract Law that operates under the auspices of the European Union, has devoted two chapters (Chapters 11 and 12) on assignment of claims and substitution of a new debtor, alias delegation of debts. These Principles recognize that a party to a contract may normally assign a claim under it. They also accept that "a third person may undertake with the agreement of the debtor and the creditor to be substituted as debtor, with the effect that the original debt is discharged". The same rules have also been elaborated in Chapter 9 of the 1994 UNIDROIT Principles of International Commercial Contracts.

Although the *Fetha Nagast* does not have rules on what we now understand as assignment in modern contract law, it has a clear provision on delegation of debt. To this end, the last Section of the Chapter on sales has this to offer:

> *An assignment of debt is not valid without the consent of the assignor and the debtor but the consent of the assignee is not necessary.*

The *assignor* and the *assignee* are what the Civil Code refers to as the *delegator* (the one who transfers his obligation to another) and the *delegate* (the one who assumes the obligation of the original debtor after the delegation), respectively.

Way back from the days of Roman law, both assignment and delegation have been widely in use both in trade and in other transactions. Every day, many people make use of them, mostly without even being aware of the complexity of the transaction involved. A very notable example of assignment in this regard is the use of cheques and other negotiable instruments, although there is quite a distinction between an ordinary assignment and assignment in the case of these instruments. This shows the truism that just as in the case of a tangible object, a claim is also a transferrable commodity. In this connection a jurist has once noted thus:

> *If we were asked – Who made the discovery which has most deeply affected the fortunes of the human race? We think, after full consideration, we might safely answer – The man who first discovered that a debt is a salable commodity.*

With that, I conclude my rather hasty and brief attempt to draw parallels between the Sale of Goods Provisions of the *Fetha Nagast* and the jurisprudence of our time pertaining to the Law of Commerce, the modern *Lex Mercatoria*. With one basic question though! Leaving the spiritual aspect of the *Fetha Nagast* to the faithful so as not to mix it with the secular one, aren't these and other related legal principles material enough for inclusion in our academic discourse?

III. EPILOGUE

Finally one may ponder as to why I had to labour on something that is a little boring and dry a subject matter as this one in an event of this type. It is a fairly sound concern, I agree. But it has very much to do with the love story and career development of the speaker. The first love encounter of this gentleman is not with a high school sweetheart or with the girl next door, as is usually the case with young people. Nor was it with one of the most wonderful and caring women one can ever conceive of. You may probably try to guess as to who this adorable lady is. Do not go too far to speculate. I will tell you who she is. She is W/o Almaz Asrega, the spouse of the speaker. But even she cannot claim to be the first love of the person now talking before you. May be to your surprise, the first love of this man, a love which is still unabated, was rather with a law book, the 1960 Civil Code of Ethiopia.

This love has its origins way back in the nineteen-sixties when a skinny elementary school student used to be instructed to copy court cases by Teshome Retta, a tall good-looking gentleman with a charismatic personality. Teshome was a High Court clerk at the time and also one of the first butch of evening students enrolled in the Certificate Program of the Faculty of Law of the then Haile Selassie I University. Over the years, the encounters the boy had had with many of the court cases and legal materials kept on growing by the day, and so was his love with the codes, especially the Civil Code; so

much so that he started cherishing the day when he too would join the Law School and be immersed in the fascinating world of the law. That was how he went to the Law School in 1973; that was why he joined the Ethiopian judiciary as a young graduate, and that was also when he came to familiarize himself with the *Fetha Nagast*, one of the elder cousins of the Civil Code. That skinny boy has now become lucky enough to be elevated to the altar of professorship (*merigetnet*); whose dear father was the Teshome Retta I told you about, may he rest in peace.

Thank you very much for your patience!!

Ethiopia Le-zele'alem Tinur!!!

Annex- *Short biography of Professor Tilahun Teshome Retta*

Professor Tilahun Teshome was born in Addis Ababa on the 19th of November 1953. He completed his elementary and high school education in Addis Ababa, passed the Ethiopian Schools Leaving Certificate Examination with Great Distinction and was awarded prize from Emperor Haile Sellasie in 1972. He also holds a diploma in Accounting which he earned with Very Great Distinction. He joined the Addis Ababa University in September 1972 and graduated with the degree of Bachelor of Laws (LL.B.) in 1979. He worked as a legal expert at the Commercial Bank of Ethiopia until March 1983 after which he served as a judge of the Special High Court and then as a judge and presiding judge of the Supreme Court of Ethiopia for nearly ten years. Professor Tilahun was engaged by the Addis Ababa University as a full-time faculty in January 1993 and has taught several courses both in the undergraduate and graduate programs of the Faculty of Law. He has likewise supervised numerous LL.B. and LL.M theses both at the Addis Ababa University and for universities outside Ethiopia. In addition to the many assignments he was entrusted with by the University Administration, he has served as the Dean of the Faculty of Law from 1996 to 2001, Secretary of the University Senate and its Executive Committee for more than four years and as the Editor-in-Chief of the Journal of Ethiopian Law for several years. Professor Tilahun has extensively written and published on the different aspects of Ethiopian law at home and abroad, including his widely read book on the Basic Principles of Ethiopian Contract Law, the copy right of which he donated to the Faculty of Law.

Professor Tilahun has worked as a consultant to a number of Governmental and Non-Governmental organizations and has served in leadership positions in many professional associations, civil society organizations and private enterprises. Among many others, he is a member of the International Board of Trustees of the African Child Policy Forum, the African Law Association, the International Society of Family Law and the Ethiopian Bar Association. He has presented study papers, conducted trainings, drafted laws and provided legal consultancy services for different organizations. He had been awarded grant as a research fellow at the Northwestern University in Chicago, U.S.A. and the University of Bayreuth, Germany. He has also been active in the provision of arbitration services to individuals and the wider business community.

Professor Tilahun has been awarded certificates of merit and appreciation from organizations at home and abroad, including the Addis Ababa Chamber of Commerce, the Mayor of the City of Detroit in the U.S.A. and the American Bar Association.

በሙስና ወንጀል ዋስትናን የሚከለክለው ሕግ ሕገ-መንግሥትዊ አይደለም በማለት የቀረበ አቤቱታን በሚመለከት የተሰጠ የሕገ-መንግሥት ትርጉም አስተያየት

የፌዴራሉ ሕገ-መንግሥት ጉዳዮች አጣሪ ጉባኤ "የፀረ ሙስና ልዩ የሥነ ሥርዓትና የማስረጃ ሕግ አዋጅን ለማሻሻል የወጣው አዋጅ ቁጥር 239/1993" አንቀጽ 51/2/ "ሕገ-መንግሥቱን የሚቃረን ስለሆነ ሕገ-መንግሥቱን የሚቃረን መሆኑን በማረጋገጥ" ወደ ፌደሬሽን ም/ቤት አቅርቦ እንዲያስወስንልን በማለት የቀረበለትን አቤቱታ ተመልክቶ በሕገ-መንግሥቱ አንቀጽ 84/2/ በተሰጠው ስልጣን መሠረት የሚከተለውን የሕገ-መንግሥት ትርጉም ሃሣብ አቅርቧል፡፡

<u>አቤቱታ አቅራቢዎች</u>፡-
የዚህ አቤቱታ አቅራቢዎች በሙስና ወንጀል ተጠርጥረው በእስር የሚገኙ ሲሆኑ ሁሉም በፀረ-ሙስና ዓዋጅ ዋስትና አይፈቀድላቸው የተባሉ ናቸው፡፡

<u>የቀረበው አቤቱታ ይዘት</u>፡-
አቤቱታ አቅራቢዎች የሙስና ወንጀል ፈጽማችኋል በሚል ጥርጣሬ ተይዘው በእስር ላይ የሚገኙ መሆናቸውንና የተጠረጠሩበት ጉዳይ በፌዴራል ፖሊስ ወንጀል ምርመራ ክፍል እየተጣራ የሚገኝ ሲሆን፣ ጉዳዩ እስኪጣራ ድረስ በዋስ የመፈታት መብት ተነፍጎን በእስር ላይ እንገኛለን በማለት አመልክተዋል፡፡

የአቤቱታ አቅራቢዎቹ አቤቱታ ይዘት ዝርዝር ሲታይ ቀጥሎ የተመለከቱትን ነጥቦች ያነሳል፡፡

1. ምንም እንኳ የሙስና ወንጀል ፈጽማችኋል በሚል ክስ ቢቀርብብንም ጉዳያችንን በዋስ እንድንከታተል ልንከለከል የማይገባን ሆኖ ሳለ በፀረ-ሙስና ልዩ ሥነ-ሥርዓትና ማስርጃ ሕግ ማሻሻያ አዋጅ ቁጥር 239/1993 አንቀጽ 51/2/ ድንጋጌ መሠረት የዋስትና መብት እንዳይፈቀድልን ተከልክሏል፡፡
   ይሁን እንጂ ሕገ-መንግሥቱ ዋስትናን በፍርድ ሊታይ የሚገባ ጉዳይ አድርጎ የደነገገው ከመሆኑም በላይ በዋስትና የመፈታት መብትን እንደመርህ አለመፈታትን ደግሞ እንደ ልዩ ሁኔታ አስቀምጦታል፡፡ ይህ ሆኖ ሳለ ግን የአዋጁ አንቀጽ 51/2/ "በሙስና ወንጀል ተጠርጥሮ የተያዘ ሰው የዋስትና መብት አይኖረውም" በማለት ፍርድ ቤት የዋስትና መብት እንዳይፈቅድ መደንገጉ ሕገ-መንግሥቱ ያረጋገጠውን በዋስ የመፈታት እና ከፍርድ በፊት እንደ ጥፋተኛ ያለቆጠር መብትን የሚጥስ ነው፡፡ በመሆኑም የተጠቀሰው የአዋጅ ድንጋጌ የሕገ-መንግሥቱን አንቀጽ 19/6/ እና 20/3/ ይቃረናል፡፡

2. የሕገ-መንግሥቱ አንቀጽ 19/6/ "በሕግ በተደነገጉ ልዩ ሁኔታዎች ፍርድ ቤት ዋስትና ላለመቀበል...." የሚለው አባባል ሕግ አውጭው ዋስትና ሊከለከል የሚችልበትን ሁኔታ በሕግ ለይቶ እንዲያስቀምጥ እንጂ አንድን ወንጀል ነጥሎ በማውጣት በዚህ ወንጀል የተከሰሰ ዋስ ይከልከል በማለት

ሕግ እንዲያወጣ ሕገ-መንግሥቱ አይፈቅድም፡፡ ይሁን እንጂ የአዋጁ ድንጋጌ ከዚሁ በተቃራኒ የተቀመጠ በመሆኑ ፍ/ቤቶች ዋስትናን በሚመለከት ሁኔታዎችን እየመረመሩ ውሣኔ እንዳይሰጡ የሚከለክል ስለሆነ ይህ የአዋጅ ድንጋጌ የሕገ-መንግሥቱን አንቀጽ 37/1/ ይቃረናል፡፡

3. የሕገ-መንገሥቱ አንቀጽ 13 ንዑስ ቁጥር 1 እና 2 ማንኛውም ሕግ አወጪ፣ አስፈጻሚ እና የዳኝነት አካል በሕገ-መንግሥቱ ምዕራፍ ሶስት ስር የተዘረዘሩትን መሠረታዊ መብቶችና ነጻነቶች የማክበርና የማስከበር ኃላፊነትና ግዴታ ያለበት መሆኑን እና "ኢትዮጵያ ከተቀበለቻቸው ዓለም አቀፍ የሰብአዊ መብቶች ስምምነቶችና ዓለም አቀፍ ሠነዶች መርሆዎች ጋር በተጣጣመ መንገድ ይተረጎማሉ" ይላል፡፡ ኢትዮጵያ ከተቀበለቻቸው ዓለምአቀፍ የሰብአዊ መብት ስምምነቶች መካከል አንዱ የሆነው የሲቪል እና ፖለቲካ መብቶች አለም አቀፍ ቃል ኪዳን አንቀጽ 9/3/ በበኩሉ ዋስትና መንፈግና በእስር ማቆየት እንደመርህ መታየት እንደሌለበት የሚደነግግ ሲሆን አዋጁ አንቀጽ 51/2/ ግን ዋስትና መነፈግን እንደመርህ ተቀብሎ የተያዙ ሰዎች በዋስትና እንዳይፈቱ ያዛል፡፡ ይህ ደግሞ የሕገ-መንግሥቱን አንቀጽ 13 ይቃረናል የሚል ነው፡፡

አቤቱታ አቅራቢዎቹ የአዋጅ ቁጥር 239/1993 አንቀጽ 51/2/ ድንጋጌ ከፍ ሲል የተዘረዘሩትን የሕገ-መንግሥቱን ድንጋጌዎች የሚጥስ በመሆኑ እና በአጠቃላይ የሕገመንግሥቱን የበላይ ሕግነት የሚጋፋ ስለሆነ ሕገ-መንግሥታዊ አይደለም ይባልልን በማለት ጠይቀዋል፡፡

<u>የሕገ-መንግሥት ትርጉም አስተያየት፡-</u>

በዚህ ጉዳይ ላይ የቀረበውን የሕገ-መንግሥት ትርጉም ጥያቄ ለመመልከት አግባብነት ያላቸው ሕጎች ድንጋጌዎች እና የአቤቱታ አቅራቢዎቹ አቤቱታ በዝርዝር ታይቷል፡፡

በዚህ ጉዳይ የሚነሳው መሠረታዊ ጭብጥ አዋጅ ቁጥር 239/1993 አንቀጽ 51/2/ "በሙስና ወንጀል ተጠርጥሮ የተያዘ ሰው የዋስትና መብት አይኖረውም" በማለት የደነገገው ድንጋጌ ከኢ.ፌ.ዲ.ሪ ሕገ-መንግሥት ጋር የሚቃረን ነው ወይስ አይደለም) የሚል ነው፡፡

የኢ.ፌ.ዲ.ሪ ሕገ-መንግሥት ለተያዙ ሰዎች ከሚያረጋግጣቸው መብቶች ውስጥ የዋስትና መብት አንዱ ነው፡፡ የሕገ-መንግሥቱ አነቀጽ 19 ንዑስ አንቀጽ 6፡-

> "የተያዙ ሰዎች በዋስ የመፈታት መብት አላቸው፡፡ ሆኖም በሕግ በተደነገጉ ልዩ ሁኔታዎች ፍርድ ቤት ዋስትና ላለመቀበል ወይም በገደብ መፈታትን ጨምሮ በቂ የዋስትና ማረጋገጫ እንዲቀርብ ለማዘዝ ይችላል፡፡" በማለት ይደነግጋል፡፡

ይህ ድንጋጌ የሚገልፀው በዋስ የመፈታት መብት የማንኛውም የተያዘ ሰው መብት መሆኑን፣ በሕግ በተደነገጉ ልዩ ሁኔታዎች ግን ፍርድ ቤት በተያዙ ሰዎች የሚቀርብለትን በዋስትና የመለቀቅ ጥያቄ ላለመቀበል እንደሚችል ወይም ደግሞ የተያዘውን ሰው በቂ የዋስትና ማረጋገጫ አቅርቦ በገደብ እንዲፈታ ለማዘዝ የሚችል መሆኑን ነው።

ኢትዮጵያ በተቀበለችው የሲቪልና የፖለቲካ መብቶች አለም አቀፍ ኮንቬንሽንም ሆነ በህገመንግስታችን የዋስትና መብት ከነፃነት መብት ጋር በቀጥታ የተቆራኘና የነፃነት መብትን በተለይ የወንጀል ክስ በፍርድ ቤት የተከሳሽ የግል ነፃነት (Pretrial freedom) መከበር ያለበት መሆኑን የሚያመለክት ነው።

> "Every One has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as established by law"[1]

በዚህ መሠረት ኮንቬንሽኑ የሚያረጋግጠው ማንም ሰው የነጻነት እና የደህንነት መብት ያለው መሆኑን፣ ማንም ሰው በጭፍን እንዲያዝ ወይም ተይዞ እንዲቆይ መደረግ የሌለበት መሆኑን እና በሕግ በተመለከቱ ምክንያቶች እና ሥነ-ሥርዓቶች ካልሆነ በቀር ማንም ሰው የግል ነጻነቱን ማጣት የሌለበት መሆኑን ነው።

ሕገ መንግሥታችንም በተመሳሳይ መልኩ በአንቀጽ 17፡-

1. "በሕግ ከተደነገገው ሥርዓት ውጭ ማንኛውም ሰው ወንድም ሆነ ሴት ነፃነቱን/ቷን አያጣም/ አታጣም።
2. ማንኛውም ሰው በሕግ ከተደነገገው ሥርዓት ውጭ ሊያዝ፣ ክስ ሳይቀርብበት ወይም ሳይፈረድበት ሊታሰር አይችልም።" በማለት ይደነግጋል።

ይህ ድንጋጌ የአንድን ሰው የግል ነጻነት ለመገደብ በሕግ የተደነገገ ሥርዓት መኖር እንዳለበት፣ በሕግ ከተደነገገው ሥርዓት ውጭ አንድን ሰው መያዝ ወይም ክስ ሳይቀርብበት ወይም ሳይፈረድበት ማሰር እንደማይቻል ይገልጻል። የዚሁ ድንጋጌ የእንግሊዝኛ ቅጅ[2] ግን የአንድን ሰው የግል ነጻነት መገደብ የሚቻለው

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[1] AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS ART-7(2) በተመሣሣይ ይደነግጋል።

(1) No one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law.
(2) No person may be subjected to arbitrary arrest, and no person may be detained with out a charge or conviction against him. F.D.R.E Constitution, Article 17,

በሕግ በተደነገገ ሥርዓት መሠረት ብቻ ሳይሆን በሕግ በተደነገጉ ምክንያቶች ጭምር መሆን እንዳለበት የሚገልፀ ከመሆኑም በላይ ምንም ሰው በጭፍን መያዝ (arbitrary arrest) የተከለከለ መሆኑን ይገልጻል።

የሕገ መንግሥታችን አንቀጽ 13/2/ በምዕራፍ ሶስት ሥር የተዘረዘሩ መብቶችና ነጻነቶች ኢትዮጵያ ከተቀበለቻቸው ዓለም አቀፍ የሰብአዊ መብቶች ሕግጋት፣ ስምምነቶችና መርሆዎች ጋር በተጣጣመ መንገድ መተርጎም የሚገባቸው መሆኑን ስለሚደነግግ ስለ ነጻነት መብት የሕገ-መንግሥታችን የእንግሊዝኛውን ቅጂ የሚደነግገውን ድንጋጌ ኢትዮጵያ ከተቀበለችው የሲቪልና የፖለቲካ መብቶች ኮንቬንሽን ስለነጻነት መብት ከተደነገገው ድንጋጌ ጋር ስለሚቀራረብ በዚህ ረገድ ልንወስደው ይገባል።

በተጠቀሰው ኮንቬሽንም ሆነ በሕገ-መንግሥታችን የግል ነጻነት ለመገደብ ወይም ለማሳጣት የሚቻለው በሕግ በተደነገጉ ምክንያቶችና ሥነ ሥርዓቶች ስለመሆኑ፣ የአንድን ሰው የግል ነጻነት ለመገደብ የመያዣ ምክንያቶችና የመያዣ ሥነ-ሥርዓቶች በሕግ በግልፅ ሊደነገጉ እንደሚገባ፣ በሕግ ከተመለከተው ምክንያቶችና ሥነሥርዓት ውጭ አንድን ሰው መያዝ ወይም ማሰር የተከለከለ መሆኑን እና በጭፍንነት የግል ነጻነትን ማሳጣት የተከለከለ መሆኑን እንረዳለን። የሰብዓዊ መብቶች ኮሚቴ (Human Rights Committee) በተጠቀሰው ኮንቬንሽን ስለ ጭፍንነት (arbitrariness) የሚገልፀውን ሀረግ በሚመለከት የሰጠው ትርጓሜ " 'arbitrariness' is not to be equated with 'against the law' but must be interpreted more broadly to include the elements of inappropriateness, injustice and lack of predictability such that remand in custody must not only be lawful but also reasonable in all circumstances."[3] የሚል ነው። በመሆኑም በጭፍን መያዝ የተከለከለ ነው የሚለው ሀረግ የአንድን ሰው የግል ነጻነት ለመገደብ በሕግ በግልጽ የተደነገጉ የመያዣ ምክንያቶችና ሥነ-ሥርዓቶች መኖራቸውን ብቻ ሳይሆን እነዚህ በሕግ የተደነገጉ ነጻነትን ሊገድቡ የሚችሉ ሕጎች የማያዳሉ፣ ፍትሐዊና ሊተነበዩ የሚችሉ መሆን የሚገባቸው መሆኑን ያመለክታል።

የነጻነት መብት በወንጀል የተከሰሰን ሰው የተከሰሰበት ጉዳይ በፍርድ ቤት ከመሰማቱ በፊት መታሰር (Pre-trial detention) የሌለበት መሆኑን ይገልጻል። በፍርድ ቤት የወንጀል ክስ ከመሰማቱ በፊት የተከሳሹን ነጻነት (Pre-trial freedom) ለመጠበቅ የተፈለገበት ምክንያት የጥፋተኝነት ውሣኔ በፍርድ ቤት ከመስጠቱ በፊት በተከሳሹ ላይ ቅጣት ላለመጣልና ተከሳሹ ለቀረበበት ክስ ያለአንዳች መሰናክል መከላከያ እንዲያዘጋጅ ለማስቻል ነው። ምንም እንኳ በአንድ በኩል ክስ ከመሰማቱ በፊት የተከሳሽን የግል ነጻነት መጠበቅ የሚያስፈልግ ቢሆንም በሌላ በኩል ደግሞ ተከሳሹ ቢለቀቅ ክሱ በሚሰማበት ወቅት ፍርድ ቤት ላይቀርብ ስለሚችል መንግሥት ተከሳሹን ለፍርድ ለማቅረብ ካለው ፍላጎት ጋር የተከሳሹ መብት መጣጣም ይኖርበታል። የዋስትና መብት በመሠረቱ የሚያነጣጥረው እነዚህን ሁለት ጥቅሞች (Interests) በማጣጣም ላይ

[3] Communication No.305/1988, HRC Report 1990, Annex IX.

ሲሆን የተለመደው መሠረታዊ ዓላማው ተከሳሽን የቀረበበት ክስ በፍርድ ቤት ከመሰማቱ በፊት በእስር በማቆየት ለመቅጣት ሳይሆን ክሱ በሚሰማበት ወቅት ፍርድ ቤት እንዲቀርብ በቂ ተያዥ (Guarantee) አምጥቶ ከእስር እንዲለቀቅ ለማድረግና ፍርድ ቤት በሚወስነው ማናቸውም ጊዜ ተከሳሹን ፍርድ ቤት የሚቀርብ መሆኑን ለማረጋገጥ ነው፡፡

በሲቪልና በፖለቲካ መብቶች ዓለም አቀፍ ኮንቬንሽንም ሆነ ሕገ-መንግሥታችን የነጻነት መብት በማናቸውም ሁኔታ የማይገደብ ለማናቸውም ለተያዙ ሰዎች ሁልጊዜ መከበር ያለበት መብት አይደለም፡፡

እነዚህ ሕጎች ለተያዙ ሰዎች በዋስትና የመለቀቅ መብት ያላቸው መሆኑን የሚያረጋግጡ ቢሆኑም፣ ውሱን በሆኑ በሕግ በግልጽ በተደነገጉ ምክንያቶችና ሥነ-ሥርዓቶች መሠረት ግን የተከሳሾችን የዋስትና መብት በመገደብ ተከሣሾቹ የተከሰሱበት የወንጀል ጉዳይ በፍርድ ቤት ከመሰማቱ በፊት በእስር እንዲቆዩ ለማድረግ ሕጎቹ ይፈቅዳሉ፡፡[4]

የሕገ-መንግሥታችንን አንቀጽ 19/6/ እና 17 በማያያዝ ስናነበው በሕግ በተደነገጉ ምክንያቶችና ሥርዓቶች ካልሆነ በቀር ማንም ሰው ነጻነቱን ማጣት የሌለበት መሆኑን፣ ወይም ሳይፈረድበት መታሰር የሌለበት መሆኑን፣ የዋስትና መብት ገደብየለሽ ሣይሆን በሕግ በተደነገጉ ልዩ ሁኔታዎች ሊገደብ እንደሚችል፣ ሕግ አውጪው ልዩ ሁኔታዎች ናቸው በማለት በግልፅ በሚያውጃቸው ድንጋጌዎች መሠረት በተወሰኑ ጉዳዮች የአንድን ተከሳሽ የዋስትና መብት ፍርድቤት ላለመቀበል እንደሚችል ያስረዱናል፡፡ ሆኖም የዋስትና መብትን የሚገድብ ሕግ የነጻነት መብትንም ስለሚገድብ ሕጉ የዋስትና መብት የሚነፈግባቸውን ምክንያቶችና ስርዓቶች በግልጽ የሚደነግግና ገደቡም በጭፍን ወይም በሚያዳላ ወይም ኢፍትሐዊ ወይም በማይተነበይ እኳኋን ሊፈፀም የማይገባ መሆኑን የሚያረጋግጥ መሆን አለበት፡፡

የዋስትና መብት "በሕግ በተደነገጉ ልዩ ሁኔታዎች" የሚገደበው በሁለት መንገድ ነው፡፡ አንዱ መንገድ በማናቸውም የወንጀል ክሶች ላይ የዋስትና መብት ጥያቄ ተቀባይነት እንዳያገኝ ፖሊስ ወይም ዓቃቤ ሕግ ተቃውሞ ሊያቀርብባቸው የሚችልባቸውን ምክንያቶች ወይም ፍርድ ቤቱ የዋስትና ጥያቄን ላለመቀበል የሚያስችሉትን የተወሰኑ ምክንያቶች በወንጀለኛመቅጫ ሥ/ሥ/ ሕግ በግልጽ ዘርዝሮ መደንገግ ነው፡፡ ለምሣሌ በሀገራችን የወንጀለኛ መቅጫ ሕግ ሥነ-

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[4] የሲቪልና የፖለቲካ መብቶች ዓለም አቀፍ ኮንቬንሽን አንቀጽ 9(1) እና (3) እንዲሁም የኢ.ፌ.ዲ.ሪ ሕገመንግሥት አንቀጽ 17 እና 19(6)

* Article 9(3) of ICCPR Provides "...it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgment."

** ከላይ በተገለፀው ምክንያት መሠረት የሕገመንግሥታችን አንቀጽ 17 የእንግሊዝኛዋ ቅጂ ነው እዚህጋ የተወሰደው፡፡

ሥርዓት ቁጥር 67 መሰረት በዋስትና ወረቀት የመልቀቅ ማመልከቻን መቀበል የማይቻለው፡-

ሀ/ በዋስትናው ወረቀት የተመለከቱትን ግዴታዎች አመልካቹ የሚፈጽም የማይመስል የሆነ እንደሆነ፣

ለ/ አመልካቹ ቢለቀቅ ሌላ ወንጀል ይፈጽም ይሆናል ተብሎ የሚገመት ሲሆን፣

ሐ/ ምስክሮችን በመግዛት (በማባባል) ወይም ማስረጃ የሚሆኑበትን ያጠፋ ይሆናል ተብሎ የሚገመት ሲሆን ነው፡፡ በማለት ይደነግጋል፡፡

ሌላው መንገድ ደግሞ የዋስትና መብት የማያሰጡ ወንጀሎችን (Non-bailable offences) በመዘርዘር ማስቀመጥ ነው፡፡ ለምሣሌ የወንጀለኛ ሥነ ሥርዓት ሕጋችን አንቀጽ 63(1) "ማንኛውም የተያዘ ሰው የተከሰሰበት ወንጀል የሞት ቅጣትን ወይም አሥራ አምስት ዓመት ወይም በላይ የሆነ ጽኑ እሥራት የሚያስቀጣው ከሆነና ወንጀል የተፈፀመበት ሰው በደረሰበት ጉዳት የማይሞት የሆነ እንደሆነ ፍርድ ቤቱ የዋስትና ወረቀት አስፈርሞ ለመልቀቅ ይችላል፡፡" በማለት የተደነገገው ድንጋጌ ሌላውን የዋስትና መብት የሚገደብበት መንገድ የሚያመለክት ነው፡፡

በዚህ ረገድ የውጭ ሀገር ልምድን ለማየት የዩናይትድ ስቴትስን ልምድ ስንወስድ የሚከተለውን እንረዳለን፡፡ በአሜሪካ ሁሉም የክልል መንግሥታት በከባድ ወንጀል የተከሰሱ ሰዎች "When the proof is evident' or 'the presumption is great that the accused committed the offence" የዋስትና መብት በፍርድ ቤት ሊገደብ እንደሚችል ይደነግጋሉ፡፡

ሁሉም የአሜሪካ ክልሎች የግድያ ወንጀል የዋስትና መብትን የሚከለክል መሆኑን የሚደነግጉ ሲሆን፣ ከዚህም በተጨማሪ የተወሰኑ የክልል መንግሥታት የበታች ፍርድ ቤት ዳኞችን (magistrates) በከባድ ወንጀል ለተከሰሱ ሰዎች ወይም ከዚህ ቀደም በወንጀል ለተቀጡ ሰዎች የዋስትና መብት እንዲከለክሉ ያዛሉ፡፡ ሌሎች የተወሰኑ የአሜሪካ ክልል መንግሥታት ደግሞ የዋስትና መብት የማይከበርባቸውን የወንጀል ዓይነቶች በመዘርዘር ይደነግጋሉ፡፡[5]

ከዚህም ባሻገር በአሜሪካ በፌዴራል ደረጃ የወጣው "The Federal Bail Reform Act of 1984" ተብሎ የሚታወቀው ሕግ የማንበረሰብን ደህንነት ለመጠበቅ ሲባል የወንጀል ክስ በፍርድ ቤት ከመሰማቱ በፊት /Pre-trial detention/ በተወሰኑ ከባድ ወንጀሎች የተከሰሱ ሰዎች የዋስትና መብትን ይከለክላል፡፡

የዋስትና መብትንና የነጻነት መብትን የሚመለከት ከላይ ያቀረብነውን ማብራሪያ መሠረት በማድረግ አሁን በያዝነው ጉዳይ ላይ የተነሣውን "አዋጅ ቁጥር 239/1993 አንቀጽ 51(2) ከኢ.ፌ.ዲ.ሪ ሕገ መንግሥት ጋር ይቃረናል ወይ)" የሚለውን መሠረታዊ ጭብጥ እንደሚከተለው መርምረነዋል፡፡

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[5] [Texas Const. Art-1 Sec I]

የማመልከቻ አቅራቢዎች መነሻ ክርክር ሕገ መንግሥቱ በዋስትና መብት ገደብ እንደሚደርግበት ቢደነግግም ይህ ገደብ "በህግ በተደነገጉ ልዩ ሁኔታዎች ፍርድ ቤት ዋስትና ላለመቀበል ወይም በገደብ መፍታትን ጨምሮ በቂ የሆነ የዋስትና ማረጋገጫ እንዲቀርብ ለማዘዝ ይቻላል" በሚል መልክ የተቀመጠ በመሆኑ ገደቡ በየጉዳዩ ፍርድ ቤት ውሣኔ የሚሰጥበት እንጂ ሕግ አውጪው አንድን የወንጀል ዓይነት ለይቶ ዋስትና ያሳጣል እንዲል ሥልጣን አይሰጠውም የሚል ነው፡፡ ለዚሁ አስተያየት መሠረት ነው የተባለውም በአንቀጽ 19/6/ በህግ በተደነገጉ ልዩ ሁኔታዎች ("in exceptional circumstances prescribed by law") ከሚለው የድንጋጌው ይዘት ልዩ ሁኔታዎች ("exceptional circumstances") ለሚለው ኃረግ በሚሰጠው ትርጉም የሚወሰን ነው፡፡ ልዩ ሁኔታዎች ማለት ደግሞ ፍርድ ቤቶች እንደነገሩ ሁኔታ እያንዳንዱን ጉዳይ ሲመረምሩ የሚያዩትና የሚደርሱበት እንጂ ቀድሞ በህግ ሊወሰን የሚችል አይደለም፡፡ የዋስትና መብት በፍርድ ቤት የሚታይ /justiciable/ በመሆኑ ህግ አውጭው በፀረ ሙስና አዋጅ ያስቀመጠውን ዓይነት ድንጋጌ በህግ እንዲያወጣ ህገ መንግሥቱ አይፈቅድም የሚል ነው፡፡

የዋስትና መብት ሕገ መንግሥትዊ መብት መሆኑና በመርህ ደረጃ የተያዙ ሰዎች በዋስትና የመፈታት መብትም ህገ መንግሥታዊ ደረጃ ያገኘ መሆኑ የሚያከራክር አይደለም፡፡ የዋስትና መብት እንደብዙዎቹ መብቶች ገደብ ሊደረግለት እንደሚችልም አከራካሪ አይደለም፡፡ ለቀረበው አቤቱታ መነሻና ምክንያት የሆነው የዋስትና መብት የሚገደበው በምን ዓይነት ሁኔታ ነው የሚለውን ነጥብ አስመልክቶ ነው፡፡
ሕግ መንግሥቱ በአንቀጽ 19/6/ "በህግ በተደነገጉ ልዩ ሁኔታዎች ፍርድ ቤት ዋስትና ላለመቀበል ወይም በገደብ መፍታትን ጨምሮ በቂ የዋስትና ማረጋገጫ እንዲያቀርብ ለማዘዝ ይችላል" በማለት ይደነግጋል፡፡ ከዚህ ድንጋጌ ሁለት አበይት ነጥቦችን ማየት ይቻላል፡፡

የመጀመሪያው ነጥብ ፍርድ ቤት የዋስትና ጥያቄ ሲቀርብለት ሁለት አማራጮች እንዳሉት ይገልጻል፡፡ ፍርድ ቤት የዋስትና ጥያቄውን አልቀበልም ሊል ይችላል፡፡ ዋስትና የሚፈቅድ ሲሆን ደግሞ ዋስትና ጠያቂው በገደብ እንዲፈታ ካልሆነ ደግሞ በቂ የዋስትና ማረጋገጫ እንዲያቀርብ ሊጠይቀው ይችላል፡፡

ሁለተኛው ነጥብ ፍርድ ቤቱ ከላይ የተመለከቱትን አማራጮች ሊወስድ የሚችለው በሕግ በተደነገጉ ልዩ ሁኔታዎች መሠረት መሆኑን የሚገለጽ ነው፡፡ በመሆኑም የዋስትና ገደብ በማስቀመጡ ረገድ ህግ አውጪውና ፍርድ ቤቶች የየራሳቸው የሥራ ድርሻ እንዳላቸው ግልጽ ነው፡፡ እዚህ ላይ መታየት ያለበት ዋናው ነጥብ ህግ አውጪው ዋስትና የማይፈቀድባቸውን ልዩ ሁኔታዎች እንዲደነግግ መብት ይሰጠዋል፡፡ ዋስትና መከልከል የመሰረታዊ መብት ገደብ በመሆኑ ህግ አውጪውም ሆኑ ፍርድ ቤቶች በጥንቃቄ ሊያዩት እንደሚገባ ይታመናል፡፡ ህግ አውጪው የሚያወጣው ዓዋጅ በሕገ-መንግሥት የሰፈረውን መብት በተወሰነ ደረጃ ከመገደብ አልፎ ዋናውን መብት ማጥፋትና መናድ ስለማይችል የዓዋጅ ድንጋጌዎች አቀራረፅና ትርጉም ግልፅ ሆኖ እንዲቀመጥ ማድረግ ይጠበቅበታል፡፡

“ልዩ ሁኔታዎች” በውስን አድማስ የሚፈፀሙ መሆናቸውን የሚጠቁም በመሆኑ ማንኛውም የዋስትና መብት የሚገድብ ሕግ በአፈፃፀም ገደብ የለሽ እንዳይሆን እያንዳንዱ ድንጋጌ በጥንቃቄ መቀረፅ ይኖርበታል፡፡

ከዚህ በመለስ ህግ አውጪው የዋስትና መብትን የሚገድብ ሕግ ሲያወጣ አንድን ወንጀል ለይቶ ዋስትና አያሰጥም ከማለት ሊከለከል አይችልም፡፡ ሕግ አውጪው ልዩ ሁኔታዎችን በሁለት አማራጮች ሊያስቀምጥ ይችላል፣ አንድም ዋስትና የማያሰጠውን የወንጀል ዓይነት ለይቶ ማስቀመጥ፣ አሊያም በየትኛውም ዓይነት ወንጀል ቢሆን ዋስትና ሊያስከለክሉ የሚችሉ ፍሬነገሮችን መዘርዘር ናቸው፡፡ በህግ ዓውጪ ተለይቶ የተጠቀሰ ወንጀል ዋስትና መብት አያሰጥም መባሉ ዋስትናው በፍርድ ቤት የማይታይ (non-justiciable) የሚያደርገው አይሆንም፡፡ ዞሮ ዞሮ ዋስትና አያስከለክልም የሚባለው ወንጀል ዋስትና ለመከልከል በቂ ፍሬ ነገሮች ቀርበዋል አልቀረቡም የሚለውን ነጥብ መመርመር ያለበት ፍርድ ቤቱ ነው፡፡ የሙስና ወንጀል ዋስትና አያሰጥም የሚል ህግ ቢኖርም አንድ ሰው በሙስና ወንጀል ለመያዝ በቂ ምክንያት አለ ወይንስ የለም የሚለው ነጥብ በአሳሪው ብቻ የሚወሰን ሳይሆን በፍርድ ቤት ሊታመንበት የሚገባ ነገርም መሆን አለበት፡፡ ሙስና ማለት ምን ማለት ነው) የሚለውን በመመለስም ፍርድ ቤቶች ኃላፊነታቸውን በአግባቡ እንደሚወጡ መገመት አግባብ ነው፡፡ ህግ አውጪው በዓዋጁ አፈፃፀም የሚገጥሙ ችግሮች ተመልክቶ መፍትሄ ማፈላለግ እንዳለብትም ይታመናል፡፡

ከዚህ ውጪ የሙስና ዓዋጅ ዋስትና የሚከለክል በመሆኑ የሕግ-መንግሥቱን አንቀፅ 19(6) የሚጥስ ነው ለማለት የሚቻል አይደለም፡፡ በመሆኑም ጉዳዩ ለሕገ-መንግስት ትርጉም ለፌዴሬሽን ምክር ቤት መላክ ያለበት አይደለም በማለት ወስነናል፡፡

The Council of Constitutional Inquiry Recommendation regarding the Petition challenging the Constitutionality of the Law that prohibits Bail for the Crime of Corruption

***Petitioners*:** Persons charged with the crime of corruption and denied bail in accordance with the Anti-corruption Special Procedure and Rules of Evidence (Amendment) Proclamation No. 239/2001.[1] The petitioners requested the House of Federation to declare Article 51(2) of the Anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation No. 239/2001 (hereinafter to be referred as the Proclamation) unconstitutional on the following grounds:

1. Article 51(2) of the Proclamation, by prohibiting bail *apriori* to those who are arrested on suspicion that they have committed corruption, contravenes Articles 19(6) and 20(3) of the FDRE Constitution which respectively provide for right to bail and presumption of innocence;
2. By providing *"in exceptional circumstances provided by law, the court may deny bail---,"* Article 19(6) of the FDRE Constitution allows the law maker to provide for conditions/ circumstances on the basis of which question of bail is to be decided by courts but not to list offences for which the right to bail is prohibited. However, the phraseology of Article 51(2) of the Proclamation does not allow courts to decide the issue of bail on a case by case basis which makes the matter non-justiciable contrary to Article 37 of the FDRE Constitution:
3. Article 13 of the FDRE Constitution requires all state organs to respect and enforce human and democratic rights recognized under Chapter Three of the same. The Constitution also requires that the rights under Chapter Three shall be interpreted in light of international instruments adopted by Ethiopia. Thus, the legislature, by enacting Article 51(2) of the Proclamation, which contravenes Article 9(3) of the International Covenant on Civil and Political Rights, acts contrary to Article 13 of the FDRE Constitution.

***Issue*:** Whether or not Article 51(2) of the Proclamation contradicts with the FDRE Constitution?

Position of the Constitutional Inquiry Council: Article 51(2) of the Proclamation is consistent with the FDRE Constitution.

Summary of the reasoning

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[1]According to this Proclamation, any one arrested on suspicion that he has committed corruption was not to be released on bail. This proclamation is repealed by Proclamation No. 234/2005 under which only those persons arrested on suspicion that they have committed corruption punishable for ten years and above are not allowed to be released on bail

Article 19(6) of the FDRE Constitution provides: "Persons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person".

As the human rights provisions of the FDRE Constitution should be interpreted in light of international human rights instruments adopted by Ethiopia, the Council makes reference to relevant Conventions. The Council observed that Article 17 of the FDRE Constitution, Article 9(3) of the International Covenant on Civil and Political Rights and Article 7(2) of the African Charter on Human and Peoples' Rights prohibit arbitrary deprivation of one's liberty.

For the Council, the bail system accommodates the interests of the suspect in pre-trial release and that of the public to see to it that the suspect continues to appear during trial. The Council read Articles 19(6) and 17 of the FDRE Constitution as simply prohibiting deprivation of liberty except on grounds and procedures as are established by law. The Council also pointed out that the provisions are understood as allowing restriction of the right to bail under some circumstances.

The Council noted that even if the right to bail is a constitutional right, it is not controversial that the right can be subject to restrictions. What is controversial and needs to be resolved is how the right to bail is to be restricted. The Council inferred two points from the phraseology of Article 19 (6) of the FDRE Constitution which provides that "in exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person". First, the court has two options where it receives an application for bail: rejecting or accepting the application. Second, the court has to opt for either of the two options in accordance with the law. The Council noted that both the legislature and the courts do have their own roles in determining the question of bail.

For the Council, Article 19(6) of the FDRE Constitution allows the lawmaker to provide exceptional conditions under which bail is not to be granted. However, the Council warned that maximum care should be taken by both the courts and the legislature so that the law restricting the right would not have the effect of totally destroying it. The Council emphatically indicated that there is no reason to say that the legislator can not provide for list of offences for which bail is prohibited. The Council maintained that the legislature may prohibit bail in two ways: by listing down offences for which bail is prohibited and by providing for factors on the basis of which courts shall decide whether to grant or deny bail. For the Council, listing offences for which bail is prohibited does not make the question of bail non-justiceable. That is so because it is the court that determines whether there are facts that indicate the involvement of the suspected person in the alleged offence. Thus, even if the law prohibits bail to those who are arrested on suspicion that they have committed corruption, it is the court that decides whether there is convincing reason to suspect the arrestee's involvement in corruption. Moreover, what act constitutes corruption is to be determined by courts.

Consequently, the Council concluded that Article 51 (2) of the Proclamation is not a violation of Article 19(6) of the FDRE Constitution which made sending the matter to the House of Federation unnecessary.

የሰ/መ/ቁ. 24974
8/4/2000 ዓ.ም.

ዳኞች፡- አቶ መንበረፀሐይ ታደሰ
አቶ ፍስሐ ወርቅነህ
አቶ ሐጎስ ወልዱ
ወ/ት ሒሩት መለሠ
አቶ ታፈሰ ይርጋ

አመልካች፡- 1. አቶ ፍቃዱ ዴሬሎ
2. ወ/ሮ ዓይናለም በሻህ } ጠበቃ ሙላት ፈለቀ

ተጠሪ፡- 1. አቶ ንጉሴ ወርቁ - ቀረቡ
2. ወ/ሮ ሐረገወይን ጀማነህ - አልቀረቡም፡፡
መዝገቡ ተመርምሮ ቀጥሎ የተመለከተው ፍርድ ተሰጥቷል፡፡

ፍርድ

ይህ የሰበር አቤቱታ ሊቀርብ የቻለው በአመልካቾችና በተጠሪዎች መካከል የተደረገው የቤት ሽያጭ ውል ተሰርዞ ውሉ ከመደረጉ በፊት ወደነበሩበት ሁኔታ እንዲመለሱ በሥር ፍርድቤቶች በመወሰኑ መሠረታዊ የሕግ ስህተት ተፈጽሟል በማለት አመልካቾች ቅሬታ በማቅረባቸው ነው፡፡

የጉዳዩ አመጣጥም ባጭሩ ሲታይ ተጠሪዎች በአመልካቾች ላይ በፌዴራል መጀመሪያ ደረጃ ፍ/ቤት ባቀረቡት ክስ በወረዳ 16 በቀሌ 04 ክልል የቤት ቁጥር 898 የሆነውን ቤት በ1/4/77 ዓ.ም በተፃፈ የሽያጭ ውል በብር 58,000 /ሃምሳ ስምንት ሺህ/ ከሣሾች ለተከሣሾች ሸጠን ውሉ በተደረገ እለት ብር 50,000 /ሃምሳ ሺህ/ የተቀበልን ሲሆን ቀሪውን 8,000 /ስምንት ሺህ/ ደግሞ በ30 ቀን ውስጥ ቤቱን አስረክበን እንደሚከፈለን በተስማማነው መሠረት ቤቱን ያስረከብን ቢሆንም ቀሪው ገንዘብ ያልተከፈለ ስለሆነ ውሉ እንዲፈርስና ወደነበርንበት እንድንመለስ ይወሰንልን በማለት ጠይቀዋል፡፡
ክሱና ማስረጃው ለተጠሪዎች ደርሶም በሰጡት መልስ የውሉን መደረግ አምነው ውሉ በተፈረመ በ30 ቀን ውስጥ ከሳሾች የሸጡትን ቤት ከእዳና ዕገዳ ነፃ አድርገው ውል ክፍል ቀርብው መሸጣቸውን በማረጋገጥ ሲፈርሙ ቀሪው ብር 8 ሺህ እንደሚከፈላቸው በውሉ ላይ የተስማማን ቢሆንም ይህንን ግዴታ ካለመወጣታችን በላይ በክስ ከተጠየቀው ገንዘብ ላይም ክስ ከመቅረቡ በፊት ብር 5 ሺህ ለከሳሾች የከፈልን ስለሆነ ውሉ ይፍረስልን በማለት ያቀረቡት ክስ ከበቂ ኪሣራ ጋር ውድቅ ሊደረግ ይገባል በማለት ተከራክረዋል፡፡

የግራ ቀኙ ክርክር በዚህ መልኩ የቀረበለትም የፌዴራል መጀመሪያ ደረጃ ፍርድቤት ተከሳሾች በቀሪነት የሚፈለግባቸውን ገንዘብ እስከ ታህሣሥ 30 ቀን 1977 ዓ.ም ድረስ አጠቃለው ለመክፈል በውል ግዴታ ገብተው ክፈያውን

አለመፈጸማቸው የተረጋገጠ ስለሆነ ግራ ቀኙ ያደረጉት ውል ፈርሶ ወደነበሩበት ሊመለሱ ይገባል በማለት ውሣኔ ሠጥቷል።

ተከሣሾች በዚህ ውሣኔ ቅሬታ አድሮባቸው የይግባኝ ቅሬታቸውን ለፌዴራል ከፍተኛ ፍርድቤት ቢያቀርቡም በፍ/ብ/ሕ/ሥ/ሥ/ቁ. 337 መሠረት ፍ/ቤቱ ይግባኙን ሳይቀበለው ቀርቷል።

ይህ ሰበር ችሎትም የቀረበለትን የሰበር አቤቱታ መርምሮ በበኩሉ ግራ ቀኙን አከራክሯል።

በአጠቃላይ የክርክሩ ይዘት ከላይ የተመለከተው ሲሆን ምላሽ ማግኘት የሚገባው የጉዳዩ ጭብጥ በግራ ቀኙ መካከል የተደረገው የቤት ሽያጭ ውል ሊሰረዝ ይገባል) ወይንስ አይገባም) የሚለው በመሆኑ ከሕጉ ጋር ተገናዝቦ ተመርምሯል። ታህሳስ 1 ቀን 1977 ዓ.ም በተፃፈ ውል ግራ ቀኙ የቤት ሽያጭ ውል ማድረጋቸውንና ውሉ በተደረገ ዕለት ሻጮች የአሁን ተጠሪዎች ብር 50,000 /ሃምሳ ሺህ/ የተቀበሉ ስለመሆኑ ግራ ቀኙ ተማምነውበታል። ተጠሪዎች ውሉ ይሰረዝልን በማለት በክስ የጠየቁት ቀሪው ብር 8 ሺህ አልከፈለንም በሚል ምክንያት ነው። በውል አፈፃፀም ሂደት ከተዋዋዮች አንዱ የውሉን ግዴታ ሳይፈጽም የቀረ እንደሆነ ሌላው ወገን እንደሁኔታው ውሉ እንዲፈጽምለት መጠየቅ እንደሚችል ይህም ካልሆነ ውሉ እንዲሰረዝ ጥያቄውን ማቅረብ እንደሚችል በፍ/ብ/ሕ/ቁ. 1771 ላይ ተመልክቷል። የውል ይሰረዝልኝ ጥያቄ ለፍርድቤት በቀረበ ጊዜ ዳኞች ውሉ ሊሰረዝ ይገባል በማለት ውሣኔ ከመስጠታቸው በፊት የተዋዋዮችን ጥቅምና ለቅን ልቦና የሚያስፈልገውን ነገር መሠረት ማድረግ እንዳለባቸው በውሉ ላይ ዓይነተኛ የሆነ የውል መጣስ ተግባር /fundamental breach of contract/ ካለፈጸመ በስተቀር ዳኞች ውል ይሰረዝ ማለት እንደሌለባቸው በፍ/ብ/ሕ/ቁ. 1784 እና 1785 ላይ ተመልክቷል።

በተያዘው ጉዳይ በቤት ሽያጭ ውሉ መሠረት ለተጠሪዎች መክፈል ከሚገባው ገንዘብ አብዛኛውን አመልካቾች እንዲከፍሉ ተረጋግጧል። ከዚህም ውሉ በአመዛኙ እንደተፈጸመ መገንዘብ ይቻላል። ውሉ ባመዛኙ መፈጸሙ ከተረጋገጠ ደግሞ ዓይነተኛ የሆነ የውል መጣስ ተግባር ተፈጽሟል ለማለት የማይቻል ከመሆኑም በላይ ከቅን ልቦና መለኪያ አኳያም ሲታይ ተጠሪዎች በቀሪነት የሚፈለገውን አነስተኛ ገንዘብ እንዲከፈላቸው በመጠየቅ ውሉ ውጤት እንዲኖረው ማድረግ እየቻሉ እንዲሰረዝ መጠየቃቸው ተቀባይነት ያለው ምክንያት አይደለም። የሥር ፍርድቤቶችም ቀሪው ገንዘብ ባለመከፈሉ ምክንያት የቀረበውን የውል ይሰረዝልኝ ክስ ተቀብለው ውሉ እንዲሰረዝ መወሰናቸው የሕግ ስህተት የተፈጸመበት ሆኖ ተገኝቷል።

ውሣኔ

1. የፌዴራል መጀመሪያ ደረጃ ፍርድ ቤት በመ/ቁ. 10356 ነሐሴ 16 ቀን 1997 ዓ.ም የሰጠው ፍርድ እንዲሁም የፌዴራል ከፍተኛ ፍርድቤት በመ/ቁ. 43067 ግንቦት 9 ቀን 1998 ዓ.ም የሰጠው ትዕዛዝ መሠረታዊ የሕግ ስህተት የተፈጸመበት ስለሆነ በፍ/ብ/ሕ/ሥ/ሥ/ቁ. 348/1/ መሠረት ተሽሯል፡፡
2. አመልካቾች መሠረታዊ የሆነ የውል መጣስ ተግባር ያልፈጸሙ ስለሆነ ከተጠሪዎች ጋር ያደረጉት ውል ሊሰረዝ አይገባም ተብሎ ተወስኗል፡፡
3. ግራ ቀኙ ወጭና ኪሣራ ይቻቻሉ፡፡
4. መዝገቡ ተዘግቶ ወደ መዝገብ ቤት ተመልሷል፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት፡፡

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Federal Cassation File No. 24974
Thasas 8, 2000[1]

Justices:
Menberetsehai Tadesse
Fiseha Workineh
Hagos Woldu
Hirut Melese
Tafese Yirga

Petitioners: Fekadu Derelo
Aynalem Besha

Respondents: Nigussie Worku
Haregwoin Jemaneh

Summary of the Judgment

This cassation petition was brought before the attention of the Cassation Bench upon the motion of the petitioners that the judgment of lower tiers of the Federal Court declaring the cancellation of the contract of sale of a house concluded between the petitioners and the respondents and the restoration of the parties to their position before the contract constitutes a fundamental mistake of law.

The background of the case shows that the respondents instituted a legal action against the petitioners in the Federal First Instance Court based on a contract of sale of a house concluded on Thasas 1, 1977. In their statement of claim, the respondents alleged they sold the house at a price of 58,000.00 Birr and collected 50,000 Birr the day the contract was concluded. They further stated that they undertook to collect the outstanding 8,000.00 Birr upon handing over the house within 30 days after the conclusion of the contract. The respondents further pleaded in their statement of claim that the petitioners failed to effect payment of the outstanding amount, regardless of the fact that they have taken delivery of the house sold to them. Thus, the respondents sought the cancellation of the contract and their restoration to their position.

In their statement of defence, the present petitioners admitted the conclusion of the contract with the respondents. They ,however, contended that they have undertook to effect the payment of the outstanding amount upon the respondents' securing of clearance of the house from encumbrance and injunctions and execute in person an attestation before the Office for Documents Registration and Authentication to the effect that they have sold the house. The petitioners stated that the respondents have failed to do so. Furthermore, the petitioners submitted that, regardless of the failure of the respondents to perform their obligations, they have effected payment to the tune of 5,000 Birr before the institution of the lawsuit against them in the Federal First Instance Court. Therefore, the petitioners pleaded the court to reject the application for the

[1] All the dates are according to Ethiopian Calendar.

cancellation of the contract and sought the reimbursement of costs they incurred in relation to the lawsuit.

The Federal First Instance Court decided in favor of the cancellation of the contract and the restoration of the parties to their previous position since it has confirmed the fact that the petitioners have failed to effect the payment of the outstanding amount until Thasas 30, 1977 pursuant to the obligation they undertook under the contract. The Federal High Court also dismissed the appeal the petitioners made on the judgment of the Federal First Instance Court based on Article 337 of the Civil Procedure Code.

The Cassation Bench to which the matter was brought examined the matter and also entertained the oral submissions of the parties on the matter. The issue in the case concerned whether or not the contract of the sale of the house needs to be cancelled or not. The parties are in agreement as to the fact that the contract pertaining to the sale of the house was concluded on Thasas 1, 1977, and that the present respondents have collected 50,000.00 Birr. The Cassation Bench further noted the fact that the respondents sought the cancellation of the contract based on their argument that they have not been able to secure the payment of the outstanding 8,000 Birr. A party to a contract can demand the forced performance or cancellation of a contract in line with Article 1771 of the Civil Code in the event the other party defaulted to perform his or her obligations. Judges need to consider the respective interests of the contracting parties and dictates of good faith before they declared the cancellation of the contract. Pursuant to Article 1784 and Article 1785 of the Civil Code, judgment ordering the cancellation of a given contract cannot be given unless there is a fundamental breach of the terms of the contract.

The Cassation Bench noted that it was confirmed that the bulk of the money that was due to the respondents had already been paid. This is indicative of the fact that the contractual obligations had been, by and large, performed. It is not possible to conclude that there is a fundamental breach in view of the fact that much of the obligation had already been discharged. Moreover, the Court noted that the respondents should not have opted for the cancellation of the contract when they could have sought the payment of the outstanding sum and by so doing ensure the performance of the contract in conformity with dictates of good faith.

Therefore, the Cassation Bench overturned the judgment in favour of the cancellation of the contract rendered by the lower courts as it constitutes a fundamental mistake of law. The Cassation Bench further declared that the contract that the petitioners concluded with the respondents remains valid.

Is Publication of a Ratified Treaty a Requirement for its Enforcement in Ethiopia? A Comment Based on W/t Tsedale Demissie v. Ato Kifle Demissie: Federal Cassation File No. 23632

Getachew Assefa[+]

1. The Case and its History

This case was first brought before a Woreda Court in 2005 in Bonga (Kafa Zone of the Southern Nations, Nationalities and Peoples State, SNNPS) where the deceased mother of the child, whose guardianship was sought, had her residence. The facts of the case show that first the father of the deceased applied to the Court to be declared the guardian and tutor of his grandson. While the case was being considered, the child's father, i.e., Ato Kifle Demissie, joined the case as an intervener. The Court held that the father of the child is the rightful guardian and tutor of the child according to the Family Code of the SNNPS, Proclamation No. 75/1996 (E.C.). After this decision was handed down, the paternal aunt of the child, W/t Tsedale Demissie, filed before the same Court an opposition as per Art. 358 the Civil Procedure Code stating that the child in question was brought up by her and her mother beginning from the time when the child was just 1 year and six months old. She further stated in her opposition that the father of the child had never cared for him for twelve or so years while she cared for the child all along by providing what was needed for his education, survival and development. She argued strongly that the history of the father of the child is such that he did not do anything for the child, and that it would be easy to deduce from this that he would not be a responsible guardian of the child in the future too. She urged the Court to change its decision that made the father of the child guardian and tutor and instead declare her the child's guardian and tutor.

The father of the child who was granted the custody argued in response that according to the law[1] the surviving parent is the guardian and tutor of the child. The father argued that since the opposition petitioner is the aunt of the child she could not be granted the custody while he is alive. In its decision given in February 2006 (in File No. 29/98), the Court reasoned that according to Art. 235(1) of the Family Code of the SNNPS, there is no way in which the aunt would be granted the custody of the child while the father of a child is alive. The Court further reasoned that it cannot be normally presumed that the aunt could be a better guardian of a child than his father, and that it would be an utter disregard of Art. 235 of the Family Code of the SNNPS to revoke the guardianship of

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[1] It is interesting to note that both the father of the child and the opposition petitioner, who were Addis Ababa residents, cited the provisions of the Federal Family Code of 2000 to support their pleadings while the Court simply disregarded it and settled the case based on the Family Code of the SNNPS.

the father and give the custody of the child to his aunt. The Court concluded that the aunt's claim is not supported by law and rejected the claim of the opposition petitioner.

The petitioner appealed from this decision to the Kafa Zone High Court (File No. 01001). This Court also affirmed the decision of the lower Court saying that there is no ground to reverse or vary the decision of the lower Court. The Court passed its decision without even calling up on the other party to the dispute, i.e., the father of the child to respond to the appeal. The application of the petitioner to the Cassation Bench of the Supreme Court of the SNNPS (File No. 14275) was also rejected as inadmissible as the Court found no error of law committed by the lower Courts.

2. The Decision of the Cassation Bench of the Federal Supreme Court

The Cassation Bench of the Federal Supreme Court (Cassation Bench) accepted the petition by W/t Tsedale Demissie in the case under discussion in March 2006 and passed its judgment in November of the same year.[2] The father of the child was directed by the Cassation Bench to present his counter-argument but did not do so thereby forfeiting his right to be heard. The Cassation Bench stated in its reasoning that the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) in its Art. 36(2) provides that in all actions concerning children undertaken by public and private welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interests of the child. The Cassation Bench went on to state:

> In addition to this, the UN Convention on the Rights of the Child – one of the Conventions which Ethiopia has ratified in 1992 – and which has become the integral part of the law of the land by virtue of Art. 9(3) [sic] of the Constitution provides under its Art. 3(1) that courts as well as all other organs that give decisions on matters pertaining to children must give primary consideration to the interest and wellbeing of children.[3]

The Cassation Bench further reasoned that it is something well known and accepted that regarding the interest and wellbeing of children, no one may be given primacy over their parents. Because of this, many countries' laws, ours included, normally contain the principle that in the event of the death of one of the parents, the surviving parent would become the legal guardian and tutor of the child. The Cassation Bench said further that because of this principle, both Federal and state family laws of Ethiopia contain express provisions recognizing the primacy of parents as guardians and tutors of their children.

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[2] The Children's Legal Protection Centre (CLPC)of the African Child Policy Forum gave the petitioner free legal aid including preparation of written submissions starting from the Kafa Zone High Court all the way to the Federal Supreme Court. In fact this author participated as a panellist in a panel discussion that was held in February 2008, organized by CLPC on the effects and ramifications of the decision on the implementation of the Child Rights Convention.

[3] Pp.2-3 of the Decision; translation by the author.

However, the Cassation Bench also reasoned that although there are such express provisions in our Federal and state family laws to the effect that parents shall be the guardians and tutors of their children, these express provisions shall be put into effect only if the parent to be granted guardianship and tutorship of his or her child is such that he or she works for the interests and wellbeing of the child as provided for in the Ethiopian Federal Constitution. The Bench Further stated:

> .... In this regard judges at any level of courts must, when they consider matters affecting children, in addition to other laws take into account the mandatory provision on the best interest of the child in Art. 36(2) of the Constitution. Any decisions and conventional (customary) practices given in contravention of this shall doubtlessly be rendered to have no effect.[4]

In its operative reasoning regarding the case at hand, the Cassation Bench said that the courts of the SNNPS, when they were looking into the guardianship issue, failed to see beyond the black letters of the law and consequently failed to ensure the best interest and wellbeing of the child as provided in the Federal Constitution. The Cassation Bench further pointed out that particularly the Kafa Zone High court had stated in its decision that the father of the child came forward to demand the guardianship of the child without visiting, bringing up, and caring for the child for 12 or so years but gave a decision to remove the child from the home where he was brought up with care and was living in tranquility without even asking for the opinion of the child in the matter. The Cassation Bench found that this decision did not take into account the interest and wellbeing of the child. The Cassation Bench emphatically concluded that the decision given by the lower courts, by simply looking at the literal words of the provisions of law and without insightfully taking into account the purpose and spirit of the law, is found to be against the FDRE Constitution as it is prejudicial to the interest and wellbeing of the child. Consequently, the Cassation Bench reversed the decisions and rulings of all the three Courts of that SNNPS that were involved in this case, and granted guardianship and tutorship to the petitioner, i.e., W/t Tsedale Demissie.

3. Comment

This case raises some interesting constitutional issues that are relevant both for the legal practice in the area as well as for the academia. In the facts of the case and the decision of the Cassation Bench presented above, at least two important constitutional questions are brought to the fore: 1) whether or not publication of a ratified international agreement is a legal requirement before such an agreement becomes enforceable in Ethiopia; and 2) the position of Ethiopian courts vis-à-vis enforcing the FDRE Constitution in general and the fundamental rights and freedoms in particular. In what follows, I shall briefly treat each of these constitutional questions (with more focus on the first one) on the backdrop of the decision of the Cassation Bench.

[4] Pp 3-4 of the Decision; translation by the author.

3.1. The issue of publication of ratified international agreements

Whether publication of ratified international agreements in the official law gazette is a legal requirement for the treaty to enter into force or not relates to the issue of whether a state is a 'monist' or a 'dualist'.[5] There is a lot of variation among the states that could be put within a monist camp in terms of the requirement of publication for the legal validity of a given ratified treaty. It is generally true that states with civil law tradition consider international agreements as part of the national legal system once such agreements are ratified by the rightful national bodies. However, there are differences on additional requirements to make the treaties that are ratified enforceable before domestic courts and other institutions. In Brazil for example, ratified international instruments become a rule of the domestic legal system after they are published in the official journal of the country.[6] The same is generally true with the Central African Republic, Chad, Chile, Cyprus, France, Guinea, the Netherlands, Panama, Portugal, Rwanda, Slovakia and Syria where ratification should be followed by publication or promulgation for the treaties to become part of the domestic law of the respective states.[7]

On the other hand, countries such as El Salvador, Germany, Japan, Jordan, Lebanon, Libya, Lithuania, Mexico, Slovenia, Sudan, Switzerland and USA make treaties integral part of the domestic law upon ratification without other additional legal requirements to be met.[8] But one should not confuse the act of publication or, as the case may be, promulgation of ratified treaties in the first of the two groups of states discussed above with the act of 'transformation' which take place in states with 'dualist' legal systems. In dualist legal systems, the re-enactment or, as it is also

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[5] This is a traditional categorization of states into the two camps based on the nature of the relationship that exists between international law and municipal law in their legal systems. Accordingly, 'monist' states are those that consider international law and domestic law to be part of a unified legal system, 'often characterized by the primacy of international norms', while dualist states consider international law and domestic law to be separate legal systems. See M. Scheinin, 'International Human Rights in National Law' in R. Hanski & M. Suksi (eds.), An *Introduction to the International Protection of Human Rights: A Textbook* (Turku/Abo: Gummerus Kirjapaino Oy, 2004), p. 418. See also a very succinct discussion on the two theories by John H. Jackson 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' in *86 Am. J. Int'l L. (1992).*

[6] Christopher Harland, 'The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey Through UN Human Rights Committee Documents' in *Human Rights Quarterly 22 (2000),* pp. 207-208.

[7] See generally Id.

[8] Id. The general placement of states into two – those publishing and those not publishing ratified treaties – may be simplistic, and a closer look at the legal systems of each of the states may bring out some distinctions even among the states placed within one category. For example, in Switzerland while publication is said to be not required, if the treaty in question creates obligations on individuals, publication would be required. See generally Andrew Z. Drzemczewski cited in Ibrahim Idris, 'The place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution' in 20 *Journal of Ethiopian Law* (2000), p.122.

known, the 'transformation' of the treaty in question through a legislative act is a validity requirement for it to be domestically enforced, whereas in the case of the monist, transforming the treaty law is not a validity requirement but just the publication of it.

When we turn to our own system, the requirement or otherwise of publication of a ratified treaty for its domestic enforcement before Ethiopian national institutions such as courts of law remains to be one of the controversial issues in the area. For the sake of grasping the points at issue clearly, we shall start by dividing up the arguments into three: the first position holds that by virtue of Art. 9(4) of the Federal Constitution, the mere act of ratification suffices to bring a treaty into force domestically without any further steps needed, including a publication of it in the official law gazette of the Federal Government. The second position espouses that a ratified treaty whose notice of ratification is published in the official law gazette should be considered to be the integral part of the law of the land, and the publication of its full text is not a legal requirement for it to be invoked before domestic bodies such as courts of law. The last position in short is the argument that publication of the full text of a ratified treaty is a requirement for that treaty to become part of the law of the land just like other 'laws' which are enacted by the Federal Law maker.

As stated above, the first position takes a sort of pure 'monist' view in this regard and argues that upon ratification, treaties automatically become the integral part of the law of the land.[9] The publication of a ratified treaty, according to this view, is an important act in itself but should by no means be taken as a validity requirement. The legal basis for this position as stated above is Art. 9(4) of the FDRE Constitution which says 'All international agreements ratified by Ethiopia are an integral part of the law of the land'. The argument goes that there is no additional requirement attached to ratification by the FDRE Constitution for ratified treaties to become 'integral part of the law of the land' and we should not add one.

The second view takes a middle ground as briefly described above. Its main contention is that so long as the notice of its ratification is published in the official law gazette, the publication of the full text of the treaty in question should not be the matter of legal requirement. Both the first view and the second view draw distinction between publication as a validity requirement and publication as needed for accessibility of the treaty law. Both views subscribe to the idea that publication of a ratified treaty serves the purpose of accessibility. But the two positions at the same time differ in that the second one considers the publication in the official law gazette of notice of ratification as mandatory while the first position does not.

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[9] The views (all of the three) we speak about are not extensively documented in research or otherwise, and it is not possible to give concrete examples of those, but see Id., pp.124-129; Girma Amare, cited in Id.; see also Gebreamlak Gebregiorgis, 'The Incorporation and Status of International Human Rights under the FDRE Constitution' in Girmachew Alemu & Sisay Alemahu (eds.) *Ethiopian Human Rights Law Series,* Vol. 2 (2008), pp.42-45.

The third position, as stated earlier, furthers the idea that publication of the full text is a legal requirement. Proponents of this position use both the FDRE Constitution and other laws to make their case. One such legal basis is Art. 71 of the FDRE Constitution.[10] Art. 71 of the Constitution, which provides for the powers and functions of the President of the Republic, in its Sub-Art.(2) stipulates that 'he [the president] shall proclaim in the Negarit Gazeta laws and international agreements approved by the House of Peoples' Representatives in accordance with the Constitution'. The proponents of this view argue that since the above-cited provision of Art. 71(2) 'is expressed in a mandatory way' publication of a ratified treaty would be a constitutional requirement.[11] They also use Proclamation No. 3/1995 as another legal basis. This Proclamation establishes the Federal *Negarit Gazeta as* the official law gazette of the Federal Government. Art. 2(2) of Proclamation No.3/1995 states: 'All Laws of the Federal Government shall be published in the Federal Negarit Gazeta', while Art.2 (3) of the same proclamation provides that: 'All Federal or Regional legislative, executive and judicial organs as well as any natural or juridical person shall take judicial notice of Laws published in the Federal Negarit Gazeta'.

This author believes that of the three positions discussed above, the first one is the most acceptable position to hold based on the Ethiopian Constitution. To begin from the making history of the FDRE Constitution, the relevant Minutes of the Constituent Assembly show that the idea of the requirement of publication was never discussed as a legal issue. During the making of the FDRE Constitution, the discussion in this area was rather totally on other matters such as whether treaties ratified before the coming into life of the Constitution should continue to be binding on Ethiopia; whether it would be necessary to include express terms that declare domestic laws that go against ratified treaties as having no effect; and whether loan agreements entered into by the previous government for the purchase of armaments should be expressly excluded from binding Ethiopia or not.[12] It seems to me to be possible to conclude from this that ratification of treaties was considered to bring upon Ethiopia all the obligations emanating from the treaty – internationally as well as nationally – without any additional legal actions. It should be taken that the single act of ratification by the House of Peoples' Representatives has two effects. The first one is that Ethiopia would be bound by the treaty under international law while the second is the treaty ratified henceforth becomes the integral part of the law of the land by virtue of Art. 9(4) of the FDRE Constitution.

For those who are persuaded by the second and/or the third positions described above, I present here briefly why I think those positions are untenable. As regards the third position, their main legal bases are stated above to be Art. 71 of the FDRE Constitution and provisions of Proclamation No. 3/1995. To say that 'since the stipulation made in Art. 71(2) of the FDRE Constitution is mandatory, publication of ratified treaties should also be mandatory' is a misunderstanding of the content of the provision cited.

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[10] See Ibrahim Idris (note 8 above), p. 125.
[11] Id.
[12] See *Minutes of the Ethiopian Constituent Assembly*, Vol.2 (November 1994, Addis Ababa).

The correct understanding of the cited provision should be that the FDRE Constitution here tells us that the president shall discharge the functions of his/her Office (emphasis added). This is absolutely different from saying that treaties ratified should be published or proclaimed in the law gazette. When we turn to the second ground based on Proclamation No.3/1995, I like to begin by saying that whatever may be the merits of the argument based on the latter law, we cannot use the provisions of a proclamation to challenge the contents of the Constitution. We have stated clearly earlier that Art. 9(4) does not imply any requirement other than ratification. Therefore, even if one may be convinced that the provisions of Proclamation No. 3/1995 (cited above) are to the effect that ratified treaties have to be published for them to be enforceable, this shall be considered as a requirement not provided for under the FDRE Constitution.

Moreover, I do not think that we can interpret the relevant provisions of Proclamation No. 3/1995 as requiring publication. There is simply no indication in those provisions to the effect that publication of laws in the Federal *Negarit Gazeta* is a validity requirement. These provisions rather aim at establishing the Federal *Negarit Gazeta* as the official law gazette of the Federal Government (Art. 2(2)), and their main aim is for evidentiary purpose such that a person who ascertains that a law is published in the *Negarit Gazeta* will be required to adduce no further proof about the existence of the law in which case the burden of proof shits to the other party (see Art.2 (3)).

The second view is a bit problematic to establish. Let me state once again that constitutionally speaking any type of publication is not a validity requirement under the Ethiopian Constitution. But even when we look at the prevailing practice, there is no consistency at all. To cite some specific cases, the notice of ratification or accession of some treaties such as the Child Rights Convention (CRC)[13], The African Charter on Human and Peoples' Rights[14], and the African Charter on the Rights and Welfare of the Child[15] have been polished in the Federal *Negarit Gazeta*. However, there is no notice of such ratification or accession published in the case of the International Covenant on Civil and Political Rights (acceded to in 1993), the International Covenant on Economic, Social and Cultural Rights (acceded to in 1993), and the Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment (acceded to in 1994). Therefore, if we pursue the view that only the treaties whose notice of ratification has been published would be regarded as the integral part of the law of the land, we will risk exclusion of some critically important human rights treaties.

When we look into the decision of the Cassation Bench of the Federal Supreme Court in the case under consideration, this author believes that it has clearly taken a position on the matter by endorsing the view that ratification alone makes a treaty integral part of the law of the land as opposed to the publication of a treaty. Having stated that the CRC is one of the treaties ratified by Ethiopia, the Bench went on to cite directly a provision in the CRC (on the best interests of the child) to determine the applicable

[13] Proclamation No. 10/1992.
[14] Proclamation No. 114/1998.
[15] Proclamation No. 283/2002.

legal rules to settle the case at hand.[16] The general reasoning of the court (the *obiter dicta*) gives a good basis to hold that all ratified treaties, just like the CRC, do become the source of law in Ethiopia.[17] This is believed to officially, at least for the judiciary in Ethiopia, settle the argument in favour of the first position we discussed earlier in this commentary. [18]

3.2. The Role of Courts in the Enforcement of the Constitution

Another contribution of the decision of the Federal Supreme Court Cassation Bench in this case is the application of the provisions of the FDRE Constitution in a case between private parties that pertains to one of the fundamental rights and freedoms protected in the Constitution. It is particularly striking to note that the Cassation Bench did so in a situation that borders setting aside a law (this time a state law) whose black letter provisions sanction clearly the course of action endorsed by the lower Courts. The Cassation Bench reasoned that 'judges at any level of courts must, when they consider matters affecting children, in addition to other laws take into account the mandatory provision on the best interest of the child in Art. 36(2) of the Constitution'.[19] It further stated that any decisions and conventional (customary) practices given in contravention of the Constitution shall be rendered to have no effect.[20]

The above exercise by the Cassation Bench is considered to be of great importance by this author because it helps in turning around what seems to be generally a hands-off approach by our courts at all levels when it comes to settling disputes on the basis of the Constitution. The behavior of the courts is not in fact groundless: it comes from the fact that the FDRE Constitution declares constitutional interpretation shall be done by the House of the Federation, not of courts. Although I myself agree that in some cases it is very difficult to draw the fine line between constitutional interpretation (or settlement of constitutional dispute) and implementation or enforcement or application of the Constitution especially when we deal with the constitutional text, I do also believe that this does not happen all the time. The decision of the Cassation Bench under review took a very instructive huge step forward for the rest of the courts to follow suit.

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[16] See the direct translation of the decision in quote under section II above.
[17] Id.
[18] This decision of the Cassation Bench is particularly important now because of Proclamation No. 454/2005 which makes the interpretations of the Bench to have a binding effect on all Federal and state courts in future similar cases.
[19] See the case briefed under section II above.
[20] Id.

4. Conclusion

Through the analysis of Cassation File No. 23632, attempt is made to show in the above commentary that the issue of publication of ratified treaties is controversial in Ethiopia. It has also been shown that states of the world that even seemingly belong to the 'monist' camp diverge when it comes to the publication of treaties ratified. The three positions that are generally taken by theorists and practitioners in Ethiopia, including judges, have been discussed in this review. I have also argued that of the three positions, the one which maintains that publication in any form is not a validity requirement for domestic application of treaties in Ethiopia aligns with the sense of the FDRE Constitution both from its relevant wording as well as from the understanding of the makers of the Constitution. The decision of the Cassation Bench in File No. 23632 is believed to be a correct reading of the FDRE Constitution. It is therefore hoped that henceforth the controversy around this issue will arise no more.

በሕጉድ የማይንቀሳቀስ ንብረት ላይ የመያዣ መብት በቅድሚያ ያስመዘገበ ባለገንዘብን ዕዳ በመክፈል በባለገንዘቡ መብት ስለ መዳረግ፤ የፌዴራል ጠቅላይ ፍ/ቤት የሰበር ችሎት በሰ/መ/ቁ. 39778 በሰጠው ፍርድ ላይ የተሰጠ አስተያየት

ንጋቱ ተስፋዬ*

በአንድ የማይንቀሳቀስ ንብረት ላይ የመያዣ መብት በቀደምትነት ያስመዘገበ ባለገንዘብ (creditor) በመያዣ ውሉ የተመዘገበው ገንዘብ ከሌሎች ገንዘብ ጠያቂዎች በፊት እንዲከፈለው ለማድረግ መያዣው መድን እንደሚሆነው በፍትሐ ብሔር ሕግ ተደንግጓል።[1] የመያዣ መብት የተመዘገበበትን ንብረት ሌሎች ገንዘብ ጠያቂዎች በፍ/ቤት አሳግደው ያሸጡት እንደሆነ የመያዣ መብቱን በቀደምትነት ያስመዘገበው ገንዘብ ጠያቂ ከሌሎቹ ገንዘብ ጠያቂዎች በፊት በቅድሚያ እንዲከፈለው ለመጠየቅ ይችላል።[2] ባለዕዳው ይህን የማይንቀሳቀስ ንብረት የመያዣ መብት ላስመዘገበ ሌላ ሦስተኛ ወገን ሽጦ ባለቤትነቱን ያስተላለፈ እንደሆነም የመያዣ መብቱን በቀደምትነት ያስመዘገበው ገንዘብ ጠያቂ ንብረቱን ከገዥው እጅ ለማስያዝ እንደሚችል ሕጉ ይደነግጋል።[3]

እንዲሁም፣ በርካታ ባለገንዘቦች (creditors) በአንድ በማይንቀሳቀስ ንብረት ላይ የመያዣ መብት ካስመዘገቡ፣ የቀደምትነት መብታቸውን የሚሠሩበት ተራ የሚወሰነው የመያዣ መብታቸው የተመዘገበበትን ቀን በመከተል ነው።[4] ይሁን እንጂ፣ የቀደምትነቱን ተራ በመዳረግ ለመውሰድ ይቻላል። መዳረግ (subrogation[5]) ማለት ከባለዕዳው ላይ ገንዘብ የመጠየቅ መብት ያለውን ሰው ዕዳ ከፍሎ በባለገንዘቡ መብት በመተካት ባለዕዳውን የመጠየቅ መብት ማግኘት ሲሆን፣ ዳራጊው (subrogor[6]) ባለገንዘቡ ወይም ባለዕዳው ወይም ሕግ ሊሆን ይችላል።

1. <u>በባለገንዘቡ መዳረግ (subrogation by creditor)</u>:- የፍትሐብሔር ሕግ ቁጥር 1968 ሦስተኛ ወገን የከፈለውን ገንዘብ ባለገንዘቡ የተቀበለ እንደሆነ በሌሎ መብቶች ተዳራጊ ሲያደርገው ይችላል፤ የመዳረጉ ጉዳይም ግልጽ መሆንና ገንዘቡ እንዳተከፈለ ወዲያውኑ መፈፀም ስለበት

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* *ሔክሔክቢ (1972)፣ ሔክሔክሔም (1976)፣ የሕቢሲንያ ባንክ ሰ.ማ. የሕግ ሰማካሪ፤ ቀድሞ በሰዲስ ሰበባ ዩኒቨርሲቲ ረዳት ፕሮፌሰርና የሕግ ፋክልቲ ዲን። ደህ ሰስተያየት የተሰጠው ሰተምህርታዊ ጠቀሜታ ብቻ መሆኑን ወሐፊው በተሐተና ይገልፃል።*

[1] *ቁጥር 3076(1)። የዚህ ድንጋጌ የእንግሊዝኛ ቅጅ* The mortgage shall ***secure*** the payment to the mortgagee, in priority to other creditors, of the registered amount of claim. *ይሳል።*
<u>ማሳሰቢያ</u>፡- ተሰይቶ ካልተገለፀ በስተቀር፣ በዚህ ጽሑፍ ውስጥ የተጠቀሱት ቁጥሮች የሚመለክቱት በ1952 የወጣውን የኢትዮጵያ የፍትሐ ብሔር ሕግ ነው።

[2] *ቁጥር 3059(1)። ሆኖም፣ ቁጥር 3077(1) በመያዣ ቦተያዘውን የማይንቀሳቀስ ንብረት በማዳስ የማሻሻል ሥራ ሰፈፀሙ ሥራ ተቋራጮች፣ ለሥራው ሰስፈሳጊ የሆነውን የማዳሻ ሰቃ ሰሸሙ ስና ሰተክልት፣ ዘር ወይም የሰብል ፍሬ ሳቀረቡ ሰቃ ሰቀራቢዎች የመያዣ ቀደምትነት መብት ካለው ባለገንዘብም በፊት በቅድሚያ ይከፈሳቸዋል ይሳል።*

[3] *ቁጥር 3059(2)*

[4] *ቁጥር 3081(1)*

[5] *Subrogation* is the substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the creditor. See *Black's Law Dictionary,* eigth edition, West Publishing Co. (2004), page 1467.

[6] *Subrogor* is one who allows another to be substituted for oneself as a creditor, with a transfer of rights and duties.

ይላል።[7] የፍ/ብሔር ሕግ ቁጥር 3083ም *ማናቸውም የሚያንቀሳቀስ ንብረት ዘያዥ ዘብት ያለው ገንዘብ ጠያቂ* ከቤሱ በፊት የመያዣ ቀዳምትነት ዘብት ያለውን ገንዘብ ጠያቂ ስስፈቀደ[8] የቀዳምትነቱን ተፈ ስመሙሰድና ከቤሱ በፊት የነበረው ገንዘብ ጠያቂ የነበረው ዘብት ስንዲኖረው ስማድረግ ይችላል። የዚህ ድንጋጌ የእንግሊዝኛ ቅጂ የመያዣ ቀደምትነት ያለውን ገንዘብ ጠያቂ ከማስፈቀድ በተጨማሪ ገንዘቡ መከፈል ያለበት መሆኑንም ይገልጻል።[9] የአማርኛው ድንጋጌ ግን እንደ እንግሊዝኛው "ገንዘቡን ከቤሱ" አይልም። በባለገንዘቡ ስለሚደረግ መዳረግ የሚደነግገው የፍ/ብሔር ሕግ ቁጥር 1968 ከፍ/ብሔር ሕግ ቁጥር 3083(1) የእንግሊዝኛ ቅጂ ድንጋጌ ጋር ይስማማል። ማንም ሰው ቢሆን ገንዘቡ ሳይከፈለው የመያዣ መብቱን ለሌላ አሳልፎ ይሰጣል ተብሎ አይገመትም።

2. **<u>በባስፅዳው መዳቲግ (subrogation by debtor)</u>**:- ባለዕዳው የተበደረውን ዕዳ ለመክፈል ሲል መጠኑ የተወሰነ ጥሬ ገንዘብ (cash) ተበድሮ የመጀመሪያውን አበዳሪ ዕዳ ከከፈለ፣ የመጀመሪያው አበዳሪ ባይፈቅድም እንኳ ተበዳሪው ለመጀመሪያው አበዳሪ ሰጥቶት በነበረው መብት የመጨረሻውን አበዳሪ ለመዳረግ ይችላል።[10] ነገር ግን፣ ባለዕዳው የሚያደርገው መዳረግ በሕግ ተቀባይነት እንዲኖረው ሕጉ የሚጠይቀቸው ሁኔታዎች (conditions) መሟላት አለባቸው። ይህም ማለት፣

   - ባለዕዳው በመጨረሻ የተዋዋለው የብድር ውል የተደረገበት ዘመን የተፈጋገጠ ቀን[11] ሊኖረው ይገባል፣
   - በብድር የተገስደው ገንዘብ የመጀመሪያውን ስበዳሪ ዕዳ ስመክፈያ የሚውል ለመሆኑ በብድር ውሱ ሳይ መጠቀስ አለበት፣
   - ገንዘቡ ለመጀመሪያው አበዳሪ መከፈሉን የሚገልፀው ደረሰኝ የተፈጋገጠ ቀን እንዲኖረውና ለመጀመሪያው ስበዳሪ ክፍያ የተፈፀመው *ባስዕዳው በመጠረሻ ከተበደረው ገንዘብ* ስመሆኑ *ግስፅ በሆነ ቃል በደረሰኙ* ሳይ *ሲጠቀስ* ይገባል። ባለዕዳው እነዚህ ነገሮች በደረሰኙ ሳይ እንዲጠቀሱለት ከጠየቀ፣ የመጀመሪያው አበዳሪ ይህን ጠቅሶ የመጻፍ ግዴታ አለበት።[12]

እንዲሁም፣ ከላይ በተራ ቁጥር 1 እና 2 ከተጠቀሱት ሁኔታዎች በተጨማሪ መዳረጉ በሕግ ተቀባይነት እንዲኖረው የመያዣ ዘብቱን ስማስተሳሰፍ በሕግ የታዘዘው ስርዓት (form) መከበር ይኖርበታል።[13] የማይንቀሳቀስ ንብረት የመያዣ መብትን

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[7] *የስንግሊዝኛው ድንጋጌ A creditor who is* ***paid*** *by a third party may subrogate him to his rights. Subrogation shall be express and effected at the time of payment. ይሳል።*

[8] *ሆኖም፣ በተፈ ተከታይ የሆነው ገንዘብ ጠያቂ የመያዣ ዘብት የተሰጠበት የማይንቀሳቀስ ንብረት በፍርድ ስንዲያዝ ስድርን ከሆነ ከቤሱ በፊት የቀዳምትነት ተፈ የነበረውን ባስገንዘብ ማስፈቀድ ሳያስፈልገው የቀዳምትነት ዘብት ሳስው ገንዘብ ጠያቂ ገንዘቡን በመክፈል ብቻ የቀዳምትነቱን ተፈ ስመሙሰድ ስንደሚችል የቁጥር 3083(1) ሁስተኛ ወረፍተ ነገር ይደነግጋል።*

[9] ይህ ድንጋጌ *Any mortgagee may pay a creditor having priority with the consent of such creditor. ይሳል።*

[10] *ቁጥር 1969*

[11] *በቁጥር 2015(ሀ) መሠረት* ***የስንዱ ስርግጠኛ ቀን*** *የሚባስው የመንግሥት መሥሪያ ቤት ባስሥልጣን ሰነዱን የጻፈበት ወይም የተቀበስበት ቀን ነው።*

[12] *ቁጥር 1970።*

[13] *ቁጥር 1975*

ለማስተላለፍ ወይም እንዲህ ያለውን ንብረት የሚመለከቱ ክፍያዎችን ለመፈፀም የሚደረጉ ስምምነቶች በጽሑፍና ውል ለማዋዋል ሥልጣን በተሰጠው ፊት እንዲደረጉ ሕጉ ያዛል::[14] በተጨማሪም፣ ተዳራጊው (subrogee[15]) በዕዳው ላይ በተሰጡት ልዩ መብቶች፣ ዋስትናዎችና ሌሎች ተጨማሪ መብቶች እንዲሠራባቸውና ባለዕዳውን ለመጠየቅ እንዲችል ገንዘቡ የተከፈለው ሰው አስፈላጊ የሆኑትን ማስረጃዎች ሁሉ ለተዳራጊው ወዲያውኑ መስጠት አለበት::[16]

ባለዕዳው ራሱ ዕዳውን ከከፈለ ግን መያዣው የሚመለከተው የገንዘብ መጠየቂያ መብት ቀሪ ስለሚሆን በማንኛውም ጥቅም ያለው ሰው (interested party) ጠያቂነት በቀደምትነት የተመዘገበው የመያዣ መብት ይሠረዛል::[17] የማይንቀሳቀሰው ንብረት ባለሀብትም የተሠረዘውን የመያዣ መብት ለመተካት አዲስ የመያዣ መብት ለማቋቋም አይችልም::[18] የመጀመሪያው የመያዣ መብት መሠረዝ ከዚህ የመያዣ መብት በኋላ የመያዣ መብት ላስመዘገበ ገንዘብ ጠያቂ የቀዳሚነት የመያዣ መብት ያስገኝለታል::[19]

3. <u>ሕጋዊ መዳረግ (Legal subrogation)</u>:- ከሌሎች ጋራ ወይም ስለሌሎች ሆኖ ዕዳ እንዲከፍል በፍ/ቤት የተገደደና የከፈለ ወይም የአንድ ንብረት የጋራ ባለቤት በመሆኑ ወይም በዚህ ንብረት ላይ ልዩ መብት ወይም የመያዣ መብት ያለው በመሆኑ ምክንያት በዚህ ንብረት ላይ ተመሳሳይ መብት ላለው ሌላ ባለገንዘብ የከፈለ ሰው በባለገንዘቡ መብቶች እንዲዳረግ ሕጉ ፈቅዶለታል::[20]

በማይንቀሳቀስ ንብረት ላይ የመያዣ መብት ያስመዘገበ ባለገንዘብንና በእሱ መብት መዳረግን በሚመለከት ሕጉ ባጭሩ ከላይ የተገለፀውን የሚል ሲሆን፣ የሰበር ችሎት በባለገንዘቡ መዳረግን እንደጭብጥ ይዞ ፍርድ የሰጠበትን ጉዳይ ከላይ ከተገለፀው አንጻር ቀጥለን እናያለን::

ሀ. የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ችሎት በሰ/መ/ቁ. 39778 ሐምሌ 30 ቀን 2001 ዓ.ም ፍርድ የሰጠበት ጉዳይ የተጀመረው በፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት ነው:: በዚህ ፍ/ቤት አመልካች አቢሲንያ ባንክ አ.ማ. ሲሆን፣ ተጠሪ ደግሞ ጉለሌ ክፍለ ከተማ መሬት አስተዳደር ጽ/ቤት ነበር:: በተጠሪው ጠያቂነት ሕብረት ባንክ አ.ማ. በክርክሩ ጣልቃ እንዲገባ ፍ/ቤቱ ትዕዛዝ ሰጥቶ ሕብረት ባንክ ጣልቃ ገብ ሆኖ ተከራክሯል::

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[14] ቁጥር 1723

[15] *Subrogee* is one who is substituted for another in having a right, duty or claim.

[16] ቁጥር 1973(1) እና ቁጥር 1774

[17] ቁጥር 3110(ሀ)

[18] ቁጥር 3115(2):: የዚህ ድንጋጌ የእንግሊዝኛ ቅጅ The owner may not create a new mortgage to replace the mortgage the registration of which has been cancelled. ይላል::

[19] ቁጥር 3115(1)

[20] ቁጥር 1971፣ 1909፣ 3042-3044 እና 2161ን ይመልከቱ:: ከላይ በግርጌ ማስታወሻ ቁጥር 5 የተጠቀሰው Black's Law Dictionary Legal subrogation arises by the operation of the law when the paying party has a liability, claim, or fiduciary relationship with the debtor, or is a surety, or pays to fulfill a legal duty or because of public policy or to protect its own rights በማለት ገጽ 1468 ላይ ከቁጥር 1971 ጋር የተቀፈረበ ማብራሪያ ሰጥቷል::

አመልካች ሐምሌ 21 ቀን 1998 ዓ.ም ጽፎ ለፊዴራል የመጀመሪያ ደረጃ ፍ/ቤት ያቀረበው አቤቱታ ተጠሪ በመያዣ መብት ቀደምትነት አመዘጋገብ ላይ የፈፀመው ስሕተት እንዲታረም የሚጠይቅ ሲሆን፣ በአቤቱታው የተገለፀውም፡-

- ስማቸው ደምሴ ኢንቨስትመንት ኃ/የተ/የግ/ማ[21] ከኢትዮጵያ ንግድ ባንክ እና ከአቢሲንያ ባንክ ብድር ሲወስድ በወረዳ 8 ቀበሌ 05 የሚገኝ የቤት ቁጥሩ 343 የሆነ የድርጅት ቤት ለሁለቱም አበዳሪ ባንኮች በመያዣነት መስጠቱና የኢትዮጵያ ንግድ ባንክ የመያዣ መብት በመጀመሪያ፣ የአቢሲንያ ባንክ ደግሞ ቀጥሎ መመዝገቡ፤
- ተበዳሪው ከኢትዮጵያ ንግድ ባንክ የወሰደውን ብድር ሕብረት ባንክ እንዲከፍልለት በማድረግ ብድሩ ወደ ሕብረት ባንክ ስለዞረ ሕብረት ባንክ ንግድ ባንክን ተክቶ 1ኛ ደረጃ የመያዣ መብት እንደአለውና አቢሲንያ ባንክ እንደቀድሞው ሁለተኛ ደረጃ የመያዣ መብቱን እንደያዘ እንደሚቀጥል ተጠሪ በደብዳቤ ለአመልካች መግለጹ፤
- ሕብረት ባንክ ቀደም ብሎ የተመዘገበ የመያዣ መብት ሳይኖረው በፍትሐብሔር ሕግ ቁጥር 3083 መሠረት የኢትዮጵያ ንግድ ባንክን በማስፈቀድ የቀደምትነት ተራ ለማግኘ ት እንደማይችል እና ሊዳረግ የሚችለው ቁጥር 1969 እና 1970 ድንጋጌዎች ሲሚሉ ብቻ መሆኑ፤
- በዚህ ጉዳይ የኢትዮጵያ ንግድ ባንክን ዕዳ ተበዳሪው ራሱ ስለከፈለ የንግድ ባንክ የመያዣ መብት ቀሪ በመሆኑ፣ በተጠቀሰው ቤት ላይ የመያዣ መብት ቅድሚያ ያለው አቢሲንያ ባንክ መሆኑ በቁጥር በፍትሐብሔር ቁጥር 3110(ሀ) እና 3115 መሠረት እንዲወሰን ነው፡፡

ለ. ተጠሪው በሰጠው መልስ ተበዳሪው የነበረበትን የኢትዮጵያ ንግድ ባንክ ብድር ሕብረት ባንክ ከፍሎ በኢትዮጵያ ንግድ ባንክ የመያዣ መብት ስለተተካ የመያዣ መብቱን በ1ኛ ደረጃ እንደመዘገበለት ገልጾ፣ ሕብረት ባንክ በክርክሩ ጣልቃ ገብቶ መልስ እንዲሰጥ ከተደረገ በኋላ ፍ/ቤቱ በሚሰጠው ውሳኔ መሠረት ለመፈፀም እንደማይቸገር ገልጿል፡፡ ፍ/ቤቱም ሕብረት ባንክ ጣልቃ እንዲገባና መልስ እንዲሰጥ አዝዞ ጣልቃ ገብ ጥር 28 ቀን 1999 ዓ.ም ጽፎ ባቀረበው የመልስ ማመልከቻ፣

- ተበዳሪው ባቀረበው ጥያቄ መሠረት የኢትዮጵያ ንግድ ባንክን ዕዳ በሙሉ በመክፈል የኢትዮጵያ ንግድ ባንክ በመያዣው ንብረት ላይ የነበረውን መብት መውሰዱን፤ አመልካች በአቤቱታው የጠቀሰው ያለመገንዘቡ ስለሚሰጥ ዳረጎት የሚደነግገውን ብቻ እንደሆነ፤ በባለገንዘቡ ከሚሰጥ ዳረጎት በተጨማሪ በባለዕዳው የሚሰጥ ዳረጎት (ፍ/ብሔር ሕግ ቁጥር 1969) እና ሕጋዊ ዳረጎት (ፍ/ብሔር ሕግ ቁጥር 1971) መኖሩን፣
- <u>ባለዕዳው ባቀረበው ጥያቄ መሠረት</u> ጣልቃ ገብ የኢትዮጵያ ንግድ ባንክን ዕዳ በሙሉ ከፍሎ ለብድሩ ዋስትና የተሰጠውን ቤት ባለቤትነት ማረጋገጫ ሰነድ በመረከብ መብቱን ማስመዝገቡ <u>በባለዕዳው መዳረጉን እንደሚያሳይና</u> የኢትዮጵያ ንግድ ባንክ ከባለዕዳው የሚፈልገውን ዕዳ ጣልቃ ገብ ከፍሎ በኢትዮጵያ ንግድ ባንክ እግር መተካቱ <u>በባለዕዳው በተሰጠው ዳረጎት መሆኑ የማያጠያይቅ</u> መሆኑን፣
- የፍ/ብሔር ሕግ ቁጥር 3083 አንደኛ ደረጃ መያዣ ያለው አበዳሪ ፈቃዱን በጽሑፍ መስጠት አለበት ወይም ተተኪው በቅድሚያ የመያዣ መብት ያለው መሆን ስለበት እንደማይል ገልጿል፡፡

ከማመልከቻው ጋርም ከስማቸው ደምሴ ኢንቨስትመንት ኃ/የተ/የግ/ማ ጋር ጥቅምት 24 ቀን 1997 ዓ.ም. የተዋዋለው ለሥራ ማስኬጃ የተሰጠ የ15 ሚሊዮን የኦቨርድራፍት ብድር ውል እና በዚሁ ቀን የተፈረመ የመያዣ ውል፣ እንዲሁም ተበዳሪው በ6/3/97 በቁጥር

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[21] ስማቸው ደምሴ ኢንቨስትመንት ኃ/የተ/የግ/ማኅበር በዚህ ጽሑፍ ውስጥ «ተበዳሪው» ስየተባለ ይጠቀሳል፡፡

ስደ/0053/97 ለጣልቃ ገብ የጻፈውን ደብዳቤ[22] እና ለስማቸው ደምሴ ኢንቨስትመንት ኃ.የተ.የግ.ማ. ብር 11,862,768.72 ክፈል የሚል ቁጥሩ 046293 የሆነ ሲ.ፒ.ኦ (Cashier's Payment Order) በማስረጃነት ከማመልከቻው ጋር አያይዞ አቅርቧል።

ሐ. የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት *ባለዕዳው ባቀረበው ጥያቄ መሠረት* ጣልቃ ገብ የኢትዮጵያ ንግድ ባንክን ዕዳ በሙሉ ከፍሎ ለብድሩ የተሰጠውን የባለቤትነት ማረጋገጫ ሰነድ በመቀበል የመያዣ መብቱን ማስመዝገቡ በባለዕዳው መዳረጉን እንደሚያሳይ ጠቅሶ፣ *የኢትዮጵያ ንግድ ባንክ የቤት ባለቤትነት ደብተሩን ለጣልቃ ገብ ማስረከቡ በድርጊት ፈቃደኝነቱን መግለጹ ስለሆነ በወረዳ 8 ቀበሌ 05 የቤት ቁጥር 343 የሆነውን የድርጅት ቤት በተመለከተ ጣልቃ ገብን 1ኛ ደረጃ የመያዣ ባለመብት አድርጎ ተጠሪ መመዝገቡ ባግባቡ ነው* በማለት መጋቢት 26 ቀን 1999 ዓ.ም በክ/ቁጥር 74358 ፍርድ ሰጥቷል።

መ. አቢሲንያ ባንክ በዚህ ፍርድ ቅር በመሰኘት ሚያዝያ 22 ቀን 1999 ዓ.ም በተጻፈ ማመልከቻ ለፌዴራል ከፍተኛ ፍ/ቤት ይግባኝ አቅርቦ፣ ፍ/ቤቱ ይግባኙን በጥሞና ከመረመረ በኋላ፣

- መልስ ሰጭዎቹ ለዚህ ፍ/ቤት በጽሑፍ እንደገለፁት *በተበዳሪው ጥያቄ 2ኛ መልስ ሰጭ*[23] የተበዳሪውን ዕዳ ለኢትዮጵያ ንግድ ባንክ ከፍሎ መያዣው በእሱ ስም በ1ኛ ደረጃ እንዲመዘገብለት አድርጓል። *በፍትሐብሔር ቀጥር 3083(1) መሠረት የመያዣ መብት ቀደምትነት ላለው ከፍሎ በእሱ እግር ለመተካት ተተኪው ቀደም ሲል የተመዘገበ የመያዣ መብት ሊኖረው ይገባል*። አሁን በተያዘው ጉዳይ 2ኛ መልስ ሰጭ በኢትዮጵያ ንግድ ባንክ እግር ተተክቶ በ1ኛ ደረጃ የመያዣ ባለመብትነት የተመዘገበው ቀድሞውኑ የመያዣ መብት ሳይኖረው ስለሆነ ከላይ በተጠቀሰው ድንጋጌ ተጠቃሚ አይሆንም።

- 2ኛ መልስ ሰጭ በኢትዮጵያ ንግድ ባንክ ቦታ የተተካው በፍ/ብ/ሕ/ቁ. 1969 መሠረት *በባለዕዳው በመዳረጉ እንደሆነ* ገልጿል። በባለዕዳው በተሰጠ ዳረጎት አንድ ሰው ተተክቷል የሚባለው *በፍትሐብሔር ቀጥር* 1970 መሠረት በባለዕዳው እና በተዳራጊው መካከል በተደረገ የብድር ውል ላይ ብድሩ የተሰጠው ለዕዳ መክፈያ መሆኑ በክፍያ ደረሰኙ ላይ ከተገለጸና በብድር ውሉና በደረሰኙ ላይ ያለው ቀን ከተረጋገጠ ነው። በዚህ ጉዳይ በ2ኛ መልስ ሰጭ እና በተበዳሪው መካከል በተደረገው የብድር ውል ብድሩ የተሰጠው ለሥራ ማስኬጃ መሆኑን ይገልጻል እንጂ ለዕዳ መክፈያ መሆኑን አይገልጽም። በ2ኛ መልስ ሰጭ የተሰጠው የክፍያ ደረሰኝም ለባለዕዳው ክፍያ መፈጸሙን እንጂ *የፍትሐብሔር ቀጥር* 1970(2) በሚያዘው መሠረት ብድሩ ለዕዳው መክፈያ መዋሉን አያሳይም።

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[22] *ይህ ደብዳቤ «ድርጅታችን ከባንካችሁ የ15 ሚሊዮን ብር ብድር ማግኘቱ ይታወሳል። ስለሆነም ከዚሁ የብድር ገንዘብ ላይ ብር 11,862,768.72 ለኢትዮጵያ ንግድ ባንክ አንድነት ቅርንጫፍ ለነበረብን ተርም ሎን ብድር ከፍላችሁ ሂሳቡ እንዲዘጋና በእነሱ ተይዞ የነበረውን ዋስትና በወረዳ 8 ቀበሌ 05 የቤት ቁጥር 343 የካርታ ቁጥር 31070 እንድትረከቡ እየጠየቅን፣ ይህን ካርታ አቢሲንያ ባንክ በንግድ ባንክ ፈቃድ በሁለተኛ ደረጃ የያዘው ስለሆነ፣ አሁን በእናንተ ስም ዋስትናው ስለሚዛወር አቢሲንያ ባንክ በሁለተኛ ደረጃ ከእናንተ ጋር ቢይዘው የማትቃወሙ መሆኑን በጽሑፍ እንድትገልጹላቸው እናሳስባለን» ይላል።*

[23] *በፌዴራል ከፍተኛ ፍ/ቤት ፭ኛ መደበኛ ሰጭ የነበረው ሕብረት ባንክ ነው።*

ስለዚህ፣ ከላይ በተገለፁት ምክንያቶች 2ኛ መልስ ሰጭ በኢትዮጵያ ንግድ ባንክ ቦታ የመዳረግ መብት የለውም፤ በማለት የመጀመሪያ ደረጃ ፍ/ቤቱን ውሳኔ ሽሮታል። የፌዴራል ጠቅላይ ፍ/ቤትም ውሳኔውን አጽንቶታል።[24]

ሠ. ሕብረት ባንክ በዚህ ውሳኔ ቅር በመሰኘት ለፌዴራል ጠቅላይ ፍ/ቤት የሰበር ችሎት ነሐሴ 2 ቀን 2000 ዓ.ም. በተጻፈ ማመልከቻ አቤቱታ አቅርቧል። በማመልከቻውም **የክርክሩ መነሻ** በወረዳ 8 ቀበሌ 05 **በቤት ቁጥር** 343 በተመዘገበው ንብረት ላይ ቀዳሚ የመያዣ መብት ያለው ማነው? የሚለውን ለመለየት መሆኑን ጠቅሶ፣

- የፌዴራል ከፍተኛ ፍርድ ቤት እና ጠቅላይ ፍርድ ቤት ስለ መዳረግ የሚደነግጉትን የፍትሐብሔር ሕግ ቁጥር 1969 እና ቁጥር 3083 ድንጋጌዎች በሚገባ ሳይመረምሩ አመልካች 1ኛ ደረጃ የመያዣ መብቱን የሚያሳጣ ውሳኔ መስጠታቸውን፤
- አመልካች የቀደምትነት ተራውን የወሰደው ስማቸው ደምሴ ኢንቨስትመንት ኃ/የተ/የግ/ማ ለኢትዮጵያ ንግድ ባንክ የነበረበትን ዕዳ በሙሉ በመክፈል መሆኑን፤ ይህን ያደረገውም <u>ተበዳሪው በጽሁፍ ስለጠየቀውና</u> የኢትዮጵያ ንግድ ባንክም በመብቱ እንዲተካ በመፍቀዱ መሆኑን፤
- መተካቱ የተለየ ስርአት መከተል ያለበት ስለመሆኑ በሕጉ አለመገለፁንና <u>በባለገንዘቡ ከሚሰጥ ዳረጎት በተጨማሪ በባዕዳው የሚሰጥ ወይም በሕግ የሚሰጥ ደረጃት መኖሩን</u> የስር ፍርድ ቤቶች አለማገናዘባቸውን፤
- ህዳር 6 ቀን 1997 ዓ.ም. በቁጥር ስዳ/0053/97 በተጻፈ ደብዳቤ ለኢትዮጵያ ንግድ ባንክ ያለበትን የብድር ዕዳ ብር 11,862,768.72 <u>አመልካች ከፍሎለት</u> በኢትዮጵያ ንግድ ባንክ የመያዣ መብት እንዲተካ <u>ተበዳሪው በጠየቀው መሠረት</u> ክፍያውን በሲፒኦ ቁጥር 046293 መፈፀሙን፤
- አመልካች የተበዳሪውን ብድር በመክፈሉ <u>በባለዕዳውና በሕግ መዳረጉን</u> ጠቅሶ፣ የከፍተኛ ው ፍ/ቤትና የጠቅላይ ፍ/ቤት ውሳኔዎች መሠረታዊ የሕግ ስሕተት ስለአለባቸው እንዲሻሩና የመጀመሪያ ደረጃ ፍ/ቤት የሰጠው ውሳኔ እንዲፀና አመልክቷል።

(1) የጠቅላይ ፍ/ቤት የሰበር ችሎት የጉዳዩ መሠረታዊ ጭብጥ <u>አመልካች በኢትዮጵያ ንግድ ባንክ በመዳረግ የባለዕዳውን ንብረቶች በመጀመሪያ ደረጃ መያዣነት የመያዝ መብት አለው ወይስ የለውም?</u> የሚለው ነው ካለ በኋላ፣ ተበዳሪው ለኢትዮጵያ ንግድ ባንክ ያለበትን የብድር ዕዳ ብር 11,862,768.72 አመልካች በኢትዮጵያ ንግድ ባንክ ፈቃድ በሲፒኦ ቁጥር 046293 ለኢትዮጵያ ንግድ ባንክ በመክፈል የመያዣውን ንብረት ሰነዶች ከኢትዮጵያ ንግድ ባንክ መረከቡን በማስረዳት በበታች ፍርድ ቤቶች እና በሰበር መከራከሩን ገልጿል።

ይሁን እንጂ፣ የሰበር ችሎቱ ጭብጡን በትክክል እንዳልያዘ ከጉዳዩ ፍሬ ነገር መገንዘብ ይቻላል። «<u>አመልካች በኢትዮጵያ ንግድ ባንክ በመዳረግ</u>» የሚለው አነጋገር ስሕተት ነው። አመልካች በኢትዮጵያ ንግድ ባንክ አልተዳረገም። ለኢትዮጵያ ንግድ ባንክም በሲፒኦ ቁጥር 046293 ክፍያ አልፈፀመም። አመልካች በሲፒኦ ቁጥር 046293 ክፍያ የፈፀመው ለተበዳሪው ለስማቸው ደምሴ

[24] ሕብረት ባንክ በዚህ ውሳኔ ቅር በመሰኘት ለፌዴራል ጠቅላይ ፍ/ቤት ይግባኝ ብሎ ጠቅላይ ፍ/ቤቱ ጉዳዩን ከመረመረ በኋላ በፍ/ብ/ይ/መ/ቁ. 35179 ሐምሌ 11 ቀን 2000 ዓ.ም በሰጠው ውሳኔ «ይግባኝ የተባለበት ውሳኔ/ትዕዛዝ ጉድለት የሌለበት ሆኖ ስግኙተነዋል። የይግባኝ ባይን ቅሬታ ባለመቀበል መልስ ሰጭን መጥሬት ሳያስፈልግ የይግባኝ መዝገቡን በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 337 መሠረት ዘግተናል፤» ብሏል።

ኢንቨስትመንት ኃ/የተ/የግ/ማኅበር እንጂ ለኢትዮጵያ ንግድ ባንክ አይደለም። አመልካች ክፍያ የፈፀመበትና ማስረጃዉ ነው ብሎ ያቀረበው ሲፒኦ የሚከተለው ነው።

DEBIT ሕብረት ባንክ አ. ማ. Date 15/11/2004

UNITED BANK S. C.

B/BET Branch

CASHIER'S PAYMENT ORDER (CPO) *No.* **046293**

Birr

11,862,768.72

Pay at sight to the order of

SEMACHEW DEMISSIE INVESTMENT PLC

The sum of *ELEVEN MILLION EIGHT HUNDRED SIXTY TWO THOUSAND SEVEN HUNDRED SIXTY EIGHT AND 72/100.*

Authorized Signatures (ስንዱ ሰዉ ፊርማ)

SEMACHEW DEMISSIE INVESTMENT PLC

C/A - 625

ሕብረት ባንክ አ. ማ.

SEMACHEW DEMISSIE INV. PLC UNITED BANK S. C. Date 15/11/2004

B/BET Branch

To: *SEMACHEW DEMISSIE INV. PLC*

CASHIER'S PAYMENT ORDER (CPO) *No.* **046293**

Made	Checked	Entered		CPO Amount	*11,862,768.72*
				Commission	*5.00*
				5% Sales Tax	----------
				Total	**11,862,773.72**

የኢትዮጵያ ንግድ ባንክ ተበዳሪው ያለበትን ብር 11,862,768.72 አመልካች በሲፒኦ መክፈሉን የሚገልጽ ማስረጃ አልሰጠም። አመልካችም የኢትዮጵያ ንግድ ባንክ በመብቱ ዳርጎኛል የሚል ክርክር አላቀረበም። አመልካች በሁሉም ፍ/ቤቶች የተከራከረው *በተበዳሪው ጠያቂነት ለኢትዮጵያ ንግድ ባንክ የነበረበትን ዕዳ ከፍያለት የኢትዮጵያ ንግድ ባንክ በነበረው 1ኛ ደረጃ የመያዣ መብት ተዳርጌያለሁ* እያለ ነው። የክርክሩ መዝገብ የሚያሳየው ይህንን ሐቅ ነው። የጉዳዩ ጭብጥ *አመልካች በተበዳሪው በመዳረግ የባለዕዳውን ንብረቶች በመጀመሪያ ደረጃ መያዣነት የመያዝ መብት አለው ወይስ የለውም?* የሚል መሆን ነበረበት። የሰበር ችሎት በተሳሳተ ፍሬ ነገር ላይ የተመሠረተ የተሳሳተ ጭብጥ ይዞ ትክክል ያልሆነ ፍርድ ሰጥቷል።

(2) የሰበር ችሎት *አመልካች በባለዕዳው ንብረቶች ላይ የመያዣ ቀዳምትነት መብት ባለው በኢትዮጵያ ንግድ ባንክ ምትክ የመዳረግ መብቴን አረጋግጫለሁ የሚለው በባለዕዳው በስማቸው ደምሴ ኢንቨስትመንት ኃላፊነቱ የተወሰነ የግል ማህበር ፈቃድና ስምምነት መሠረት ሳይሆን፣ በአበዳሪው በኢትዮጵያ ንግድ ባንክ ፈቃድና ስምምነት መሠረት መሆኑን በመግለፅ በየደረጃው ተከራክሯል* ብሏል። እንዲሁም፣ *የከፍተኛው ፍ/ቤትና የጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት*

አመልካች የመዳረግ መብቱ ምንጭ ነው ብሎ ያልጠቀሰውን በተበዳሪው ፈቃድና ስምምነት ስለመዳረግ በፍትሐ ብሔር ሕግ ቁጥር 1969 እና 1970 የተደነገጉ ሁኔታዎች አልተሟሉም በማለት ውሣኔ መስጠታቸው አግባብ አይደለም ብሏል፡፡

እነዚህ ትችቶች በፍሬ ነገሩ ላይ ያልተመሠረቱና አመልካች ያቀረበውን ክርክርና መዝገቡ የያዘውን ፍሬ ነገር ጠለቅ ብሎ ካለማየት የተሠነዘሩ ናቸው፡፡ አመልካች አንድም ጊዜ በፍ/ብሔር ሕግ ቁጥር 1968 መሠረት በኢትዮጵያ ንግድ ባንክ የመያዣ መብት ተዳርጌያለሁ አላለም፡፡ አመልካች ያለው በቁጥር 1969 እና 1971 መሠረት ተዳርጌያለሁ ነው፡፡

የሰበር ችሎት እንዳለው አመልካች *በፍትሐብሔር ቁጥር 1968* መሠረት ተዳረገ ብንል እንኳን መዳረጉ ሕጉ የሚጠይቃቸውን ሁኔታዎች እንዳላሟላ እንገነዘባለን፡፡ የሰበር ችሎት አበዳሪው ከባለዕዳው የሚፈልገውን ገንዘብ ከሦስተኛ ወገን ተቀብሎ ገንዘብ ከፋዩ በእሱ መብት ተዳርጎ እንዲሠራበት መስማማቱን በግልፅ ለማሳየት የሚችለው እንዴት ነው? በማለት ጠይቆ *ቁጥር 1968(2) በመሰረታዊነት ያስቀመጠው የተበዳሪውን ዕዳ የከፈለው ሦስተኛ ወገን በመብቱ ተዳርጎ እንዲሠራበት አበዳሪው የተስማማ መሆኑን ለባለዕዳው እና ለሌሎች ወገኖች በግልጽ በሚያሣይ ሁኔታ ፈቃዱን መስጠቱን እንጅ ስምምነት መኖሩን በሚገልጽ ጽሑፍ እንዲሆን አይደለም፡፡ የኢትዮጵያ ንግድ ባንክ የባለዕዳው ዕዳ በአመልካች ስለተከፈለው በእጁ የነበሩ የመያዣውን ንብረት ባለቤትነት የሚያሳዩ ሰነዶች ለአመልካች መስጠቱ አመልካች በእሱ እግር ተተክቶ መያዣውን በቀዳሚነት እንዲያስመዘግብ የተስማማና በፍታብሔር ሕግ ቁጥር 1974(1) መሠረት ግዴታውን የተወጣ መሆኑን በግልጽ ያሳያል* ብሏል፡፡

ይህ አባባል *በፍትሐብሔር ሕግ ቁጥር 1975(1)* ድንጋጌ ጋር አይጣጣምም፡፡ *በፍትሐብሔር ሕግ ቁጥር 1975(1)* በማይንቀሳቀስ ንብረት ላይ ያለን የመያዣ መብት ለማስተላለፍ በሕግ የታዘዘው ሥርዓት (form) መከበር ያለበት መሆኑን ይገልጻል፡፡ ሕጉ የደነገገው የውል ሥርዓት ስምምነቱ በጽሑፍና ውል ለማዋዋል ሥልጣን በተሰጠው ፊት እንዲደረግ ነው፡፡[25] በዚህ ጉዳይ ይህ በሕግ የታዘዘው ሥርዓት ስለአልተሟላ መዳረጉ በሕግ ተቀባይነት አልነበረውም፡፡

(3) የሰበር ችሎት *የኢትዮጵያ ንግድ ባንክ ለተበዳሪው ያበደረውን ገንዘብ ሁለተኛ ደረጃ የመያዣ መብት ካለው ከተጠሪ (ከአቢሲንያ ባንክ) በመቀበል በመያዣው ንብረት ላይ ያለውን የመያዣ መብት የማስተላለፍ ምርጫ ተሰጥቶታል፡፡ ተጠሪ የኢትዮጵያ ንግድ ባንክን ፈቃድና ስምምነት ሳይጠይቅ ባለዕዳው ለኢትዮጵያ ንግድ ባንክ መክፈል የሚገባውን ገንዘብ ከፍሎ በንብረቱ ላይ ቀዳሚ የመያዣ መብት ሊኖረው የሚችለው ንብረቱን በፍርድ ያሳገደ ከሆነ ነው፡፡ ተጠሪ ግን የኢትዮጵያ ንግድ ባንክ በመያዣነት የያዘውን ንብረት በፍርድ ያሳገደ መሆኑን የሚያረጋግጥ ማስረጃ ያላቀረበ በመሆኑ ያለኢትዮጵያ ንግድ ባንክ ፈቃድና ስምምነት በኢትዮጵያ ንግድ ባንክ ቦታ ለመተካትና በመብቱ ተዳርጎ ሊሠራበት አይችልም፡፡ ባለዕዳው ከኢትዮጵያ ንግድ ባንክ የወሰደውን ብድር ባለመክፈሉ የኢትዮጵያ ንግድ ባንክ መያዣውን ለመሸጥ ሲንቀሳቀስ ተጠሪ ከባለዕዳው የሚፈለገውን ገንዘብ አጠቃሎ ለመክፈል ሳይጠይቅና ክፍያ ሳይፈፅም በኢትዮጵያ ንግድ ባንክ መብት ለመዳረግ ያቀረበው ክርክር የሕግ ድጋፍና ምክንያት የሌለው ነው*፤ ብሏል፡፡

የሰበር ችሎት ይህንን ሐተታ የጻፈበት ምክንያት ግልጽ አይደለም፡፡ ተጠሪ በኢትዮጵያ ንግድ ባንክ ቦታ ተተክቼ ወይም ተዳርጌ 1ኛ ደረጃ የመያዣ መብት

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[25] *ቁጥር 1723*

ይኑረኝ የሚል ጥያቄም ሆነ ክርክር አላቀረበም። ተጠሪ ያቀረበው ጥያቄና ክርክር *ከሲቲዮሽያ ንግድ ባንክ የተበዳደሙን ገንዘብ ተበዳሪው ሱሉ ስለከፈሰና በፍትሐብሔር ሕግ ቁጥር 3110(ሀ) መሠረት የሲቲዮሽያ ንግድ ባንክ የመያዣ መብት ስለቀረ በቁጥር 3081(1) እና 3115 መሠረት የመያዣ መብቱ ቅድሚያ የለኔ ነው* የሚል ነው። በዚህ ጉዳይ እንደታየው ዕዳው በተበዳሪው በራሱ በመከፈሉ ምክንያት የኢትዮጵያ ንግድ ባንክ የመያዣ መብት ቀሪ በመሆኑ ከኢትዮጵያ ንግድ ባንክ በኋላ በሁለተኛ ደረጃ የመያዣ መብቱን ያስመዘገበው ተጠሪ አንደኛ ደረጃ የመያዣ መብት ያገኛል። የማይንቀሳቀሰው ንብረት ባለሀብት ቀሪ በሆነው የመያዣ መብት ቀደምትነት ምትክ አዲስ የመያዣ መብት ለማቋቋም አይችልም።[26] በእዚህ ሁኔታ አቢሲንያ ባንክ ንብረቱን መጀመሪያ በፍርድ ማሳገድ አያስፈልገውም።

አስተያየቱን እናጠቃልል። የፌዴራል ከፍተኛ ፍ/ቤት በፍርዱ ላይ እንደገለፀው በፍትሐብሔር ሕግ ቁጥር 3083(1) *መሠረት የመያዣ ቀደምትነት መብት* ያለውን ገንዘብ ጠያቂ አስፈቅዶ የቀደምትነቱን ተራ በመዳረግ ለመውሰድ የሚቻለው በማይንቀሳቀሰው ንብረት ላይ መጀመሪያውኑ የመያዣ መብት በማስመዝገብ ነው። የቀደምትነት የመያዣ መብት ካለው ባለገንዘብ በኋላ የተመዘገበ የመያዣ መብት ሳይኖር በቁጥር 3083(1) ድንጋጌ መሠረት ከባለዕዳው የሚፈለገውን ገንዘብ ክፍሉ በመዳረግ በማይንቀሳቀሰው ንብረት ላይ የቀደምትነት መብት ለማግኘት አይቻልም። በፍትሐብሔር ሕግ ቁጥር 3083(1) ከተደነገገው ውጭ በመዳረግ የመያዣ ቀደምትነት ተራ ለማግኘት የሚቻለው በፍ/ብሔር ሕግ ቁጥር 1968 እና በተከታዮቹ ቁጥሮች መሠረት ነው። በቁጥር 1968 መሠረት ለመዳረግ የቁጥር 1975(1) እና 1723 ድንጋጌዎች ሲከበሩና የመያዣ ቀደምትነት ካለው ባለገንዘብ ጋር የተደረገ የመዳረግ የጽሑፍ ስምምነት ሊኖር ይገባል። በዚህ ጉዳይ በሕብረት ባንክና በኢትዮጵያ ንግድ ባንክ መካከል የተደረገ የጽሑፍ ስምምነት አልቀረበም። በመሆኑም ሕብረት ባንክ በሕጉ መሠረት ተዳርጓል ሊባል አይችልም።

ሕብረት ባንክ በቁጥር 1969 እና 1971 መሠረት በተበዳሪው እንደተዳረገ ለፍ/ቤቱ አበክሮ ገልጿል። የፌዴራል የመጀመሪያና ከፍተኛ ፍ/ቤቶችም በውሳኔያቸው ላይ ይህንኑ ሁኔታ በሚገባ ገልፀውታል። ነገር ግን፣ ቁጥር 1969 እና 1971 ያስቀመጧቸውን ሁኔታዎች ሕብረት ባንክ አላሟላም። መሟላታቸውን ለማሳየትም ማስረጃ አላቀረበም። ያቀረበው ማስረጃ ተበዳሪው ከሕብረት ባንክ 15 ሚሊዮን ብር አቨርድራፍት ለሥራ ማስኬጃ ተበድሮ ከዚህ ብድር ውስጥ ብር 11,862,768.72 በሲፒኦ ቁጥር 046293 መውሰዱን የሚያሳይ ማስረጃ ነው። ነገር ግን፣ በቁጥር 1969 መሠረት ለመዳረግ የቁጥር 1970 ሁኔታዎች መሟላት አለባቸው። በዚህ ጉዳይ ሕብረት ባንክ እነዚህ ሁኔታዎች መሟላታቸውን የሚገልጽ ማስረጃ ለፍ/ቤት አላቀረበም።

የፍትሐብሔር ቁጥር 1971 ስለ ሕጋዊ መዳረግ (legal subrogation) የሚገልጽ ስለሆነ ለዚህ ጉዳይ አግባብነት የለውም። ሕብረት ባንክ ይህን ቁጥር የጠቀሰው ያስኬዳል ብሎ አምኖበት ሳሆን ለውርደበጅ ያህል መሆኑን ካደረገው ክርክር መረዳት ይቻላል።

በፌዴራል ከፍተኛ ፍ/ቤት፣ በፌዴራል ጠቅላይ ፍ/ቤት እና በክልል ፍ/ቤቶች *የመጨረሻ ውሳኔ የተሰጠባቸውንና መሠረታዊ የሕግ ስሕተት ያሰባቸውን ጉዳዮች* በሰበር

[26] ቁጥር 3115 እና *ቁጥር 3081(1)*

የማየት ሥልጣን ለፌዴራል ጠቅላይ ፍ/ቤት በአዋጅ ተሰጥቶታል።[27] በዚህ አዋጅ መሠረት፣ ጠቅላይ ፍርድ ቤት የመጨረሻ ውሳኔ የተሰጠባቸውንና መሠረታዊ የሕግ ስሕተት ያለባቸውን ጉዳዮች የሚያይ የሰበር ችሎት አቋቁሟል። የሰበር ችሎት የመጨረሻው የፍትሕ አካል በመሆኑ ለሚሰጠው ውሳኔ ከፍተኛ ጥንቃቄ ያደርጋል ብለን እንገምታለን። ይሁን እንጂ፣ በዚህ ጉዳይ የሰበር ችሎቱ በፌዴራል ከፍተኛ ፍ/ቤትም ሆነ በፌዴራል ጠቅላይ ፍ/ቤት የተፈፀመ መሠረታዊ የሕግ ስሕተት ሳይኖርና በአመልካቹ ባልተነሳና በማስረጃ ባልተደገፈ አዲስ ፍሬነገር ላይ ተመሥርቶ ለጉዳዩ አግባብነት የሌለውን ሕግ ተፈፃሚ አድርጓል። በዚህም አድራጎቱ መሠረታዊ የሕግ ስሕተት እንዲያርም የሚጠበቅበት የሰበር ችሎት የፌዴራል ከፍተኛ ፍ/ቤት የሰጠውንና የፌዴራል ጠቅላይ ፍ/ቤት ያፀደቀውን ትክክለኛ ፍርድ ያለ በቂ ምክንያት በመሻር ራሱ መሠረታዊ የሕግ ስሕተት ፈጽሟል።

[27] የፌዴራል ፍ/ቤቶች ስዋጅ ቁጥር 25/1988 አንቀጽ 10

አባሪ

የሰ/መ/ቁ. 39778
ሐምሌ 30 ቀን 2001 ዓ.ም.

ዳኞች:- ዓብዱልቃድር መሐመድ
ሒሩት መለሰ
ታፈሰ ይርጋ
አልማው ወሌ
ዓሊ መሐመድ

አመልካች:- ሕብረት ባንክ (አ.ማ.) - አልቀረቡም

ተጠሪ:- አቢሲንያ ባንክ (አ.ማ.) - አልቀረቡም

መዝገቡን መርምረን የሚከተለውን ፍርድ ሰጥተናል::

ፍ ር ድ

ጉዳዩ የቀረበው አመልካች የፌዴራል ከፍተኛ ፍርድ ቤት በመዝገብ ቁጥር 55790 ታህሣሥ 11 ቀን 2000 ዓ.ም. የሰጠው ውሣኔና የፌዴራል ጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት በመዝገብ ቁጥር 35179 ሀምሌ 11 ቀን 2000 ዓ.ም. የሰጠው ትዕዛዝ መሠረታዊ የህግ ስህተት ያለበት ስለሆነ በሰበር ታይቶ ይታረምልኝ በማለት የሰበር አቤቱታ በማቅረቡ ነው::

ክርክሩ በመጀመሪያ የታየው በፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት ነው:: በፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት ተጠሪ አመልካች በዚህ ክርክር ተሳታፊ ያልሆነው የጉለሌ ክፍለ ከተማ የመሬት ልማትና አስተዳደር ጽ/ቤት ተጠሪ አመልካች ጣልቃ ገብ በመሆን ተከራክረዋል:: ተጠሪ በሥር ፍርድ ቤት በአመልካችነት ቀርቦ ደምሴ ኢንቨስትመንት ኃላፊነቱ የተወሰነ የግል ማኅበር የተባለ የንግድ ድርጅት ከኢትዮጵያ ንግድ ባንክና በሥር አመልካች ከሆነው ከአቢሲኒያ ባንክ ገንዘብ ተበድሯል:: ተበዳሪው የንግድ ድርጅት ለወሰደው ብድር በአዲስ አበባ ከተማ በቀድሞ ወረዳ 8 ቀበሌ 05 የሚገኘውን ቁጥሩ 343 የሆነውን ቤትና ድርጅት ለኢትዮጵያ ንግድ ባንክ በአንደኛ ደረጃ መያዣነት ለአቢሲንያ ባንክ በሁለተኛነት ደረጃ መያዣነት አስይዟል:: ሆኖም የአቢሲንያ ባንክ በሁለተኛ ደረጃ በንብረቱ ላይ ያለውን የመያዣ መብትና የፍትሐብሔር ህግ ቁጥር 3081 ንዑስ አንቀጽ 1 የተደነገገውን በመፃረር የጉለሌ ክተማ የመሬት ልማና አስተዳደር ጽ/ቤት ንብረቱ የህብረት ባንክ አንደኛ ደረጃ እንደሆነ በማድረግ የመዘገበ ስለሆነ ይኸ ምዝገባ ተሰርዞ ንብረቱ የአቢሲንያ ባንክ አንደኛ ደረጃ መያዣ ነው ተብሎ እንዲወሰንልኝ በማለት አመልክቷል::

በዚህ ክርክር ተሰታፊ ያልሆነው የጉለሌ ክፍለ ከተማ የመሬት ልማትና አስተዳደር ጽ/ቤት በተጠሪነት ቀርቦ ስማቸው ደምሴ ኢንቨስትመንት ኃላፊነቱ የተወሰነ የግል ማህበር የማይንቀሳቀስ ንብረት የህብረት ባንክ አንደኛ መያዣ መሆኑን የመዘገብኩት ሕብረት ባንክ የንግድ ድርጅቱ ከኢትዮጵያ ንግድ ባንክ

የወሰደውን ብድር በመክፈል የንብረቱን የባለቤትነት ሰነድ ከኢትዮጵያ ንግድ ባንክ በመረከብና የኢትዮጵያ ንግድ ባንክን አስፈቅዶ በመቅረቡ ነው። ስለዚህ፣ የመያዣ ቀዳሚነት አስመልክቶ ለቀረበው ክርክር ሕብረት ባንክ (አ.ማ.) ጣቃገብቶ እንዲከራከር በማለት አመልክቷል። የሥር ፍርድ ቤት የሰበር አመልካች በጉዳዩ ጣልቃ ገብ ሆኖ በክርክሩ እንዲገባ ትዕዛዝ ሰጥቷል። አመልካች ለሥር ፍርድ ቤት የመያዣ ቀዳሚነት አለኝ። ምክንያቱም በባለዕዳው ጠያቂነት ከኢትዮጵያ ንግድ ባንክ የተበደሩትን ብድር በመክፈል በኢትዮጵያ ንግድ ባንክ ተይዘው የነበሩ ሰነዶች ተቀብያለሁ። ስለሆነም በንብረቱ ላይ የአንደኛ ደረጃ መያዣ መብት ባለው በኢትዮጵያ ንግድ ባንክ የተዳረኩ (የተተካሁ) በመሆኔ በንብረቱ ላይ አንደኛ ደረጃ መያዣ እንዳለኝ መመዝገቡ ትክክል ነው በማለት ተከራክሯል።

የሥር ፍርድ ቤት የአሁን ተጠሪ አመልካች በመሆን ያቀረበውን አቤቱታና ማስረጃ በሥር ተጠሪ የሆነው የጉለሌ ክፍለ ከተማ መሬት አስተዳደርና አመልካች በጣልቃ ገብ ተከራካሪነት ያቀረበውን ክርክርና ማስረጃ ከመረመረ በኋላ አመልካች በንብረቱ ላይ የአንደኛ ደረጃ መያዣ መብት ያለውን የኢትዮጵያ ንግድ ባንክ ዕዳ በመክፈልና በማስፈቀድ በዳረጎት መብቱን ያረጋገጠ ስለሆነ በመያዣው ላይ የቀዳሚነት መብት አለው በማለት ወስኗል። በዚህ ውሳኔ ተጠሪ ቅር በመሰኘት ይግባኝ አቅርቦ የከፍተኛው ፍርድ ቤት የተጠሪንና የአመልካችን ክርክር ከሰማ በኋላ አመልካች በኢትዮጵያ ንግድ ባንክ ለመዳረግ ቀድሞውንም በንብረቱ ላይ የመያዣ መብት ያለው መሆን ይገባዋል። አመልካች ከዚህ በፊት በንብረቱ ላይ የመያዣ መብት የሌለው በመሆኑ ባለዕዳው ለኢትዮጵያ ንግድ ባንክ ያለበትን ዕዳ የከፈለ ቢሆንም በመያዣው ላይ የቀዳሚነት መብት የለውም በማለት የሥር ፍርድ ቤት የሰጠውን ውሣኔ ሽሮታል። አመልካች በዚህ ውሣኔ ቅር በመሰኘት ይግባኝ ለፌዴራል ጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት ያቀረበ ሲሆን ይግባኝ ሰሚ ችሎቱ ይግባኙን በፍትብሔር ሥነሥርዓት ሕግ ቁጥር 337 መሠረት ሰርዞታል።

አመልካች ነሐሴ 2 ቀን 2000 ዓ.ም. ባቀረበው የሰበር አቤቱታ አመልካች ስማቸው ደምሴ ኢንቨስትመንት ኃላፊነቱ የተወሰነ የግል ማህበር ህዳር 6 ቀን 1997 ዓ.ም. በተጻፈ ደብዳቤ በኢትዮጵያ ንግድ ባንክ ያለበትን የብድር ዕዳ ብር 11,862,768.72 /አስራ አንድ ሚሊዮን ስምንት መቶ ስልሳ ሁለት ሺህ ሰባት መቶ ስልሳ ስምንት ብር ከሰባ ሁለት ሳንቲም/ በመክፈል በኢትዮጵያ ንግድ ባንክ እንድንተካ በጠየቀን መሠረት ክፍያውን በሲፒኦ ቁጥር 046293 ፈጽሟል። ገንዘቡ ባለዕዳው ለኢትዮጵያ ንግድ ባንክ ላለበት ዕዳ የተከፈለ በመሆኑ አመልካች የመያዣውን ንብረት ሰነድ ከኢትዮጵያ ንግድ ባንክ ተረክቧል። አመልካች በመያዣው ላይ የቀዳሚነት መብት ያለውን የኢትዮጵያ ንግድ ባንክ ዕዳ በመክፈል በመብቱ የተዳረገ ሆኖ እያለ በባለዕዳውና በአመልካች መካከል የተደረገው የብድር ውል ገንዘቡ የኢትዮጵያ ንግድ ባንክን ዕዳ ለመክፈል የሚውል ስለመሆኑ አይገልጽም በሚል ምክንያት ብቻ የመዳረግና በመያዣው ላይ ያለውን የቀዳሚነት መብት የላቸውም በማለት የከፍተኛው ፍርድ ቤትና የጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት የሰጡት ውሣኔ በፍታብሔር ሕጉ ስለመዳረግና ስለመተካት የተደነገጉትን ድንጋጌዎች ያላገናዘበና መሠረታዊ የህግ ስህተት ያለበት በመሆኑ በሰበር ታይቶ እንዲታረምልኝ በማለት አመልክቷል።

ተጠሪ በበኩሉ አመልካች ለባለዕዳው ብድር የሰጠው ለሥራ ማስኬጃ ማከናወኛ እንጂ የኢትዮጵያ ንግድ ባንክን ዕዳ ለመክፈል አለመሆኑን በአመልካችና በተበዳሪው መካከል የተደረገው ውል ያሣያል። አመልካች የቆረጠው ሲፒኦ ገንዘቡ ለተበዳሪው እንዲከፈል እንጂ ለኢትዮጵያ ንግድ ባንክ የባለዕዳውን ዕዳ ለመክፈያ የዋለ መሆኑን

የሚያሳይ ደረሰኝ አላቀረበም። አመልካች በባለዕዳው ፈቃድ ለመዳረግ የሚያስችሉ እነዚህን መስፈርቶች ባላሟላበት ሁኔታ በኢትዮጵያ ንግድ ባንክ እግር ተዳርጌአለሁ በማለት የሚያቀርበው የህግ መሠረት የለውም። አመልካች በንብረቱ ላይ አንዳችም የመያዣ መብት ሳይኖረው በንብረቱ ላይ ሁለተኛ ደረጃ የመያዣ መብት ያለውን ተጠሪ በመቅደም በንብረቱ ላይ የመያዣ መብት አለኝ እያለ የሚያቀርበው ክርክርም የህግ መሠረት የለውም። ስለሆነም ከፍተኛው ፍርድ ቤትና የጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት የሰጡት የህግ ትርጉም ምንም አይነት ስህተት የሌለበት በመሆኑ የአመልካችን አቤቱታ በመሠረዝ እንዲያሰናብተኝ በማለት በጽሑፍ መልስ ሰጥቷል።

አመልካች በበኩሉ የኢትዮጵያ ንግድ ባንክ ከባለዕዳው የሚፈልገውን ዕዳ በሙሉ አጠቃልዬ የከፈልኩ መሆኑን የሚያረጋግጥ ማስረጃ ሰጥቶኛል። ከዚህ በተጨማሪ የኢትዮጵያ ንግድ ባንክ የባለዕዳን ንብረት በቀዳሚነት በመያዣነት ሲይዝ የተረከባቸውን የንብረቱን ባለቤትነት የሚያረጋግጡ ሰነዶች ለእኛ አስረክቦናል። እኛም በንብረቶች ላይ አንደኛ የመያዣ መብት ባለው በኢትዮጵያ ንግድ ባንክ በመዳረግ መያዣውን አስመዝግበናል። ስለሆነም ከፍተኛው ፍርድ ቤትና የጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት የሰጡት ውሣኔ መሠረታዊ የህግ ስህተት ያለበት በመሆኑ በሰበር እንዲታረምልን በማለት በጽሑፍ የመልስ መልስ አቅርቧል።

ከሥር የክርክሩ አመጣጥና በሰበር የተደረገው ክርክር ከላይ የተገለፀው ሲሆን እኛም ጉዳዩን መርምረናል። ጉዳዩን እንደመረመርነው አመልካች በኢትዮጵያ ንግድ ባንክ በመዳረግ የባለዕዳውን ንብረቶች በመጀመሪያ ደረጃ መያዣነት የመያዝ መብት አለው ወይስ የለውም? የሚለው የጉዳዩ መሠረታዊ ጭብጥ ሆኖ አግኝተነዋል።

1. ከላይ የተያዘውን ጭብጥ ለመወሰን በመጀመሪያ በአማርኛ ቋንቋ «መዳረግ» የምንለው እና በእንግሊዘኛ ቋንቋ "subrogation" በመባል የሚገለፀውን ፅንሰ ሀሳብ ትርጉም ይዘትና ውጤት መመርመር ያስፈልጋል። መዳረግ ወይም በእንግሊዘኛው "subrogation" የሚለው ፅንሰ ሀሳብ "The substitution of one person in the place of another with reference to lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to debt or claim, and its rights, remedies, or securities." የሚል ትርጓሜ ያለው መሆኑን ለመረዳት እንችላለን። በአጭር አገላለጽ ዳረጎት ወይም subrogation "The right of one who has paid an obligation which another should have paid to be indemnified by another" የሚል ትርጉም ይዘት ያለው መሆኑን ለፅንሰ ሀሳቡ በህግ መዝገበ ቃላት የተሰጠውን ትርጓሜ በማየት ለመረዳት ይቻላል።

ከዚህ አንፃር አበዳሪው ከባለዕዳው የሚጠይቀውን ዕዳ በሙሉ ወይም በከፊል የከፈለ ሶስተኛ ወገን በከፈለው ዕዳ ልክ በዋናው አበዳሪ በመተካት አበዳሪው በባለዕዳው ላይ ያሉትን ልዩ መብቶች በዋስትናዎችና ሌሎች ተጨማሪ መብቶች ሊሠራባቸው የሚቻልበትን ሁኔታ «መዳረግ» በሚል መንገድ የሚገለፅ መሆኑን ለመገንዘብ ይቻላል። አንድ ሶስተኛ ወገን አበዳሪው ከተበዳሪው የሚፈልገውን ዕዳ በመክፈል በአበዳሪው እግር የመዳረግ መብት የሚኖረው ዳረጎቱ በአበዳሪው የተፈቀደ ሲሆን ወይም በተበዳሪው የተፈቀደ ሲሆን ወይም በህግ የተፈቀደ ሲሆን እንደሆነ በዚህ ዙሪያ የተደረጉ የሥነ ህግ ጥናቶች ይገልፃሉ። የመዳረግ መብት ምንጩና መሠረቱ የአበዳሪው ፈቃድ ወይም የተበዳሪው ፈቃድ ወይም ህግ ሊሆን እንደሚችል ለመገንዘብ ይቻላል።

በአገራችንም የባለዕዳውን ዕዳ ለአበዳሪው የከፈለ ሶስተኛ ወገን በአበዳሪው መብት ለመዳረግ የሚቻልባቸው ሁኔታዎችና መዳረጉ ስለሚያስከትለው ውጤት ግዥነት

ያላቸው ድንጋጌዎች ከፍትሐብሔር ሕግ ቁጥር 1968 እስከ ፍትሐብሔር ሕግ ቁጥር 1974 በዝርዝር ተደንግጓል። የፍትሐብሔር ህጉ የባለዕዳውን ዕዳ ለአበዳሪው የከፈለ ሦስተኛ ወገን በአበዳሪው ፈቃድ ስለሚዳረግበት ሁኔታ በፍታብሔር ህግ ቁጥር 1969 እና በፍትሐብሔር ህግ ቁጥር 1970፣ በህግ መዳረግ የሚቻልበትን ሁኔታ በፍታብሔር ህግ ቁጥር 1971 በዝርዝር ደንግጓል። የተበዳሪው ዕዳ ለአበዳሪው የከፈለ ሦስተኛ ወገን በአበዳሪው መብት ለመተካትና ለመዳረግ የሚቻለው ከሦስቱ የዳረጉት አይነቶች አንደኛው የተሟላ ሆኖ ሲገኝ እንደሆነና ሦስቱ የዳረጉት አይነቶች የሚጠ ይቁት መስፈርት የተለያየ መሆኑን ከላይ የጠቀስናቸውን የህግ ድንጋጌዎች ይዘት በማየት ለመረዳት ይቻላል።

አመልካች ባለዕዳው በኢትዮጵያ ንግድ ባንክ የነበረበትን ዕዳ እንድንከፍልለት በጽሑፍ ባቀረበው ጥያቄ መሠረት ባለዕዳም ስማቸው ደምሴ ኢንቨስትመንት ኃላፊነቱ የተወሰነ የግል ማህበር በኢትዮጵያ ንግድ ባንክ የሚፈለግበትን ብር 11,862,768.72 /አስራ አንድ ሚሊዮን ስምንት መቶ ስልሳ ሁለት ሺህ ሰባት መቶ ስልሳ ስምንት ብር ከሰባ ሁለት ሳንቲም/ በሲፒኦ የከፈለ መሆኑን በኢትዮጵያ ንግድ ባንክ በሰጠው ማስረጃ የተረጋገጠ መሆኑን በማንሣት ተከራክሯል። ከዚህ በተጨማሪ አመልካች ከኢትዮጵያ ንግድ ባንክ ባገኘው ፈቃድ መሠረት በመብቱ የተዳረገ መሆኑንና የኢትዮጵያ ንግድ ባንክ በመብቱ ለመዳረግ የሚያስችለውን በመያዣነት የያዛቸውን የባለዕዳውን ንብረቶች የባለቤትነት ሰነድ አሳልፎ በመስጠት በንብረቶቹ ላይ ያለውን የቀዳሚነት የመያዣ መብት እንዲሠራበት እንዳደረገው በመግለፅ የተከራከረ መሆኑን ለበታች ፍርድ ቤቶች እና በሰበር ከተደረገው ክርክር ተገንዝበናል።

አመልካች በባለዕዳው ንብረቶች ላይ የቀዳሚ የመያዣ መብት ባለው በኢትዮጵያ ንግድ ባንክ ምትክ የመዳረግ መብቴን አረጋግጫለሁ የሚለው በባለዕዳው በስማቸው ደምሴ ኢንቨስትመንት ኃላፊነቱ የተወሰነ የግል ማህበር ፈቃድና ስምምነት መሠረት ሳይሆን በአበዳሪው በኢትዮጵያ ንግድ ባንክ ፈቃድና ስምምነት መሠረት መሆኑን በመግለፅ በየደረጃው ተከራክሯል። የሥር ፍርድ ቤት ይህንን የአመልካች ክርክር በጭብጥነት በመያዝ ውሣኔ የሰጠ ሲሆን የከፍተኛው ፍርድ ቤትና የጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት አመልካች የመዳረግ መብቴ ምንጭ ነው ብሎ ያልጠ ቀሰውን በተበዳሪው ፈቃድና ስምምነት ስለመዳረግ ፍትሐብሔር ህግ ቁጥር 1969 እና ፍትሐብሔር ህግ ቁጥር 1970 የተደነገጉት ሁኔታዎች አልተሟሉም በማለት ውሣኔ መስጠታቸውን ለመገንዘብ ችለናል። ከዚህ አንፃር ስንመዝነው የከፍተኛው ፍርድ ቤትና የጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት አመልካች በአበዳሪው የኢትዮጵያ ንግድ ባንክ ፈቃድ የመዳረግ መብቴን አረጋግጫለሁ በማለት ያቀረበውን ክርክር በማለፍ አመልካች የመዳረግ መብቴ ምንጭና መሠረት ነው ብሎ ባልተከራከረበት በባለዕዳው ፈቃድ ስለመዳረግ የሚደነግጉትን የፍትሐብሔር ህግ ቁጥር 1969 እና የፍትሐብሔር ህግ ቁጥር 1970 ድንጋጌዎች መሠረት በማድረግ መወሰናቸው ተገቢ ሆኖ አላገኘነውም።

3. አመልካች በንብረቶቹ ላይ የቀዳሚ የመያዣ መብት ላለው ለኢትዮጵያ ንግድ ባንክ የባለዕዳውን ዕዳ በመክፈል በአበዳሪው ፈቃድ ተዳርጌአሁ የሚለው የኢትዮጵያ ንግድ ባንክ በመብቱ እንዲዳረግ ፈቅዶልኛል በማለት ነው። ስለሆነም አመልካች በኢትዮጵያ ንግድ ባንክ ፈቃድና ስምምነት መሠረት ተዳርጓል ወይስ አልተዳረገም? የሚለው ነጥብ በዝርዝር መታየት ያለበት ሆኖ አግኝተነዋል። ይህንን መሠረታዊ ጥያቄ ለመመለስ አግባብነት ያላቸውን የህግ ድንጋጌዎች አቀራረፅና ይዘት መመርመር አስፈላጊ ነው።

"ባለገንዘቡ ስለሚሰጠው ዳረጎት" በሚል ርዕስ የተደነገገው የፍታብሔር ሕግ ቁጥር 1968 ንዑስ አንቀፅ 1 "ሶስተኛ ወገን የከፈለውን ገንዘብ ባለገንዘቡ የተቀበለ እንደሆነ በራሱ መብቶች ተደራጊ ሊያደርገው ይችላል" በማለት በአበዳሪው ፈቃድና ስምምነት የባለዕዳውን ዕዳ የከፈለ ሶስተኛ ወገን ለመዳረግ የሚቻል መሆኑን የሚደነግግ ሲሆን የዚሁ ድንጋጌ ንዑስ አንቀጽ 2 "የዳረጎቱ ጉዳይ ግልፅ መሆንና የገንዘቡ መከፈል እንደተደረገ መፈፀም ይገባዋል" በማለት ይደነግጋል። የፍትሐብሔር ሕግ ቁጥር 1968 ንዑስ አንቀፅ 2 የእንግሊዝኛው ቅጅ ስንመለከት "subrogation shall be express and effected at the time of payment" በማለት ይደነግጋል።

የመዳረጉ ሁኔታ እንዴት መፈፀም እንዳለበት የሚደነግገው የፍታብሔር ሕግ ቁጥር 1968 ንዑስ አንቀፅ 2 የአማርኛው ቅጅም ሆነ የእንግሊዝኛው ቅጅ የባለዕዳውን ዕዳ የከፈለ ሶስተኛ ወገን አበዳሪውን በመዳረግ መብቱን እንዲሰራበት የተስማማ መሆኑን ግልጽ በሚያደርግ መንገድ ዳረጎቱ መፈጸም እንዳለበትና የመዳረግ ሁኔታው ክፍያው በተፈፀመበት ጊዜ መከናውን እንዳለበት የሚገልፁ ናቸው። እዚህ ላይ አበዳሪው የባለዕዳውን ዕዳ የከፈለ ሶስተኛ ወገን በእሱ መብት ተዳርጎ እንዲሠራበት መስማማቱን በግልፅ ለማሳየት የሚቻለው እንዴት ነው? የሚለው ጥያቄ ምላሽ ሊሰጠው ይገባል። የፍትሐብሔር ህግ ቁጥር 1968 ንዑስ አንቀፅ 2 በመስፈርትነት ያስቀመጠው የተበዳሪውን ዕዳ የከፈለው ሶስተኛ ወገን በመብቱ ተዳርጎ እንዲሠራበት አበዳሪው የተስማማ መሆኑን ለባለዕዳው እና ለሌሎች ወገኖች በግልጽ በሚያሣይ ሁኔታ ፈቃዱን መስጠቱን እንጅ አበዳሪው የባለዕዳውን ዕዳ የከፈለው ሶስተኛ ወገን እንዲዳረግ የተስማማ መሆኑን በሚገልጽ ልዩ ፎርማሊቲ ባለው ፅሑፍ ወይም ስለመዳረግ በተደረገ ውል የመግለፅ ግዴታ እንዳለበት የሚደነግግ ድንጋጌ አይደለም። ስለሆነም አመልካች በኢትዮጵያ ንግድ ባንክ ፈቃድና ስምምነት ለመዳረግ የኢትዮጵያ ንግድ ባንክ አመልካች በመብቱ እንዲዳረግ ፈቃድና ስምምነቱን የሰጠ መሆኑን በማያሻማ መንገድ ለማሣየት የሚችሉ የፅሑፍ ማረጋገጫዎችን ወይም የተለያዩ ተግባራትን የፈፀመ መሆኑን ማስረዳት ይጠበቅበታል። ከዚህ አንጻር የኢትዮጵያ ንግድ ባንክ ባለዕዳው የነበረበት ዕዳ በአመልካች የተከፈለው መሆኑን በመግለፅ የሰጠው ማስረጃና በመያዣነት ይዟቸው የነበሩ የባለዕዳውን ንብረቶች የባለቤትነት ሰነድ ለአመልካች አሳልፎ መስጠቱ አመልካች መያዣውን በእሱ እግር ተተክቶ (ተዳርጎ) በቀዳሚነት እንዲያስመዘግብ የተስማማ መሆኑን በግልጽ የሚያሣዩ ናቸው።

የኢትዮጵያ ንግድ ባንክ አመልካች የባለዕዳውን ዕዳ የከፈለ መሆኑን በማረጋገጥ በመያዣ የያዛቸውን ንብረቶች የባለቤትነት ሰነድ ለአመልካች አሳልፎ መስጠቱ አበዳሪው እዳውን የከፈለው ሶስተኛ ወገን በመዳረግ መብቱ ሊሠራበት እንዲችል በመያዣነት የያዛቸውን ንብረቶች የባለቤትነት ሰነድ እና ሌሎች ማስረጃዎች አሳልፎ የመስጠት ግዴታውን በፍትሐብሔር ህግ ቁጥር 1974 ንዑስ አንቀፅ 1 መሠረት የተወጣ መሆኑን የሚያረጋግጥ በቂ ማስረጃ ነው። ስለሆነም አመልካች የባለዕዳውን ዕዳ ለኢትዮጵያ ንግድ ባንክ በመክፈል በአበዳሪው የኢትዮጵያ ንግድ ባንክ ፈቃድና ስምምነት መሠረት በባለዕዳው ንብረቶቹ ላይ የቀዳሚ የመያዣ መብት ባለው የኢትዮጵያ ንግድ ባንክ ተዳርጓል በማለት የመጀመሪያ ደረጃ ፍርድ ቤት የሰጠውን ውሣኔ በተበዳሪው ፈቃድ ስለመዳረግ የሚደነግጉትንና ለጉዳዩ አግባብነት የሌላቸው የፍትሐብሔር ሕግ ቁጥር 1969 እና የፍትሐብሔር ህግ ቁጥር 1970 የተደነገገው መሥፈርት አልተሟላም በማለት የከፍተኛው ፍርድ ቤት መሻሩና የጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎትም የከፍተኛው ፍርድ ቤት የሰጠውን ውሳኔ ማፅናቱ መሠረታዊ የህግ ስህተት ያለበት ሆኖ አግኝተነዋል።

3. ተጠሪ በባለዕዳው ንብረቶች ላይ ሁለተኛ ደረጃ የመያዣ መብት ያለው መሆኑ አከራካሪ አይደለም። ተጠሪ አመልካች ከዚህ በፊት በባለዕዳው ንብረቶች ላይ ምንም

አይነት የመያዣ መብት የሌለው በመሆኑ በባለዕዳው ንብረቶች ላይ ከእኔ የሚቀድም የአንደኛ ደረጃ የመያዣ መብት ሊኖረው አይችልም በማለት የፍትሐብሔር ሕግ ቁጥር 3083 ንዑስ አንቀፅ 1 በመጥቀስ ተከራክሯል። የተጠሪ ክርክር የህግ ድጋፍ ያለው መሆኑን ለመመርመር የፍትሐብሔር ሕግ ቁጥር 3083 ንዑስ አንቀፅ 1 አቀራረፅ ይዘትና ተፈፃሚነት በትኩረት ማየት ያስፈልጋል። የፍታብሔር ሕግ ቁጥር 3083 "ስለ መተካት" የሚል ርዕስ ያለው ሲሆን የዚህ ድንጋጌ ንዑስ አንቀፅ 1 ማንኛውም የማይንቀሳቀስ ንብረት መያዣ መብት ያለው ገንዘብ ጠያቂ ከርሱ በፊት ቀደምትነት ያለውን ገንዘብ ጠያቂ አስፈቅዶ የቀደምትነቱ ተራ መውሰድ ይችላል። በተራ ተከታይ የሆነው ገንዘብ ጠያቂ ባደረገው ጥያቄ መሠረት የመያዣ መብት የተሰጠበትን የማይንቀሳቀስ ንብረት በፍርድ እንዲያዝ አድርጎ እንደሆነ ግን ከርሱ በፊት የነበረውን ገንዘብ ጠያቂ ማስፈቀድ አስፈላጊው አይደለም በማለት ይደነግጋል።

የዚህ ድንጋጌ የእንግሊዝኛው ቅጅ "Any mortgage may pay a creditor having the priority with the consent of the creditor, or where the immovable attached on the cotter's (*sic*) request with out such consent"* የሚል ነው። ድንጋጌው በይዘቱ ሁለት ገዥ የሆኑ የተለያዩ ደንቦችን የያዘ ነው። የመጀመሪያው ድንጋጌው በመሠረታዊነት ባለዕዳው ንብረት በቀዳሚነት መያዣ ያደረገው አበዳሪ የባለዕዳውን ዕዳ የከፈለውን ሶስተኛ ወገን በፍታብሔር ሕግ ቁጥር 1968 መሠረት የመዳረግ መብት ሙሉ በሙሉ የሚከላከል ወይም የሚገድብ አይደለም። ተጠሪ በኢትዮጵያ ንግድ ባንክ ከባለዕዳው የሚፈለገውን ገንዘብ በመክፈል በንብረቶቹ ላይ ቀዳሚ የመያዣ መብት ሊኖረው የሚችለው የኢትዮጵያ ንግድ ባንክ ይህንን ጥያቄውን ሲቀበለውና ሲፈቅድለት ነው። ስለሆነም ከባለዕዳው የሚፈለገውን ገንዘብ ከሌላ ሶስተኛ ወገን በመቀበል ክፍያውን የፈፀመው ሶስተኛ ወገን አመልካች በመብቱ እንዲዳረግ በፍትሐብሔር ቁጥር 1968 የመፍቀድ ወይም በንብረቶቹ ላይ ሁለተኛ ደረጃ የመያዣ መብት ካለው ተጠሪ ያበደረውን ገንዘብ በመቀበል ተጠሪ በንብረቶቹ ላይ የቀዳሚ የመያዣ መብት እንዲኖረው የመስማማትና የመምረጫ መብቱ የተሰጠው ለኢትዮጵያ ንግድ ባንክ መሆኑን ከፍትሐብሔር ህግ ቁጥር 3083 ንዑስ አንቀፅ 1 የመጀመሪያው ክፍል ገዥ (ደንብ) ለመረዳት ይቻላል።

ሁለተኛው ከእሱ የቀዳሚነት መብት ያለውን የኢትዮጵያ ንግድ ባንክ ፈቃድና ስምምነት ሳይጠይቅ ባለዕዳው ለኢትዮጵያ ንግድ ባንክ መክፈል የሚገባውን ገንዘብ በመክፈል ተጠሪ በንብረቶቹ ላይ ቀዳሚ የመያዣ መብት ሊኖረው የሚችለው ተጠሪ ንብረቶቹን በፍርድ ያሳገደ ስለመሆኑ ማስረጃ ሲያቀርብ ብቻ እንደሆነ ከፍትሐብሔር ህግ ቁጥር 3083 ንዑስ አንቀፅ 1 ሁለተኛው ክፍል ገዥ ደንብ ለመረዳት ይቻላል። ተጠሪ የኢትዮጵያ ንግድ ባንክ በቀዳሚ መያዣነት የያዛቸውን ንብረቶች በፍርድ ያሳገደ መሆኑን የሚያረጋግጥ ማስረጃ ያላቀርበ መሆኑ ያለ ኢትዮጵያ ንግድ ባንክ ፈቃድና ስምምነት በኢትዮጵያ ንግድ ባንክ ለመተካትና በመብቱ ተዳርጎ ሊሠራበት አይችልም። ስለሆነም ምርጫውን ለኢትዮጵያ ንግድ ባንክ የሚሰጠውንና ፈቃጅ የሆነውን ፍትሐብሔር ህግ ቁጥር 3083 ንዑስ አንቀፅ 1 ድንጋጌ እንደአስገዳጅ የህግ ድንጋጌ በመቁጠር ተጠሪ ለኢትዮጵያ ንግድ ባንክ ያለበትን ዕዳ በሙሉ ወይም በከፊል ከሌሎች የገቢ ምንጮች በመክፈል ሆነ ብሎ አመልካች በንብረቶቹ ላይ የቀዳሚ የመያዣ መብት እንዲኖረው ለማድረግ አመልካችና ከአበዳሪው ከኢትዮጵያ ንግድ ባንክ ጋር በመመሳጠር ተግባር የፈፀመ መሆኑን አላስረዳም። በመዝገቡ የተደረገው ክርክርና ማስረጃዎች የሚያሳዩት ባለዕዳው የኢትዮጵያ ንግድ ባንክ የወሰደውን ብድር በውሉ መሠረት ለመክፈል ባለመቻሉ የኢትዮጵያ ንግድ ባንክ በቀዳሚ መያዣነት የያዛቸውን

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* The correct English version of Article 3083(1) provides as follows: *"Any mortgagee may pay a creditor having priority with the consent of such creditor or, where the immovable is attached on the latter's request, without such consent."*

የአበዳሪውን ንብረቶች በመሸጥ ዕዳውን ለማስከፈል በመንቀሣቀስ ላይ እያለ አመልካች ዕዳውን አጠቃልሎ የከፈለና ይህንኑ የሚያረጋግጥ ማስረጃም በመያዣነት የተያዙ የባለዕዳው ንብረቶች የባለቤትነት ሰነድ ከኢትዮጵያ ንግድ ባንክ መቀበል በአበዳሪው መብት ተዳርጎ የሠራበትና በንብረቶቹ ላይ ያለውን ቀዳሚ የመያዣ መብት በሚመለከተው የአስተዳደር ክፍል ያስመዘገበ መሆኑ ነው፡፡ ተጠሪ ባለዕዳው ከኢትዮጵያ ንግድ ባንክ የወሰደውን ብድር ባለመክፈሉ በንብረቶቹ ላይ የቀዳሚ የመያዣ መብት ያለው የኢትዮጵያ ንግድ ባንክ መያዣውን ለመሸጥ ሲንቀሳቀስ ከባለዕዳው የሚፈለገውን ገንዘብ አጠቃልሎ ለመክፈል ሳሣይጠይቅና ክፍያ ሳይፈፅም በኢትዮጵያ ንግድ ባንክ መብት ለመዳረግ ያቀረበው ክርክር የህግ ድጋፍና ምክንያት የሌለው ነው፡፡ ተጠሪ በንብረቶቹ ላይ ያለው ሁለተኛ ደረጃ የመያዣ መብት አመልካች በኢትዮጵያ ንግድ ባንክ ምትክ በመዳረጉ ምክንያት አልተሸራረፈም፡፡

በአጠቃላይ አመልካች በባለዕዳው ንብረቶች ላይ ቀዳሚ የመያዣ መብት ያለው የኢትዮጵያ ንግድ ባንክ ከባለዕዳው የሚጠይቀውን ገንዘብ አጠቃልሎ በመክፈል በባለገንዘቡ (አበዳሪው) የኢትዮጵያ ንግድ ባንክ ፈቃድና ስምምነት መሠረት በፍትሐብሔር ሕግ ቁጥር 1968 ድንጋጌዎች መሠረት ተዳርጓል፡፡ አመልካች በኢትዮጵያ ንግድ ባንክ በመተካት ንብረቶቹን በአንደኛ ደረጃ መያዣነት ለማስመዝገብ የሚያስፈልጉ የባለዕዳው ንብረት ሰነዶችና ማስረጃዎች የፍትሐብሔር ሕግ ቁጥር 1974 ንዑስ አንቀፅ 1 በሚደነግገነው መሠረት ከኢትዮጵያ ንግድ ባንክ በመረከብ ንብረቶቹን በቀዳሚ መያዣነት አስመዝግቧል፡፡ የከፍተኛው ፍርድ ቤትና የጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት ለጉዳዩ አግባብነትና ተፈፃሚነት የሌላቸውን የፍታብሔር ሕግ ቁጥር 1969 የፍትሐብሔር ሕግ ቁጥር 1970 እና የፍትሐብሔር ሕግ ቁጥር 3083 ድንጋጌዎች በመጥቀስ አመልካች የኢትዮጵያ ንግድ ባንክን የመዳረግ መብት የለውም በማለት የሰጡት ውሣኔ መሠረታዊ የህግ ስህተት አለበት በማለት ወስነናል፡፡

<u>ውሣኔ</u>

1. የፌደራል ከፍተኛ ፍርድ ቤት መዝገብ ቁጥር 55790 የሰጠው ውሣኔና የፌደራል ጠቅላይ ፍርድ ቤት ይግባኝ ሰሚ ችሎት በመዝገብ ቁጥር 35179 የሰጠው ውሣኔ ተሽሯል፡፡
2. የፌደራል የመጀመሪያ ደረጃ ፍርድ ቤት በመዝገብ ቁጥር 74358 መጋቢት 26 ቀን 1999 ዓ.ም. የሰጠው ውሣኔ ፀንቷል፡፡
3. አመልካች የባለዕዳው የስማቸው ደምሴ ኢንቨስትመንት ኃላፊነቱ ተወሰነ የግል ማህበር ለኢትዮጵያ ንግድ ባንክ በአንደኛ ደረጃ መያዣነት አሲዟቸው በነበሩ ንብረቶች ላይ የኢትዮጵያ ንግድ ባንክን በመዳረግ ቀዳሚ የመያዣ መብት አለው ብለናል፡፡
4. ወጭና ኪሣራ ግራ ቀኙ የየራሳቸውን ይቻሉ ብለናል፡፡

ይህ ፍርድ በፌደራል ጠቅላይ ፍርድ ቤት ሰበር ችሎች ድምፅ ተሰጠ፡፡

Book Review

Solomon Nigussie, *Fiscal Federalism in the Ethiopian Ethnic-based Federal System (Revised Edition, 2008, iii – xiv +308 page)*

Reviewed by Taddese Lencho*

I am that rarest of reviewers who actually reads every word, and rather slowly.

Gore Vidal

George Orwell, in his short essay on reviewing books, evokes a depressing picture of a reviewer assigned to the strenuous task of reviewing books for or about which he has neither an inclination nor inkling. Orwell conjures images of 'stuffy bed-room sitting', a pile of 'cigarette ends' and 'half empty cups of tea', 'moth-eaten dressing gown', 'rickety table', 'dusty papers' and 'unpaid bills' which stare at a not-too-pleased writer struggling to open the dreaded books for reviewing.[1] And he has to meet a deadline. Let me state up front that I did not have to go through these depressing bouts of labor to review this book. I have enjoyed reading the book and I did not have to meet any deadline to have this review printed in this or any other journal. More importantly, I have both the inclination for and inkling about the subject I am reviewing – or so I believe.

Few subjects in the recent history of Ethiopia have attracted as much academic attention as the Ethiopian federalism. And one aspect of Ethiopian federalism – the ethno-linguistic organization of the federation- has probably attracted the most attention. The images conjured about its implications are not usually flattering to the federation. In this category, we may cite Eshetu Chole's article during the Transition period and Merera Gudina's PhD dissertation (later published).[2] Solomon's book, from the very title, appeals to this 'trademark' of Ethiopian federalism, its ethnic accent. We may be puzzled by why Solomon qualifies Ethiopian fiscal federalism by the ethnic organization of Ethiopian federation until we get to Chapters 5 and 7 of his book,

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[1] George Orwell, "Confessions of a Book Reviewer", in Sonia Orwell and Ian Angus (eds.), *The Collected Essays, Journalism and Letters of George Orwell, In Front of Your Nose: 1945-1950*, volume 4, Harcourt Brace & Co., p. 191

[2] See Eshetu Chole, "Opening Pandora's Box: Preliminary Notes on Fiscal Decentralization in Contemporary Ethiopia" *North East African Studies*, Vol. 1, No. 1 (New Series); Merera Gudina, *Ethiopia: Competing Ethnic Nationalisms and the Quest for Democracy, 1960-2000*, the Netherlands: Shaker Publishing, 2003 (Reprinted in Addis Ababa: Chamber Printing House, 2003).

where it becomes evident why ethnicity is central to his analysis of Ethiopian fiscal federalism.

Solomon first published his PhD dissertation as a book in 2006. In 2008, he published the revised version of the book (with financial support from Forum for Federations) with a preface but without the text of the Ethiopian Constitution and his CV attached. In many other respects, the revised version is identical with the book published in 2006.[3]

Fiscal federalism issues can be as many as one can take but they can be grouped into four categories:

i) Who does what (expenditure assignment);
ii) Who gets to collect what revenues (revenue assignment);
iii) How does one resolve the likely fiscal imbalance between the center and the states (vertical imbalance); and
iv) How does one resolve the once-again likelihood of fiscal disparity between the constituent states (horizontal imbalance).

Most issues of fiscal federalism can be subsumed under one of the four major categories outlined above. Solomon's book is structured along these four issues. That does not mean that his book is just four chapters. The first two chapters of his book prepare the stage for the 'real' issues of fiscal federalism by providing background information on the history of federalism in Ethiopia (chapter 1) and the general theory of federalism and fiscal federalism (chapter 2). It is from chapter 3 onwards that Solomon deals with 'real' issues of fiscal federalism in some detail. Of course, he does not devote equal attention to all the issues of fiscal federalism. The first issue of fiscal federalism – expenditure assignment- gets extensive treatment in chapter 3 of the book, and so does the second issue – revenue assignment – which is dealt with in chapter 4 of the book. Solomon devotes more chapters to the issue of fiscal imbalance in all its forms, probably because he considers fiscal imbalance to be the thorniest of all the other issues of fiscal federalism in Ethiopia (see chapters 5, 6 and 7).

In his chapter on expenditure assignment, Solomon adopts a comparative approach to illuminate concepts that are often used to distribute power between the federal government and constituent states: exclusive, residual, concurrent, framework, implied etc. In his comparative analysis, Solomon notes that the Ethiopian Constitution follows the US model by enumerating the powers of the federal government and allocating residual powers to the states. But since the Ethiopian Constitution does not stop there, the author believes that the Ethiopian Constitution also shares some features with Indian and Canadian Constitutions in listing some of the powers of the regional states (see P. 61).

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[3] All page references are to the revised edition.

A more vexing question is whether there are concurrent powers in addition to the 'exclusive' and 'residual' category already identified. Solomon believes that there are. He cites the enactment of civil and criminal laws, declaration of states of emergency and policies and legislation of social, economic and development as cases for concurrent jurisdiction (see p. 65). The problem with this taxonomy is that it can apply to many areas that are categorized as exclusively federal or state. A good example in this regard is education. As a subject matter, education falls under a concurrent jurisdiction. The federal government controls powers over national policies of education, while states control the rest. Which begs the question: is the taxonomy of powers as exclusive, concurrent or residual helpful at all? Solomon seems to realize the inadequacy of the labels later in the chapter because he abandons them in favor of the more general labels of 'federal' and 'state' powers when he deals with the Ethiopian Constitution in some detail (see pp. 68-71).

Aside from the taxonomy, Solomon deals at great length with practical issues of expenditure assignment in the Ethiopian federal system, such as intergovernmental cooperation (vertical as well as horizontal) and budgetary relations between the federal government and the regional government (see pp. 85ff). He draws upon information collected from interviews with relevant federal and regional government officials and official government documents to give us a feel about how the federal system works in practice. His analysis of the expenditure assignment in the Ethiopian Constitution is impressive over all. There is one minor problem, however. He mentions Article 98 of the Ethiopian Constitution as an example of 'concurrent' power. Article 98 is about concurrent tax power, not expenditure power, and dealing with it under 'expenditure' assignment can be misleading. Solomon has a separate chapter for tax powers (chapter 4), and that is where Article 98 belongs (he actually comes back to it in that chapter; see p. 189). In addition, Solomon mentions Article 98 as a possible concurrent power but concludes that it is no longer a concurrent power because the federal government controls the levying and collecting of the taxes and reserves to the states the right to share from the proceeds. This, he writes, is a result of a constitutional amendment which he does not write a lot about. However the constitutional amendment came about, Article 98 does not lose its concurrent nature simply because the federal government appropriates the power of levying and collecting concurrent taxes.

One of the issues which seem to concern Solomon a lot is the problem of asymmetrical distribution of power in the Ethiopian federation. He characterizes Ethiopian federation as de facto asymmetrical and de jure symmetrical (p. 83). He recommends a number of solutions to the problem of asymmetrical power relations between the regional states, such as reduction of territory and population size of the larger states (essentially by breaking the larger states into smaller ones), provision of federal assistance to the regions that are not financially viable and allocation of specific power to municipalities (p. 84). He returns to this issue again in later chapters of his book where he once again forcefully argues that the issue of asymmetry should be addressed carefully if the Ethiopian federation is to remain viable.

In his treatment of division of revenue powers (chapter 4), Solomon follows a similar approach of first dealing with normative theories of revenue assignment in a federation and then comparing different federal systems with the Ethiopian approach. He devotes a separate section of chapter 4 to the allocation of revenue powers over specific taxes like import/export taxes and duties, income taxes, sales and excise taxes, property taxes and fees and charges. In the assignment of income taxes, Solomon believes that personal income taxes on federal government and NGOs employees should be reassigned to the regional governments 'in order to enhance their revenue capacity' (see p. 130).

Solomon does much the same thing with respect to sales and excise taxes. He writes how sales and excise taxes are assigned under the Ethiopian Constitution (see p. 134). And a few pages later, he writes about the reassignment of VAT to the center (see pp. 143-144). He does not go into details of the circumstances under which VAT was assigned to the federal government. This matter should be a matter of extensive analysis because there are controversies about whether VAT was really an undesignated tax and could be assigned under the procedures laid down under Article 99 of the Constitution or whether VAT required an amendment of the Constitution. The fact that the federal government later decided to share the proceeds of VAT on derivative basis should have signaled to Solomon that VAT is not an undesignated tax.

The administration (i.e., the levying and collection) of concurrent tax sources (Article 98) has been a subject of much contention since the Ethiopian Constitution was approved. Solomon writes about the various options open to the federal and regional governments in administering joint tax sources (see pp. 140-141). But that has now been mooted by the 'amendment' of Article 98 as a result of which the levying and collection of joint taxes has been arrogated to the federal government. Solomon does not tell us much about the 'amendment' and if it followed proper procedures of constitutional amendment. Much of the controversy surrounding the administration of concurrent taxes could have been solved from the very beginning had the Constitution followed the example of the law that regulated the division of revenues during the transition period – Proclamation No. 33/1992. That Proclamation has a clear provision on how concurrent taxes were to be administered. Article 8(4) of that Proclamation makes it clear that the Central Government fixes the tax rates on joint tax sources. This must have been forgotten during the drafting of the Constitution.

Overall, Solomon's analysis of the assignment of specific taxes was sound until he raised the possibility of residual taxation (see pp. 146-148). The use of 'residual' taxation as far as the Ethiopian Constitution goes is not helpful and can only help in confusing one about how the Constitution structures the division of revenues between the federal government and the regions. One would do well to stick to the Constitution's division of tax powers as 'federal', 'state', 'concurrent' and 'undesignated'. The category of residual tax powers has no place in any of these.

In the same chapter, the author briefly deals with the issue of federal government issuing tax legislation over matters reserved to the regional governments or not designated by the Constitution at all. Of taxes not designated by the Constitution, one

can take examples of taxes on interest deposits and taxes on transfer of capital assets like shares and business buildings. Both these tax bases are mentioned in the Federal Income Tax Law of 2002.[4] The House of the Federation (HoF), pursuant to the power vested in it in Article 99 of the Constitution, has since then designated some of these taxes as 'federal', 'state' or 'concurrent. Solomon does not write anything about this presumably because he did not have access to information on this matter at the time of his writing. This is not important. But the author does not find it extraordinary that the federal government issues tax legislation over matters that are not only not-reserved to it but also on matters that are undesignated by the Constitution. Some may argue that this is necessary to create a harmonized tax system throughout the federation but there is no support for it in the Constitution. The Federal Financial Administration Law of 1996 actually has a provision that enjoins both layers of government to have harmonized tax systems and standardized tax bases, but it is not clear if this is really a constitutional mandate or just an ideal to which all members of the federation aspire (see Article 58 of Proclamation No. 57/1996). Solomon writes elsewhere that the power to levy and collect 'exclusive' taxes includes both legislative and administrative powers (see p. 129). The federal government writing (or underwriting) tax legislation as a sort of common law in an operative tax legislation does not appear to be consistent with that assertion.

In the assignment of taxes, Solomon is primarily concerned with the ability of the assignment under Ethiopian Constitution in empowering regional states to raise their own revenues. He does not believe that the current assignment is empowering the regions. His call for reassignment of certain federal taxes (e.g. corporate income taxes on private limited companies, see pp. 285-286) is the result of his concern that the regional governments do not possess sufficient revenue sources to be able to cover their expenses. We know from the reading of the theories of fiscal federalism[5] that

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[4] See Article 34 and 37 of Income Tax Proclamation No. 286/2002, *Federal Negarit Gazetta*, 8th Year, No. 34

[5] Most books on public finance contain at least a chapter in fiscal federalism and deal with the theories of fiscal federalism; See, for example, Richard A. and Peggy B., *Public Finance in Theory and Practice*, Fifth Edition, 1989 (Reprinted, by Tata-McGraw- Hill, New Delhi, 2004); John F. Bernard P. Herber, *Modern Public Finance*, 5th Edition, Richard D. Irwin, Inc., U.S.A. (Reprinted by A.I.T.B.S. Publishers & Distributors, Delhi, 2004); John F. Due and Ann F. Friedlaender, *Government Finance: Economics of the Public Sector*, A.I.T.B.S. Publishers & Distributors, Delhi, 2002; see also Eshetu Chole (ed.), *Fiscal Decentralization in Ethiopia*, Addis Ababa University Press, Addis Ababa, 1994.

empowerment of regional states is not the only consideration (probably not even the primary consideration) of revenue assignment in federations. Solomon briefly deals with the theories of fiscal federalism in the area of revenue assignment (pp. 122-124) but does not really ask whether the assignment of taxes under the Ethiopian Constitution is consistent in a broader sense with the theories of fiscal federalism, and if not, what the implications would be.

In his arrangement of chapters, the sections within chapters, and the topics covered in each of those, Solomon usually has a clear idea of what he wants to do and how he wants to do it. There are, however, occasional lapses. For example, in his introductory remarks about taxation (pp. 119-120), he writes about the relationship between taxation, democracy and good governance. Historically, great constitutional battles were fought over the power of taxation without representation. The slogan 'no taxation without representation' has a particular resonance to us when we hear about taxation and representation. That this topic deserves a few pages (at least a few paragraphs) in a book like this, there can be little doubt about it. Solomon treats this subject as an introductory matter to his chapter on division of revenue powers under the Ethiopian Constitution but he does not really tell us why it is even necessary to know this subject in that chapter. He probably did not realize that taxation and governance are as much constitutional constructs as any other. Solomon devotes a few pages later (see pp. 149-155) to 'constitutional limitations' like 'non-discrimination', 'extraterritoriality' and 'intergovernmental immunity' and his treatment of taxation and representation would have fallen perfectly into our mental arrangement of concepts had he done that.

In chapter 5 of his book, Solomon addresses both vertical and horizontal forms of fiscal imbalance in a federation. This is the chapter where he makes extensive use of financial information mainly collected from the Ministry of Finance and Economic Development to measure the magnitude of imbalances. His finding that there is vertical imbalance in the Ethiopian federation is hardly surprising. What may surprise is the extent of vertical imbalance. According to Solomon, regional governments (including the City Administrations of Addis Ababa and Dire Dawa) accounted for only 17% of the total government revenue, and if we take Addis Ababa out, the figures are much lower (about 11%, see pp. 166 and 170). On the expenditure side, the regional governments covered only about 37% of their total expenditure with their own revenues in 1996/1997 fiscal year (p. 166).

Solomon also measures the extent of horizontal imbalance- the disparity in fiscal capacity between regions- again relying upon financial information obtained from the Ministry of Finance and Economic Development. He discovers that the magnitude of horizontal imbalance between regions is huge. Four regional states account for more than 80% of the total revenue generated at the regional level during 1999/2000 fiscal year (p. 172). The largest region in the federation – Oromia- accounted for 27% of the total revenue while a small regional state of Benishangul could only manage to collect 0.83% of the total revenue. Oromia was able to cover about 30% of its expenditure needs and Benishangul only about 6% of its expenditure needs (p. 172).

Solomon traces the fiscal imbalance in the Ethiopian federation to the usual culprits: that the federal government controls the fat cows (productive taxes) while the regions are assigned less productive tax sources (see p. 167). While that seems intuitively to be the answer, it probably underplays the lengths the Ethiopian Constitution goes to supply revenue powers to the regional states. The Ethiopian Constitution is fairly on the generous side in giving certain taxes to the regional governments, although the assignment of these taxes goes against the grain of conventional wisdom in fiscal federalism. The vertical imbalance in the Ethiopian federation is partly exacerbated by the inability and/or reluctance of the regional governments to effectively raise revenues from sources assigned to them (e.g. agricultural income taxes should have been important sources of regional government revenue but they are not; the same can be said for taxes on proprietorship businesses). The causes of imbalance are also administrative inefficiencies, not just constitutional imbalances.

In his chapter on revenue transfer (chapter 6), Solomon deals with both revenue sharing (from concurrent tax sources) and transfer of federal grants. He writes about the various objectives the federal government might meet through revenue transfers (pp. 185-188), and the forms revenue sharing might take in different federal systems (pp. 189-193), the different types of grants again used in various federal systems (pp. 193-197). More significantly, he surveys several federal systems for their experiences in providing grants to constituent states (pp. 197-200). He also deals with the institutions of revenue transfer, again from comparative perspective (pp. 203-205). Based on his surveys, the author concludes that the use of several grant instruments is desirable if multiple objectives were to be achieved and stresses the importance of 'independent commission with required expertise in order to prevent political exigencies and logrolling, and to promote impartiality.' (p. 206).

After this comparative survey of different federal systems, Solomon comes round to an extensive analysis of the Ethiopian revenue transfer system in chapter 7 of his book. On the question of revenue sharing, Solomon writes about the 'new system of concurrent tax sources, based on a principle recommended by both the center and the regions and decided by the HOF' (p. 213). The new system of revenue sharing (approved in 2004) allocates equal share to the federal government and the regional governments when the concurrent tax in question is a profit tax or dividend tax, 70% to the federal government and 30% to the regions when the tax in question is an indirect tax and 60% to the federal government and 40% to the regions when it is a tax on royalties from large scale mining and petroleum and gas operations (p. 214). With regard to the sharing of tax on companies (e.g., profit tax payable by companies), the federal government shares the revenues on the basis of the share of each region, which is determined on the basis of the amount collected from the respective regions, i.e., derivative principle (pp. 214-215). The place of the company's registration determines with which region the revenue should be shared. It does not take much thought to realize how unfair this system is to those regions which bear the brunt of the company's operations except for registration. Solomon exposes the unfairness of the system because as he rightly points out the revenue sharing scheme transfers revenue to those regions where the company is incorporated although the tax is collected from the operations of the company in

other regions (see P. 286). Although the scheme is superficially derivative, Solomon is right on the mark when he concludes that the system is 'neither derivative nor redistributive' (see P. 286). He recommends that revenue sharing should be based on 'accounting or formula basis' (p. 286) although he does not tell us how the formula works. His recommendation seems to accept the current practice of the federal government collecting joint tax sources and then sharing the proceeds with the regional governments. It is not at all certain why this should be the best of all possible options out there. In fact, there is reason to believe that the regions levying their own additional taxes on joint tax sources would produce better results than the system we currently have.

The institutional arrangement for revenue sharing and grants comes in for some criticism from Solomon. We know of course from reading the Ethiopian Constitution that the HOF is in charge of these matters (see Article 62(7)). Solomon exposes the weaknesses of the current institutional framework and questions if the system is going to survive the strains of centrifugal forces (see Pp. 245-250). One of the glaring weaknesses of the HOF is that it has little expertise support of its own, which makes it suspiciously dependent upon federal executive agencies like Ministry of Federal Affairs (MoFA) and Ministry of Economic Development and Cooperation (MEDAC) (p. 248). Another problem, which Solomon rightly draws our attention to, is the potentially unfair results of the simple majority required for the House (of Federation) to reach a decision. This gives some regions the power to lock in the majority required very easily, vetoing the more populous regions of Oromia and Amhara. To overcome the deficit of expertise, Solomon proposes the Australian-cum-Indian model of using independent expert commissions providing support to the House of Federation (see pp. 249-250). Towards the end of his book (p. 288), the author makes specific recommendation for the establishment of an 'independent grant commission' composed of 'non-partisan' and 'independent' professionals to measure the revenue and expenditure needs, to collect and analyze data 'free from local manipulation' and 'ensure fiscal accountability'. The commission is to be accountable to the 'Federal Houses'. Although the establishment of a commission will go a long way in bridging the current deficit in information and expert analysis, I am not sure that the commission will be independent from the manipulation of the all powerful executive and centralized party system.

After extensively dealing with the issue of fiscal imbalance in the Ethiopian federation, Solomon devotes a whole chapter to an assessment of Ethiopian fiscal federalism (chapter 8). One of his principal claims is that the current design of fiscal federalism may become 'a driving force behind a claim for the right to statehood by groups that are not represented at the state level' (p. 261). Even worse, he fears that strained fiscal relations might trigger secessionist tendencies (p. 261). He produces data to show how the transfer system favors some ethnic groups accorded statehood and disfavors others not accorded the same status, although these ethnic groups are comparable in population size and level of economic development (see pp. 233-234). Solomon fears that this might not only create legitimate grievances over the transfer system but also provides an incentive for different ethnic groups to seek statehood status.

The claim for statehood has already happened, as far as he is concerned. He mentions the Silte case in the Southern Nations, Nationalities and Peoples' Region (SNNPR) as partly at least motivated by the desire to obtain a larger share from the federal grant pie (p. 265). His solution is to break up the larger regional states – Oromia, Amhara, and Somali- into more than one state (p. 267; see also p. 291) and merge some of the smaller states (such as Dire Dawa and Harari) into larger states (p. 291). He recommends that the reorganization be based not just on ethnicity alone, but also 'historical, geographical, demographic and economic factors' (pp. 267 and 291). He does not go any more specific than that. This, he believes, 'redresses not only fiscal imbalances but also creates economic and administrative efficiencies, promotes federal loyalty, reduces the politics of ethnicity and promotes national integrity' (p. 267).

In the end, if one were to pick the one issue that seems to concern Solomon the most, it is the issue of whether the current system creates a viable and sustainable federal polity. In this regard, Solomon endorses Alemante's pessimistic take on ethnic federalism. On page 278, he quotes Alemante:

> In the context of a federal structure that emphasizes ethnicity alone its implementation is fraught with serious difficulties. ….ethnic based governments have a tendency to view themselves as primarily concerned with the welfare of their own citizens with little or no incentive to share income or resources with other ethnic groups. Compelling them to share their resources, constitutionally or otherwise, is possible, but this will sooner or later create resentment and become a source of political friction and instability.[6]

In the next page, Solomon writes that 'the language based approach has not only created permanent asymmetry between subnational governments in size, population and economic resources, but also it generates conflicts between ethnic groups' (see p. 279).

Solomon is right to have drawn our attention to the myopia of the federal grant design; that the lens of the federal grant distorts or does not properly look at the ethnic groups within the states although 'nations, nationalities and peoples' are the building-blocks of the Ethiopian Constitution. He is also right to have pointed out that the federal transfer system does not address the poorest of the poor in the big, populous regions. In reading his book, we must at least come away convinced that something is awry about the federal grant system. Unfortunately, the author withdraws his analysis from the grant design just when that is badly needed and turns his attention in stead upon the design of the federation itself.

Solomon is not the first, and nor will he be the last to raise the dangers of ethnic federalism in Ethiopia. Many other writers have raised the ogre of ethnicity as a

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[6] Alemante G. Sellassie, "Ethnic Federalism: Its Promise and Pitfalls for Africa," (28 *Yale Journal of International Law* 51, 2003), quoted on p. 278.

divisive element in the Ethiopian federation. Solomon seldom bothers to ask whether the grant formula has all the elements to make everyone happy in the federation. In stead, he uses the possible disaffections and fall-outs resulting from the 'unequal' distribution of grants as an occasion to turn his critical eye against the design of the federation itself. He seems to have abandoned hope that tinkering with the grant formula would make any difference. He sees ethnicity as a divisive factor, turning ethnic groups, in particular their 'ethnic entrepreneurs' into making endless demands for greater share or else threatening the federation with independent statehood under Article 39 of the Constitution. That, to Solomon, is an evil lurking behind the sinister organization of the federation based on ethnicity alone. On page 276 of his book, he writes:

> … difference in the rate of development can lead to a politically sensitive fragmentation of the national economic system, resentment and the perception of inequity. Further, the system accentuates ethnicity and enables 'ethnic entrepreneurs' to seize power and perceive all power relations with the center and with states in terms of interethnic relations…. ethnic elites can easily aggravate the facts of the different pace of development and interpret these as injustice, inequality and favoritism. This kind of perception generates a discernible danger to the system as a whole.

To Solomon, nothing short of slaying the hydra-headed, divisive and polarizing ethnicity would provide relief if we are to expect a stable federal system. He is single-minded about the problem of asymmetrical development, and his solution is simple, although difficult to implement in practice. He underestimates the psychological hold of ethnicity in Ethiopia. And he erroneously believes other forms of reorganization are less divisive than ethnicity. Religion may be one factor in the organization of regional states in Ethiopia, but is it any less divisive? Even geography can be equally polarizing, although it probably shifts the center of conflict to regions of Ethiopia that were historically strong on regional identity (recall the problems Emperor Haile Sellassie I had with Gojjam and Wollo).

Solomon's call for reorganization – in particular his call for downsizing the larger regional states- is suspect for another reason. He provides evidence for possible discontent about the grant distribution by comparing some ethnic groups in the SNNPR with those in small states like Gambella. And he mentions that there are murmurs of dissatisfaction in the larger regions as well, but I don't think the larger regions would have pushed their grievances so far as to submit to being reduced to smaller regions than what they are now. Nor is it certain that the small regions would choose to be larger solely to meet the demands of symmetrical 'economic' development.

Solomon trumps all other factors in the design of the federation to meet the demands of proportionate grant distribution. Asymmetry is a feature of many (perhaps all) federations. The issue is not whether they should or not be asymmetrical but how the grant design can address the competing interests of all states- small or big, densely populated or sparsely populated, etc. It appears from his writing also that he confuses 'equitable' with 'equal' distribution. It is to be expected that during the formative years

of an asymmetrical federal system like Ethiopia, the smaller and less developed states will receive more per capital than the bigger, populous states. Although the distribution is not equal, it may be equitable. This is not a permanent situation, however (or it should not be). The regions that are undeveloped now will not remain 'undeveloped' for ever. Besides the elements of the grant formula will change (and must change) with the changing circumstances. The problem, I think, is in assuming that the grant formula is static, while it is not. The grant design has been evolving since it was first introduced back in 1994, and various elements have gone into as well as out of it. We can only hope that in time the grant design will respond to the various conflicting and competing interests of various groups in the federation. The fact that the grant design has changed over the years is a cause for optimism, although one would wish that it changed less frequently than it did.

Besides, Solomon's proposal of reorganization of the federation invites a heavy-handed management (not to say intervention) from the central government, while the current arrangement under the Ethiopian Constitution at least in theory leaves the question of reorganization to the people at the grassroots level. The latter arrangement is more genuine and democratic, and I prefer that any day. It is a system of checks and balances that keeps a reality check on the federation. It can also be a weapon to remind the center that the people at the economic periphery are not to be taken for granted.

Apart from these objections, Solomon's book is an important contribution to the fledgling literature on fiscal federalism in Ethiopia. In many of his chapters, Solomon attempts to draw from the experiences of several other federal systems in illuminating some issues of Ethiopian fiscal federalism. He is not committed to this or that paradigm of fiscal federalism. He leaves the final judgment to us, which is as it should be. More significantly, Solomon uses government financial information to support most of his claims. Solomon wades into what is for legal scholars a treacherous territory – analysis of financial information, and I think he has handled it admirably well. His book is also a source of much useful information on Ethiopian fiscal federalism in its formative years. Issues of fiscal federalism are many and probably endless. Those who read Solomon's book to the end are guaranteed to meet with many of these issues and come away with at least an idea of how to tackle them in the future. It is actually an easier read than one would assume at the beginning, and for a book of its kind, quite an enjoyable one. Whether we should agree with his recommendations in the end is quite another matter (we cannot but agree with some of them).

Book Review

Frans Viljoen, *International Human Rights Law in Africa* (Oxford University Press, Oxford, 2007, 670 pp.) ISBN 978-0-19-921858-5

Fikremarkos Merso*

With the end of colonialism, Africa had begun to grapple with a range of issues to put its house in order. In this regard, the protection of human rights continues to be the most formidable challenge to independent Africa. African states have taken different steps to curb human rights violations and establish a credible system for the sustained protection and promotion of human rights. As a first step, African states have ratified the Charter of the United Nations (UN Charter) and the different international human rights treaties. African states took their commitment to human rights to a higher level with the adoption of the first ever regional human rights treaty, the African Charter on Human and People's Rights (the African Charter) in 1981. The African Charter established the African Commission on Human and People's Rights (the African Commission), the institutional framework for the enforcement of its provisions.

The normative and institutional framework for the protection of human rights in Africa continued to evolve, *inter alia*, with the adoption of a number of specific regional human rights treaties as well as the coming into force of the African Court of Human and People's Rights (the African Court of Human Rights). Though their main agenda is promoting economic integration, African Regional Economic Communities (RECs) have also taken the promotion and protection of human rights as one important agenda. It is not also uncommon to see national constitutions in Africa inundated with human rights provisions, often in the form of a direct replica of the international human rights treaties.

Despite all the human rights norms and institutions at the regional, sub-regional and national levels, realization of international human rights in Africa remains much to be desired. The issue of realization of international human rights in Africa is certainly a complex issue that requires a multi-faceted analysis. It is this critically important issue that the book entitled '*International Human Rights Law in Africa'* by Dr. Frans Viljoen has sought to address.

The aim of the book as stated by the author is to provide a comprehensive, systematic and holistic overview of the African states' obligations under international human rights law and the realization of this law in the continent (p.xxiii). The book has thus sought to examine the norms, institutions and processes relating to human rights in the global and regional systems of the UN, the AU and the Regional Economic Communities (RECs) and their relationship with national legal systems in Africa. While the book addresses a range of issues related to international human rights law, its

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prime focus is the African regional human rights system and the challenges against the realization of human rights in Africa.

The book is divided into five parts, and each part is further divided into different chapters. Part I is basically introductory and addresses background issues such as the very basic issue of what international human rights law is all about, and other important issues such as the different levels of international human rights law, the relation between the international and national systems of human rights, the sources of and limits to international human rights law. The analysis in this part laid the basis for the discussions on the more advanced issues in subsequent parts.

Part II of the book, which is divided into two chapters, takes the reader through the UN system of human rights. The discussion in this part introduces the UN human rights system to the reader, and more importantly, examines the role of this system in realizing human rights in Africa. While recognizing the important role of the UN system in promoting human rights and curbing human rights violations through measures such as by integrating human rights in its development agenda, the author argues that the UN system and its different institutions "have not served as an adequate catalyst to jerk the global consciousness into action, and have not succeeded in making a marked difference to the material realization on the African continent" (pp 87-88). This part focuses on the seven human rights treaties under the UN human rights treaty system and their relevance to Africa. The author points out that while ratification of these treaties epitomizes a first important step to human rights commitment-and Africa is not behind in this front and in some cases it leads the rest of the world- African states generally shy away from accepting the optional protocols to the international human rights treaties which allow for individual complaint mechanisms and much closer scrutiny on enforcement of the treaties (p.150). Addressing the relevance of the UN human rights system to Africa, the author argues that for the UN human rights treaty system to be taken as one of the great achievements of the organization, as often is claimed, there is a need to have evidence of the achievements in Africa (p.146). Though not precisely stated by the author, the message appears to be that no such evidences are available in Africa yet. Part II goes beyond the UN human rights system and briefly outlines the UN financial and trade institutions as well, in particular, the Bretton Woods Institutions, in the context of the realization of international human rights in Africa. More specifically, this part of the book outlines the negative effects of the (in) famous Structural Adjustment Programs (SAPs) spearheaded by these institutions. The author argues that the SAPs negated the structural causes of poverty in Africa that go beyond economic management and priorities(p.79).

Part III of the book is devoted to the critical analysis of the African human rights system in realizing international human rights. With its eight different chapters, Part III deals with issues in the African human rights system with the necessary depth and breadth. As such, Part III represents the main focus of the book. The discussions in this part include the origin of the African human rights system, the regional normative architecture, the institutional framework, in particular, the African Commission on Human and People's Rights, and the African Court on Human and People's Rights.

After analyzing the different aspects of the African regional human rights system, the author has concluded that the African human rights system is the weakest regional human rights system compared to the European and Inter-American systems. According to the author, duplication of mandates, lack of coordination among the different institutions and the very limited resources availed to the institutions have, among others, undermined the effectiveness of the African regional human rights system. In examining the role of the AU in promoting and protecting human rights, the author commented that the very foundation of the AU should be people centered, involving people at all levels and that "Only if it is able to allow for a truly deliberative and inclusive culture will the AU become an institution of the African People, by them and for them, and not and institution of, by, and for the African heads of state" (p.234). Part III of the book discusses the African Commission with a particular emphasis on its protective mandate and offers a critical insight into the strengths and weaknesses of the Commission with some suggestions for the improvement of the operation of the Commission. Moreover, this part also discusses the prospects and challenges of the African Human Rights Court where the author warns that with the coming into force of the African Human Rights Court there is a danger of placing much emphasis on judicial and quasi-judicial dimensions of human rights by neglecting the broader issues that hinder the realization of human rights in Africa such as illiteracy, ignorance, lack of resources, etc (p. 230). Based on the experience so far, the author argues that even if high hopes are certainly legitimate for the African Human Rights Court, unrealistic expectations from the court does not seem to be warranted.

Part IV of the book takes the discussion one step down and evaluates the role of the African RECs in advancing human rights in the continent. It has been noted by the author that RECs have the potential not only to create strong and viable economic units but can also serve as forum for the development of common human rights standards and for effective implementation of the standards. The author thus recognizes the very important role of RECs in the context of the realization of international human rights in Africa.

In its Part V, the book addresses the issue of implementation of international human rights law at national levels in Africa. In this regard, the author appropriately noted that international human rights law does not form an effective part of domestic law in Africa and that it is rarely used as a source of enforceable rights in domestic legal systems (p.565). Particular attention was given to the issue of justiciability of socio-economic rights and human rights questions relating to HIV/AIDS. In relation to the first issue, the book addresses the challenges in making socio-economic rights justiciable which is partly associated with the loopholes in the interpretation of these rights. The author tried to suggest some strategies for enforcement of such rights domestically. But, above all, the strong message the author wanted to convey appears to be that enforcement of these rights rests more on judicial activism than on the legal status of such rights (p.585). The main problem identified by the author in relation to HIV/AIDS is lack of human rights based approach in the implementation of the different policies and strategies of most African states. Moreover, the author argues that the issue of HIV/AIDS should not be considered from the medical perspective (access

to HIV/AIDS drugs) alone, and the other dimensions of the issue such as the social and human rights dimensions should also be looked into.

Part VI of the book wraps up the discussions by providing concluding remarks. The central message of the book is that realization of international human rights in Africa has been very limited for several reasons. For example, the author pointed out that even if human rights issues appear to be high on the agenda of the UN and the AU, sometimes priority is given to other political or economic agendas. Moreover, the author pointed out that human rights are not integrated into the policies and functions of these institutions. Lack of coherence between the international and regional systems has also been identified as one of the problems in realizing international human rights in the Continent. The author has also noted that still the notions of national sovereignty and non-interference are being taken as excuses to do nothing about human rights violations across the Continent. The author has also made the observation that in the context of Africa poverty is at the centre of human rights violations and suggested that good governance and justiciablity of socio-economic rights may create the basis for addressing poverty in the Continent.

The book presents a very comprehensive work covering a wider range of issues on international human rights law in the context of Africa. It indeed appears that the author has done a hard work to include all relevant issues related to the topic. The work takes the reader through the basics of international human rights law, to the more complex issues of enforcement and implementation of the laws at the regional and national levels. Perhaps not surprisingly for an ambitious work such as this, the book appears to be voluminous. The author's pursuit of comprehensiveness and all-inclusiveness might have also risked a limited treatment of some important issues.

Nonetheless, the book is thoroughly researched, highly informative, clearly written and carefully structured. The clarity with which the different issues are explained in the book is impressive. This indeed is one important quality of this book. The author deserves praise for his pursuit of simplicity while maintaining comprehensiveness. The problem with other works in this area is that they are often very technical and thus not easily accessible for readers with limited or no knowledge of the subject. Discussions in the book often go beyond mere description of doctrinal issues and the author has made the best effort to look at the realities on the ground. Indeed, the work has attempted to capture the jurisprudence of the international courts and quasi judicial bodies such as the African Commission, to a limited extent the courts of the RECs in Africa, the European Court of Human Rights and the European Court of Justice, the international Court of Justice, the communications to the different committees of the UN as well as the national courts in Africa.

The book is also well organized and the very detail list of contents together with the index makes it easy to find a specific topic or issue in the book without much difficulties. The author's boldness in his critique of several issues is also something to be recognized. Several authors in the area limit themselves to the analysis of normative

and institutional frameworks of human rights with a general tendency to shy away from the *realpolitik.*

In general *'International Human Rights Law in Africa'* by Dr. Frans Viljoen is the most comprehensive and well researched work on international human rights in Africa this reviewer has ever seen. It is undoubtedly a very valuable book for everyone interested in human rights issues in Africa and a very important addition to the literature on international human rights law in Africa.

A BIBLIOGRAPHY ON ETHIOPIAN LAW

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