

Courts and Traditional Financial Institutions in Ethiopia:

Selected Case-Studies on Legal Hybridity

Gebreyesus A. Yimer and Wim Decock¹

Abstract

ENG - Drawing on the analysis of court records in Addis Abeba and the Amhara, Oromia and Tigray Regional States, this paper offers case-studies on the conflicting encounter between the formal legal system and normative practices in the way judges deal with problems arising in traditional financial institutions known as “Eqqub” or “Iqub”. It is shown how, on a variety of topics – ranging from the legal capacity of Eqqub leaders to present members, through the legal validity of internal bylaws to the liability of guarantors – judges decide not only on the basis of the codified laws but also on the basis of traditional practices that are clearly at variance with the official norms. This leads to the hybrid co-existence of both official and unofficial norms that somehow works in practice but also leads to abuse and legal uncertainty for Eqqub members. Therefore, at the end of this paper the authors recommend the legislator to give both more recognition to the seminal role played by “Eqqubs” in the economic development of Ethiopia while offering a more predictable framework that judges can rely on when deciding Eqqub-cases.

NL - Op basis van de analyse van archieven van rechtbanken in Addis Abeba en de Amhara, Oromia en Tigray Regionale Staten in Ethiopië biedt deze bijdrage inzicht in de spanningsverhouding tussen het officiële rechtssysteem en de normatieve gebruiken inzake de regulering van een traditionele financiële instellingen die bekend staat als “eqqub”. De studie toont aan hoe rechters niet alleen beslissen op basis van formele, gecodificeerde rechtsnormen,

¹ Gebreyesus A. Yimer is Associate Professor of Law at Mekelle University, Ethiopia and a Global Minds PhD Candidate at the University of Leuven (KU Leuven). Wim Decock is Research Professor at the Faculty of Law of the University of Leuven and Chargé de cours at the Faculty of Law, Criminology and Political Science at the University of Liège. Funding for the research was generously provided within the framework of the Global Minds Scholarship program at KU Leuven.

maar ook op basis van traditionele praktijken die duidelijk niet overeenstemmen met het als officieel erkende recht. Dit conflict is zichtbaar in de manier waarop rechters in de praktijk omgaan met een heel aantal problemen, gaande van de vertegenwoordigingsbevoegdheid van de eqqub-leiders tot de aansprakelijkheid van borgstellers en juridische waarde van de informele statuten van de eqqubs. Dit leidt tot een soort hybride mengvorm van officiële en officieuze normen die tegelijkertijd worden toegepast door de rechters, zonder dat altijd duidelijk is welke richting een beslissing zal uitgaan. Om aan de die situatie van juridische onzekerheid tegemoet te komen, die bovendien misbruik in de hand werkt, pleiten de auteurs voor een genuanceerd wetgevend optreden. Enerzijds zou de wetgever het autonome functioneren van eqqubs, die een belangrijke rol spelen in de economie sterker kunnen erkennen, en anderzijds toch meer rechtszekerheid bieden.

1. Introduction

This paper presents the findings of small-scale research into how courts in Ethiopia deal with conflicts originating from traditional financial institutions known as “Eqqub”.² These institutions collect savings from their members on a regular basis while also providing mechanisms to attribute the collected money to one of the members at the moment of gathering as a kind of loan. For example, fifty employees of a hospital decide to meet every Sunday after mass for a period of fifty weeks, contributing 1000 birr each. Each Sunday, a lot will be drawn that assigns the total amount of 50 000 birr to one of the members as a kind of loan which has to be paid back. At the end of the cycle, each of the members will have drawn the lottery once.³ These traditional institutions are very common in Ethiopia, as Jacques Vanderlinden already observed in the 1970s.⁴ But they are

² It is based on the presentation held at the “Séance commune” of the Royal Academy of Overseas Sciences (KAOWARSOM) on Wednesday 22 January 2020 in the Palace of the Academies, Brussels. While it contains new case material, it also builds on previous research, viz. G. A. Yimer, W. Decock, G. Hadush Abera, M. Ghebremeskel Ghebregergs, G. Seyoum Halibo, “The Interplay Between Official and Unofficial Laws in ROSCAs (Eqqub) in Tigray, Ethiopia”, *Journal of Legal Pluralism and Unofficial Law* 50 (2018), 94-113, and G. A. Yimer, “Uncertainties in the Enforcement of Loan Agreements in the Informal Credit Markets in Ethiopia”, *Mizan Law Review* 13 (2019), 472-494.

³ For more background information on “eqqub”, see Yimer et al. “The Interplay Between Official and Unofficial Laws in ROSCAs (Eqqub)”, 94-99.

⁴ J. Vanderlinden, *L'Éthiopie et ses populations*, Brussels, Editions Complexe, 1977, 121-122, citing the work of Robert Pankhurst and Andreas Esheté. See also P. McCarthy “Defacto and customary partnerships in Ethiopia law”, *Journal of Ethiopian Law* 5 (1986), 105-122.

also known in other developing and developed countries under different names, for instance the “Stokvels” in local South-African communities.⁵

Following the seminal work of influential anthropologists such as Clifford Geertz in the 1960s,⁶ researchers use the generic name “rotating saving and credit associations” (ROSCA) to refer to institutions that collect savings from their members to provide credits to those members on a rotating basis. The operation of Eqqub heavily relies on traditional understandings of the customary norms of society, which are thought to be age-old. Many Eqqubs have internal dispute resolution mechanisms that favor mediation and conciliation. However, a significant number of disputes in relation to Eqqub end up being treated before the formal courts. Judges in those courts are supposed to base their decisions on the legal norms laid down in the codes or other formal regulations. According to codified laws, the traditional financial institutions must adapt their functioning to the formal normative structure. They do not provide specific laws and procedures that are consonant with the existing customs of these traditional institutions.

The lack of a clear legal framework designed to provide rational, predictable and equitable judicial remedies to disputes arising in traditional institutions confronts the judges in formal courts with great challenges. In decisions related to Eqqub, courts apply both the official laws, and notions of equity, usage, custom and fairness. In practice, one can notice a “hybrid” and “ad hoc” application of laws, resulting in a pragmatic mix of both informal and formal norms that defies notions of legal certainty and gives priority to “accommodating” different sense of justice.⁷ The most common legal issues that arise in relation to Eqqub are the following: Can Eqqubs bring a legal action in court of law as a legal person? Can Eqqub leaders represent Eqqub members bringing a legal action against defaulting members? Can a member sue the Eqqub leaders for any unpaid money? Do

⁵ A. Hutchison, “Uncovering Contracting Norms in Khayelitsha Stokvels”, *Journal of Legal Pluralism and Unofficial Laws* 52 (2020), 3-27. For further examples, we refer to S. Ardener, “The Comparative Study of Rotating Credit Associations”, *The Journal of the Royal Anthropological Institute of Great Britain and Ireland* 94 (1964), 201-229 and Abegaz Yimer et al., “The Interplay Between Official and Unofficial Laws in ROSCAs (eqqub) in Tigray”, 95-99.

⁶ C. Geertz, “The Rotating Credit Association: A Middle Rung in Development”, *Economic Development and Cultural Change* 10 (1962), 241-263.

⁷ From a Euro-centric legal perspective, deeply indebted as it is to Max Weber’s notion of legal modernity, this accommodating nature of Ethiopian law in practice could be considered the sign of a lack of quality of the legal system. However, comparative lawyers and legal historians are increasingly pleading for a more positive assessment of the capacity to deal with normative complexity; see S. Donlan, “To Hybridity and Beyond: Reflections on Legal and Normative Complexity”, in V.P. Palmer and M.Y. Mattar (eds.), *Mixed Legal Systems, East and West*, Farnham, Ashgate, 2015, 17-32, and T. Duve, “Legal Traditions: A Dialogue Between Comparative Law and Comparative Legal History”, *Comparative Legal History* 6 (2018), 15-33.

Eqqub leaders have solidarity of liability toward Eqqub members who are unpaid? Can courts rely on the internal agreements of the Eqqub and other records of the Eqqub to decide cases even when the documents do not meet the form requirements imposed by the formal laws? Can guarantors be held responsible when the principal debtor is solvent? Can Eqqubs claim set off against guarantors for the default of the principal debtor?

This article will illustrate how courts deal with these issues based on original research of court records. Geographically, the research covers Oromia Regional State (Adama), Amhara Regional State (Dessie), Tigray Regional State (Mekelle) and Addis Ababa (Lideta area court). The regions and the specific cities have been selected on practical grounds, especially considering the possibility of gaining access to the court records. Because of limitations of resources, the only region with a significant number of Eqqubs that could not be covered in this research is the Southern Nations and Nationalities Regional State. In terms of methodology, we used the case catalogues kept by the courts in the above-mentioned regions to identify Eqqub cases, finding a total of 197 cases over the period 2013-2017. Unfortunately, due to poor file management in the courts and the poor quality of their case record system it is not possible to exclude that there are even more cases that deal with Eqqubs. We used key terms like “loan agreements”, “usury”, “Eqqub” and “check” to identify cases that emanate from transactions in Eqqubs. We used those key words because courts commonly use them to record Eqqub cases. In addition to the catalogues we also used key informants like senior judges, prosecutors, attorneys and court registrars to help us to identify cases of interest for this research. In this manner, 56 cases were identified in Tigray First Instance and Higher Court, 20 cases in the Dessie First Instance and Higher Court, 49 cases in the Adama First Instance and Higher Court, and 72 cases in the Lideta First Instance Court and the Federal High Court.

We have applied the purposive sampling method to narrow down the total amount of cases to the twenty discussed here.⁸ The following criteria guided us in further selecting the cases: we retained cases with similar facts, cases with similar decisions, cases that have similar facts but different court decisions, cases with similar facts and similar court decisions, deviant cases, typical cases

⁸ J. Seawright and J. Gerring, “Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative options”, *Political Research Quarterly* 61 (2008), 297.

and extreme cases (based on the approach of the court to unofficial laws or other issues of interest for this research). All available and accessible cases that have been decided by the Cassation Bench of the Federal Supreme Court are included in this research.

2. The legal capacity of Eqqub leaders to bring action against defaulting members

Eqqubs are commonly organized by three Eqqub leaders, who are also called “judges”. The members of the Eqqub do not enter into a well-defined and specific contract with Eqqub leaders as borrowers or lenders. Members agree in general terms to contribute, on a weekly or daily basis, a certain amount of money and draw a lot, until everyone will have been paid back the total contribution he has made over the course of the cycle of duration of the Eqqub. Therefore, there is no one-to-one relation in the Eqqub. When someone defaults to make the contribution according to the customary practice, there is a legal question that arises as to who should bring a legal action against the defaulting member in court of law. The three possible scenarios are: the unpaid Eqqub member, and he alone, can bring a legal action for the unpaid money; all members of the Eqqub as joint creditors can sue the defaulting member for the unpaid money; or the Eqqub leaders representing the Eqqub members bring a legal action to request the court to order the defaulting member to pay the Eqqub money.

These questions are not commonly addressed in the internal rules of the Eqqubs and neither do the customs provide clear answers. Sometimes the internal rules provide that the leaders can take legal action against defaulting members, but it is not clear whether this kind of provision can be interpreted as a legitimate form of delegation according to the official laws. Official laws clearly prohibit any one from being delegated to take a legal action in somebody else’s name unless that person is a licensed attorney or stands in a first degree family relationship with the damaged party. Employees, too, can represent their organization in their capacity as employee and without a special license. But Eqqubs are not legally recognized legal persons, so it is difficult to justify the validity of internal rules granting their leaders the power to sue defaulting members.

When we consider court practice, we find out that in most cases Eqqub leaders file the cases in court of law and the defendants commonly do not object the case for lack of a locus standi (vested interest) on the part of the plaintiffs. However, in some cases defendants do argue that the Eqqub

leaders have no legal mandate to sue members in court of law for the unpaid money. Most frequently, judges decide that the leaders can bring a legal action representing all members, citing the internal Eqqub-rules granting such power to Eqqub leaders. Some selected cases are discussed hereunder to indicate how courts deal with this issue.

In *Abdule Yusuf Vs Shamsi Aliyi*⁹, an Eqqub leader, acting as a plaintiff, justifies his right to bring legal action in court of law against the defendant who is a member of the Eqqub. The plaintiff argues that the Eqqub internal rules give him the right to bring a legal action against defaulting members and an obligation to pay members the full payment that they deserve even though some members failed to contribute. The leader thereafter can sue the defaulting members because he has already paid the money to the members who are entitled to be paid the money by the internal rules and therefore he is subrogated by the law to their right to sue the defaulting member.¹⁰ The plaintiff further argued that he was also assigned by the internal rules to take a legal action against defaulting members after he had paid the money to the other Eqqub members according to the internal Eqqub-rules.¹¹ The implicit assumption of the Eqqub leader is that each Eqqub member has a right to bring a legal action against any defaulting Eqqub member because all Eqqub members have already assigned him to use their right to sue a defaulting member. The assumption is that once the leader has paid the member who won the lot, he is subrogated to the right of the creditor to claim the unpaid contribution from those who failed to make their obligatory contribution. The Court concurred with the reasoning of the plaintiff.

In *Frew Ashagre and Frew Ferede Vs Solomon Agenaw, Degu Zafu and Gedefaw Agenaw*¹², the Court comes with a different decision in its approach to Eqqub leaders' power to bring a legal action. The court rules that the Eqqub leaders lack a vested interest to sue defaulting members and that only members whose interest is directly affected by the non-performance by the specific member should sue him or her in court of law. In this case the plaintiffs, who were the chair and

⁹ Oromia Supreme Court- Eastern Bench, File number 264670, Date of decision: 19/03/2010. All the dates follow the Ethiopian Calendar (E.C.), which implies a seven to eight year difference with the Gregorian calendar used in Europe and the United States.

¹⁰ Article 1968 of the Ethiopian Civil Code provides that a creditor who is paid by a third party may subrogate him to his rights.

¹¹ Article 1962 of the Ethiopian Civil Code provides that a creditor may assign his rights to a third party without the consent of the debtor unless assignment is forbidden by law, contract or the very nature of the transaction.

¹² Dessie First Instance Court, File number 19433, Date of decision: 16/01/2010 (E.C.).

the secretary of the Eqqub, claim that they were running an Eqqub and that they were collecting the Eqqub money every week. They claim that the first defendant joined the Eqqub and was paid 262,000 birr from the Eqqub money. The first defendant defaulted and failed to pay his full Eqqub contribution, leaving him with an outstanding debt of 160,000 birr to the Eqqub. The second and third defendants joined as defendants in the case in their capacity as guarantors of the first defendant.

The defendants successfully filed a preliminary objection claiming that the plaintiffs did not have a vested interest to bring a legal action against them. The defendants argued that the plaintiffs could not bring a legal action against members, since the internal rules of the Eqqub give them only the responsibility and power to provide the required support to Eqqub members who want to sue each other in case one of them defaults. According to those internal rules, the leaders cannot sue defaulting members in their own name even though they paid the money to members from their own sources. The defendants argued that only a member whose interest is affected by the non-contribution of another member can bring a legal action and not the Eqqub leaders. The Dessie first instance court accepted the preliminary objection of the defendant and dismissed the case. The court ruled that the chair and the secretary lacks the required vested interest to bring a legal action in court of law and that they did not enjoy a legal mandate to bring a legal action representing the unpaid member since the internal rules did not grant this right to them expressly.

3. The liability of Eqqub leaders for defaulting members

A second group of important legal issues arising in relation to Eqqubs revolve around the issue of whether a member can sue the Eqqub leaders for unpaid money. Do Eqqub leaders have solidarity of liability toward Eqqub members who remain unpaid, or should all Eqqub-members be sued separately? Commonly, members of the traditional financial institutions apply to courts of law seeking a judgment that makes Eqqub leaders responsible for unpaid money. The members normally do not refer to specific provisions in the law codes to support their claim, and they are not expected to do so under article 222 of the Ethiopian Civil Procedure Code. They normally take it for granted that disputes about contributions to the traditional Eqqub-institution will be admitted

by formal courts and that those courts will deliver the decision required to support their claim.¹³ Hereunder we will discuss selected court cases that express how courts approach these issues.

In *Mulugetea Dame and Bashada Gemechu Vs Zeleke Shewazemed*¹⁴, the defendant admitted the fact that the plaintiffs had been members of the Eqqub that he had been serving as one of the leaders of the Eqqub. However, he argued in the court that he should not be held personally liable to pay the unpaid money for the following reasons: first, the money was not paid because some members of the Eqqub had defaulted to pay their contribution, therefore, he couldn't pay the plaintiffs as there was no money in the account of the Eqqub. Second, he has no personal liability for any member if other members default. He added that his responsibility under the internal rules of the Eqqub was limited to bringing a legal action against members who default to make contributions. Third, he argued that he was not the only leader in the Eqqub; another person named Gezhagn Arega was serving as a chairperson of the Eqqub and he should join him as a defendant.

The Arsi Zonal Higher Court decided that the defendant could not be sued as he had no personal liability and dismissed the case for lack of vested interest to be sued as per article 33(2) of the Civil Procedure Code of Ethiopia. The plaintiffs, however, appealed to the Supreme Court of Oromia, arguing that the defendant should be held responsible in person as he was the Eqqub-leader and should be held responsible for collecting the unpaid money from defaulting members. The Supreme Court ruled that the Arsi Higher Court erred in dismissing the case for lack of locus standi. It referred the case back to the Arsi Zonal Higher Court ordering the court to include the defaulting Eqqub members and the other Eqqub-leaders as defenders in the case.

This court case clearly shows the transformation of Eqqub from an institution that functions based on trust and confidence between members to an institution in which members' confidence relies on the trust they have in the Eqqub leaders and not necessarily in each other. The decision of the Arsi Zonal Higher Court is acceptable if we consider the formal laws and the traditional Eqqub system. Yet, Arsi Zonal Higher Court ignored the fact that nowadays members join Eqqub

¹³ In an empirical research that was conducted in Tigray to assess the sources of confidence among Eqqub members a significant majority of respondents indicated that they were confident that the formal courts would provide a hand to enforce the relations in Eqqub if required; see Yimer et al., "The Interplay Between Official and Unofficial Laws in ROSCAs (Eqqub) in Tigray, Ethiopia", 107.

¹⁴ Oromia Supreme Court-Eastern Bench, File number 276783, Date of decision: 04/08/10 (E.C.).

believing that the leaders will pay them if other members default. In most commercially oriented Eqqubs, the risk of nonpayment by members is commonly taken by leaders of the Eqqub. As a result, Eqqub-members are barely concerned about the trustworthiness and solvency of the other members in the Eqqub. The Supreme Court seems to be more progressive in its approach in this particular case since it preferred to acknowledge the more recent developments in the expectations of members towards Eqqub as safe traditional credit institutions and offered protection to the plaintiffs. It also tried to apply the formal laws by ordering the Higher Court to include the defaulting members and the other Eqqub-leaders as joint defenders.

In *Dajane Kebede Vs Abera Zawude Grocery (Genet Sambee: guardian of heirs of Abera Zawude), Wasane Lema and Getinet Tashome*¹⁵, the court held liable the heirs of a deceased Eqqub leader for unpaid money to Eqqub members. We may learn two important points from this decision. One of the points is that the court held not only the Eqqub leader himself but also his heirs were held responsible for unpaid money. The second important point is the fact that the plaintiff admitted in the out of court conciliation process that the actual unpaid money was less than what he claimed in his formal court claim. In formal court litigation parties consider not only the existence of evidence to prove their own claim but also the lack of proof that the defendant can cite, and wittingly exploit formal requirements for evidence. In the out of court reconciliation, however, they avoid the formalities and they focus on what they think they really deserve, taking into account social values and norms in defining their negotiation ground. In this case, the plaintiff intentionally exaggerated the amount when suing the defendants before the formal court, but in the out of court reconciliation he admitted he had already been paid partly, even if the defendant could not prove that, and agreed to be paid the actual unpaid debt.

In *Tadu Eshetu Vs Amare Zennebe and Fikadu Abebe*¹⁶, the court ruled that Eqqub founders and leaders remain liable even if they resign from the leadership . The first defendant claimed that he had stopped working as one of the leaders in the Eqqub in the thirteenth week of the Eqqub for lack of confidence in the chairperson and the secretary of the Eqqub. He argued in court that he should not be sued as he had terminated to be a leader of the Eqqub before the plaintiff acquired a right to be paid by the Eqqub. His point of argument is that he was not in the leadership of the

¹⁵ Adama Special Higher Court, File number 24570, Date of decision: 30/03/2009 (E.C).

¹⁶ East Shewa Zone High Court, File number 53816, Date of decision: 01-05-2011 (E.C).

Eqqub when the plaintiff acquired the right to be paid by the Eqqub. A witness testified to support his claim that he resigned from the leadership in the Eqqub in the thirteenth week.

The second defendant also argued that, according to the internal rules of the Eqqub, the responsibility to pay members when they win the lot is the duty of the chairperson and the 2nd leader who acts as advocator of the Eqqub. Therefore, he should not be sued for nonpayment to members, since he had no mandate to pay money in the Eqqub to members. However, the court did not accept these arguments. The decision in this case reaffirms that courts acknowledge the evolution in modern Eqqub practice, considering that members join a particular Eqqub because they trust the leadership rather than the members of the Eqqub. Therefore, the decision of the court to hold the founders of Eqqub responsible even after resigning from the leadership of the Eqqub makes sense. It corresponds to the evolving nature of the customs in the administration of Eqqubs. However, in *Shamsu Sabir, Nejjib Bilal and Seid Temam Vs Sadik Kedir*¹⁷, the Oromia Supreme Court reaches a different conclusion, deciding that leaders are liable only for money they collected in person, not for Eqqub money paid to other Eqqub leaders. The court in this case decided that there is no solidarity of liability and Eqqub leaders are responsible only for what they take directly and in person from members.

In *Abera Tesfaye Vs Tseyiba Wbla*¹⁸, the Federal Higher Court decided that a founding leader of an Eqqub whose name is mentioned in the Eqqub documents as one of the leaders shall not be held responsible for the unpaid money if he is not actually involved in the management of the Eqqub. In this case, the Higher Court examined whether the appellant had an active administrative role in the Eqqub in general and in the collection of money in particular. The court then freed the appellant from the case ruling that the appellant was not participating in the effective management of the Eqqub. In this decision the court overlooked the fact that the name of the appellant was used to lure members to join the Eqqub. Eqqub members consider the goodwill and the economic condition of leaders in making the decision to join a particular Eqqub. Members consider the leaders as their last resort to get back their money if the eqqub administration failed to pay them according to the internal rules and the customs in the society. The court in this case tacitly suggested that members cannot rely on the list of names mentioned by the Eqqub as founders or

¹⁷ Oromia Supreme Court, East Bench, File number 276741, Date of decision: 11/08/2010 (E.C.).

¹⁸ Federal Higher Court, File number 162989, Date of decision: 28/03/2008 (E.C.).

leaders of the Eqqub and they should go further and investigate who are the actual leaders of the Eqqub. This is a much more difficult job to do, especially in larger Eqqubs where members have limited knowledge about other members in the Eqqub.

In an earlier case, *Brhanu Teklu Vs Tadesse Tekle and Demis Werku*¹⁹, the Federal Higher Court seemed not to have followed the same reasoning. In this case the Higher Court decided that founders whose names are mentioned in the establishment documents are jointly and severally liable even though they do not have an active participation in the administration of the Eqqub any longer. In this case the court also decided that it is possible to use an artificial name in Eqqub and still it is possible to bring a legal action for any unpaid money using one's real name. The court concurred with the appellant that only the amount that was actually paid by the member could be reclaimed from the Eqqub. The Higher Court rejected the plaintiff's plea that he should be paid 17,850 birr, that is the amount he originally subscribed to in the Eqqub, but actually did not pay.

In *Grmay Reda Vs Kidus Mikeal Eqqub (Kiros Zegeye)*²⁰, the Tigray Regional State First Instance Court decided that only the chair of the Eqqub is responsible for claims for unpaid money by members, excluding liability on the part of other leaders. The court also decided that the chair who resigned from his position will be responsible for the period he served and for the amount of money he collected as a chair. The new chair that substituted him will be responsible for payments made afterwards. Yet, in *Letabrhan Tirfu Vs Teklay Hadush, Sbhatu Gebremeskel and Gebretenseay Fisha*²¹, the Court held that all Eqqub leaders are jointly and severally liable and added that not getting a benefit from the Eqqub as a leader is not an acceptable ground to be exempted from liability.

The court released the second defendant accepting the defense by him that he had already given his house to the Eqqub to compensate for the damage he had caused on members by his own consent. Guided by considerations of equity, the court therefore releases the second defendant

¹⁹ Federal Higher Court, File number 142122, Date of decision: 24/03/2007 (E.C.).

²⁰ Kedamay Weyane First Instance Court, File number 11405, Date of decision: 09.06.2008 (E.C.).

²¹ Kedamay Weyane First Instance Court, File number 9338, Date of decision: 09.11.2007 (E.C.).

from liability. In this case the court applied customs, Eqqub internal rules and equity to adjudicate the case rather than formal laws.

4. Evidence requirements and internal rules of the association

The third group of legal issues that courts are frequently confronted with concerns the different types of evidence that courts can accept to adjudicate Eqqub cases. Eqqubs operate mainly based on the culture, usage and norms that are accepted by the society and they do not always give proper attention to the formality requirements that are imposed by the codified laws. Most Eqqubs have written internal bylaws, but the legal status of the internal rules is not clear in the eye of the law codes. It is difficult to consider those internal rules as bylaws of an “association” in the technical sense of articles 404-405 of the Civil Code. Under these provisions, groups and associations that intend to satisfy financial interests of their members are excluded from the definition of “association” in the strict legal sense of the word and are deemed to be regulated rather by the Commercial Code. The Commercial Code, in its turn, regulates three different kinds of partnerships. Among these, “ordinary partnerships” come closest to Eqqubs.²² However, it remains difficult for judges to consider Eqqubs from the perspective of ordinary partnerships, since they do not fulfill the formality requirements. For example, an ordinary partnership in the sense of the Commercial Code must be registered by the appropriate government office.

Since the internal Eqqub-rules cannot be considered as the juridical equivalent of the bylaws of associations or ordinary partnerships, the remaining option is to consider the internal rules as simple contracts that are made among members. To consider the internal rules as a contractual agreement is, however, not free from doubts either. First of all, in most cases Eqqub internal rules are not signed by all members and it is difficult to consider that all members have the required knowledge and understanding to assent freely and properly to the terms of the internal rules. But regardless of these problems, judges nevertheless consider internal Eqqub-rules to be binding in formal courts. For example, in *Takir Baede Vs Sabsibe Tadgu*²³, the High Court decided that internal rules of Eqqub are binding in court of law as a matter of principle, while nullifying certain internal rules that laid down a penalty for delay in paying contributions. In this decision the court

²² P. McCarthy “Defacto and customary partnerships in Ethiopia law”, *Journal of Ethiopian Law*5 (1986), 105-122.

²³ East Shewa High Court, Adama, File number 52987, Date of decision: 03/11/2010 (E.C.).

considered the internal rules of the Eqqub as binding in court of law but it declined to give reasons for its decision.

Furthermore, even if Eqqubs are to be considered from the point of view of contract law, and not the law of associations or commercial partnerships, it is not yet settled whether credits provided in Eqqubs are to be considered as loans under the Civil Code. If they are, all payments to members exceeding 500 Birr should in principle be proved following the rules laid down in article 2472 of the Civil Code.²⁴ According to this article, contracts exceeding a value of 500 Birr shall be proved by written evidence or by a confession or oath taken in court of law. In many Eqqub-related cases, though, the courts do not always apply those general evidence rules. For example, in *Abdule Yusuf Vs Shamsi Aliyi*²⁵, the first instance court decided that a payment to Eqqub could only be proved by written evidence as per article 2472 of the Civil Code. The Higher Court, however, reversed the decision of the first instance court and decided that oral testimonies can be used to prove transactions in Eqqub even when the amount exceeds 500 birr. The Oromia Supreme Court, in turn, disagreed with the Higher Court. Following the codified rules on evidence, it confirmed the decision of the first instance court arguing that oral evidence is not accepted to prove payments above 500 birr.

The Dessie First Instance Court decided in *Hiwot Shiferaw and two others (two guarantors) Vs Frew Ayalew*²⁶, that oral evidence can be used by Eqqub leaders to prove nonpayment even when the amount due exceeded 500 birr. In this case the court considered all evidence without being restrained by article 2472 of the Civil Code. By allowing the Eqqub leaders to prove their claim using evidence that does not meet the requirements of the positive law, the court seems to accept the autonomous normative power of traditional financial institutions. Along the same lines, the Dessie First Instance Court decided in *Tewodrs Afework v Sememonalu and 4 others (guarantors)*²⁷ that Eqqub leaders' decisions are binding and enforceable in court of law when they are based on internal rules of the Eqqub. The court reasoned that Eqqubs enjoy the status of traditional institutions, which exempts them from provisions in the Civil Code that require written evidence.

²⁴ Yimer, "Uncertainties in the Enforcement of Loan Agreements in the Informal Credit Markets in Ethiopia", 480-482.

²⁵ Oromia Supreme Court-Eastern Bench, File number 264670, Date of decision: 19/03/2010 (E.C.)

²⁶ Amhara Regional Supreme Court, File number 03/20420, Date of decision: 10/04/2010 (E.C.).

²⁷ Dessie First Instance Court, File number 22624, Date of decision: 17/03/2011 (E.C.).

In both cases the Dessie First Instance Court's main objective seems to have been to encourage Eqqubs and to protect its internal regulatory mechanisms, even if those internal rules turned out to be at variance with codified norms. The court seems to have considered the decision by the Eqqub-leaders as final, simply giving official endorsement to the execution of that decision and leaving factual investigation of the case aside.

Similarly, in *Hailay Gebremedhin and Dinku Ashebir v Mulugeta Araya*²⁸, a First Instance Court in Mekelle decided that Eqqubs are traditional institutions, requiring special treatment. The evidence rules of the Civil Code were deemed irrelevant, so that oral evidence could be admitted to prove claims related to Eqqub. The court also decided that penalties for delay in making contributions which are laid down in the internal Eqqub-regulations are valid and enforceable in court of law. It refused to apply article 2489 of the Civil Code that provides that only a legal interest at the rate of 9% shall be paid to delay in repayment of loans. The same provision provides that any agreement among the parties that increases the liability of the debtor is invalid under the law. The decision of the court, then, clearly did not observe the provisions of the civil code, giving precedence to internal Eqqub-rules and customary practices instead.

In *Tsegay Alamrew v Getahun Asmamaw*²⁹, however, the Amhara Regional Supreme Court decided that the return of a pledged cheque to a member by the Eqqub-leader is prima facie evidence for payment of the contribution by that member. Presumably, this case shows that, when the traditional institutions develop into bigger associations with members who do not necessarily know each other personally, courts take that evolution into account by giving more credit to formal written records than to oral testimony. In this particular case the lower court had decided the case on the basis of oral testimony, but the supreme court ordered that the lower court should examine the book of record of transactions of the Eqqub. The decision mirrors the hypothesis that when organizations become more complex the rules also become less flexible and complex requiring an advanced form of rulemaking, interoperation and execution. Under such circumstances, observation of the rules of the Code becomes easier.

²⁸ Mekelle Kedamay Weyane First Instance Court, File number 9603, Date of decision: 22/12/2007 (E.C.)

²⁹ Amhara Regional State Supreme Court, File number 09-19967, Date of decision 28/05/2010 (E.C.).

In *Dawit Brihanu vs Zelalem Asirat*³⁰ the court decided that the face value of the cheque can be challenged by oral testimony if it is given for security purposes in Eqqub. The plaintiff stated that he was a member of an Eqqub and had sold one of his lots in the Eqqub to the defendant.³¹ As a result, the defendant received 515,000 birr in cash and gave the plaintiff a cheque of 515,000 birr numbered QA1440725 that would be funded in Business and Construction Bank six months from the date of issue. He pleaded that the bank informed him that there was no cover available in respect of the cheque, reclaiming the reimbursement of 515,000 birr. The defendant argued that he had given the cheque to the plaintiff for the sole purpose of guaranteeing the repayment of the weekly payment made to the Eqqub (5000 birr) and pursuant to their agreement, he claimed that he had already discharged his obligation to the Eqqub thereby performing his obligation to the plaintiff via the payments to the Eqqub.

To prove the disputable issue, the court ordered the parties to adduce evidence, but the defendant failed to do so. The court based its verdict merely on testimonial witness produced by the plaintiff. The witnesses testified that they had seen that the defendant borrowed 515,000 birr from the plaintiff, adding that the defendant had paid back only a partial amount. The court called the Eqqub leaders to give their testimony on the case and how they actually ran the Eqqub. The Eqqub leaders testified that the defendant had paid 280,000 birr to the Eqqub in the name of the plaintiff and terminated making contributions before paying the full amount, that is 500,000 birr as per his subscription in the Eqqub. In light of that oral evidence, the court ruled that the defendant had not entered into an agreement of a loan, and that the cheque had only been given as a guarantee. The Court decided that the defendant was responsible to pay the plaintiff the amount of money he had failed to discharge to the Eqqub or the plaintiff (235,000 birr). Relying on oral testimony, the court rejected the request by the plaintiff for payment of the full amount as had been written in the cheque. In other words, the Court decided the case following normative practices in Eqqub rather than the formal laws. The Court considered the cheque as a security for continuation of contribution in Eqqub rather than as a payment. On the basis of the evidence, the court decided

³⁰ Oromia Supreme Court (East Bench), File number 225082, Date of decision: 30/5/2009 (E.C).

³¹ It is common nowadays to assign your right to be paid in priority to another member by taking 10% of the total amount as a payment for exchanging the right to be paid now to a right to be paid later when the assignee acquires the right to be paid by the lot system of the Eqqub. Here the Eqqub leaders commonly act as facilitators and they charge 1% for their service and for giving recognition to the agreement.

that there were loan agreements between the parties within the Eqqub framework and that the cheque was used as a guarantee to make sure the defendant paid back 500 birr every week until the end of the Eqqub-cycle. The court therefore showed no interest in applying the law in a way that would contradict the practice in Eqqub.

Other instances of flexibility in the treatment of Eqqub-cases concern the use of summary procedures. In the afore-mentioned *Hiwot Shiferaw and two others (two guarantors) Vs Frew Ayalew*³², the case was filed in the first instance court as per article 284/1/a/ of the Civil Procedure Code of Ethiopia. A civil case can be submitted in accordance with article 284 of the Civil Procedure Code when the plaintiff demands to recover a debt that emanates from a simple and clear contract of loan or a claim that is connected to a bill of exchange, promissory note or cheque. In the case at hand, the plaintiffs applied to the court requiring a summary procedure supported by *affidavit* claiming that the first defendant defaulted to pay the Eqqub money after he had been paid by the Eqqub. The plaintiffs requested the court to declare the defendants jointly and severally liable to pay the unpaid Eqqub money. The court accepted the request to claim payment in summary procedure. It is worth noting here that the deputy registrar of the Federal First Instance court confirmed during an informal interview with researchers that, originally, the Federal First Instance Court was allowing plaintiffs to use summary procedures to deal with Eqqub cases. However, later the Federal First Instance Court revised its policy, since requests for a full, ordinary trial becomes common and courts commonly grant defendants a right to a full trial.

5. Suretyship and liability of guarantors

A last type of cases concerning Eqqub that are frequently dealt with by the courts relate to the liability of guarantors. Articles 1725 and 1922 of the Civil Code provide that suretyship contracts must be the product of explicit consent and cannot be presumed to have been concluded tacitly. Moreover, a valid suretyship requires a written contract in which the maximum amount of the guarantee is specified. However, in practice, most suretyship contracts used in Eqqubs do not meet these requirements. On the other hand, guarantors sued by Eqqub leaders do not refer to those formal requirements to defend their case in court.

³² Amhara Regional Supreme Court, File number 03/20420, Date of decision: 10/04/2010 (E.C.).

Guarantors were deemed to be jointly and severally liable in *Debesa Sirreessaa House Vs Aregay Gebre, Yidnkachew Asrat, Eyob Tsegaye and Ashebo Chemso*.³³ However, in *Aschalew Vs Ayimir Ajemu, Mehamad Bushe and Kedir Gemechu*³⁴, an Eqqub leader sued a member who defaulted to pay contributions and the two guarantors for payment of 2500 birr. The guarantors argued that they should not be held responsible, since the principal debtor was not insolvent and the plaintiff should first sue the principal debtor. The court accepted the argument of the guarantors, releasing the second and third defendant and ordering the first defendant who is the principal debtor to pay the plaintiff 2500 birr. The Court, in this case, considered the guarantors as simple guarantors and accepted their claim according to article 1935 of the Civil Code.

In *Getiye Tenni, Shimelis Shewa and Abraham Gezahegn Vs Fikadu Shewadeg and Geremew Moshe*³⁵, the Eqqub leaders sued both defaulting members and their guarantors by virtue of a summary procedure. In this case the court considered the principal debtor and the guarantors as co-debtors and ordered that they should be jointly and severally liable to pay 24,400 birr to the plaintiffs. The Court decided the case using a summary procedure without requiring the litigants to follow a full trial. In this particular case the court seems to have endorsed the norms and usages of Eqqub, showing little interest in applying the official laws.

In *Kidane Gebregzeabher v Tsegay Hagos, Abrhet Teklu and Hialay Teklu*³⁶, the court decided that guarantors in Eqqub are jointly and severally liable to make payments to the Eqqub when a member fails to pay contributions as per the internal rules. In this case the plaintiff argued that he provided 171,000 Birr to the defendant to be returned when the defendant wins a lot in the *Rahwa*-Eqqub. In other words, the loan had to be repaid as soon as the debtor won the Eqqub-money. Of course, winning the Eqqub-money presupposes that a member continues to pay his weekly contribution, as per the bylaws of the Eqqub. Therefore, the debtor's obligation was, first, to pay the weekly contributions to the Eqqub, and, secondly, paying back the lender upon winning the Eqqub-money. However, according to the claim of the plaintiff, the defendant stopped paying his weekly contribution after having paid the Eqqub only 96,000 Birr, while he was supposed to pay

³³ Adama Special Zone High Court, File number 21437, Date of decision 21/04/2008 (E.C).

³⁴ Adami Tulu District Court (East Shewa Zone), File number 27687, Date of Decision: 09/06/2009 (E.C).

³⁵ East Shewa Zone High Court, Date of Decision: 27/03/2011 (E.C.).

³⁶ Kedamay Weyane First Instance Court, File number 11291, Date of decision: 08/06/09 (E.C.).

171,000 Birr. The plaintiff therefore requested the court to order the debtor to pay the remaining 75,000 Birr that was not paid to the Eqqub and to make interest payments for the delay. The principal debtor, the first defendant in the case, did not show up in court of law and the court ordered the trial to be conducted in his absence. The guarantors, the second and the third defendants in the case, argued that they should not be held responsible for paying the sum, since their obligation was only subsidiary in nature. They argued that the plaintiff should first sue the principal debtor and that they could not be held liable unless the principal debtor was insolvent. The Court however rejected the argument of the guarantors and decided that they should be held responsible along the principal debtor.

In *Belay Amare Vs Hailemariam Gebrehiwot*³⁷, the Court was called upon to decide on the power of Eqqub leaders to claim set off against guarantors for none payment by defaulters. In most Eqqubs only members of the same Eqqub and who are not yet paid can be accepted as guarantors to make payments to members who won the lot. Therefore, when the member defaults Eqqub leaders automatically seize the payments that are due to the guarantor as composition for the nonpayment by the other member for whom the guarantor agreed to be a personal guarantor. The court decided that Eqqubs can seize and use the money to satisfy the obligation of the defaulting debtor. The Court also decided that the guarantor can claim the money that was seized by the Eqqub from the member who defaulted as he is the principal debtor.

In *Kidane Gebreezgeaber Vs Dr. Theodros Hailesslassie and Mr. Mulugeta Hailekiros*³⁸, a court decided that a member of an Eqqub who provided a loan to another member of the Eqqub taking as a pledge the right the debtor has in the Eqqub has a right to sue the debtor if he terminates to pay the Eqqub thereby affecting his right to be paid by the Eqqub. The point here is that the member reneges on his promise. He takes in advance, from another Eqqub-member, an amount that is equal with what he would be paid by the Eqqub when his turn comes, promising that he will continue to make the weekly or the daily contributions. The practice is *mutatis mutandis* similar with a loan that is agreed to be paid in installments. The court decided that if the debtor failed to discharge his obligation towards the Eqqub thereby rendering the pledge of the creditor unenforceable, then the creditor can require a court order to force the debtor to discharge his obligation toward the Eqqub.

³⁷ Kedamay Weyane First Instance Court, File number 11725, Date of decision: 30/10/09 (E.C.).

³⁸ Kedamay Weyane First Instance Court, File number 09140, Date of decision 24/11/2007 (E.C.).

The most important part of this decision is that the court endorsed the practice of using a right in Eqqub as a pledge to access loans from other loan providers in the informal credit market. Commonly, the loan is provided by a member of the same Eqqub or by the leader of the same Eqqub. In this case we can see that loan contracts are somehow blended with Eqqub administration and the modalities that are used for providing advance payment in Eqqub.

In *Mr. Mulugeta Hailekiros Vs Kidane Gebreezgeaber*³⁹ a legal action was brought against the *Rahwa* Eqqub. The plaintiff complained that the Eqqub association refused to pay the Eqqub money that should be paid to him according to the internal rules. The Eqqub leaders argued that the money was used to set off the unpaid money by Dr. Theodros for whom the plaintiff stood as a guarantor. The court rejected the application by Mr Mulugeta reasoning that the Eqqub has a right to use the Eqqub money of the guarantor to set off for the unpaid money by the principal debtor who defaulted in the same Eqqub. Here it is clear that the court applied the prevailing custom and practice in the administration of Eqqub, since there is no formal law that allows the creditor to claim for set off against the rights of the guarantors.

In another related case *Mr. Muez Vs Kiros*⁴⁰ the court decided that a guarantor whose money was used to set off the debt of another Eqqub member for whom he stands as a guarantor can be legally claimed back from the principal debtor who failed to pay the Eqqub money. The court in this case decided that the principal debtor who failed to pay the Eqqub money and caused the guarantor to sustain damage is responsible to pay the guarantor the money that was taken by the Eqqub.

6. Conclusions

From the findings in this article we can infer, first of all, that there is a vivid encounter between the formal legal system and the normative practices developed around traditional financial institutions known as Eqqubs. This is not self-evident. As the South African example reveals, traditional institutions often operate alongside the formal legal system, with members of Stokvels showing strong aversion to litigation before the courts.⁴¹ In other contexts, too, traditional institutions have been seen to fall “beyond the reach of the usual instruments of coercion, both

³⁹ Kedamay Weyana first Instance Court, File number 10614.

⁴⁰ Kedamay Weyane First Instance Court, File number 09573.

⁴¹ Hutchison, “Uncovering Contracting Norms in Khayelitsha Stokvels”, 18.

political and legal”.⁴² But this is clearly not the case for ROSCA’s in Ethiopia, which are the subject of many cases brought before the official courts. Both Eqqub leaders and members seem to realize that they need the formal courts to enforce the internal rules and to minimize default. Especially considering the growth of Eqqub as a device for financing bigger projects and its capacity to bring together more and more people who do not know each other personally, reputation mechanisms alone do no longer suffice to obtain obedience from all members of the Eqqub. Interestingly, litigation about Eqqub is often introduced before the courts by lawyers who received their training at the university as experts in codified norms, but then they defend normative practices that are going against the letter of the official law. Moreover, against the expectations of the researchers, this research does not show any visible differences between lower courts and higher courts in their flexible approach to the legal codes. Both first instance and high courts are willing to discard the formal legal rules in favor of the customary norms regulating Eqqub.

The second conclusion, then, which we can draw from this article is that, in the courts, the tension between the normative practices by which Eqqubs abide and legal provisions in the official codes is very real. Moreover, we have found that, in most cases, the courts prefer to give legal protection, through the official justice system, to practices in Eqqubs that are at variance with official norms. From a broader perspective, the judges seem to reason that Eqqubs are important institutions for society and that, as a result, their functioning on the basis of customary rules should be promoted and maintained. In principle, that is not problematic from the formal legal system’s point of view, since art. 3347 of the Ethiopian Civil Code is considered to accept the validity of customary norms as subsidiary laws as long as they are not at variance with the formal laws. However, that is exactly what is happening on the ground: in most cases, judges accept customary practices and internal rules of Eqqubs, even if that leads to violations of codified, official legal provisions. More than half a century after the introduction of European-style codifications in Ethiopia, then, we can still repeat the conclusion reached by Jacques Vanderlinden in 1966,⁴³ namely that Ethiopian court judges appeal to the notion of equity to give precedence to the sense of fairness that lives in the local community instead of following official norms, even if that leads to contradictory outcomes.

⁴² S. Anderson, J. Baland, K. Moene, “Enforcement in Informal Saving Groups”, *Journal of Development Economics* 90 (2009), 14-23.

⁴³ J. Vanderlinden, “Civil Law and Common Law Influences on the Developing Law of Ethiopia”, *Buffalo Law Review* 16 (1966), 250-266.

A third and final conclusion concerns the lack of predictability in the way that courts deal with Eqqubs. One of the negative results of this situation is that Eqqubs often turn to legal fictions to make sure that their transactions receive legal protection by the formal courts. We propose two ways for policy-makers to try to solve this problem. A first option is to reject any deviation from the official laws in a rigorous way and require Eqqubs to comply with official norms in the strictest of ways. Such a modernist policy might encourage Eqqubs to adapt their dealings to the official laws by changing their internal rules. It could also be helpful to prevent criminal behavior in those rare instances where the traditional institutions are led by leaders with malicious intent. But it also runs the risk of pushing them to the underground and weaken their strength as an important traditional financial institution. Moreover, requiring the traditional institutions to entirely adapt to the formal system can only work if the environment is ready for such a large scale modernization process, notably when it comes to the functioning of courts and the juridical culture as a whole – but after six decades of failed attempts to impose this modernist agenda, this seems to be wishful thinking.

Another and perhaps better option, therefore, would be to give Eqqubs the autonomy to regulate their own internal affairs while providing legal protection when it comes to the enforcement of decisions. Decisions taken by Eqqub-leaders could be considered, technically speaking, as tantamount to decisions by arbitrators, which are subject to real but limited scrutiny by the official courts. Eventually, intervention by the legislator would be appropriate, since achieving legal certainty and judicial predictability will remain hard if courts continue to be allowed to decide on a case-by-case basis. But, as a principle, we recommend the legislator to take the customary practices as a starting point, since they emanate from society and are therefore more likely to receive approbation by its members in practice.