

Call For A New Ethiopian Civil Code (NECC)

by

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Starting Point

The Ethiopian Civil Code (hereinafter: ECC) and the Commercial Code were enacted in 1960 as the last of the five "imperial judiciary laws " restructuring the Ethiopian legal system after occupation and WW II. ECC stands as it was enacted 50 years ago. Seemingly it remained unchanged for two generations irrespective of fundamental changes in the constitutional and economic fabric of the country. But this is not so. The ECC has changed and the society in which it is embedded have changed. The text of ECC must be adapted to these changes. What is said here is applicable *mutatis mutandis* also to the Commercial Code, but this article focuses only on ECC. The aim of this study is twofold.

1. Suggest a fundamental revision or re-codification of the ECC.
2. Show that this should be done along the systematic lines, notably of the German Civil Code as ECC, despite its French flavour, is already following this in line, albeit imperfectly.

Part I Need for Revision

I. ECC outdated

Many of ECC's articles have obviously been derogated by the development. To give only some examples: Art. 73 obliges the captain of an Ethiopian ship in a certain situation to call the next Ethiopian port. Unfortunately for this country Ethiopia does not have a port any more. Articles relating to His Imperial Majesty (HIM) like Art. 132 (*Records relating to the Imperial Family*) or Art. 2137 (*Legal Immunity*) are clearly set aside by the political changes. However, one may ask, whether the privilege given to the Emperor in Art. 581 II vests now with the President of the FDRE being not an imperial prerogative but one that belongs to the Head of State as such.

Regulations pertaining to private land ownership, e.g. Art. 1553 ss., have become obsolete since the land has been nationalised.

While it is quite evident in these cases that the respective articles have been derogated, this is less clear in other cases. Art. 1647 – 1674 (*Literary and Artistic Ownership*) may totally have been superseded and abolished by the Ethiopian Copyright Law of 2004, but it may also be that some of these articles are still the law – somehow.²

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² see: Mandefro/Molla Journal of Ethiopian Law 2011, p. 155 ss

Some articles have apparently seldom if ever been put into practice, e.g. Art. 516 ss (*Trust*) and have remained dormant now for more than five decades. Nobody knows whether these are still laws or whether these have been abrogated by disuse, while it is unclear whether this paralegal concept of law applies in Ethiopia. At the very least ECC should be cleared from these uncertainties.

II. ECC Partly Unconstitutional?

1. Competency of the FDRE to legislate ECC

Under the 1995 Constitution Ethiopia is a Federal Republic. Legislative power in principle lies with the member states (Art. 39, Art. 47 EthC). FDRE, acting through the House of Peoples` Representatives (hereinafter: HPR) , has the power of legislation only in matters enumerated in the Constitution. *Sedes materiae* is Art. 55 EthC and with respect to civil and commercial law Nr. 4 and 6 of this article. Nr. 4: *It (=HPR) shall enact a commercial code.* This can be done by the HPR *sua sponte*, i.e. without asking or referring to the House of Federation (hereinafter: HoF). Nr. 6: *It shall enact civil laws which the House of Federation deems necessary to establish and sustain one economic community.* Here the HPR can only act in cooperation with the HoF.

ECC was enacted by Imperial Order of 5th May 1960, when Ethiopia was a unitary state under the rule of an absolute Emperor. ECC was clearly in line with the then existing Ethiopian constitution. Under the present EthC FDRE would however not be allowed to promulgate ECC without having a decision to this end by HoF. In the absence of transitional provisions in EthC it could therefore even be argued that ECC in total has become an unconstitutional law *ipso iure*, by the operation of law itself, in the moment when, with the adoption of EthC, the legislative power devolved from the central state, FDRE, to the member states. This interpretation, as leading to a result unforeseen by the Constitutional Assembly, may be discarded as hermeneutic “over-achievement”. What could, however, hardly be doubted is, that many topics, now covered in the ECC are not *necessary to establish and sustain one economic community*. Example: Book II (Family and Successions, Art. 550 - 1125) as being of no economic relevance cannot be part of ECC or NECC, lest it be illegal under Art. 9 I EthC. Another example may be found in Art. 3131 ss (Administrative Contracts) or many rules strewn all over the more than 3000 article of ECC , which are of ap procedural or public law nature.

2. Constitutionality of a Specific Articles

Art. 9 I EthC declares invalid *ipso iure* any law .. *which contravenes this Constitution.* This study cannot give a thorough constitutional scrutiny of present ECC but some examples may be shown, where the constitutionality of an article of ECC can be questioned. Art. 398 gives a special status to the Ethiopian Orthodox Church. This would contravene Art. 11 (*Separation of State and Religion*) and Art. 25 (*Equality*), as other religious groups may feel discriminated. Art. 34 gives equal rights to husband and wife. All articles in the ECC treating husband and wife, father and mother differently have therefore become questionable, e.g. Art. 2124 speaking only of the father`s liability.

III. ECC did not take Roots

The acceptability of ECC in Ethiopia was always a problem. David himself was not convinced that his Code would soon take roots in the country and owned that the Code would, at least in the first step, become practical only in the more developed parts of Ethiopia.³ Beckstrom, who in the late 60ies had conducted a survey on this came to the conclusion: (S. 582) : *Evidence shows a country hardly aware of the codes and a judiciary still struggling to comprehend them.* Singer concurs and did also not believe in the success of ECC.⁴

*At the time of this writing, the Code has been in effect for some nine years. Most observers feel that it has not been applied outside the High and Supreme Courts. This proposition may or may not be true; apparently, no one has researched the question of whether the Code is actually being applied and, if it is, of how its articles are being interpreted. One conclusion is clear: foreign materials are not being cited in abundance. It is not too early for scholars to start reviewing court archives to determine the extent and manner in which the Civil Code has embedded itself in the legal system. Then, and only then, will one be able to evaluate whether modernization has been, as the Emperor hoped, "the crowning achievement of Our life as a monument for those generations that are waiting impatiently on the threshold of existence."*⁵

This could have been written also today, 50 years on. Ethiopian lawyers, albeit hesitatingly, admit that ECC has not taken roots in the land. It may be true, that ECC initially did not meet with hostility.⁶ But, given the absolute power of the emperor, it would not have been advisable for anybody in public service to be too outspoken on this favourite child of HIM. Beckstroem says: *The courts have shown considerable flexibility and ingenuity in certain areas. Viewed another way, what we are about to recount might be labeled "patterns of unauthorized activity outside of the law."* In other word: the courts simply disregarded ECC. Whether this has changed very much, is an open question. The remarkable scarcity of academic work on the ECC is not a sign for a deep attachment of Ethiopian jurists to ECC.

IV. Sources of the ECC

1. French

Aklilu, since the occupation the closest adviser and personal confidant of the Emperor, writes: *After the constitution (of 1955) was proclaimed I proposed to the emperor the need to draft statutory laws regarding civil and commercial activities. These were The*

³ A Civil Code for Etiopia: Considerations on the codification of the Civil law in African countries Tulane Law Review 1963, 187 ; p.203 f: *...not immediately applicable for the whole country*

⁴ Singer, Norman J. *The Ethiopian Civil Code and the recognition of customary law*, Houston Law Review Vol. 9 (197), 460

⁵ Singer, Norman, *Modernization of Law in Ethiopia: A Study in Process and Values*, Harvard International Law Journal 1970, 73 ff, S. 92

⁶ Brietzke, aaO S. 160; Beckstroem, *Transplantation of Legal Systems: An Early Report on the Reception of Western Law in Ethiopia*, American Journal of Comparative Law (Vol. 21, 1973,) dort FN 39: It is worth noting that the studies turned up no evidence of hostility, on the part of judges, to the new codes as being "foreign law" imposed upon the country. This comports with an opinion recently expressed by the Attorney General to the effect that judges and lawyers were not resisting the new laws.

*Civil Code...Commercial Code The emperor agreed to my proposal. I was well aware that we needed professional lawyers and specialists, and that it would take a long time to prepare these codes.*⁷ As Ethiopia had no such experts, they had to be recruited from abroad. This meant that the future Ethiopian law would be influenced or even dominated by a foreign law. And so it was. Aberra writes: *.. private laws were imported virtually wholesale*⁸ The Emperor had been educated in French culture and language. This was also the case with Aklilu, who was even married to a French woman. It is therefore not surprising that the task of creating the new law, was entrusted to a renowned French jurist, René David. There was also an editorial committee. But its members apparently never became known. David is therefore the only person to give evidence as to the sources of ECC. He declared to have used sources from Egypt, France, Greece, Italy, Switzerland, Turkey, Iran and the Soviet Union. Mainly, however, so he says, he did his own creative legislation. About the sources of his inspirations he says nothing. Krzeczunowicz states: *... The Ethiopian Civil Code, ... constitutes an original compilation from largely unrevealed sources.*⁹

2. German Civil Code (=BGB)

Germany is missing in David's list. The French influence on the ECC indeed is the dominant one. But it can be shown, that the structure of ECC owes a lot to BGB. The adoption of German law is not by taking German articles, by adopting its systematic legal thought. The new Russian Grazhdansky Kodeks (= BGB) or the new Dutch Civil Code, to name only the two most recent and important European codifications after 1990, contain hardly any literal borrowings from BGB, and yet there is no doubt that both laws are influenced by the BGB, namely in their respective systematic structure. The BGB of 1.1 1900 for the first time in the entire jurisprudence gave a clear structure to any conceivable civil law. This consisted ultimately only of a few system elements: legal subjects, legal objects, juridical acts, law of obligations, law on things or goods, abstracting the general from specific etc. The clarity in which this was executed, explained the myth *that any law other than German law is not law, (which) came into fashion about 1897.*¹⁰ The high reputation of BGB still prevails in many countries, e.g. China, Japan, Korea, now independent states of former Soviet Union; Afghanistan and others.¹¹

Part II New Ethiopian Civil Code (NECC)

I. BGB structures in ECC

The present Code must be thoroughly revised or even totally be restated. This should be done the systematic way. The BGB system is - to a large extent - already incorporated in the ECC. This seems to be unquestioned in Ethiopia, nevertheless some examples for this may be given. Basis is: What is in ECC and BGB but not in French Civil Code (=FCC) probably is German influence on the ECC.

⁷ loc. cit. p. 206

⁸ loc. p. 6

⁹ 1963 JAL S. 173

¹⁰ Hideo Tanaka, The Japanese Legal System, University Tokyo Press 1976, S. 209

¹¹ cf. Aden, M. Law Made in Germany, Zeitschrift für Rechtspolitik 2012, p. 50 ss; see German text also in: www.dresaden.de

1. Legal Subjects: ECC Art. 1 = § 1 BGB . No parallel in FCC
 2. Possession: ECC Art. 1140 -50 = § 857 ff BGB. No parallel in FCC
 3. Joint ownership: ECC Art. 1257 ss = §§ 1008 BGB . No parallel in FCC
 4. Sale: ECC Art. 2273 Nr. 1 (deliver) Nr 2 (transfer ownership). Verbatim § 433 BGB. No parallel in FCC; cf FCC art. 1582: only to deliver.
 5. Unlawful Enrichment: ECC Art. 2162 ss= §§ 812 BGB. No parallel in FCC
 6. Agency: ECC Art. 2179 ss = §§ 164 ss BGB. No parallel in FCC, see Art. 1984 FCC
- And many more.

II. Outline of Systematic Structure of NECC

Outline means, that author does not undertake to give a complete table of contents of NECC. It is rather the description of the anatomy of NECC, which must be filled with flesh from living Ethiopian law and legal practice

1. Book General Rules

I. Persons - Subjects of Rights and Obligations, R&O ¹²

Physical Person: ECC Art. 1 and 2. Suggestion for Art. 1 NECC: *Each human is capable of holding rights and obligations.*

Every conceivable law must start with the subjects of law. Who is able to *hold* R&O? Plants, animals, environment etc as such are not *subjects* of law; maybe not yet. Here is room for legal innovation. ECC rightly puts the person at the very beginning , as does BGB; contrary to FCC. A human is a human. Period! Discussion, whether or as of when the not yet born child is to be regarded as human, and if so with what R&O, should be left to the courts to develop. Therefore delete Art. 3- 7 as too detailed and possible surpassed derogated by modern medicine.

Legal Person(s): Next to physical person come legal persons to be able to hold R&O. Suggestion for Art. 3 NECC:

- I. *More than one person can assume a distinct legal personality distinct from its members (legal Person, LP) , where the law so provides.*
- II. *Person in this meaning shall include LP.*

NECC should only give a basic concept of legal person. Details to be covered in specific laws, e.g. Commercial Code and other laws. The courts may develop notion further.

II. Things – Objects of R&O (passive capacity)

After stating, who can *hold* R&O, it is logical to regulate on , what can be *object* of R&O. Therefore retain: Art. 1126 - 1139, although to be thoroughly revised. Art. 1126 (reworted) would therefore become Art 4 NECC.

III. Juridical Acts, Rechtsgeschäft

After I and II the logical next question is: How can legal subjects (=persons) create, change , dispose etc on R&O with respect of legal objects? Answer: By Juridical Acts (JA). JA do not only occur in contracts but also in other legal relations. Adapt Art. 1696 ss. ECC for all conceivable JA. JA, a key element in every legal system, is not defined in French Civil Code or ECC.BGB here is a good model. JA are the basis of all contracts and other acts. The scope of the effect given by law to a certain JA must be worked our by courts. Void and voidable contracts in Ethiopian law must be clearer worked out in NECC.¹³ Author`s Definition of JA:

Words, spoken or written, signs and all other utterances of a person made with the intent to have legal effect , Juridical Act, JA, shall have this effect, provided this person is 18 years of age and sound of mind.

IV. JA through others, power of attorney, Stellvertretung

In private live, let alone in business, most JA are declared or received not in person, but by or through third persons. After III the next logical step for NECC to regulate would be (as in BGB): Who is allowed to declare/receive JA for others.? How is power of attorney given and recalled? Pertaining article in ECC are 2179 - 2198. For NECC these should be revised and moved as following upon III.

Art. 2199 – 2233 (Agency) if retained must be revised and be moved to Paragraph VI (Specific Contracts). ECC following the French Civil Code also adopts the misconception that a contract of mandate (to do something for another person) is identical with acting under his power of attorney. BGB makes clear distinction.

Author`s suggestion:

§ 1 General

- I. *A person (agent) may by law be authorized to declare JA in another person`s name (principal).*
- II. *A person (principal) may by JA to this end authorize another person (agent) to declare JA in his name (Power of attorney).*

§ 2 Effects

¹³ see: Lantera Nadew Mizan Law Review 2008, 91

I. A JA declared by an agent (§ 1) in the name of the principal will create R&O only for the latter, if the agent stayed within his authority given by law or power of attorney.

II. The agent will be bound himself by his JA, unless he has made clear that he acted in the name of the principal.

2. Book Obligations from Law and Contracts

Paragraphs I – III of NECC covered how subjects can dispose over objects by JA. Logical next step: What R & O can there be? How do they arise and terminate? Answer: By law or Contract.

There are General Rules which apply to all thinkable relationships between two and more identified persons, whether by law or contract. These should be spelled out.

V. Contracts in General

Art. 1675 – 2026 cover General Rules. To be retained, but only in principle; must be very thoroughly revised for NECC.

VI. Specific Contracts

The logical next step is: How do General Rules as outlined in par. V operate in real contracts, e.g. in a sales contract.

ECC does this more or less adequately. But many new types of contract have developed (banking, telephone, leasing, consumer protection etc) which should be integrated; other to be thrown out.

3. Book Non Contractual Relations

After having covered *contractual* relations NECC must now look at relationships in which R&O of a private nature arise by operation without a contract, out of law

VII. Unauthorized Agency (Geschäftsführung ohne Auftrag)

Art. 2257 – 2265 cover this; to be retained in principle

VIII. Unjust enrichment

Art. 2162 - 2178 cover this; to be retained in principle

IX. Damages/Torts

Art. 2028 - 2161 cover this; to be retained in principle, but need a very deep and thorough revision. Possible in line with BGB – concept, which avoid many shortcomings of this French inspired, but apparently already also “BGB-flavoured” law.

4. Book Law of Good – Sachenrecht

Obligations are between two or more identified or identifiable persons. The next logical step in NECC would be, to describe R&O *erga omnes*, against each and everybody. These are property rights. In BGB these rights are called “dinglich” (=factual or corporeal); Roman law: *rights in rem*. There are several forms of rights in rem. How are these acquired, lost, used, recovered etc. Here follow only some aspects.

X. Possession

Art. 1140 – 1150 to be retained, but moved to this para X.

XI. Sole & Joint Ownership

Art. 1151 – 1425 in principle to be retained, but need a very deep and thorough revision.

XII. Others, e.g. Common ownership, pawn, mortgage, usufruct etc.

Some of these are not or not adequately covered in ECC.

Part III Chart

The following chart tries to show, of which articles ECC should be cleared and which should be retained and considered NECC. It is emphasized, that also all articles marked as “to be retained” invariably must thoroughly be scrutinized., individually and in their systematic context.

Article to be retained from existing ECC for use in NECC	Delete or Move to other Code	Remarks
1, 2		Physical Person: capacity to hold rights and obligations (R&O)
	4 - 191 Move to Family Code or special code	
	201 – 340 dito	
192 -197		Principles of capacity to exercise R&O
198, 199		Minor:Capacity to exercise rights
341		Insane, not able to exercise R& O
	342 - 393 Move to Family Code or special code	
394 – 414		Legal Persons
	415 - 544 to Commercial code	
	545 - 549 to Code on Int. Private	

	Law	
	550 – 1125 to family or other code	
1126 – 1139		= 90 BGB
1140 – 1150		= 857 BGB
	1151 – 1325 move to new book IV	
	1426 – 1443 delete or move to civil procedure	
	1444 – 1552 delete; outdated or not belonging in ECC Parts to new specific code	
	1553 -1646. to new specific code	
	1647 – 1674: delete; covered under copyright law (?)	
1675 - 2019		General Rules to Obligations, = 241 BGB
	2020 – 2026. Move civil procedure	
2027 – 2178		Quasi contract or extracontractual relationship. Better to move as following upon Specific Contracts as in BGB
2179 – 2198		For systematic reasons to be moved as following upon 1150: Juridical acts through others
2199 - 2233		For systematical reasons to be moved to Specific contracts
	2234 – 2256 to commercial code	
2257 - 2265		This is a quasi contract, uncontractual obligation,; for systematic reasons to be moved as following: to be moved as following upon 2178
2266 - 2874		Specific Contracts
	2875 -3130: delete as largely obsolete as no private land ownership	
	3131 – 3306: delete as largely obsolete, evtl. move to other code as not belonging to civil law	
	3307 - 3346: delete or move to civ. procedure	
	3347 – 3367: delete as obsolete	
Sytematically after law of (non-) contractual obligations would follow: Law of goods.		

Summary

A new Civil Code for Ethiopia is a necessity. In preparing this, old mistakes should be avoided. NECC should follow a clear systematic line, but should be of Ethiopian making, while foreigners, e.g. specialist in BGB, may give their assistance.

NECC should be clear but not too detailed. A code should be open for new legal developments. This is why it is strongly suggested to create together with the NECC a commentary which will explain the articles and which will take up court judgements and academic articles by which the NECC will develop.

M. A.

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