Competing Water Resource Demands in Ethiopia's Federal System:
Infancy of the Law toward Integrated Management

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Abstract

The Federal Democratic Republic of Ethiopia Constitution confines the power of regional states over water to administration of watercourse that flows within their respective territories. Various proclamations introduce an integrated approach to water resources management through the application of proper and integrated master planning. To this end, a new institutional framework is established through the creation of Basins' Development Authority at national level. The previously established Basin High Councils and Authorities were implementing integrated water management within their respective basins and the powers and obligations of the basin based high councils and authorities are transferred to the newly established National Basin High Council and Basins Development Authority. Some adjustments are necessary due to federalism and issues related to the constitutional framework of water resources that have been overlooked. When the Water Resources Management Proclamation and other water laws are read together with the various provisions of the FRDE Constitution, they lack clarity save the power of the federal government to enact framework legislation over water resources within states' territories. Works undertaken by the federal profit-oriented public enterprises transforming water into an economic good on the lands that are administered by the regional states is an area of on-going controversy. I argue that regional states should claim their constitutional right to levy and collect land use fee from profit making federal public enterprises that are engaged in transforming water into economic good within the framework of integrated water resources management system.

Key terms

Water · Water resources · Federalism · Water law · Integrated water resources management · Ethiopia

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Introduction

Water is a natural resource with multiple uses. Furthermore, water is essential to human life and ecosystems. These aspects, associated with the 'economic dimension related to some of these uses' (e.g. hydroelectricity, irrigation, navigation, tourism and recreation) and with possible conflicts among users under scarcity, require a very special treatment with regard to water management.[1] Water is constantly in motion, passing from one state to another, and from one location to another, which makes its rational planning and management complex.[2] Water is a resource that is of 'direct interest to the entire population, as well as to most ministries of development at federal and state levels, municipalities, private sector, and non-governmental organizations (NGOs)'.[3]

Ethiopia is often described as the 'water tower of East Africa'[4] and is home to a large reserve of surface and underground water resource containing significant amount of the continent's existing freshwater. Its territory encompasses several trans-boundary watercourses and basins, including the Nile River basin. The entire country possesses abundant water, for it has 'an annual surface runoff of close to 122 billion cubic meters of water excluding ground water'.[5] Close to 80-90 % of the country's water resource is found in the four river basins which are Abbay (Blue Nile), Tekeze, Baro Akobo, and Omo-Gibe.[6] The aforementioned four major basins have a population density of 30 to 40 percent of Ethiopia's population in the west and the south-west parts of the country.[7] On the other hand, the water resources available in the east and central river basins (10 to 20 percent) have the highest population density in

[1] B. P. F. Braga , R. Flecha , P. Thomas , W. Cardoso & A. C. Coelho (2009), 'Integrated Water Resources Management in a Federative Country: The Case of Brazil', *International Journal of Water Resources Development*, 25:4, 611-628, DOI: 10.1080/07900620903273432, p.611

[2] Asit K. Biswas (2004*),* 'Integrated Water Resources Management: A Reassessment', *Water International*, 29:2, 248-256, DOI: 10.1080/02508060408691775, p. 248.

[3] Ibid.

[4] Gebrehiwot, S.G., Gärdenäs, A.I., Bewket (2014), W. et al. **'**The long-term hydrology of East Africa's water tower*:* statistical change detection in the watersheds of the Abbay Basin', *Reg Environ Change*, 14: 321. doi:10.1007/s10113-013-0491-x, p. 322.

[5] Ethiopian Water Sector Policy (2001), p.3. *See* also World Bank (2013), 'Ethiopia second economic update: laying the foundation for achieving middle income status', World Bank, available at: http://documents.worldbank.org/curated/en/2013/06/18594155/ ethiopia-second-economic-update-laying-foundation-achieving-middle-income-status.

[6] Ethiopian Water Sector Policy (2001), p.3.

[7] Ibid.

Ethiopia (over 60 percent).[8] This indicates that water is distributed unevenly throughout the territory of the country.

Ethiopia is one of the largest countries in Africa. Organised into a federal republic. It is divided into nine states[9] and two city administrations.[10] There are distinct variations in size, population, contribution to national water resources and catchment areas of the basins among the states and this diversity determines the level of investment in the implementation of policies and norms for water use.

The above-mentioned reality of the country suggests that Ethiopia has abundant water and its endowment would naturally benefit from highly developed and well-organized water regulation. It is with the enactment of the 1960 Civil Code that the country began to be concerned about water regulation. However, given the importance of water and the current governance system, there has been little academic scholarship on water resources and federalism since its introduction to the Ethiopian federal system in the early 1990s. Specially, the division of federal and state powers and responsibilities with respect to water require analysis.

In spite of the 1995 FDRE Constitution and subsequent enactments of the Water Resource Management Proclamation[11], Ethiopia Water Policy, and the River Basin Proclamation[12], and Powers and Duties of the Executive Organs Proclamation,[13] Ethiopia's water law is still at its infant stage and is not well equipped to resolve the legal uncertainties surrounding the subject. First, when many provisions of the Water Resource Development Proclamation, Ethiopia

[8] Ibid.

[9] Member States of the Federal Democratic Republic of Ethiopia are the following: The State of Tigray, The State of Afar, The State of Amhara, The State of Oromia, The State of Somalia, The State of Benshangul Gumuz, The State of the Southern Nations, Nationalities and Peoples, The State of the Gambela Peoples and The State of the Harari People. *See* Article 47 of Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995. *Federal Negarit Gazeta*, Addis Ababa, 1995 Ethiopia (herein after the FDRE Constitution)

[10] The two city administration are the Addis Ababa and Dire Dawa City administrations.

[11] Ethiopia Water Resources Management Proclamation 197/2000, *Federal Negarit Gazeta*, 61st Year No. 25 Addis Ababa, 9th March 2000 (herein after Water Resources Management Proclamation) .

[12] Ethiopia River Basin Councils and Authorities Proclamation 534/ 2007, *Federal Negarit Gazeta*, 13th Year No. 40, Addis Ababa, 2007 (herein after River Basin Proclamation).

[13] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 1097/2018, *Federal Negarit Gazeta*, 25th Year No. 8, Addis Ababa, 29th November, 2018 (hereinafter Powers and Duties of the Executive Organs Proclamation) .

Water Policy, the River Basin Proclamation and Powers and Duties of the Executive Organs Proclamation are read together with various provisions of the FDRE Constitution, many of these provisions are unclear especially those that deal with federal and state water rights and their respective legislative and enforcement powers. There is ambiguity on the respective roles of each levels of government with respect to the management and utilization of water resources as well as problems related to benefits at each level accrued from water sources.

The situation is further complicated by the lack of elaborating regulations and weak organization structure of the river basin authority. There were attempts to establish river based authorities and recently with the coming into power of new administration and its swift reforms, the basin based High Councils and Authorities are replaced with Basin Development Authority. This opens a room for regional states to carry out unilateral development projects that may lay seed for a potential conflict. Second, the inter-governmental relationship between the federal and regional governments with respect to benefit sharing from a planned water projects is not clear. The constitutional rights of regional states to levy and collect land use fee from profit making federal public enterprises –especially those that are engaged in transforming water into an economic and exportable good– is controversial.

This Article attempts to provide an overview of the legal treatment of waters in Ethiopia through the eyes of water resources and federalism. The *first section* gives a comparative perspective on water law in some selected federal states. *Section 2* highlights the historical development of the regulation of water beginning with the 1931 Constitution and continuing through the current FDRE Constitution and subsequent Water Resource Management Proclamations and Regulations. *Section 3* presents the constitutional rights of regional states in the administration of water resources and any potential rights that states can claim against profit making federal public enterprise that are engaged in the development and transformation of water resources into economic goods. *Sections 4* and *5* examine the current national legislation and administrative institutions on water resources governance among the regional states through an integrated water resource management. The *sixth section* discusses inter-state water dispute resolution in the context of integrated water resources management.

1. Water Resource Management in Some Federal States

1.1. Water Resource Management in Federal systems: An overview

In a federal system of government, there is inevitable fragmentation and overlap in managing water with considerable tension between jurisdictions. While it is the nature of a federal system to divide territory according to political borders, river systems are 'hydrologically interdependent and holistic'.[14] This is not to say that the management of rivers would be straightforward under a unitary system of government. It is rather to say that 'the existence of multi-level governments with respective constitutional mandate in a federal system complicates inter jurisdictional water management systems'.[15]

A recurring issue in the management of water resources has been the role and responsibility of state and federal governments in water use and management.[16] Historically, states have sought to 'optimize their water extractions with little regard for others, leading to tendencies for over-extraction and widespread environmental degradation which ultimately justify the need for intervention by the federal government'.[17] There are divisions of powers related to water resources in federations and are quite diverse and complicated. Some jurisdictions substantially assign the power to the federal government, others to the states, while some make it shared power. It is not within the scope of this article to deal with the different modality of arrangements of water resources within a federation in detail, and this section highlights water resources management in two federal states selected for comparative discussion.

The experience relating to legal and institutional aspects of the water governance framework in Australia and Brazil is highlighted in this section. These two countries have similar layers of government (federal and state), and they pursue different institutional approaches in dealing with water governance. The two federal countries are selected based on the models adopted by the counties that have some common elements with the Ethiopian approach to the management of water resources that will be discussed in later sections.

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[14] Sandford Clark, 'Working paper on Inter-Jurisdictional Water Resources' (Working Paper, Constitutional Commission, 1987) 1, in Paul Kildeal and George Williams (2010), 'The Constitution and the Management of water in Australia's rivers', *Sydney Law Review*, Vol. 31:595, p.597.

[15] Paul Kildeal and George Williams (2010), 'The Constitution and the Management of water in Australia's rivers', *Sydney Law Review*, Vol. 31:595, p.597.

[16] Zachary A. Smith (1986), 'Competition for Water Resources: Issues in Federalism', *Journal of Land Use and Environmental Law*, Vol. 2:177, p. 177.

[17] Margaret Alston, Kerri Whittenbury, Deb Western & Aaron Gosling (2016), 'Water policy, trust and governance in the Murray-Darling Basin', *Australian Geographer*, 47:1, 49-64, DOI: 10.1080/00049182.2015.1091056, p. 50.

1.1.1 Australia

The Australian Constitutional framework has determined the extent of state and Commonwealth influence over river management. Under its Constitution, the state and territorial governments have primary responsibility for water resources management, with limited powers to the Commonwealth Government. The Australian Constitution left river management largely in the hands of the states.[18] The federal system requires equality of rights between states, one outcome of which is 'an implied limitation on state legislative powers that could operate as a protection of state water rights'.[19] The Australian Constitution states that 'the power of the parliament to make laws with respect to trade and commerce extends to navigation…'[20] It goes on to state that 'the Commonwealth shall not, by any law or regulation of trade or commerce abridge the rights of state or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation'.[21] Regulation of waters within state boundaries is constitutionally within the states' domain, although waters outside the limits of the states fall within the competence of the Commonwealth.[22] Thus, in the past, the Australian Government has sought other mechanisms to gain state acceptance of the need to change water management policy.[23]

The current framework for Commonwealth/state interaction is defined by a concept of cooperative federalism in environmental and resource management. State and federal government agree on policy and legal objectives; and these are 'then translated into intergovernmental agreements, which in turn leads to law reform in the states and territories'.[24]

After the allocation of water in the Australian Constitution, many attempts to reform the water sector was made. In 1994, the Council of Australian Governments (COAG), an intergovernmental forum, agreed to a Water Reform

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[18] Paul Kildeal and George Williams, *supra* note 15, p. 595.

[19] Nicholas Kelly, '*A Bridge?* The Troubled History of Inter-State Water Resources and Constitutional Limitation on State Water Use', *UNSW Law Journal*, Volume 30 (3), 639-664, p. 641.

[20] Article 98 section two of the Constitution.

[21] Id., Art. 100.

[22] Lee Godden (2005), 'Water Law Reform in Austria and South Africa: Sustainability, Efficiency and Social Justice', *Journal of Environmental Law*, Vol 17 No 2, 181–205 doi: 10.1093/envlaw/eqi016, p. 187.

[23] M. D. Young, Environmental effectiveness and economic efficiency of water use in agriculture: The experience of and lessons from the Australian water reform programme, in Wilson Sousa and et al., *Water: Drought, Crisis and Governance in Australia and Brazil*, *Water* 2016, *8*, 493; doi:10.3390/w8110493, available atwww.mdpi.com/journal/water p. 2.

[24] Lee Godden, *supra* note 22, p. 187.

Framework Agreement which recognized 'that action needs to be taken to arrest widespread natural resource degradation in all jurisdictions', and which sought to 'implement a strategic framework to achieve an efficient and sustainable water industry'.[25] The framework endorsed the following guiding principles. *First*, water pricing should be consumption-based and operate on the principle of full cost-recovery and removal of cross-subsidies.[26] *Second*, water allocations should include reviewable allocations for the environment based on the best scientific information[27], and restoration of environmental allocations in over allocated systems. *Third*, water allocations should be clear, separate from land title,[28] and tradeable.[29] Finally, the public should be widely consulted.[30] Furthermore, Integrated Catchment Management was adopted as the basis for water resource planning.[31]

A second phase of reforms began with the negotiation of the National Water Initiative in 2004.[32] The National Water Initiative aims at setting down a blueprint for national water reform; its broad purpose is to achieve a 'nationally-compatible, market, regulatory and planning based system of managing surface and groundwater resources for rural and urban use that optimizes economic, social and environmental outcomes'.[33] The National Water Initiative puts in place a program of implementation for the agreed water law reform directions and this process is enhanced by the establishment of a National Water Commission.[34] The Commission's responsibilities include 'overseeing implementation of reforms, accrediting implementation plans of state and territory governments and overseeing assessment of progress toward reforms'.[35]

[25] *COAG, Communique,* Attachment A, Hobart, 25 February 1994 in Paul Kildeal and George Williams, *supra* note 15, p. 599.
[26] CoAG Water Resource Policy clause 3(a)(i). *See* Lee Godden , *supra* note 22, p. 189.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] The Intergovernmental Agreement on a National Water Initiative was signed at the June 2004 meeting of the
Council of Australian Governments, with Tasmania and Western Australia joining the agreement in 2005 and 2006 respectively. See Paul Kildeal and George Williams, *supra*, note 15, p.599.
[33] Ibid.
[34] *See* Schedule C, CoAG Agreement. *See* Lee Godden , *supra* note 22 , p. 190.
[35] Id., p. 189.

In 2007, the Commonwealth Parliament passed the Water Act 2007.[36] The Act set down a detailed regime for the use and management of Australia's water resources, most significantly through requiring the development of a 'Basin Plan'. The purpose of the Plan is 'to provide for the integrated management of water resources in the Murray-Darling Basin'.[37] Another important development followed in July 2008, with the decision of the Commonwealth and the Basin States to sign the Intergovernmental Agreement on Murray Darling Basin Reform.[38] These new arrangements involve 'a substantial shift in power toward the national government and away from the states and the relatively weak provisions for compliance in the Water Act 2007'.[39] Its purpose is to 'improve planning and management by addressing the Basin's water and other natural resources as a whole, in the context of a federal-state partnership'.[40] Key elements of the basin plan include (1) sustainable limits for surface and groundwater, (2) basin-wide environmental objectives, including water quality and salinity targets, (3) rules for a basin-wide water trading regime, (4) requirements for each of the four state sub-plans that will implement the basin plan objectives, and (5) measures that will improve security for water entitlement holders.[41] Each reform has been marked by 'tension between the need for better coordination, and the requirement to preserve state autonomy'.[42] Water reforms in Australia will require much greater horizontal and vertical integration and coordination across institutions and stakeholders.[43]

1.1.2 Brazil

Brazil is a federal republic consisting of 27 states (including the Federal District).[44] It is estimated that about 12 % of the world's surface water resources and 53 % of South America's surface water resources are located in Brazil.[45] The present Brazilian Constitution, promulgated in 1988, brought two important

[36] Paul Kildeal and George Williams, *supra* note 15, p.599.
[37] Ibid.
[38] Id., p.600.
[39] Daniel Connell and R. Quentin Grafton (2011) "Water reform in the Murray-Darling Basin", *Water Resources Research*, Vol. 47, W00G03, doi:10.1029/2010WR009820, p.6.
[40] Intergovernmental Agreement on Murray-Darling Basin Reform, Preamble. Paul Kildeal and George Williams (2010), *supra* note 15, p.600.
[41] Daniel Connell and R. Quentin Grafton , *supra* note 39, p.5.
[42] Paul Kildeal and George Williams , *supra* note 15, p.600.
[43] Daniel Connell and R. Quentin Grafton, *supra* note 39, p.8.
[44] Lilian Bechara and Alessandra Magrini (2013), 'The Brazilian Water Resources Management Policy: Fifteen Years of Success and Challenges', *Water Resource Management Journal*, 27:2287-2302, p. 2292.
[45] Reboucas AC (2006), Agua Docc no Mundo e no Brasil: in Aguas Doces no Brasil: capital ecologico, use e conservacao. 1:1-35, 3rd Edition. ISBN 85-86303-41-0 in Lilian Bechara and Alessandra Magrini (2013), Ibid.

innovations regarding water resource management: 'first, water resources fall under both federal and state jurisdiction, second, water is a public asset'.[46]

According to the Brazilian Constitution, the states, and the federal district are jointly responsible for legislation regarding natural resources.[47] However, the union has the mandate of legislating exclusively with respect to water, fluvial, lake, and coastal navigation. Section 22 allows the states to legislate complementarily through specific legislation regulating these matters.[48] The same constitution, however, 'does not allow the states to legislate", and in effect, "attend the peculiarities of such a large territory as Brazil'.[49] Section 21-XII states that 'the federation shall explore, directly or through authorization, concession, or permission, the hydroelectric potential of the watercourses'. This exploitation, however, 'must be performed in articulation with the states where the development is planned'. [50]

Nine years later, in 1997, after wide-ranging debates, and considering the experiences of other countries, the Brazilian Congress passed Law 9,433 (1997), which establishes the National Water Resources Policy and creates the National Water Resources Management System.[51] The water act defined 'two water management domains: the federal level, for interstate or transboundary water basins; and the state level, for water basins contained wholly within the territory of one state'.[52] Inspired by the procedures adopted in France, it strives to administer water resources on the basis of the river basin concept, as the management unit.[53] The Law defines the river basin as 'the territorial unit for water resource planning; reinforcing the concept brought in 1988 by the Constitution that water is a public asset'.[54] The river basin *via* the basin plan manages and maximizes 'its use in a rational manner through actions designed

[46] Ibid.
[47] Benedito P. F. Braga Jr. (2000), 'The Management of Urban Water Conflicts in the Metropolitan Region of São Paulo', *Water International*, 25:2, 208-213, DOI: 10.1080/02508060008686820, p.209 citing Section 24-VI of the Brazil Constitution.
[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] Lilian Bechara and Alessandra Magrini, *supra* note 44, p. 2295.
[52] Wilson Sousa and *et al*., (2016), 'Water: Drought, Crisis and Governance in Australia and Brazil*', Water*, *8*, 493; doi:10.3390/w8110493, available atwww.mdpi.com/journal/water p. 6.
[53] Rocine Castelo Do Carvalho and Alessandra Magrini (2006) , 'Conflicts over Water Resource Management in Brazil: A Case Study of Inter-Basin Transfers', Water Resources Management, 20: 193–213, DOI: 10.1007/s11269-006-7377-3, p. 195.
[54] Lilian Bechara and Alessandra Magrini, *supra* note 44, p. 2295.

to ensure appropriate environmental management'.[55] The law also stipulates that 'water is a scarce resource, which has economic value, and recognizes the existence of multiple water uses and user rights'.[56]

At the institutional level, the Law 9,433/1997 establishes a new organizational framework, 'involving shared and decentralized water resources management'.[57] This framework is composed of the National Water Resources Council, State Water Resources Councils, River Basin Committees, State Water Resources Management Institutions and Water Agencies.

Two other institutions play a role in the Brazilian water resources management system: water councils and governmental water agencies, both of which are replicated at the state and federal levels.[58] The water councils are comprised of representatives from the government, water users (companies) and civil society (academy, NGOs), appointed by each sector and established by law.[59] Different from the committees, they are not limited by a river basin.[60] They are collegiate structures responsible for developing and reviewing policies and for conflict resolution about water management.[61] They also conduct discussions about inter-basin and inter-state issues, and even international and transboundary waters at federal level.[62]

The Basin Committees consist of representatives of the Federal, State and Municipal Governments, as well as users and civil entities functioning in the water resource area.[63] These Committees are 'in charge of organizing discussions of problems related to the river basin, arbitrating disputes, approving the basin plan and establishing the fee mechanisms and the amounts to be charged'.[64] Appointed under the Water Act, or the state's legislation, these committees were 'intended as innovative decision-making spaces, characterized by a natural territoriality (the watershed), and incorporating a diversity of stakeholders (representatives from civil society, water users, and the government)'.[65] The integrated water resources management principles have

[55] Rocine Castelo Do Carvalho and Alessandra Magrini , *supra* note 53, p. 195.
[56] Lilian Bechara and Alessandra Magrini (2013), *supra* note 44, p. 2295.
[57] Magrini A, Santos M (2001), 'River basin management and the national water resources policy in Brazil.
[58] Wilson Sousa and et al., *supra* note 52, p. 6.
[59] Ibid.
[60] Ibid.
[61] Ibid.
[62] Ibid.
[63] Rocine Castelo Do Carvalho and Alessandra Magrini , *supra* note 53, p. 195.
[64] Ibid.
[65] Wilson Sousa and *et al* (2016), *supra* note 52, p. 6.

been implemented mainly in the form of 218 state river basin committees and 10 federal committees.[66]

The Water Agencies are 'responsible for implementing the basin plans, as well as issuing the concessions and charging fees for the use of water resources, with the Grantor Authorities being the states for state rivers and the federal government for rivers falling under federal jurisdiction'.[67] The Water Agency serves as the executor of the resolutions adopted by the committees.[68] It must be noted that after the enactment of Law 9433, in order to facilitate the management of Brazilian water resources, in 2003, Brazil water resources were divided into 12 hydrographic regions.[69] Each of these regions is 'composed of a basin or continuous group of basins and/or sub-basins with similar natural, social and economic characteristics'.[70]

2. The Ethiopian Constitution and its Impact on the Water Regime

The regulation of water resources was a neglected area in Ethiopia. The first 1931 Constitution has not dedicated any single provision pertaining to the regulation of any natural resources. The second 1955 Ethiopian Constitution introduced the regulation and conservation of natural resources, among other things, water. The texts of this Constitutions [71] assigned dominion over rivers and lakes.[72] In the same manner, third 1987 Constitution also assigned dominion

[66] Agência Nacional de Águas (ANA). Apoio à Gestão de Recursos Hídricos no Brasil. Available online: http://www.ana.gov.br in Wilson Sousa and et al., *supra* note 52, p. 6.

[67] Rocine Castelo Do Carvalho and Alessandra Magrini , *supra* note 53, p. 196.

[68] Ibid.

[69] Lilian Bechara and Alessandra Magrini, *supra note 44*, p. 2293.

[70] Ibid.

[71] Article 10- "The State shall ensure that the ecological balance is maintained and, by ensuring the conservation and development of natural resources, particularly land, water, forest, and wildlife, it shall guarantee their utilization for the benefit of the working people. Article 13- (1)- State ownership is public ownership." (2)- "… Natural resources, in particular land, minerals, water and state, are state property." Art 55 (3)- "Ethiopians have the duty to protect and conserve nature and natural resources, especially to develop forest and to protect and care for soil and water resources."

[72] Article 130(a) stipulates that 'the natural resources of, and the sub-soil of the Empire including those beneath its waters, are state domain'. Article 130 (b) also stipulates that 'the natural resources in the waters, forests, land, air, lakes and rivers and ports of the Empire are a sacred trust for the benefit if the present and succeeding generations of the Ethiopian people. The conservation of the said resources are essential for the preservation of the Empire. The Ethiopian Imperial government shall accordingly take such measures as may be necessary and proper, in conformity with the constitution, for the conservation of the said resources'. Article 130(c) further elaborates that 'none of the above mentioned

over watercourses. The current 1995 FDRE Constitution addresses water in two main ways; it assigns the ownership rights to the commons and legislative and enforcement responsibilities to the federal government and on limited grounds, to the states.

2.1. Ownership of Water

Under the FDRE Constitution, all Ethiopian waters are publicly owned. According to Article 40(3) short of expressly mentioning water as such, the right of ownership of all natural resources is exclusively vested in the state and the peoples of Ethiopia. The FDRE Constitution is clear as who owns water and states 'all natural resources *(water)* is the common property of the nations, nationalities and peoples of Ethiopia *(emphasis added).* The Water Resource Management Proclamation and Water Resources Policy in the same manner declares that water is the common property of the Ethiopian people and the state.[73] Water is a public asset, meaning there is no privately owned water in Ethiopia. It must also be clear that regional states or the federal government do not own the water resources that flow through the riverbeds of states. There are no federal or state owned water resources; and the Constitution is very clear that it is the common property of nations, nationalities and peoples of Ethiopia. Common ownership renders the operation of a national water management system difficult, as it, demands coordinated and harmonized actions by the federal and regional governments.

2.2. Legislative and Administration Jurisdiction

Water resources fall under both federal and state (legislative and administrative) jurisdictions depending on the interstate or intrastate nature of the river flow. The FDRE Constitution states that the federal government has the power to enact laws for 'the utilization and conservation of land *and other natural resources among other things water* (emphasis added)*'.* [74] The Constitution further elaborates that it is the domain of the federal government and responsibility for the development, administration and regulation of ….. '*waterways and sea transport and …. linking two or more states*…(emphasis added)'.[75] Inter-state watercourses involve national interest. Development refers to any improvement on the waters, rivers, or lakes. In other words, development of water resources refers to the transformation of water resource into useful

natural resources shall be exploited by any person natural or judicial, including all lands in escheat; and all abandoned properties be it real or personal, as well as all the products of sub-soil, all forests, and all grazing lands, watercourses, lakes and territorial waters are state domain'.

[73] *See* Art. 5 of the Water Resources Management Proclamation.

[74] Id., Art. 51 (5) of the FDRE Constitution.

[75] Id., Art 51 (9).

social and economic goods. Administration is related to the executive activities of the government on the water bodies. Administration acts can be defined as 'those actions that are necessary to carry out the intent of statutes; those acts required by legislative policy as it is expressed in laws enacted by the legislature'.[76]

Regulation refers to the power of federal and state governments to legislate on matters that fall within their respective exclusive jurisdictions and includes any regulatory actions taken by the governments. Thus, inter-state watercourses development, administration and regulation fall within the exclusive domain of the federal government. The federal government 'determines and administers the utilization of *the waters or rivers and lakes linking two or more states or crossing the boundaries of the national territorial* jurisdiction (emphasis added)*'*.[77]

Unlike the Australian Constitution that gives widespread power to the states, the FDRE Constitution gives overwhelming power to the federal government in the management of watercourses in Ethiopia. The federal government has (according to Article 51(11) of the FDRE Constitution) the right to determine and administer water resources if the use by one state of trans-regional water resource affects other states, or if the water resources cross Ethiopia's national boundaries. Other watercourses are under state domain. The contrary reading of the aforementioned provision seems to leave the power of administering waters, rivers, or lakes that are intra-state in nature within the exclusive powers of the state. The Constitution recognizes the right to states to levy and collect taxes on incomes from transport services rendered on waters within their territory.[78]

As far as additional power of the regional states is concerned, there is an exclusive power to administer land and *other natural resources (water) found within their territory* in accordance with federal laws *(emphasis added)*.[79] In a federal system, this is what is called a framework power where the federal is empowered to enact framework legislation without exhaustively covering the area and leave the details to be complemented by state laws. Under the Constitution, states have a room to administer water in accordance with federal laws.

At this juncture, a question may arise regarding the power of regions to administer water resources in accordance with federal laws. The issues that are related to this question are whether states can enact laws with regard to

[76] www.encyclopedia.com/law/ accessed on 12 June, 2017.
[77] Art 51 (11) of the FDRE Constitution.
[78] Id., Art 97 (5).
[79] Id., Art 52 (2).

administering the water resources, and if yes, whether this amounts to legislating a law. Administration of natural resources in the context of water is meant to take all the necessary actions that are required for the effective management of watercourses including enacting by-laws that supplement the federal laws. Therefore, it will be safe to conclude that regional states have constitutional right in administering water resources and as such, they can enact laws for the proper implementation and administration that suits their actual local conditions. In doing so, administration of water resources must be carried out in conformity with the federal laws.

The FDRE Constitution states that the House of Peoples' Representatives shall 'enact specific laws on matters of utilization of land and *other natural resources, of rivers and lakes* crossing the boundaries of the national territorial jurisdiction or *linking two or more States; as well as on the regulation of* water and sea transport, ….. linking two or more states…*(emphasis added)*'[80] The federal as well as the regional governments have 'duties to hold, on behalf of the People, land and *other natural resources* and to deploy them for their common benefit and development *(emphasis added)'.*[81]

Subject to the condition that states must follow federal legislation on water governance, each state can regulate water resources laws that apply within its boundaries. For instance, Oromia regional constitution has incorporated a provision on the ownership of natural resources and states that the right to ownership of rural and urban land as well as all *natural resource, among other things, water,* is exclusively vested in the state and the people of the region *(emphasis added).*[82] The same constitution also imposes a duty on the regional government to administer lands and *other natural resources of the region* in accordance with the laws enacted by the federal government. Regional governments are even allowed to enact laws in relation to inter-state watercourses through the delegation of powers of the federal government as per the River Basin Proclamation and Powers and Duties of the Executive Organs Proclamation.[83] Although a regional state must follow federal legislation, it can thus enact laws for the water resources within its boundary.

[80] Id., Art 55 (2).
[81] Id., Art 89 (5).
[82] Art 40 (3) of the Constitution of the Regional State of Oromia, Proclamation No. 1/1995.
[83] *See*, Article 9 (5) of the River Basin Proclamation. Powers and Duties of the Executive Organs Proclamation has an identical article in Article 32 (5)(g) in which the Basin Development Authority can 'issue permits applicable to basins' water use and water works, and ensure that the terms of the permits are complied without prejudice to the powers given to Regional States'.

3. The Power of States over Water Transportation Incomes and Profit-Making Federal Public Enterprises

The Water Resource Management Proclamation and other water laws lack clarity when they are read together with the provisions of the FRDE Constitution that deal with the federal and state water rights. This difficulty of interpretation, *inter alia*, relates to works undertaken by federal profit-oriented public enterprises on lands that are administered by the regional states. This section forwards the argument that regional states have the constitutional right to levy and collect land use fee from profit making federal public enterprises that are engaged in transforming water as an economic good within the spirit of the basin based integrated and cooperative water management system.

Water and land are interconnected. Under the FDRE Constitution states have the power to levy and collect land use fee over land thereby providing them usufructuary rights.[84] States can also 'levy and collect taxes on income from *transport services rendered on waters within their territory (emphasis added)'.*[85] This is one area of rights of states in surface waters flowing in well defined channels that has become a navigable stream and it is the power of states to enact laws that determines the amount of fee that should be levied and collect the same amount on water transportation services within their territory.

It can be deduced that states do not own the waters or beds of the navigable streams; however, they can exercise rights to levy, collect and administer land use fee rights and income on water transportation rendered within their territory. However, the Ethiopian Constitution has explicitly recognized inter-governmental tax immunity. To this end, Article 100(3) of the Constitution provides '*Neither States nor the Federal Government shall levy and collect taxes on each other's property unless it is a profit making enterprise'.* This important constitutional taxation principle puts limitation on the power of both levels of government.[86] In other words, Article 100(3) refers to bidirectional taxation power (federal to state and state to federal) on profit making enterprises.

[84] Art 97 (2) of the FDRE Constitution.

[85] Id., Art 97 (5).

[86] Articles 287 and 288 of India's Constitution are relevant to this subject. Article 287 provides for exemptions from state taxes of electricity consumed by, or sold to, the Government of India. Article 288 exempts from state taxation water and electricity in certain cases. Article 288 (1) provides '… no law of a State…shall impose, or authorize the imposition of, a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river or river-valley.

Accordingly, federal institutions that are established with profit-oriented objectives must pay land use fee if they operate in states' territories. Those institutions include public enterprises such as Ethio-telecom, Ethiopian Electric Power Corporation, Ethiopian Sugar Corporation, Hotel enterprises, mining enterprises, Ethiopian Aviation Enterprise etc. Those Federal government owned-enterprises make profit by using the land-based resources of the states. However, the states, so far, have neither imposed tax nor fees on the federal government-owned profit making enterprises.[87]

In order to contextualize the application of the intra-governmental tax immunity in the context of water resources and federalism, it is important to use the Great Ethiopian Renaissance Dam (GERD) as an illustration. GERD is being constructed in Benishangul regional state. The GERD is a large dam, with a height of 145 m, storage capacity of 74 BCM. The reservoir is more than twice the size of Lake Tana, with a length of 245 km, and is expected to cover an area of 1874 km^2.[88] The GERD is supplemented by a saddle dam with a length of 5 km, and a height of 245 m.[89] The installed capacity of the GERD is 6450 MW, with 16 turbines, each expected to generate 375-400 MW. Plans are for power to be traded soon after completion of the dam on the basis of power-purchase agreements signed as early as 2011 with a number of neighboring countries, such as Kenya, Djibouti and Sudan.[90]

The ambition of Ethiopia to make the sale of electricity as an export item qualifies the Ethiopian Electric Power Corporation a profit making public enterprise. The regional state of Benishangul is to lose a vast area of land and large-scale of land will submerge when the filling of the GERD is completed. According to the FDRE and Benishangul Regional state's Constitutions[91], the regional government is entitled to levy and collect land use fee on profit making public enterprises such as the Ethiopia Electric Power Corporation.

What if a constitutional dispute arises between the state governments and federal profit making enterprises with regard to the levying and administration of land use fee in connection with water works carried out by the federal

[87] Ghebrehiwet Tesfai, The Practice of Fiscal Federalism in Ethiopia: A Critical Assessment 1991-2012: An Institutional Approach, Doctoral Thesis, Faculty of Economics and Social Science, University of Fribourg Switzerland, 2015 (Unpublished), p. 229.

[88] Salman M. A. Salman (2016), 'The Grand Ethiopian Renaissance Dam: the road to the declaration of principles and the Khartoum document', *Water International*, 41:4, 512-527, DOI: 10.1080/02508060.2016.1170374, p.216.

[89] Ibid.

[90] Ana Elisa Cascão & Alan Nicol (2016), 'GERD: new norms of cooperation in the Nile Basin?', *Water International*, 41:4, 550-573, DOI: 10.1080/02508060.2016.1180763, p.560.

[91] *See* Art. 47 (2.10) of the Benishangul Regional State Constitution.

government? In this regard, Article 62(1) of the Constitution has entrusted the House of Federation (hereafter HoF) to interpret the Constitution. If any controversy arises on the constitutionality of any statute, decision of an organ of state or public official it shall be decide by the HoF. Accordingly, if any tax statute or practice of the regional government is alleged to contradict with the principle of intergovernmental tax immunity, it shall be decided by the HoF.

4. Integrated Water Resource Management as Model to Water Governance in Ethiopia's Federal System: An Overview

The Water Resources Management Proclamation was enacted (in 2000) within the exclusive mandate of the federal government in accordance with Article 55(1) of the Constitution. The Proclamation applies "to water resources management on the water resources that exist in Ethiopia'[92]. Water resource management is defined as 'activities that include water resources development; utilization, conservation, protection and control'.[93]

The Proclamation brings together objectives, principles and legal instruments of the national policy on water resource management. Ethiopia's existing legal and policy framework for water resources management enshrines the basic principles of integrated water resources management. Integrated water resources management is also one of the pillars of Ethiopia's Water Resources Policy. Integrated water resources management envisages the preparation and implementation of Integrated Basin Master Plan Studies.

The previous proclamation, i.e., Water Resources Utilization Proclamation No.92/1994 did not have any provision for integrated water resources management.[94] For example, it did not take into account a river basin as the appropriate planning unit.[95] It also lacked institutional backing to implement and reinforce the law.[96] The presences and roles of multi-stakeholders were unrecognized.[97]

The Water Resources Management Proclamation introduces many changes at institutional and policy levels. It defines the river basin as 'a geographical area,

[92] Article 4 of the Water Resources Management Proclamation.
[93] Id., Art 2 (19).
[94] Reta Hailu, Degefa Tolossa & Getnet Alemu (2018), '*Water institutions in the Awash basin of Ethiopia: the discrepancies between rhetoric and* realities', *International Journal of River Basin Management*, 16:1, 107-121, DOI: 10.1080/15715124.2017.1387126. p.111.
[95] Ibid.
[96] Ibid.
[97] Ibid.

described by the watershed limits of a water system including surface and underground water flowing into a common terminus'.[98] This definition reinforces the concept enshrined in the FDRE Constitution that water is a public good. The Proclamation defines that water is a scarce resource, which has economic and social benefits[99], and it recognizes the existence of multiple water uses and user rights.[100]

Under the Water Resources Management Proclamation, the right to allocate and apportion water to all regional states regardless of the origin and location is bestowed upon the Ministry of Water Resources (currently called the Ministry of Water, Irrigation and Energy) in its capacity as supervisory body. The legal provisions in the Proclamation with regard to ownership of the resources and its allocation and apportionment clearly show that the development, management, utilization and protection of all water resources in the country fall within the power of the federal government. The literal reading of the words "all waters" in the Proclamation seems to also include intra-state water resources which should have been within the exclusive legislative jurisdiction of states.

The purpose of Water Resources Management Proclamation is 'to ensure that the water resources of the country are protected and utilized for the highest social and economic benefits of the people of Ethiopia, to follow up and supervise that they are duly conserved, ensure that harmful effects of water are prevented, and that the management of water resources is carried out properly'.[101] The Proclamation also lists some fundamental legal principles that provide a coherent structure for the system.

First, it treats water as public property, as mandated by the FDRE Constitution. It states that all 'water resources of the country are the common property of the Ethiopian people and the state'.[102] *Second*, it recognizes that water, along with its ecological attributes, has social and economic value. Especially recognizing water as an economic good justifies charging for its use and the use of the water resources of the country shall be with a permit system.[103]

Third, the Proclamation requires that water management involves multiple uses and there must be a preference among uses.[104] The Proclamation makes the use of water for domestic use an absolute priority above and over any other

[98] See preamble as well as Art. 2 (15) of the Water Resources Management Proclamation.
[99] Id., Art. 6 (1).
[100] Id., Art.7.
[101] Id., Art. 3.
[102] Id., Art. 5.
[103] Id., Art, 6 (4).
[104] Id., Art. 7.

uses.[105] *Fourth*, it designates the Integrated Basin Master Plan as a point of reference for the implementation of the social and economic development programs, investment plans and programs and water resources development activities.[106] The river basin is the territorial unit for water resources planning and management.[107] These elements of integrated water management in the Proclamation have common features with the Australian and Brazilian models which define the *river basin* as the territorial unit for water resources management and planning. This avoids the fragmentation of river management and coordination.

Ethiopia's water law principles have incorporated many of the well-established principles of international water law. For instance, the principle of fair and equitable utilization of water appears in the River Basin Proclamation as one of the very objectives of the integrated water policy of the country with a view to "using of the basins' water resources for the socio-economic welfare of the people in *an equitable* and participatory manner, and without compromising the sustainability of the aquatic ecosystem *(emphasis added)*".[108] Article 23(1)(c) of the Powers and Duties of the Executive Organs Proclamation in the same manner states that establishing sustainable and integrated administration system is one of the powers of the Ministry of Water, Irrigation and Energy with the aim of facilitating the '*equitable utilization of water resources (emphasis added)'.*

Integrated water resources management[109] principles were adopted at the International Conference on Water and the Environment in 1992.[110] Integrated water resource management is 'a process which promotes the coordinated development and management of water, land and related resources, in order to maximize the resultant economic and social welfare in an equitable manner

[105] Ibid.
[106] Id., Art 6 (2).
[107] *See* preamble of the River Basin Proclamation.
[108] Id., Art. 4.
[109] Integrated water resources management aims for the integration of management at the river basin level, usually through creating an institutional body (a river basin authority, RBA) reflecting its spatial and functional scope and offering a forum for integrating policy and management. *See* Ross Beveridge & Jan Monsees (2012) 'Bridging parallel discourses of Integrated Water Resources Management (IWRM): institutional and political challenges in developing and developed countries', *Water International*, 37:7, 727-743, DOI: 10.1080/02508060.2012.742713, p.729.
[110] Asit K. Biswas, (2004), 'Integrated Water Resources Management: A reassessment', *Water Int. , 29*, 248–256 in Wilson Sousa and et al., *supra* note 52, p. 2.

without compromising the sustainability of vital ecosystems'.[111] For instance, countries of the European Union have been implementing the Water Framework Directive which requires 'the application of economic instruments and the encouragement of public participation as part of the basin management process'.[112]

Ethiopia's pursuits in the path of integrated water management strategy is related with the increasing demand for water among the regional states and the need to utilize water for food and other needs. The river basin concept is thus considered as 'the pillar of the Ethiopia water Policy'.[113] The integrated water resources management is ideal in arranging mechanisms in reconciling the different priority of water use among potential water uses and states within a river basin system with a view to 'achieve balance and sustainable development of water resources as economic as well as environmental resources'.[114]

The coordination of many stakeholders and their respective different approaches, interests and perceptions were the factors that rendered integrated water resources management necessary.[115] To this end, the River Basin Councils and Authorities were established as the effective implementation organs of the Ethiopian Water Resources Management Proclamation.[116] Recently the two basin based water administration structures are replaced by the Basin Development Authority established at national level.

5. Ethiopia's Water Administration Structures in Light of Integrated Water Resource Management

Ethiopia's current administrative organs for water management include the Ministry of Water, Irrigation and Energy, [117] and Basin Development Authority (which has replaced the River Basins High Councils and River Basins High Authorities). The rights and obligations of the basin based authorities are transferred to the Basins Development Authority. It must be noted that administration of intra-state water resources is within the constitutional

[111] Global Water Partnership (2003), *Integrated Water Resources Management Toolbox, Version 2*. Stockholm: GWP Secretariat in Asit K. Biswas (2004), 'Integrated Water Resources Management: A Reassessment', *Water International*, 29:2, 248-256, DOI: 10.1080/02508060408691775, p. 249.

[112] Lilian Bechara and Alessandra Magrini, *supra* note 44, p. 2285.

[113] *See* Preamble of the River Basin Proclamation, para.2.

[114] Id., para.3.

[115] Id., para.4.

[116] Id., para.5.

[117] Cumulative reading of Art 2 (7) and Art 8 (2) the Water Resource Management Proclamation. *See* also art 23 (1) of Powers and Duties of the Executive Organs Proclamation.

mandates of a regional state, and it is carried out in accordance with federal laws/policies.

In Australia, for example, water related policies are the sole responsibilities of the department of the environment (federal level), and state government agencies are coordinated through the Council of Australian Governments (national level). Likewise, in Brazil, the Department of Water Resources is linked to the Minister of the Environment, at federal level, with similar departments at state level that are entrusted with the responsibility of water related policies.

5.1 Ministry of Water, Irrigation and Energy

The Ministry of Water, Irrigation and Energy has the mandate of designing appropriate policy and legal framework for the development and administration of water resources.[118] The Ministry holds special responsibility for water resources development and river basin planning. Powers and Duties of the Executive Organs Proclamation empowers the Ministry to 'design policies and legal frameworks for the development of water resources and irrigation'.[119] With regard to water management, the Ministry shall 'undertake basin studies and verify the country's ground and surface water resource potentials in volumetric and quality terms, and facilitate utilization of same'.[120]

Sustainable and integrated administration of water resources within the context of equitable utilization of water resources is under the Ministry's mandate, and it can delegate the same power to the Basins Development Authority. The Ministry also determines 'conditions for optimum and equitable allocation and utilization of water bodies that traverse across or lie between more than one regional states among various uses and regional states' in addition to its duties of undertaking various studies pertaining national and international water resources and negotiating international water based treaties.[121]

5.2 Basin High Council and Basins Development Authority

Powers and Duties of the Executive Organs Proclamation has established Basins Development Authority as a federal organ which replaces River Basin High Authorities. Unlike the River Basin Proclamation,[122] Powers and Duties of the

[118] Art. 23 (1) (a) Powers and Duties of the Executive Organs Proclamation.
[119] Ibid.
[120] Id., Art. 23 (1) (b).
[121] Id., Art 23 (1) (f) (g).
[122] According to Art. 4 of the River Basin Proclamation, the overall objective of river basin High Councils and Authorities was to:

Executive Organs Proclamation does not indicate the objective of the establishment of Basins Development Authority. Yet, we can deduce that the same objective is also transferred to Basins Development Authority.

Basin based authorities and direct public participation have been abolished and replaced with centralized decision making process. The River Basin Proclamation had introduced new paradigms, such as decentralization, the use of economic tools for water management and public participation in the decision making process. The issue of participatory interventions in the decision making process at the river basin level was one of the peculiar characteristics of the Ethiopian integrated management model. Unlike the Brazilian model, the Powers and Duties of the Executive Organs Proclamation fails to ensure the participation of important sectors such as relevant regional governments within their respective basins.

In 2007, Ethiopia (in similar fashion like the Brazilian water resources management model) was divided into 12 hydrographic basins to facilitate the administration of water resources,.[123] The basins are Abbay Basin[124]; Aisha Basin[125]; Awash Basin[126]; Baro-Akobo Basin[127]; Danakil Basin[128]; Genale-Dawa Basin[129]; Mereb Basin[130]; Ogaden Basin[131]; Omo-Ghibe Basin[132]; Tekeze Basin[133]; Rift Vally Lakes Basin[134] and Webi-Shebele[135] Basin.[136] Each of the

'promote and monitor the integrated water resources management process in the river basins falling under their jurisdiction with a view to using of the basins' water resources for the socio-economic welfare of the people in an equitable and participatory manner, and without compromising the sustainability of the aquatic ecosystems'.

[123] Id., Art. 2 (1).

[124] Abbay covers Oromia Regional State, Amhara, and Benshangul Gumuz. See Dereje Adeba and *et a*l., *supra* note 99, p. 317.

[125] Aysha covers Somali. Ibid.

[126] Awash covers Oromia Regional State, Southern Nations, Nationalities and Peoples State, Amhara, Afar, Somali, Dire Dawa and Addis Ababa. Ibid. It is the most highly utilized basin in Ethiopia. *See* Abraha, A.A., 2006. Flood modeling and forecasting for Awash River basin in Ethiopia. Delft: UNESCO-IHE Institute for Water Education in Reta Hailu, Degefa Tolossa & Getnet Alemu, *supra* note 94, p.107 .

[127] Baro Akobo Basin, about 31 % of this area falls in Oromia; 9.8 % in Benshangul Gumuz; 24.6 % in Southern Nations Nationalities and People's Regional State (SNNPRS); and 34.3 % in the Gambela Regional State. Ibid.

[128] Denakil covers Amhara, Afar, and Tigray. Ibid.

[129] Genale Dawa covers Oromia Regional State, Southern Nations, Nationalities and Peoples state , and Somali. Ibid.

[130] Mereb covers Tigray. Ibid.

[131] Ogaden covers Somali. Ibid.

[132] Omo Gibe covers Oromia, and Southern Nations, Nationalities and Peoples state. Ibid.

[133] Tekeze covers Tigray. Ibid.

[134] Rift Valley covers Oromia, and Southern Nations, Nationalities and Peoples state. Ibid.

basin regions is composed of sub-basins that share similar natural, social and economic characteristics.

Basin is defined as 'a geographical area, described by the watershed limits of a water system including surface and underground water flowing into a common terminus'.[137] Previously, three river basin authorities had been established, namely; Abbay Basin High Council and Authority[138], Awash Basin High Council and Authority[139] and Rift Valley Lakes High Council and Authority.[140] Three more River Basin Authorities had been planned in the Tekeze, Omo-Gibe and Baro-Akobo basins.[141] Under the Powers and Duties of the Executive Organs Proclamation, the rights and obligations of these Basin Authorities, have been transferred to the Basins Development Authority.[142]

The former river basin authorities had not developed water resource development master plan.[143] The integrated water resources management did 'not properly cascade down to the lower level as it was fundamentally top down'.[144] Several stakeholders were not involved in the policy-making process.[145] The involvement of pertinent stakeholders including local

[135] Wabi Shebelle covers Oromia Regional State, Southern Nations, Nationalities and Peoples state, Harari, and Somali. Ibid.

[136] "Basin" means a geographical area, described by the watershed limits of water system including surface and underground water flowing into a common terminus and includes the main basins and their sub-basins of Ethiopia. *See* Art. 2 (1) of the River Basin Proclamation.

[137] Art 3 (15) of the Water Resources Management Proclamation and Art. 2 (1) of River Basin Proclamation.

[138] Abbay Basin High Council and Authority Establishment Regulation No. 151/2008. *See* also Mosello, B., Calow, R. Tucker, J., Parker, H., Alamirew, T., Kebede, S., Alemseged, T. and Gudina, A. (2015) 'Building adaptive water resources management in Ethiopia'. *ODI Report*, London: ODI, available at https://www.odi.org/ publications/9568-building-adaptive-water-resources-management-ethiopia.

[139] Awash Basin High Council and Authority Establishment Regulation No. 156/2008 which replaced the Awash Basin Water Establishment Proclamation No. 129 /1998. The total length of the Awash river is approximately 1,250 km.

[140] Rift Valley Lakes High Council and Authority Establishment Council of Ministers Regulation No. 253/2011.

[141] Helen Parker, *et. al*, A Thirsty Future? Water Strategies for Ethiopia's New Development Era, report, overseas development institutes August 2016, available at http://www.odi.org, p. 30.

[142] Art. 36 (2) Powers and Duties of the Executive Organs Proclamation.

[143] Awash Basin Authority is at final stage of the preparation of the integrated water resource development basin plan.

[144] Reta Hailu, Degefa Tolossa & Getnet Alemu, *supra* note 94, p.107.

[145] Ibid.

community has received little attention.[146] Investment decisions remained top-down. This means that riparians along the river basins do not have to report on how much water they consume, as investments that are government-led do not require water permits. Consequently, each water-using sector makes 'investment decisions on ad hoc plans, often designed by external consultants, without accounting for other users of the same water resources'.[147]

5.2.1 Basin High Council

With the recently introduced reform in the water governance and establishment of the Basin Development Authority, there will be one National Basin High Council instead of basin based High Councils. The Water Resource Management Proclamation had important innovations in its provision for management by water basin units and its creation of Water Basin High Councils. The Water Basin High Council was responsible for decisions about the use of water resources in their designated basins. Article 6(7) of the River Basin Proclamation had designated the Water Basin High Council to play an advisory role to the River Basin Authorities. The National Basins Development Authority need also to bring its policy studies, surveys and researches within basins for approval to the National Basins High Council.[148] It must be noted that an equivalent advisory institution in the Australian model is the National Water Commission while the advisory body in the Brazilian model is National Water Resources Council at federal level and similar councils at state level.

Under the River Basin Proclamation, the Basin High Council was responsible for approving the river basin plan[149] and for proposing the amount to be charged for water use[150] and this right and obligation is transferred to the National Basins High Council. The adoption of the river basin management plans associated with economic instruments is the defining characteristics of the Ethiopian, Brazilian and Australian models and is implemented involving water use permits and water usage charges.

However, Water Basin High Councils at river basin levels have been disestablished, and centralized and undertaking activities at national level will be less effective. The National Basin High Council is the highest organ at national level. Regional states in the different basins should be consulted in the

[146] Ibid.
[147] Helen Parker, et. al, *supra* note 141, p. 30.
[148] The Basins Development Authority need first to approve all its studies and basin based master plans. *See* Art. 32 (5) (a) of Powers and Duties of the Executive Organs Proclamation.
[149] Art. 9 (4) of the River Basin Proclamation.
[150] Id., Art. 6(3).

planning and construction of water works.[151] Powers and Duties of the Executive Organs Proclamation 'ensures continuous collaboration between federal and regional governments and other relevant bodies by setting up a forum for effective networking'.[152] Unlike the Brazilian model, Ethiopian integrated water management system disregards the adoption of integrated management at the river basin level through the establishment of National Basin High Council. The Ethiopian model lags behind in the establishment of the necessary institutional organizations that are supposed to carry out the basic functions of river basin committees established in the Brazilian model.

The disestablishment of Water Basin High Councils at river basin levels demonstrates that, despite the introduction of the integrated water resource management system in the Powers and Duties of the Executive Organs Proclamation, it is at the institutional level that the new system's effectiveness will be tested. The establishment of National Basin High Council and centralized decision making process will cast doubt on the effectiveness of integrated water resources management system. The disestablished Water Basin High Councils had been struggling in implementing integrated water resources management system and the centralization of decision making process can make management of basins difficult unless there is the appropriate balance between decentralization toward basin-level empowerment in the context of the harmonized/centralized aspects of integrated water resources management.

5.2.2 Basins Development Authority

It is the independent federal entity responsible for implementing the Ethiopian Water Resources Policy and coordinating the national system of Water Resources Management at basin levels.[153] Basins Development Authority is responsible for preparing the river master plan; issue permits; give advice and technical support to the Ministry of Water, Irrigation and Energy in relation to dispute settlement and collect water charges from users.[154] The Basins Development Authority is responsible to the Ministry of Water, Irrigation and Energy.[155] The Basins Development Authority shall 'undertake policy studies,

[151] Id., Art 9 (5) River Basin Proclamation states that 'without prejudice to the power given to Regional State by law, issue permits applicable to the basin's water use and water works in accordance with Article 15 of this Proclamation, and ensure that the terms of the permits are complied with'. *See* also Art 32 (5) (g) of Powers and Duties of the Executive Organs Proclamation.

[152] Art 33 (5) (m) of the Powers and Duties of the Executive Organs Proclamation.

[153] The duty of the disestablished River Basin Authorities can be inferred from the preamble of the River Basin Proclamation, Para 5.

[154] Art 32 (5) of Powers and Duties of the Executive Organs Proclamation.

[155] Id., Art 33 (14).

surveys and researches needed to create a conducive environment for the implementation of an integrated water resources management within basins; and follow up implementation upon approval by the relevant body'.[156]

The Basins Development Authority is also empowered to facilitate and undertake activities 'necessary for the implementation of integrated water resources management in basins'.[157] The Basins Development Authority also ensures that 'projects, activities and interventions related to water in basins, in their content, schedule, impacts and management, are in line with integrated water resource management process'.[158]

The River Basin Proclamation and Powers and Duties of the Executive Organs Proclamation have established four management instruments to help the implementation of Integrated Water Resource Management (IWRM) System. These schemes of implementing IWRM are river basin plans, water permits, water use charges and information systems.

River Basin Plans are master plans that provide guidelines for the management of water resources and for the implementation of the National Water Resources Policy at the river basin level. According to the River Basin Proclamation, River Basin Plan means 'strategic water resources planning with long-term vision in the aim of guarantying equity and sustainability in water resource uses'.[159]

The Basins Development Authority is empowered to 'develop plans for the protection and sustainable use of basins; follow up implementation once it is approved by the relevant organ'.[160] The Basins Development Authority also 'develops and implements basin models in order to guide and support strategic planning of water resources and water administration functions'.[161] River Basin Plans require data from the Information Systems related to water availability and quality, as well as water demands by category of use and by watershed.[162] In order to implement river basin plans, Basins Development Authority needs to collect data and analyze and disseminate the same information for 'proper planning, administration and steering of water resources in basins'.[163]

[156] Id., Art 32 (5) (a).
[157] Id., Art 32 (5) (b).
[158] Id., Art (5) (c).
[159] Art. 2 (8) River Basins Proclamation.
[160] Art (5) (d) Powers and Duties of the Executive Organs Proclamation.
[161] Id., Art (5) (e).
[162] Art. 16 (1) of River Basins Proclamation.
[163] Art (5) (k) Powers and Duties of the Executive Organs Proclamation.

The Proclamation underlines a *water permit system* as the basis of water resources management 'to ensure quantitative and qualitative control of water uses'.[164] They represent the right to water or the necessary authorization for water use. The Basins Development Authority issues 'permits applicable to basins' water use and water works, and ensure that the terms of the permits are complied with'.[165] The issuance of water permits relating to water use or water works should take into consideration 'the basin's future perspective in line with integrated water resources management processes'.[166] They demand quantitative and qualitative data (from the Information System) on water availability, upstream and downstream users. *Water use charges* are established that consider the water permits granted, and are intended to make water use more efficient and to reduce pollution. They also provide financial resources. [167]

The main goal of the *information system* is 'to produce, systemize and provide data and information regarding water resources conditions at the river basin level, including quality and quantity for different uses, land use maps, slope, vegetation cover, point discharges, registers of users and other relevant information for water management'.[168] The Powers and Duties of the Executive Organs Proclamation imposes an obligation on Basins Development Authority to 'collect data and analyze and disseminate the same information for proper planning, administration and steering of water resources in basins'. [169]

In the same manner, the River Basin Proclamation had imposed an obligation on the River Basin Authorities to prepare basic information system 'in order to guide and support the basin water resources strategic planning and water management functions'.[170] The Basin Information System must include basin data such as the quantity and quality of water resources of the basin; the level of the water demand within the basin; and the existing and planned major water infrastructures.[171] It must be noted that, the River Basin Authorities lacked resources and authority to coordinate investments, allocate water and resolve conflicts.[172]

[164] B. P. F. Braga and et al., *supra* note 1, p. 617.
[165] Art (5) (g) Powers and Duties of the Executive Organs Proclamation.
[166] Art. 15 (3) of the River Basin Proclamation.
[167] See Art. 31 of the Ethiopian Water Resources Management Council of Ministers Regulation No. 115/2005. *Federal Negarit Gazeta*, 3057–3068 , 2005.
[168] B. P. F. Braga and et al., *supra* note 1, p. 618.
[169] Art (5) (k) Powers and Duties of the Executive Organs Proclamation .
[170] Art. 16 (1) of the River Basin Proclamation.
[171] Id, Art. 16 (2).
[172] Helen Parker, et. al, *supra* note 141, p. 9.

6. Inter-state Water Dispute Resolution

According to the Powers and Duties of the Executive Organs Proclamation, it is the Ministry of Water, Irrigation and Energy that serves as dispute resolution center in the event of inter-state water disputes. According to the Proclamation, the Basins Development Authority shall 'give advice and technical support to the Ministry of Water, Irrigation and Energy on dispute resolution in relation to the allocation and use of water resources in basins'.[173]

Previously, the Basin High Council managed water use disputes between regional states in the basin; and the Council served as a river water dispute resolution center.[174] The scope of the mandate of the Basin High Council was limited only to those water resources within the federal mandate. Thus, there is the need for Regulations and Directives as to how the Ministry of Water, Irrigation and Energy can resolve issues of conflict. In the absence of legal rules on dispute settlement, it becomes difficult to manage and resolve conflicting interests among riparian communities along the regional states so that they can have sustainable agreement and peace. This is, *inter alia*, because different agencies and actors make investment decisions, both public and private, with often-conflicting plans to develop the *same* water resources.[175]

River Basin Authorities had struggled to resolve these conflicts without the political authority to influence investment decisions or the means to assess impacts and trade-offs.[176] For instance, the Awash River Basin[177] is experiencing increased tension between downstream and upstream irrigators along the regional states, and between water for agriculture, energy and domestic use.[178] The regional government of Oromia is investing in its own irrigation projects in Fentale and Tibila, with no reference to upstream and downstream users.[179] In the Awash Basin, competing and conflicting interests of

[173] Art (32) (5) (I) of Powers and Duties of the Executive Organs Proclamation.

[174] Article 6(6) of the River Basin Proclamation.

[175] Mosello, B., Calow, R. Tucker, J., Parker, H., Alamirew, T., Kebede, S., Alemseged, T. and Gudina, A. (2015) '*Building adaptive water resources management in Ethiopia'.* ODI Report, London: ODI, available at https://www.odi.org/ publications/9568-building-adaptive-water-resources-management-ethiopia in Helen Parker, et. al, *supra note 141,* p.21.

[176] Ibid.

[177] The Awash Basin is a prime example of emerging and increasing competition over water resources.
Approximately 15.7 million people live in the Awash, about 17% of Ethiopia's population. *See*, Helen Parker and et al, *supra* note 141, p. 19.

[178] Id., p. 7.

[179] Id., p. 20.

various regions have aggravated the scarcity of water resources.[180] A number of studies have attributed the cause of conflicts in the Awash River Basin to the introduction of various large scale commercial agricultural schemes along river courses.[181]

This prompts a question whether the regional states in the basin can, from the outset make decisions on development activities over such inter-state water resources such as Awash, which is within the exclusive mandate of the federal government. If this occurs, an issue arises whether such projects violate constitution thereby increasing tension between/among states. Such activities may indeed give rise for dispute between federal and state governments.

Concluding Remarks

Poor water management has led to conflicts between upstream and downstream users in international watercourses. The same cannot be ruled out in national water resources. Competing demands should thus be mediated through rules that set out the terms and conditions under which different groups can access and use water. The blend between the utilization of water resources and federalism in Ethiopia through integrated water resources management is at its infant stage and it is partly attributable to the lack of well-developed water law.

There are limited provisions in the FDRE Constitution and other laws on the legal framework related to water governance in Ethiopia. The power to legislate and administer water is vested on the federal government and limited legislative and administrative jurisdiction is left for the regional states. In order to manage water, Ethiopia has introduced a legal foundation for integrated water resources managements system. However, the implementation of the integrated water resource management model is still incomplete, and its administration and decision making process has been confined at federal level.

Unlike Brazilian and Australian Models, the Ethiopian integrated water management legal framework is yet in the course of struggling to set up the necessary institutions to ensure an effective, coordinated and integrated approach to water management. The disestablishment of river basin authorities and replacing them with national Basins Development Authority can make the

[180] Dereje Adeba *et al*. (2016), 'Economic evaluation of the proposed alternatives of inter-basin water transfer from the Baro Akobo to Awash basin in Ethiopia', *Sustain. Water Resour. Manag*. 2:313–330 DOI 10.1007/s40899-016-0058-3, p. 322.

[181] Desalegn Chemeda Edossa *et al*., (2005), Indigenous systems of conflict resolution in Oromia, Ethiopia, International workshop on 'African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa', 26-28, Johannesburg, South Africa, p. 2.

implementation of integrated water management system difficult unless there are schemes that can facilitate response to specific basin needs. This challenge is indeed evident in light of the weak legal and institutional set-ups in the management and resolution of inter-state water disputes. ■

Ethiopia's Justice System Reform at Crossroads:
Impediments relating to Institutional Continuity, Ethnic Politics and the Land Regime

Elias N. Stebek ♣

Abstract

Ethiopia's Justice System Reform Program has not achieved the pledges that were promised since 2002. One of the sources for the impediments was 'revolutionary democracy' because its 'democratic' limb represented the pursuits of justice system reform while its 'revolutionary' limb caused impediments to the reform. This involves various manifestations of 'revolutionary democracy' which include institutional discontinuity, ethnic politics and reluctance to land reform. Disruptions owing to periodic changes in institutional structures (and mandates) adversely affect institutional memory and continuity in Ethiopia's justice system reform. The *second* impediment relates to problems in law and order owing to the risky experiment in ethnic politics that has nurtured ethnic radicalism and hostilities along linguistic lines thereby creating pressures on the justice sector. It has also impeded attainments in the first two dimensions of good governance, (i.e. voice and accountability) because genuine *voice* of citizens envisages rational choice as opposed to ethnicity. The *third* trap which is among the manifestations of 'revolutionary democracy' involves rigidity against reforming Ethiopia's land law which has handcuffed broad-based economic performance thereby impairing the resource base of all reform pursuits (including justice system reform). The way forward thus envisages not only addressing the external manifestations of the problems in the justice system, but also requires directly addressing the root causes of the impediments.

Key terms

Justice system reform · Good governance · Nation building · Land tenure security; Ethnic politics · Ethiopia

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Frequently used Acronyms:
JLSRI: Justice and Legal System Research Institute
JLRTI: Justice and Legal Research and Training Institute

Introduction

The concept of 'Revolutionary Democracy' is affiliated to Vladimir I. Lenin's 'New Democratic Revolution' (NDR). For Lenin, NDR meant an interim phase toward socialism and communism. According to Lenin, the victory of "a revolutionary-democratic dictatorship of the proletariat and the peasantry" will enable the communist party "to rouse Europe, and the socialist proletariat of Europe".[1] On the contrary, 'Revolutionary Democracy' in post-1991 Ethiopia embodied contradictory meanings, because it claimed to represent 'economic and political liberalization' in official discourse, while it was clearly within the ambit of Marxist-Leninist thinking in political party operations and party-state relations.

It was in the midst of such inherent contradiction in the concept of 'revolutionary democracy' that achievements were attained in the formulation of the 2002 Justice System Reform Program (JSRP) and the 2005 Comprehensive Justice System Reform Program (CJSRP).[2] The 'democratic' limb of revolutionary democracy facilitated the formulation of the 2002 JSRP and the 2005 Comprehensive Justice System Reform Program, and on the contrary, its 'revolutionary' limb (caused by the Marxist heritage of the political leadership) was incongruent with most parts of JSRP's and CJSRP's recommendations. The cutbacks in the pace of justice system reform were apparent in 2005/2006 (immediately after the 2005 elections) and from 2007 onward under pledges of 'democratic developmental statehood'.

There was indeed optimism that the attention given to justice sector reform during the formulation of the program would be sustained in its implementation phases as well. However, sixteen years after the take-off towards Justice System Reform Programme in 2002[3], Ethiopia's justice sector has regressed[4], and this can be verified by the facts that were officially admitted (after the 2018 political

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[1] Vladimir Ilyich Lenin (1905), *Two Tactics of Social-Democracy in the Democratic Revolution*, Collected Works, 1962, Vol. 9, (Translation: Abraham Fineburg and Julius Katzer), pp. 15-140, Section 10: "Revolutionary Communes" and the Revolutionary-Democratic Dictatorship of the Proletariat and the Peasantry.

[2] *The Comprehensive Justice System Reform Program Baseline Study Report*, Ministry of Capacity Building, Justice System Reform Program Office, February 2005.

[3] Ministry of Capacity Building, *Justice System Reform in Ethiopia: Proceedings of the Workshop on Ethiopia's Justice System Reform*, Africa Hall, 7-8 May 2002.

[4] For details on the regression in the pace of justice sector reform programmes *see* two articles by this author published in *Mizan Law Review*, Volume 9, No. 2, titled "Judicial Reform Pursuits in Ethiopia, 2002-2015: Steady Concrete Achievements - *versus* - Promise Fatigue" (pp. 215-257), http://dx.doi.org/10.4314/mlr.v9i2.1 and "Legal Sector Reform Pursuits in Ethiopia: Gaps in Grassroots Empowerment" (pp. 258-300), http://dx.doi.org/10.4314/mlr.v9i2.2

reforms) regarding the unconstitutional acts of various law enforcement institutions. Steadily declining public trust in the justice sector (i.e., the legal and judicial sectors) renders the discourse on justice sector reform as relevant and expedient today as it was in 2002. This article focuses on certain themes that are relevant in the way forward towards the reinvigoration of the 2002 and 2005 aspirations which, *inter alia*, require dealing with impediments of reform.

Section 1 presents an overview of institutional discontinuity in Ethiopia's justice sector during the last decades, and *Section 2* discusses the current pursuits in law reform and the resumption of justice system reform projects. The *third* and *fourth* sections deal with the problems of institutional discontinuity in the coordination of the justice system reform program and in relation to trends of scrapping codes of law in the name of revision. *Sections 5* and *6* respectively highlight the nexus between good governance and justice sector reform, and the tension between good governance and ethnic politics. Based on these themes, *Sections 7* to *10* highlight four challenges in justice sector effectiveness in the context of ethnic politics. The themes are: law compliant citizenship, peace and order in the context of diversity, the tension between multi-ethnic civic identity and Article 39 of the FDRE Constitution, and the constitutionality debate regarding the emblem on the Ethiopian flag. *Sections 11* and *12* respectively deal with the need for land reform and normative gate keeping against predatory statehood.

1. Overview of Institutional Discontinuity in Ethiopia's Post-1931 Laws and Justice Sector

Ethiopia's 1931 Constitution was a significant achievement in lawmaking. The reformers of the period (who were regarded as Japanizers) sought *modernization* and *progress*.[5] Another significant landmark in legal development was the *Negarit Gazeta* which began to be promulgated in March 1942. In spite of its slow pace, justice sector institution building (including the legal regime) continued, and the attainments included the 1955 Revised Constitution. A major achievement in this regard relates to the codification of six codes of law –from 1957 to 1965– and the establishment of Faculty of Law at Haile Selassie I University (currently Addis Ababa University) in 1963. These achievements resulted from the modernization thinking of the period and the belief in a legal system's instrumental function in development.

The 1960 Civil Code and Commercial Code had envisaged facilitating the modernization of Ethiopia through the path undergone by the Global North

[5] *See*, for example, Bahru Zewde (2002). *Pioneers of Change in Ethiopia*: The Reformist Intellectuals of the Early Twentieth Century (J. Currey Publisher).

through reception of their institutions including laws. However, legal institutions cannot be regarded as mere results of political will. Nor can the law be regarded as a stand-alone toolkit for social engineering. Indeed, progress in the legal regime and justice sector institutions has a bi-directional relationship with the corresponding social and economic realities that render a rational legal system and justice sector expedient, and at the same time facilitate its development, implementation, outcomes and impact.

Unfortunately, however, Ethiopia's pace of nation-building and legal development (in 1942-1974) failed to catch up with unfolding realities on various fronts, which include: (i) land reform, (ii) constitutional reforms that, *inter alia* ensure equality in religion and ethnic identity, (iii) reform towards constitutional monarchy, and (iv) the accommodation of federalism in Eritrea in accordance with the UN General Assembly's Resolution, rendered in 1950.[6]

In addition to these domestic problems, the global economic system brought about widening gaps in balance of trade in developing countries accompanied by the global oil crisis during the early 1970s. As the regime failed to address the domestic challenges and the effects of the 1973/74 global oil crisis, promises of reform in Mid-1974 including a draft constitution toward constitutional monarchy[7] seemed to be too-little-too-late after the 1974 revolution.

There were indeed lost opportunities in land reform, nation-state building and institutional development (including the justice sector) which include the absolute monarchy's failure to reform itself during the 1960s and early 1970s. There was a similar failure to learn from models of pragmatic reform (such as the South Korean path) that could have been adopted upon the advent of the Dergue to power in September 1974. Such options could have been conducive to incremental and steady institutional reforms (including the justice sector) thereby facilitating institutional continuity in the organic improvement of lawmaking, court systems, law enforcement, law practice and legal education.

In contrast to the *modernization* theory which was reflected in the legal development pursuits of the 1960s, communism –that was tailored to the 19th century realities of England, France and Germany– informed policies in Ethiopia from 1975 until the late 1980s. Analogous to the attempts to revise the 1955 Constitution toward constitutional monarchy in 1974, the economic reform pledges of the late 1980s were eleventh-hour attempts. It is to be recalled that a request for mixed economy by Col. Atnafu Ababte was unduly suppressed in September-October 1977. Even worse, the Dergue was too rigid to consider a political solution (such as federation) to Eritrea.

[6] UN General Assembly's Resolution 390-A(V), 2 December 1950.

[7] *See*, for example, *New York Times*, 7 August 1974, p. 38. "A New Constitution offered in Ethiopia", citing AP, August 6, 1974.

Even though the land reform of 1975[8] was a positive achievement, its extremely radical content was incongruent with Marx's views (whose ideology was pledged to be pursued), because Karl Marx (1818-1883) did not envisage nationalization of the means of production before the attainment of the capitalist mode of production. According to Marx, *socialized production* and *private appropriation* reach at a stage of an irreconcilable contradiction under an advanced level of capitalism. He argued that "scattered private property arising from individual labour" is transformed "into capitalist private property" and he considered this as "the expropriation of the mass of the people by a few usurpers".[9] Based on this premise, Marx envisaged "the transformation of capitalistic private property, already practically resting on socialized production, into socialized property".[10] For Marx, this constitutes "the expropriation of a few usurpers by the mass of the people".[11]

At hindsight, it can be observed that Ethiopia's 1975 land reform could have benefited from *pragmatism* and *reason* –as was the case in South Korea– and this would have enabled the appropriate balance between *equity* (distributive justice) and *economic efficiency*. Ethiopia's 1975 land reform solely focused on distributive justice, and this has ultimately brought about *land fragmentation* and *shared impoverishment*. Farm size steadily declined owing to Ethiopia's rising population and the slow pace in the transition to manufacturing-led economy. According to a 2015 study by FAO, Ethiopia's "average small farm size is 0.9 hectares"[12], and the study indicates the decline in average small farm size "from 1.43 hectares in 1977 to 1.03 in 2000".[13]

For example, the nationalization of modern farms (owned and managed by professionals and entrepreneurs) in 1975 merely led to state farms that were largely bankrupt and subsidized. Moreover, exceptions could have been made to room rentals in urban house compounds as long as the parcel size did not exceed the maximum (i.e. 500 sq. meters) that was allowed in the 1975 Urban Land and Extra Houses Proclamation.[14] However, the rush of the Marxists –during the

[8] Public Ownership of Rural Lands Proclamation No. 31/1975.

[9] Karl Marx (1867), (English Translation, 1887, by Samuel Moore & Edward Aveling), *Capital*: *A Critique of Political Economy*, Volume 1, Book One: The Process of Production of Capital, Chapter 32, "Historical Tendency of Capitalist Accumulation", Progress Publishers, Moscow (1954), p. 715.

[10] Ibid.

[11] Ibid.

[12] George Rapsomanikis (2015), *The economic lives of smallholder farmers*: An analysis based on household data from nine countries (Food and Agricultural Organization of the United Nations, Rome), p. 5

[13] Ibid.

[14] Government Ownership of Urban Lands and Extra Houses Proclamation No. 47/1975.

period– was to avoid the tag of 'revisionism'. Thus, pragmatic options of land reform (such as abolition of tenancy and ensuring tenure security to smallholder farmers, compensation to former landowners with exceptions stated by law, etc) would not have been acceptable to the Ethiopian left. An ideology that emerged as an anti-thesis against a fully developed capitalist mode of production was imported dogmatically to a predominantly agrarian Ethiopia of the Mid 1970s.

With regard to the judiciary (in 1974-1991), there were extra-judicial interventions such as military tribunals. But these interventions did not involve simulations thereby leaving the judiciary to operate –on its own– in commercial, civil, tax and non-political criminal cases. Even though ordinary courts were recognized as the only judicial organs under the 1987 People's Democratic Republic Ethiopia (PDRE) Constitution, a military tribunal was established against the leaders of the coup that was attempted in May 1989. The executive was thus resorting to such tribunals whenever it needed intervention, and it did not need a façade of 'show trials' through the ordinary courts.

However, special tribunals outside ordinary courts are not formally possible after 1991 owing to the pledges of constitutional democracy and separation of powers. During this period, executive intervention in judicial matters could only be done through the ordinary courts which eventually became a *modus operandi* in many benches. Eventually, the level of political intervention (in 2017, for example) included the act of gathering judges and court staff for sessions that were known as 'renewal' and 'deep renewal' ('*tehadiso'* and '*tilq tehadiso*'). Although courts are declared to be independent under Article 79 of the FDRE Constitution, there was apparent intervention of the executive (and the political leadership) because 'revolutionary democracy' influenced the policy framework (including the justice system).

2. Current Pursuits in Law Reform and Justice System Reform Projects

2.1 Pursuits of law reform

There is an initiative toward law reforms by the Federal Attorney General. To this end, it had organized a workshop conducted on June 6, 2018. As noted during a presentation at the workshop, there are problems and limitations in the justice sector,[15] which include:

a) deterioration in the quality of laws,
b) absence of a forum that facilitates consistent and meaningful consultation,
c) absence of a scheme that can be used to analyze the extent to which laws are just, effective and viable,

[15] Dr. Mulugeta Mengist, Presentation at the Consultative Workshop on Problems in Ethiopia's Justice conducted at Capital Hotel, June 6, 2018.

d) the erroneous view which unduly strives to discard laws merely because they were enacted some decades ago (የቆየ ይፍረስ የሚል አሠራር) while older codes of laws in Europe are still operative, and
e) problems related to independence and effectiveness.

According to Dr. Mulugeta, the problems in the justice sector are, *inter alia*, attributable to "abrupt switch to different tracks (such as BPR) analogous to being carried away with new songs (ያዝ ለቀቅ፣ እንደአዲስ ዘፈን), and "lack of forum for consultation, discourse and analysis". He also noted the "gaps in the institutionalization of achievements and performance, and gaps in institutional memory." Moreover he indicated other factors such as the historical context and "the internal operations and structures of justice sector institutions."[16]

The workshop aimed at facilitating discussion on issues of concern in Ethiopia's justice sector. As Attorney General Birhanu Tsegaye stated, an Advisory Council has been established, and it is entrusted with the task of presenting "proposals on certain laws that are believed to narrow the political space in order for the government to make amendments" which include the anti-terrorism and the charities and societies proclamations.[17] "The Council is conducting studies to make sure whether the existing laws [comply] with the Constitution" with a view to "improving the justice system, ensuring the rights of citizens and broadening the political space".[18] The Council's Chairperson, Professor Tilahun Teshome, has likewise expressed the need for justice sector reform in order to ensure rule of law, peace and development.[19]

Dr. Gedion Timothewos, Coordinator of the Research Team on the Anti-terrorism Proclamation, stated that the Legal and Justice Affairs Advisory Council has adopted a roadmap for three years, based on research. He also pointed out that in addition to the workshops and panel discussions, "platforms will be created to incorporate the views and ideas of political party leaders, journalists, prosecutors and lawyers".[20]

2.2 The JLRTI study towards resuming justice system reform projects

Justice and Legal Research and Training Institute (JLRTI) is expected to resume the projects under the Justice System Reform Program based on its mandate under Proclamation No. 1071/2018. The Federal Supreme Court, Federal

[16] Ibid.
[17] *Ethiopian News Agency*, June 29, 2018.
[18] Ibid.
[19] Professor Tilahun Teshome, Addis Ababa University, School of Law, Fana Broadcasting, August 18, 2018.
[20] *Ethiopian News Agency*, August 18, 2018. Dr. Gedion Timothewos, Addis Ababa University, School of Law.

Attorney General, Justice and Legal Research and Training Institute, and Higher Education Strategy Center have conducted a joint study with regard to the gaps in the pace and attainments of the justice system reform sub-programs that were formulated under the 2005 Justice System Reform Program. These studies were compiled under the auspices of Justice and Legal Research and Training Institute (JLRTI) and were presented as *a joint study* by presenters from the respective justice sector institutions at the Joined-up Justice Forum workshop in Adama on August 28, 2018.[21]

The introduction of the *joint study*[22] by justice sector institutions (hereinafter referred to as the JLRTI Study) recalls the level of attention that was given to the Justice System Reform Program during the initial years, and it highlights the factors that contributed to the decline in the pace of its effective implementation. The study indicates the transfer of the coordination task [from the Justice System Reform Program Office at the Ministry of Capacity Building] to Justice and Legal System Research Institute (JLSRI) in 2005/2006. It appreciates the achievements (during the coordination by JLSRI) in the field of legal education reform which includes the development and implementation of a new LLB Programme curriculum and academic staff capacity development pursuits. However, it notes that the attainments in the judicial and law enforcement sub-programs of the 2005 Comprehensive Justice System Reform Program were inadequate after the coordination function was transferred to JLSRI.

According to the study, there was further regression in the Justice System Reform Program after JLSRI ceased to coordinate the program due to the decision of functional rearrangements that led to the fragmented implementation of the sub-programs [since 2010/11]. The regression in justice system reform program continued further because it was ultimately subsumed under general themes such as good governance after the task of coordination was transferred to the Ministry of Public Service and Human Resources Development.[23]

Part Four of the study deals with analysis and findings that relate to the three sub-programs under Ethiopia's justice sector reform (i.e. sub-programs for

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[21] የፌዴራል የፍትሕና ሕግ ምርምርና ሥልጠና ኢንስቲትዩት፤ ፍትሕ ሥርዓት ማሻሻያ ኘሮግራም በፌዴራል ተቋማት ያለበትን ደረጃ ለመለየት የተካሄደ ዳሰሳዊ ጥናት፤ነሐሴ 2010 ዓ.ም፤ አዲስ አበባ። [Federal Justice and Legal Research and Training Institute, Assessment of the Status of Justice System Reform Program in Federal Institutions, August 2018, Addis Ababa]

[22] Id., pp. 4, 5.

[23] የትምህርትና ሥልጠናውን የትምህርት ሚኒስቴር (የትምህርት ስትራቴጂ ማዕከል)፤ የሕግ ምርምር ሥራውን የፍትሕና ሕግ ሥርዓት ምርምር ኢንስቲትዩት፤ የሥራ ላይ ሥልጠናውን የፌዴራል የፍትሕ አካላት ባለሙያዎች ማሠልጠኛ ማዕከል፤ የፍርድ ቤቱን የፌዴራል ጠቅላይ ፍርድ ቤት እንዲሁም የሕግ አስከባሪውን ደግሞ በፍትሕ ማስከበር ሥራው ላይ የተሠማሩ ተቋማት በተናጠል እንዲያከናውኑ ሲደረግ የቅንጅት ሥራው በጣም ተዳክሟል። ከዓመታት በኃላ ፕሮግራሙን የማስተባበር ሚናው ለፐብሊክ ሰርቪስና የሰው ሀብት ሚኒስቴር ቢሰጥም ሚኒስቴር መ/ቤቱ ከሌላ የለውጥ ሥራዎችና መልካም አስተዳደር ጋር በማቀላቀል የማሻሻያ ፕሮግራሙ ይዘት እንዲጠፋ አስተዋጽኦ አድርጓል። (Id., page 5)

judicial reform, law enforcement reform and legal education). It discusses the goals that were attained (during the period between 2003 to 2010 Ethiopian Calendar, i.e. 2010/11 to 2017/18) among the planned activities under 54 projects,[24] the activities that were not performed under each sub-program, the challenges encountered, the tasks that have become regular tasks, and good practices.

The fifth part states the findings, conclusions and recommendations of the study. The gaps stated in the findings include the following:

- there are "problems and public concerns in service provision and good governance with regard to the registrar [and] judicial decisions …";[25]
- the measure of subsuming justice system reform program under the Ministry of Public Service was not effective;[26]
- draft laws are not mostly based on research; there is failure to comply with the procedures of legislative drafting; and the quality of various legislative drafts is low;[27]
- there are gaps in the quality of charges submitted to courts and in the levels of skills and diligence with regard to public prosecution services;
- "there were violations committed by prison warders and administrative office holders in the treatment and respect of the human rights of prisoners;" [28]
- the problems in law schools include admission of students with low national exam results, shortage of law school teaching staff, inadequate networking between justice sector institutions and legal education, absence of pedagogy training to newly recruited law teachers, and shortage of teaching materials;[29]
- there is the problem of "opening of law schools in large numbers without due attention to standards thereby resulting in a steady decline in the quality of legal education.[30]

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[24] "እነዚህን ንዑስ ፕሮግራሞች ለማሳካት እንዲቻል ለፍርድ ቤቶች ማሻሻያ 16፤ ለሕግ አስከባሪ 30 እና ለሕግ ትምህርት ሥልጠናና ምርምር ማጠናከሪያ 8 በአጠቃላይ 54 ፕሮጀክቶች ተግባራዊ እንደሚደረጉ በዕቅዱ ተመልክቷል።" [The plan indicates 16 projects for judicial reform, 30 projects for law enforcement reform 8 projects for legal education reform, i.e. a total of 54 projects]. Id., page 25.

[25] Id., page 136.

[26] Id. p. 140.

[27] Id., p. 141.

[28] Id. p. 144.

[29] Id. pp. 146-147.

[30] Id. p. 147.
"የሕግ ትምህርት ቤቶች (ትምህርት ክፍሎች) በብዛት መከፈታቸው ያለምንም ስታንዳርድ ከመሆኑ ጋር ተያይዞ የትምህርት ጥራት ከጊዜ ወደ ጊዜ እያሽቆለቆለ [ሄዷል።]"

The study notes the gaps in the institutional framework towards coordination and harmonization of justice sector reform that have adversely affected the achievements in the sector:

> "Most [justice sector] institutions do not have offices or professionals in charge of justice system reform activities. Justice and Legal Research and Training Institute does not have an office with a professional staff that is specifically designated to conduct the justice system reform activities at required level. There was no institution that follows up, evaluates and supports justice sector institutions in the course of their plans and achievements [in their respective sub-programs]. While most of the project activities were being conducted as ordinary functions, some projects are not performed due to shortages in finance and manpower".[31]

The study further states recommendations for the various entities that are in charge of the sub-programs on judicial reform, law enforcement, and legal education. The recommendations of the JLRTI Study with regard to the *judicial reform sub-program*[32] include the following:

a) due attention to the level of satisfaction of judicial service recipients, stakeholders and lawyers and to public trust, in addition to the focus courts have hitherto given to internal operations and institutional arrangements;
b) identify barriers that impede the enhancement of public satisfaction and trust;
c) ensure that statements of claims/charges, statements of defence, memoranda of appeal, etc., fulfil the requirements under the laws of procedure (both in content and form);
d) the independence of courts accompanied by neutrality and accountability;
e) ensuring the independence and neutrality of courts including their empowerment to prepare their annual budget and to submit it to the House of Peoples Representatives;
f) executing a system (beyond the exchange of reports) that facilitates in-depth follow up, analysis and evaluation of implementation in the judicial reform sub-program;
g) staff engagement and motivation by going beyond the minor improvements in operations, service provision and human resource development that have accrued from previous instruments;
h) enhancing the consistency and predictability of sentences in criminal cases;
i) provision of residential facilities to judges, implementation of the draft salary scale for judges, and facilitating their academic development;
j) pursuance of the projects of reform that are underway;

[31] Id. p. 145.
[32] Id. pp. 148-150.

k) strengthening the activities that were part of the judicial reform sub-program and that have now been classified as ordinary activities; and
l) initiating new projects that bring about judicial reform through tools that facilitate concrete and visible performance towards achieving the projects of judicial reform.

The recommendations in the JLRTI study with regard to the *law enforcement sub-program*[33] include:

- human resource development, awareness enhancement and motivation schemes;
- the need for urgent reform in management and staffing at training centres (including the police and prison administration);
- adequate budget to enhance the number and skills of researchers in the justice sector;
- support to and follow up of the law revision activities that are underway;
- schemes of support to encourage Alternative Dispute Resolution;
- the need for alternative punishment to avoid overcrowding of prisons which weakens the efforts of reform and rehabilitation in prisons; and
- strategies and directives that can facilitate the effective implementation of Ethiopia's Crime Prevention Policy.

The JLRTI study condemns human rights violations against detained suspects due to improper investigation (**ያልተገባ የምርመራ ተግባር**). It states the need for the enhancement of technology, proper training in investigation, forensic labs and services, forensic pathology and forensic psychiatry, and enhanced public awareness about crimes. It also underlines the need for "prohibitive and deterrent measures against persons who conduct improper investigation against suspects who are under custody"[34] and demands the "provision of clean lodging, adequate healthcare and adequate food to suspects under custody as much as possible".[35] To this end, the study calls for harmonized pursuits among all justice sector institutions.[36]

[33] Id. pp. 150-156.

[34] "**በሕግ ጥላ ሥር በቁጥጥር የሚገኙ ተጠርጣሪዎች ላይ ያልተገባ የምርመራ ተግባራትን የሚፈጽሙ መርማሪዎች ላይ ተገቢውን የማያዳግም እርምጃ በመውሰድ ከድርጊታቸው እንዲታቀቡ እና ሌሎች እንዲማሩበት ማድረግ፣**"

[35] "**በወንጀል ተጠርጥረው በሕግ ጥላ ሥር ላሉ ተጠርጣሪዎች አቅም በፈቀደ መጠን ንፁህ የማረፊያ ቦታ፣ በቂ የሆነ የሕክምና እና የምግብ አቅርቦት የሚያገኙበትን ሁኔታ ማመቻቸት፣**"

[36] Id., p. 153.

"**ቅንጅታዊ አሠራር ማጠናከር በፍትሕ ሴክተሩ የሚታዩት ችግሮች በየደረጃው መፍትሔ በመስጠት በሕገ መንግሥቱ ከሴክተሩ የሚጠበቁትን ኃላፊነቶች እንዲወጣ ለማድረግና ለፍትሕ ሴክተሩ እቅድ ለማሳካት የቅንጅት አሠራር ወሳኝ ነው። በመሆኑም፡ አሁን እየታየ ያለው አሠራር በዝቅተኛ ደረጃ ላይ ያለና የጎበረተሰቡን ፍላጎት መሠረት ያላደረገ በመሆኑ በጥናት ላይ የተመሠረተ ጠንካራና ቀጣይነት ያለው ቅንጅታዊ አሠራር መፍጠር ይገባል።**"

With regard to the *legal education reform sub-program*,[37] the study, inter alia, calls for "staff development in post graduate and PhD programmes, pedagogy training, formulation of a system that implements admission exam to legal education in addition to the exit exam that is underway, and sustained review and updating of curriculum." Moreover, it underlines the need for "incentives to academics toward preparing and publishing law textbooks and incentive schemes to legal research and its implementation".

Various *cross-cutting* recommendations in the JLRTI study are stated under the law enforcement sub-program. The need to give due focus to the availability of required facilities are stated among the recommendations of the study.[38] Moreover, the study notes the gaps in the justice sector with regard to harmonization, and calls for coordinated and harmonized activities because the level of operations in the justice sector is currently low and not in tandem with the needs of the public, thereby necessitating enhanced and harmonized modes of operations.[39]

The recommendations in the study further state the need for mechanisms that ensure legal aid through the enhanced participation of practicing lawyers and law schools, and for the representation of the indigent who should receive *pro bono* services in their claims of compensation as victims of serious crimes and human rights violations. With regard to professional associations, the study indicates the need for strengthening associations in the legal profession, and it states their prospective role in the efforts toward solving the problems in the justice sector. To this end, the study, *inter alia*, calls for due attention to a legal framework and a coherent institutional arrangement.[40]

Cross-cutting recommendations (in the section on law enforcement sub-program) include the enhancement of ICT and due attention to the effective and efficient legal information flow though the completion of the National Integrated Justice Information System /NIJIS (ብሔራዊ የተቀናጀ የፍትሕ ተቋማት መረጃ ሥርዓት) project that has taken a long time. The *Cross-cutting* recommendations[41] (that are stated under the legal education sub-program) include the need to establish institutional structures in all justice sector institutions that manage the justice system reform program and substantially enhance the capacity of JLRTI in expertise, resources and facilities commensurate with its functions. These recommendations further state the need to identify the projects under the justice system reform program that have not been implemented, and mobilize fund and manpower for their implementation.

[37] Id. pp. 157, 158.
[38] Id., p. 154.
[39] Id., p. 155.
[40] Ibid.
[41] Id., pp. 157, 158.

3. JLRTI's Mandates to Coordinate Justice Sector Reform –*vis-à-vis*- Gaps in Institutional Continuity

As indicated in the preceding paragraph, there is the need for "substantial enhancement in the capacity of JLRTI in expertise, resources and facilities commensurate with its functions of supporting justice sector institutions". Even though the Federal Attorney General and JLRTI have overlapping functions in legislative drafting and law revision, the remaining components of justice system reform clearly fall under the responsibilities of the entities that are in charge of the respective sub-programs, thereby requiring follow-up, harmonization and coordination.

The Federal Supreme Court, the Federal Attorney General (which can coordinate the reform sub-programs of prosecution services and prisons), Justice and Legal System Research and Training Institute, and the Consortium of Ethiopian Law Schools are the entities in charge of the sub-programs in the justice system reform. At the level of coordination and harmonization, there should also be the representation of the legal profession through the Ethiopian Lawyers Association, which according to the 2005 Baseline Study Report,[42] is expected to be recognized by law and be entrusted with tasks that include licensing attorneys and handling cases of discipline with due participation of other stakeholders including the Federal Attorney General.

Legal information is a cross-cutting component in Ethiopia's justice system reform program, and Article 4(2) of Proclamation No. 1071/2018 requires the Justice and Legal Research and Training Institute to make "available comprehensive information about the justice systems of the country" and "be a center of justice and legal information". In spite of this mandate, however, JLRTI does not even have an official website that has basic legal information. This clearly indicates budgetary, human resource and ICT constraints.

In 2016, JLSRI (currently restructured as JLRTI) was not willing to receive and administer fund from the African Law Library Project (under the African Innovation Foundation fund) towards the preparation and publication of EtLex Volume 2. As a result, the series titled EtLex could not be sustained. The volume was a sequel in the series of publications to enhance Ethiopian legal information by indexing proclamations and translating Federal Supreme Court Cassation decisions. The first volume of the project EtLex Volume 1[43] was successful (in 2013), and the level of attention to the second phase of the project

[42] Baseline Study, *supra* note 2, p. 23 (The Judiciary, Recommendation No. 15).

[43] *EtLex*, Volume 1, (2013), Ethiopian Legal Information Consortium, Selected Federal Cassation Decisions and Ethiopian Law Index (1995-2012), Published by Justice and Legal Systems Research Institute, December 2013.

substantially declined in 2016. This shows that the challenges in continuity further involve gaps in the sustained pursuance of projects and tasks.

According to Article 5(4) of Proclamation No. 1071/2018, JLRTI has the responsibility of "coordinating, integrating and ensuring the effectiveness of the justice system and legal education reform programmes as well as other reform program carried out in the justice sector." Even though the Advisory Council (that is envisaged to be established under JLRTI Proclamation No. 1071/2018) is not expressly mandated to coordinate the reform tasks of justice sector institutions, Article 12(1) of the Proclamation clearly empowers the Advisory Council to serve as a forum where "federal justice organs shall work in collaboration in order to coordinate and facilitate the Institute's activities".

There is yet another restructuring based on Article 33(8)(d) of the Powers and Duties of the Executive Organs Proclamation No. 1097/2018 which has made JLRTI accountable to the Federal Attorney General's Office, by changing JLRTI's accountability to the Prime Minister's Office under Proc. No. 1071/2018. Under both proclamations, the Federal Justice Organs Professionals Training Center (JOPTC) which has merged with JLSRI (to form JLRTI) comes under the executive even though it, *inter alia*, offers judicial training. This inevitably necessitates undoing what was done, i.e., splitting JLRTI into JLSRI (Justice and Legal System Research Institute) and reinstituting JOPTC as a Judicial Training Center under the Federal Supreme Court.

There have been series of interruptions in *institutional memory* that have caused discontinuity in JLSRI's and JOPTC's tasks and services. Equally important is JLRTI (formerly JLSRI)'s location so that it can be convenient to attract and retain professional staff and be easily accessible to all stakeholders in justice system reform including the legal profession at large.

Unfortunately, however, this crucial factor of location has not been given due attention since JLRTI (formerly JLSRI) was forced to leave the compound of the Ministry of Finance and Economic Development (in 2010/11) while in fact – at the current information age– the Ministry could have regarded the premises in its compound adequate for its functions. The new premises constructed past Ayat (at the outskirts of Addis Ababa), to be used by JLRTI, can only serve as a training center and not as premises to a legal research institute whose offices, facilities and library should be accessible (at a convenient location) to the justice sector, law schools, researchers and the legal profession at large.

4. *Caveats* against Disrupting Institutional Continuity by Scrapping Entire Codes of Law in the Name of 'Revision'

While law reforms in areas such as Ethiopia's anti-terror legislation, the proclamation on civil societies, etc., are expedient, there is the need for caution against trends in law revision that aim at scrapping the codes of law enacted in

the 1960s. This author has expressed the views indicated in the following paragraphs to colleagues at the Justice and Legal Research and Training Institute[44] and the Federal Attorney General[45] regarding the need for caution in the course of revising the Civil Code and the Commercial Code.

The view which considers the Civil Code as outdated (merely because it was enacted fifty-eight years ago) is not persuasive even though there are indeed Civil Code provisions that need reform. Yet, the 'age' of the Codes is repeatedly stated at the opening statements of various (Codes of Law Revision) workshops. Of course, there are parts of the Civil Code that have already been replaced, such as land law, intellectual property law and family law. But in various parts of the Code, including the issue of *family name* in law of persons, we have not yet attained some of the objectives that were envisaged. Unfortunately, we tend to radically negate the past (analogous to throwing away a child with the bathwater), and build up afresh (which is unwise). For example, the codes of law in France are over two hundred years old, and new changes stand over the shoulders of the preceding laws.

In our case, we rush to change rather than merely amend the ones that are obsolete. As a French proverb goes, "*plus ça change, plus c'est la même chose*" ("the more things change [fast], the more would they remain the same"). In some of the revisions, unnecessary confusion is created, because the Criminal Code, for example, could have been revised without substantial change in the number designations of the provisions. With careful drafting, most provisions could have retained their numbers as it is duly done in Articles 1-33, 46-47, 48-53, and 56-59 of the 2004 Criminal Code.

The inclusion of Article 34 on corporate criminal liability, for example, was indeed appropriate. The title of Article 32 could have been amended as "Principal Criminal Liability and Special Crimes" to accommodate Article 33 of the 1957 Penal Code as Article 32(4) of the 2004 Criminal Code. This could have enabled corporate criminal liability to be designated as Article 33 without disturbing Articles 34 to 45. This could have been done throughout the Code thereby retaining the judicial jurisprudence and academic literature that was accumulated from 1957 to 2004.

The same applies for provisions that may be omitted during revisions of other codes of law because a preceding or an immediately following provision can be split into two in order to maintain sequence in subsequent provisions. In the case of substantial omissions, amendments can state the numbers omitted and then proceed with the old sequence. Where there is a substantial insertion of

[44] 27 April 2018.
[45] 28 June 2018.

new provisions, alphabetical designations can be attached to numbers, as is the case of amendments to the 1804 French Civil Code that has periodically updated consolidated versions. Likewise, the Swiss Civil Code of 1907 updates the Code with new changes rather than scrapping it *en toto*.

This facilitates the transmission of judicial decisions and academic literature to generations, because in continental legal systems, court decisions and academic literature cite provisions and not cases thereby rendering easier reference to the number designations of provisions very important. In this regard, we can draw lessons from the drafter of the 1957 Penal Code, Professor Jean Graven, his team and the legislature for having used 120A after Article 120. The drafter did not originally include flogging as punishment, but the issue of lashes to a maximum of *'arba jiraf*' (forty lashes) was persistently raised as traditionally important by certain members in the legislative process, and the drafter had no option, other than including it.

However, the drafter was aware that flogging will be obsolete after certain years owing to Ethiopia's steady interactions with the international community and in the course of legal development in Ethiopia. It was not thus given a number on its own (i.e. Article 121), but was included as Article 120A. As proactively envisaged by the drafter, the provision was obsolete (after a few years) in courts of law. The Civil Code can thus be amended without scrapping it aside.

The same holds true for the Commercial Code because most of the numerical designations of the earlier Commercial Code can be maintained with careful draftsmanship. This can be done by blending immediately preceding (or subsequent) provisions to accommodate newly inserted provisions. Changing the entire numerical designations of the Commercial Code including various landmark provisions would mean throwing away our legacy that is accumulated since the 1960s in textbooks, scholarly articles, judicial decisions, etc., which cite specific provisions. One of the problems in Ethiopia relate to our inability to stand over the shoulders of earlier achievements (while we could have focused on what needs to be corrected and developed). To borrow a phrase from Dr. Mehret Debebe's statement (during a radio interview), it is always wise to consider the "ceiling of an earlier achievement" as the "floor for new pursuits."

Where consistency in numerical designation becomes impossible (while revising some parts of codes of law), the usual practice is to let the specific branches of the law emerge and stand on their own feet. With regard to the Commercial Code, there is apparently the need for responding to the steadily unfolding realities which require changes in the formation and operation of companies. However, this can, for example, be accommodated by a new law that can be designated as *Ethiopian Law on Commercial Companies,* analogous to the laws on insurance, banking etc, that have already stood on their own feet even if certain provisions of the Commercial Code are still relevant to the

sectors. Under this option, the (1960-2018) judicial jurisprudence and literature related to the 1960 Commercial Code can stay undisturbed (because there would not be namesake/ሞክሻ confusion).

5. The Nexus between Good Governance and Justice Sector Reform

Worldwide good governance indicators[46] include six dimensions of governance:

> "1. *Voice and Accountability* (VA): …the extent to which a country's citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association, and a free media.
>
> 2. *Political Stability and Absence of Violence/Terrorism* (PV): … the likelihood that the government will be destabilized or overthrown by unconstitutional or violent means, including politically motivated violence and terrorism.
>
> 3. *Government Effectiveness* (GE): … the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies.
>
> 4. *Regulatory Quality* (RQ): … the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development.
>
> 5. *Rule of Law* (RL): …the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.
>
> 6. *Control of Corruption* (CC): … the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as "capture" of the state by elites and private interests".[47]

These six dimensions are enablers for Ethiopia's justice system reform. The first dimension (*Voice and Accountability*) is a *sine qua non* condition for a competent legislative body and independent judiciary. The legitimacy of governments under theocracy, monarchy, communism, etc. is attributed to

[46] The World Bank, Worldwide Governance Indicators <http://info.worldbank.org/governance/wgi/index.aspx#home>

[47] Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi (2010), *The Worldwide Governance Indicators: Methodology and Analytical Issues*, Global Economy and Development at Brookings, p. 4.

For further discussion on in the application of the six dimensions to justice sector reform, *see* Stebek (2016), Ethiopia's Justice Sector Components in GTP I and II, *Ethiopian Lawyers Association* (pp. 74, 75).

factors other than the ballot box. On the contrary, governments that claim to pursue constitutional democracy attribute their legitimacy to elections. Whenever governments use the ballot-box as a façade, they intervene in the operations of public prosecution services, the judiciary, electoral boards/ commissions, the media etc., to suppress opposition political parties; and they operate in the context of a rubber-stamp parliaments and non-independent judiciary.

The second dimension (*Political Stability and Absence of Violence/ Terrorism)* can be related with the population's perception of government legitimacy. It can also be related with various social and economic grievances. Societies that are polarized due to religious, ethnic and clan hostilities are mostly volatile. Elites usually hijack and exacerbate such hostilities towards economic and political 'gains', although they usually end up in 'lose-lose' scenarios.

Laws envisage compliance, and violations are regarded as exceptions. However, order and stability are disrupted where mobs (in the crude form of *ochlocracy*) take the law into their hands. This not only reflects lawlessness, but it is also a symptom of erosion in the fabric that holds neighborhoods, communities and a society together. Achievements in Ethiopia's justice system reform thus, *inter alia*, depend on the extent to which the root causes for such acts are addressed.

> The core foundation of terrorism is one of the basic emotions in human beings, i.e., 'anger-fear'. In their positive dimension, '*anger*' secures *justice* (as in the case of an infant whose toy is unduly taken by another child, civil disobedience, legitimate strikes, etc,); and '*fear*' facilitates *survival* (as in the case of subconsciously-enhanced pace in running from an aggressive wild animal). These basic emotions of 'anger' and 'fear' can be distorted in the course of ideological, ethnic or religious fanaticism, or as over-reaction in the course of counter-terrorism. [48]

The third dimension of good governance (*Government Effectiveness*), *inter alia*, relates to the quality of public services (including justice sector institutions) and the degree of "independence from political pressures". The scene of widespread street vending at various parts of Addis Ababa clearly verifies the gaps in the effectiveness of law enforcement and its inability to protect tax payers from the wave of contraband merchandise. One can, for example, recall the effectiveness of community guards in Merkato (for many years) while they were under a business development association. A letter from

[48] Author's reflections in email exchange with a staff member at Education for Justice (E4J), United Nations Office on Drugs and Crime, 6 August 2018.

the Chief Executive Officer of the Sub-city,[49] repealed the earlier practice, and the community guards operate under a Police Station since November 2016. Merkato is engulfed in street vending during the last two years. While the former option was effective *governance* with the participation of stakeholders, the latter represents regulation under a government organ without stakeholder engagement.

Gaps in government effectiveness are reflected in various public services. For example, streets (through tacit or explicit *ultra vires* consent of municipal offices) are illegally enclosed by individuals as in the case of a building construction work that has (for about three years) blocked a street between the building where Flamingo Café (Bole Road) is located and Tomy Tower.

The *fourth* dimension of good governance (*Regulatory Quality*) is, inter alia, manifested by the extent to which policies and laws "permit and promote private sector development" thereby enhancing livelihoods which include economic efficiency and social well being in the context of environmental sustainability. There are concerns such as the need for land tenure security which require revisiting Ethiopia's rural and urban land laws because Ethiopia's land laws do not empower broad-based private sector development. As indicated in various studies (such as the ones highlighted in Section 9 below), there is the need for legal regime reforms toward private sector empowerment in the context of inclusive economic development whereby landholders and entrepreneurs can team up in win-win economic activities. Absence of stock market in Ethiopia is another issue that needs regulatory attention to enhance broad-based saving and investment.

Regulatory quality further envisages harmonization and professionalism in legal drafting and promulgation. For example, various institutions haphazardly incorporate 'penal' provisions thereby creating fragmentation and confusion in the criminal law regime. This is inconsistent with Article 3 of the 2004 Criminal Code which allows other penal legislation (outside the Criminal Code) as an exception only when it is enacted as a regulation to enforce the Criminal Code, or if it is enacted as a special law of a criminal nature.

There is extensive discourse and literature on the challenges in the fifth and sixth dimensions of good governance, i.e., gaps in '*rule of law*' and '*control of corruption*' in the context of Ethiopia. The apparent gaps in the *fifth* dimension include problems in contract enforcement and property rights protection. Moreover, the impediment in the *sixth* dimension, i.e., level of corruption deserves utmost attention. These challenges call for due attention to the root

[49] Letter from the Sub-city to Woreda 5 General Business Persons Business and Development, Tikimt 21, 2009 Ethiopian Calendar (October 31, 2016).

causes, while at the same time steadily combating their manifestations and effects.

6. The Tension between Ethnic Hostilities and Good Governance

The *first dimension* of good governance, i.e., voice and accountability embodies two elements. As highlighted in the preceding section, the first element (*voice)* refers to 'the participation of citizens in selecting the government', while the second element refers to the extent to which the government is *accountable*, which includes freedom of speech, freedom of association and the media. Both elements are indispensable in good governance.

Good governance is an enabler in all pillars of justice sector reform. Ethnic hostilities impede the attainment of both limbs in the *first dimension* of good governance. Under settings where ethnic hostilities and extremist perceptions of ethnic distinctiveness are entrenched, a minority ethnic group that coercively holds power inclines toward vote rigging, manipulating elections and intervention in electoral boards/commissions because most voters tend to cast their votes to candidates who belong to their ethnic group. A minority ethnic group that is coercively in power cannot thus retain office through free and fair elections under ethnic polarities thereby rendering transgressions against rule of law and judicial independence its *modus operandi*.

Such ruling parties invest much energy, time and finance to manipulate constituencies before elections, and devote equal attention to post-election justifications and show trials after the elections (which in the Ethiopian context included 'anti-terrorism' charges and convictions). Under this setting, governments are mostly trapped in a 'legitimacy' syndrome, and only a small percentage of their 'term' (between 'elections') is devoted to governmental functions. Such 'legitimacy' syndrome is also susceptible to fraudulent reporting of 'achievements' (in development pursuits) as a result of fixations on unduly exaggerated figures and statistics rather than pragmatic and functional achievements commensurate with the requisite pace, quality and standards.

On the contrary, a political party (in ethnically polarized societies) from an ethnic group (that constitutes the majority of a country's population) does not need to manipulate elections unless there are competing ethno-radical candidates in similar constituencies (with substantial support-base) from the same ethnic group. Even though such ethnic-based political parties may not usually resort to fake elections, they may not enthusiastically pursue the second limb in the first dimension of good governance, i.e., *accountability*. This is because their political offices are mainly secured by ethnicity rather than policy roadmap, competence, integrity and commitment. Such candidates may lack sense of accountability to citizens in their constituencies.

Ethnic groups in Ethiopia constitute the majority in most of the regional states in Ethiopia other than Southern Nations, Nationalities and Peoples Regional State (SNNPRS) and the two chartered cities, i.e. Addis Ababa and Dire Dawa. Ethnic politics can thus erode *accountability* and enhance ethno-centric populism in the regional states. Such contest in populism between ethnic-based political groups in their constituencies is susceptible to an adverse race in ethnic radicalism to win the impressions and sentiments of the electorate in lieu of rational ideas. Such extreme political polarities accompanied by the proliferation of political parties can significantly hamper post-election policymaking and legislative productivity.

Opportunities in this regard relate to the coalitions and political platforms which can eventually lead to their merger onto multiethnic political parties. For example, EPRDF (Ethiopian Peoples Revolutionary Democratic Front) is, at some point, expected to omit the qualifier 'revolutionary' when it fully disentangles itself from its Leninist ideological heritages (of the 'New Democratic Revolution') even if it can still remain within the social democratic fold. At such a stage, the word 'Front' is expected to be revisited and substituted by a word which fits to its current and upcoming policy roadmaps.

Ethiopia's experience indicates that the *second dimension* of good governance (i.e. political stability and absence of violence) cannot be attained in the context of ethnic hostilities. Plutchik's views on pairs of emotions (such as joy-sadness, anger-fear, trust-disgust, surprise-anticipation)[50] provide insights into the basic emotions of individuals that can be manipulated by radical ethno-nationalists. A provocation by a certain group evokes anger and chain of negative emotions which trigger further reactions based on revenge, distrust and fear thereby rendering peace, governance through law and rule of law difficult.

Fraternity based on shared citizenship and trust is susceptible to erosion under ethnic hostilities, and on the contrary, *distrust* entrenches *fear* and *anger* thereby making it difficult for the justice system to ensure order and political stability. The current digital age and social media exacerbate these challenges owing to the ease, magnitude and pace of dissemination including manipulative misinformation. Actual and anticipated ethnic-based or religion-based hostilities adversely affect political stability, social harmony and economic performance thereby rendering it difficult for the justice system to ensure law and order.

Politics *per se* is based on rational discourse and shared citizenship, while ethnic 'politics' primarily targets at emotion and claims of common descent,

[50] *See* for example, Robert Plutchik (1980), A general psychoevolutionary theory of emotion. In R. Plutchik & H. Kellerman (Eds.), *Emotion: Theory, research, and experience: Vol. 1. Theories of emotion* (pp. 3-33). New York: Academic.

language and distinctiveness. Ethnic-based politics thus renders it difficult to attain the first two dimensions of good governance. This cascades to the other dimensions, because gaps and challenges in the first and second dimensions of good governance have direct relationship with the remaining four dimensions, i.e. *government effectiveness*, *regulatory quality*, *rule of law* and *effective control against corruption* that are adversely affected by ethnic-based politics.

7. Law Compliant Citizenship and Justice Sector Effectiveness

7.1 The need to restore public trust

Public service constitutes the *raison d'être* of justice sector institutions, and public trust in the justice system is determined by the level and quality of actual performance. Restoration of public trust, after its substantial decline, can be compared with land reclamation through the rehabilitation of degraded agricultural land due to grave problems such as gully erosion. As Lal noted, "[a]n eroded rill, on deepening and widening, becomes a gully. A gully is sufficiently deep that it would not be obliterated by normal tillage operations, whereas a rill is of lesser depth and would be smoothed by ordinary tillage".[51]

As gully erosion cannot be restored by ordinary tillage, the gravity of the problems in Ethiopia's justice system requires a thorough self-assessment of the sub-sectors. It also needs survey-based assessment on the gravity of the problems with due participation of stakeholders so that the magnitude of the problems can be identified based on *Truth* and *Reason*. This is because laws and the institutions in charge of lawmaking, adjudication, enforcement, legal education and access to justice that are not informed by *Truth* (in terms of objective and subjective realities) and *Reason* cannot be effective.

In the gully analogy, the act of restoring a gully cannot be adequate unless its root causes are addressed. Such measures include the need to deal with the problem such as concentrated runoff of floods that caused the gully. Likewise, there should be deeper examination into the root causes that have adversely affected the operations and services of justice sector institutions. Such deeper diagnosis and effective pursuits call for the blend between autonomy and harmonization in the reform pursuits of each sub-sector.

7.2 The need to enhance law compliant citizenship

In the absence of *law compliant citizenship*, the justice sector becomes susceptible to caseloads in investigation, prosecution and adjudication that impede efficiency and effectiveness. Various factors such as widespread public perception of *illegitimacy* of a government in office, dwarfed moral authority of

[51] Rattan Lal (1992), 'Restoring Land Degraded by Gully Erosion'; in *Advances in Soil Science*, Volume 17, Springer-Verlag New York Inc., p. 123.

corrupt office holders, and *wrong* policies erode *law compliant citizenship*. This, in the Ethiopian context, is exacerbated by ethnic-based perceptions of "*we*" and the "*others*" that have been nurtured by the political leadership during the past decades.

We can, for example, recall Aristotle's view that good *thoughts* lead to good *actions*, and can through repetition become good *habits* and good *character*. On the contrary, thoughts that emanate from misrepresentation, ideological 'indoctrination' and hatred-infested politicking (including social media hate scripts) are distorted and usually antagonistic. It is thus *Truth* and *Reason* that can create *shared* beliefs and *positive* thoughts that are in tune with the *reality, general will* and the *rule of law*.

Manipulation of emotions through *misrepresentation* is a breeding ground for irrational hostilities and lawlessness, while *reason* nurtures inquiry, moral standards, work ethic, quality education and law compliant citizenship. Wider scope of freedom in a legal regime presumes higher levels of awareness and moral responsibility from citizens. On the contrary, substantial reform in a legal regime can unmask the level of hostilities, intolerance and gaps in political culture that were concealed under suppressive regimes. Under settings where legal regimes with wider levels of freedom are accompanied by the requisite level of *law compliant citizenship*, professional associations nurture and control occupational conduct, and the society's value systems are among the core sources of individual moral standards.

The ethnic hostilities that are occurring in Ethiopia illustrate gaps in law compliant citizenship. It is in spite of Ethiopia's criminal law regime that the Jigjiga tragedy, for example, occurred on August 4, 2018. It was unimaginable that the heavy loss in life and property including arson against churches would occur in a country which is known for the level of tolerance and cooperation among religions. As Basu observes:

> The might of the law, even though it may be backed up by handcuffs, jails, and guns, is, in its elemental form, nothing but a structure of beliefs carried in the heads of all the people in society—from the ordinary citizenry to the police, politicians and judges—, intertwining and reinforcing one another, till they become as strong as concrete structures … . The most important ingredients of a republic, including its power and might, reside in nothing more than the beliefs and expectations of ordinary people going about their quotidian chores.[52]

[52] Kaushik Basu (2015), "The Republic of Beliefs: A New Approach to 'Law and Economics'," *Policy Research Working Paper* 7259 (Wold Bank Group Development Economics Vice Presidency, Office of the Chief Economist, May 2015), p. 15.

Any meaningful reform in lawmaking and revision should thus pay attention to the *beliefs* and *expectations* that have brought about the *actions* of citizens such as the Jigjiga hostilities, Gedeo and West Guji zone conflicts and ethnic displacements. In September 2018, these hostilities and displacements continued, in various parts of Ethiopia such as Burayu, Benishangul Gumuz Regional State (Kamashi Zone), and others. Even though Ethiopia is not yet a fragile state (a phase that signals the prelude to failed statehood), ethnic hostilities and the *perceptions* that trigger them need to be carefully examined in the course of justice system reform. The magnitude of the problems in this regard can be easily verified by the fact that Ethiopia has become a country with the largest displaced population in the world due to ethnic clashes.[53]

It is becoming common to equate the word 'hizb' with ethnic homogeneity (in a regional state) as a semantic referent. This approach entrenches the dichotomy of "*we*" and "*the rest other than us*" in the minds of linguistic groups. Such perception erodes sense of citizenship and can be easily hijacked by ethnic entrepreneurs who speculate toward economic gains and political power. If we opt to use the word 'hizb' at sub-national level, it should have retained its inherent heterogeneity, as in the case of usages such as 'የቀበሌው ሕዝብ/ people in the Kebele' which refers to every resident irrespective of ethnicity and religion. Any different usage is expected to have a qualifier to show specific reference.

Professor Bahru Zewde had (at a workshop) suggested that we use the phrase 'የኢትዮጵያ ሕዝብ/ Ethiopian people' rather than "የኢትዮጵያ ሕዝቦች/Ethiopian peoples." It is thus high time that views of historians, sociologists and other experts on their respective fields be seriously considered in the context of critical thinking and informed discourse. The following observation by Kymlicka shows the need for caution in the use of the word 'peoples' rather than 'people" in the context of a country's population:

> ... Multinational federalism divides the people into separate 'peoples', each with its own historic rights, territories, and powers of self-government; and each, therefore with its own political community. They may view their own political community as primary, and the value and authority of the larger federation as derivative.[54]

Kymlicka further states that in order to reduce this danger of deep division, "federal governments have encouraged national minorities to identify with, and feel loyalty towards, the federal government", and he notes that "the historical

[53] *See* for example, Addis Standard, September 12, 2018.

[54] Will Kymlicka, Federalism, 'Nationalism, and Multiculturalism' in D. Karmis et al. (eds.), *Theories of Federalism: A Reader* [in Dimitrios Karmis and Wayne Norman 2005; Chapter 24], p. 287. (Citing OECD)

record suggests that these efforts have limited success".[55] Attainments in this regard thus need due attention to the root factors transcend official statements and pledges.

There have been challenges in maintaining the proper balance between ethnic identity and sense of membership in the bigger Ethiopian political community. In this regard, there were earlier symptoms of ethnic tensions that could have served as wake-up calls. Physical assaults in university campuses and soccer games that reflect ethnic tension could have been regarded as symptoms in diagnosing the problems. On the contrary, there are Ethiopian universities that are becoming hubs for ethnic-based student groupings and tensions, while they should have been forums for rational discourse, critical thinking and cosmopolitanism.

Ethnic hostilities indeed affect nation-building. As René Grotenhuis notes, the "process of nation-building boils down to 'forging a sense of common nationhood',[56] and he raises the following issues:

> How can we make sure that Luos and Kikuyus identify themselves as Kenyans and that the Kenyan nationhood is an important aspect of their identity? The same challenge goes for people of different ethnic and tribal affiliations ... .
>
> ... [I]n many fragile contexts, the state is absent or, worse, a perpetrator of acts of violence. In such a reality, people look towards their family, tribe, clan or religious community to find protection and to access basic needs like food, shelter and medical care.[57]

Grotenhuis uses a model formulated by Shulman in his discussion on the components of national identity. According Shulman, there are three layers of collective identity, i.e., *ethnic*, *cultural* and *civic*. The first layer (i.e. ethnic identity) is based on ancestry and race, while the second layer (cultural identity) is based on [factors such as] language and tradition. Civic identity that is shared by all citizens is the third layer which is based on citizenship, territory, will and consent, political ideology, political institutions and laws.

> Shulman's three main elements (civic identity, cultural identity, ethnicity) and their underlying components are the building blocks of a national identity, but their relative importance of weight is not defined in advance. It is an open model that leaves space for a contextual and diverse understanding of national identity. ... What is at stake is not the objective truth about the

[55] Id., p. 292, Endnote 26.
[56] René Grotenhuis (2016), 'National identity: A model and its content', in *Nation-Building as Necessary Effort in Fragile States*, Amsterdam University Press), p. 125.
[57] Ibid.

> different elements and components and their relative importance, but the extent to which people actually use these labels to define their national identity. ... If we want to build a national identity, this will have to be a bottom-up process.[58]

Various Ethiopian laws including the FDRE Constitution use nations, nationalities and peoples without clarity in definition and context. There should have been caution in using the word '*nation*' for pre-industrial ethno-cultural groups of people, unless it is used in a country-wide context of nation-state or nation-building. Such conceptual clarity could have facilitated harmony among the triadic elements of a person's collective identity (i.e., ethnic, cultural and national identity, with the latter representing *Ethiopian identity*).

The following conversation between Dr. Alex de Waal[59] and the late prime minister, Meles Zenawi (while the latter was alive) relates to nation building:

> **Question** (Alex de Waal):
> …[A]ny attempt to define nations and nationalities in a non-industrial society involves applying a set of more-or-less arbitrary criteria concerning language, culture, territory, etc. If the criteria are adjusted even ever-so-slightly, the groups or populations that are identified as nations will alter, their boundaries will change, etc. [Secondly] … economic development …will change the character of those national entities. People will migrate, they will be organized differently, cultures will change. This is normal. So how will your definition of 'nation' change as Ethiopia industrializes? And what does this mean for the constitution? [60]
>
> **Response** (Meles Zenawi):
> This is a critically important point that we have not resolved. It may be the most politically sensitive and explosive question that we need to face. Our federal formula was devised during the transition in negotiation with the OLF. … They regressed to a narrow nationalism that is the obverse of developmentalism or democratic nationalism. Meanwhile, the chauvinists adopted another pathology of nationalism, inherited from the feudal-imperial past, of a pan-Ethiopian chauvinism that refuses to recognize other national-cultural entities as equals. For us to move forward, it is absolutely essential that the equal status of nations and nationalities is not only enshrined in the

[58] Id., pp. 128, 129.
[59] Alex de Waal (2018), *The Future of Ethiopia*: Developmental State or Political Market Place? August 20, 2018 (Executive Director at the World Peace Foundation at The Fletcher School, Tufts University, and Research Program Director): http://www.africanidea.org/The-future-of-ethiopia_development.pdf
[60] Id., pp. 6, 7.

> Federal Constitution but is internalized as part of our common political discourse. This is the foundation of democratic nationalism.[61]

The late prime minister's response is clearly untenable because political polarities are not managed through explosive experiments that are more harmful than the problems they are meant to resolve. This risky experiment can clearly be observed from the minutes of the Transitional Government of Ethiopia (TGE) during the seven meetings of the Council of TGE (mostly constituted of ethnic-based political groups that were members of the TGE) held on Meskerem 6, 8, 20, 22, 24, 27 and 29 in 1984 Ethiopian calendar (i.e. September/October 1991). With regard to the determination of regions/ kilils, the minutes of the Council of the TGE state the following views that were expressed by Councils's chairperson, the late Prime Minister Meles Zenawi:

> The chairperson stated that the criteria for the delineation of regions/kilils is a basic issue; language, geographic adjacency and psychological make-up are adopted by the Council as criteria. The issue of nation or nationality is not biological but a historical process. This recognizes irreversible historical phenomena that are positive and negative. Or else, conflicts will ensue. For example, it can be said that most of the northern part including Tigray, Godjam, Gondar and Wollo were originally Agaw, and orgin cannot be the premise [criteria for regions]. The actual realities indicate that many parts of Wollo that were Oromo communities are now Amharic speakers and there are communities that still speak Oromiffa. On the other hand, these communities are not adjacent to their [ethnic group], and it seems preferable to allow them to form their own Woreda Councils (*Shengos*). [62]

The Transitional Government of Ethiopia (TGE) was thus fully aware that the fourteen regions that were formed during the transition period (later reclassified into nine regions and two cities under the 1995 FDRE Constitution[63]) were based on linguistic lines and other factors such as geographic adjacency and psychological make-up, and *not biological origin*. In reality, however, the

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[61] Id., p. 7.

[62] Minutes of Meskerem 22, 24 and 27, 1984 Ethiopian Calendar. Pages 11 and 12፡

> "በዚሁ ጊዜ ሊቀመንበሩ የመሥፈርት ጉዳይ መሠረታዊ ስለሆነ ቋንቋን፣ ጂኦግራፊያዊ ኩታገጠምነትና ሥነልቦናን ምክር ቤቱ እንዳስቀመጠ ጠቁመው ብሔር፣ ብሔረሰብ ሲባል ጉዳዩ ሥነፍጥረታዊ (biological) ሳይሆን ታሪካዊ ሂደት እንደሆነ፣ መስፈርቱም ታሪክ የፈጠረውን መጥፎም ሆነ ደግ ክስተት ሪቨርስ (reverse) የሚያደርግ ሳይሆን የሚቀበል መሆኑን፣ ይህ ካልሆነ ግን ውዝግብ እንደሚያስነሳ ለምሳሌም አብዛኛውን የሰሜን ክፍል ማለትም ትግራይን ጨምሮ ጎጃምን፣ ጎንደርና ወሎን ከመሠረቱ (originally) አገው ነው ማለት እነደሚቻል ስለሆነም ኦሪጅንን (origin) እንደመንደርደሪያ መውሰድ እንደማይቻል አስረድተዋል። በማያያዝም ወሎ ውስጥ አሁን በተጨባጭ ብዛት ያለው መጀመሪያ ኦሮሞ የነበረ አሁን አማርኛ ተናጋሪ የሆነ ክፍል እንዳለና አማርኛ ከሚናገረው ቁጥሩ አነስተኛ የሆነ እስካሁን ኦሮምኛ የሚናገር ክፍል እንደሚገኝ ጠቅሰው ሆኖም በሌላ በኩል ሲታይ ክፍሉ ከአናት ብሔሩ ጋር ስለማይገኛኝ … ወሎ ከአማራ ክልል ጋር ተጠቃሎ ኦሮምኛ ተናጋሪው ክፍል በወረዳ ደረጃ የራሱን ሽንን የሚያቋቁምበት ሁኔታ ቢፈጠር የሚሻል እንደሚመስላቸው ማብራሪያ ሰጥተዋል።"

[63] Article 47, Sub-Article 1 of the 1995 FDRE Constitution

experiment was susceptible to the creation of false consciousness towards biological/ethnic distinctiveness.

Alex de Waal was curious as to why EPRDF opted to adopt ethnic federalism that might not be conducive to changing realities in the course of Ethiopia's economic development. The following question relates to this concern:

> But I still see some big problems. Nations are not static and unchanging, especially when they are entities within a 'nation of nations'. Isn't there a danger of getting stuck with a system that cannot adapt to historical changes—especially with the pace of economic development that is now occurring? [64]

The following was the response of the late prime minister:

> That is why we are decentralizing important elements of governance, such as budgeting, to the zonal level and even lower. We need to have the right balance between the powers that are held at all different levels of government. If we invest too much in one single layer, there is the danger that the corresponding level of officialdom will become rent-seekers based on the outsized administrative privileges of that particular level. When the system was designed in 1991, the nations determined the administration. We want to avoid a situation in future where the administration determines the nations, which is what doomed Yugoslavia and the USSR.
>
> There is also no reason why the EPRDF should be comprised of constituent parties that match the federal entities and are confined to them. There is no other federal system where party politics is run on this basis. We are considering making the EPRDF into a single unified national party. This would be a logical step, but it needs to be taken at the correct time with all the necessary preparation.[65]

The response of the late prime minister clearly shows the risks in region-based party politics. He had also noted the need for the transition of EPRDF into a single unified party. However, the challenge that may adversely affect the pace of reform towards EPRDF's transition to a multinational party can be the competition of EPRDF members with other ethno-radical parties for wider support base (in their constituencies) which can promote ethnic-based populism.

The current major "obstacles and challenges" in Ethiopia's nation building pursuits "come from populisms animated by rival nationalisms, and their possible entanglements with organized politics".[66] Current realities clearly

[64] Minutes, *supra* note 62.
[65] Ibid.
[66] Andreas Eshete and Samuel Assefa (2018), "Reflections on Expanding Ethiopia's Democratic Space", pp. 42-49 in *Reflections on Expanding Ethiopia's Democratic Space*

indicate "a growing divide among the nationalist populisms and an effort by regional parties or their rivals to win the support of populist movements."[67]

Political platforms relate to competing rational ideas and not ethnicity. For example, Ghana's Constitution prohibits the formation of political parties that are tribal or ethnic based. It provides that "Every political party shall have a national character, and membership shall not be based on ethnic, religious, regional or other sectional divisions".[68]

The way forward in the path of effective nation building thus envisages a legal regime that encourages multi-ethnic political party formations, and the inclusion of non-ethnic members in ethnic based political groups which can lead to broader multi-ethnic political platforms. Positive developments in this regard relate to the reform processes in member parties of EPRDF that have expressed their intention to allow membership to non-ethnic residents of their respective regions who support their political programmes. Meanwhile, mass organizations, civil societies and other entities are expected to conduct various activities to protect collective rights which can, indeed, include ethnic and religious groups.

8. Peace, Order and Stability in the Context of Diversity

As peace (order) and freedom are two sides of the same coin, rule of law is unimaginable in the context of disorder and lawlessness. The latter not only affects the lives and property of citizens, but also exacerbates mass encroachments to forests, fragile landscape and wildlife. Polarities –which can ultimately bring about fragility and failed statehood– need not necessarily be among different linguistic and religious groups. It is to be noted that shared language and religion did not save Libya or Yemen from such tragedies.

Upon the disruption of the social fabric of a society –including value systems of pluralism, tolerance and fraternity– the effectiveness of laws and justice system institutions decline. In effect, individuals, gangs and mobs merely pursue their whims that trigger attacks, counter-attacks and hostilities. It is under such settings that virtues in the inner-self of many citizens dwindle. Subsequent realities can then bring about a chaotic setting that was explained by Thomas Hobbes (1588-1679) based on his observations during prolonged civil wars in Britain. Such chaos and anarchy can only lead to tyranny under a 'supreme sovereign' in the quest for *order* rather than rule of law.

Aspirations, Opportunities, Choices, p. 45. Available at: http://fes-ethiopia.org/wp-content/uploads/2018/12/Printing-Version.pdf

[67] Ibid.

[68] Article 55 (4), The Constitution of the Republic of Ghana, 1992.

The way forward does not lie in the Ethiopian unitary state, which unlike countries such as France, has not become successful in Ethiopia during the pre-1991 regimes. Nor can ethnic radicalism bring about the balance between unity and diversity. There is thus the need to address the causes of the disequilibrium in the unity and diversity nexus while at the same time dealing with the symptoms in the course of justice system reform (including legislative reform).

Mere enactment of laws that deal with individual freedom in a multinational state "overlooks the fact that people identify with their particular community on the basis of their special or distinctive features…".[69] Respect for diversity thus becomes inevitable in multiethnic societies. However, the notion of diversity can be misconstrued by ethno-radicalism which "includes all political endeavour that bases the distinction between friend and foe on ethnic characteristics and pursues its aims accordingly, even by violent means".[70] This causes ethnic conflict in multinational states as long as the foundations are ripe. As Feiner observes:

> If one wishes to search for new state concepts that could prevent ethnic conflicts or at least manage them peacefully, one needs to know the real causes of such conflicts. However, the views and theories as to the causes are as diverse as the conflicts themselves. Possible causes include:
> - economy (social injustice),
> - history (retaliation for historical injustice, denial of self-determination, historical discrimination),
> - ethnic communities living in foreign neighbouring territory, religious fundamentalism,
> - power-hungry warlords,
> - fear and mistrust as consequence of terrorism of minorities and terrorism of the state.[71]

These objective realities constitute foundations for ethnic conflict that can erupt when the subjective conditions are ripe. As Feiner notes, the factors indicated above are "in some way related to the issue of ethnic identity and the attendant self-awareness", and he states that "the ethnic dispute is marked by a friend-foe mentality, which can be manipulated and radicalised by various private interests. Ethnic differences can be emotionalised in order to pursue economic, political, cultural or mere power interests, or to divert attention from other internal problems".[72]

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[69] Thomas Feiner (2009), 'The Multicultural State: The Challenge of the Future' in Thomas Feiner & Lidija Basta Feiner (2009), *Constitutional Democracy in a Multicultural State and Globalised World*, Springer, 8, p. 513.
[70] Id., p. 516.
[71] Id., p. 519.
[72] Ibid.

While democracies are based upon the majority principle, addressing ethnic tensions calls for legal regimes that at the same time ensure equal treatment "as an individual as well as a member of an ethnic community or collective" in the absence of which the majority rule can "degenerate into a tyranny over minorities".

> If states want to hold different ethnicities together, the majority will have to grant minorities the right to be recognised as ethnic units or communities on equal footing with other ethnicities including the ethnic majority. It is not enough that people as individuals are treated equally. It is essential that members of minorities can see themselves as belonging to an ethnic unit or group, which as a collective entity is on an equal footing with all other communities within the state. …[73]

In the course of ensuring equal treatment and freedom of citizens as individuals and as an ethnic or religious collective, the "multicultural state can set itself the goal of holding society together by regarding diversity not as a burden but as an asset, and by fostering diversity as something that enriches society rather than merely 'tolerating' diversity".[74]

> How can cultural diversity be fostered? The only known means to foster diversity is to not only grant rights and liberties to the various communities, but to also equip them with the necessary autonomy to develop themselves according to their own values. It is necessary to construct the constitutional framework in such a way that the vast majority of the population can identify with the multicultural state and can see it as 'their' own state ('we'). People within such a state should be able to find a common answer to the questions: What is good for us as a multicultural community and what is good for us as a collective community? [75]

Feiner substantiates his views by using the Swiss experience which shows that generally accepted political values can ultimately bind multinational units of the federation thereby making such societies to steadily enhance their integration through common values:

> Given that the Swiss democratic polity has been organised around common interests and integration rather than (as in such homogeneous states as France and the United Kingdom) sectional conflict, the combat of interests, and clashing power, it has found a legitimate way to unite the existing diversity into a politically homogenous unit on the basis of generally accepted political

[73] Id. p. 525.
[74] Id. p. 527.
[75] Ibid.

> values. Compromise has thereby retained its legitimising function for the establishment of political and civic identity.[76]

This explains the reason why federations under communist dictatorships failed and led to dismemberment (the Soviet Union, Yugoslavia and Czechoslovakia), while on the contrary they succeeded in constitutional democracies. As Kymlicka notes,

> On any reasonable criteria, democratic federations, as opposed to Communist federations, have been surprisingly successful in accommodating minority nationalisms. Both historic multination federations, like Switzerland and Canada, and more recent multination federations, like Belgium and Spain, have not only managed the conflicts arising from their competing national identities in a peaceful and democratic way, but have also secured a high degree of economic prosperity and individual freedom for their citizens.[77]

According to Kymlicka, this has been possible because "democratic multination federations have succeeded in taming the force of nationalism" and "[d]emocratic federalism has domesticated and pacified nationalism, while respecting individual rights and freedoms".[78] He also states that many federal systems in democratic countries (such as the United States or Australia) " were not designed as a response to ethnocultural pluralism" as a result of which the federal units do not correspond in any way with distinct ethnocultural groups who desire to retain their self-government and cultural distinctiveness". He further notes that "[t]hese sorts of federal systems can be quite stable".[79] It is also worth to note that such territorial federations (as in the case of the United States, Brazil, and others) can "worsen the position of national minorities", unless the decisions about boundaries and powers are "made with the conscious intention of empowering national minorities".[80]

On the other hand "nationality-based units will seek different and more extensive powers than regional-based units"[81], and "of course the most extreme assertion of self-government-namely, secession-has only been made by nationality-based units, whether it be in the former Czechoslovakia, Yugoslavia or the Soviet Union, not regional-based units".[82] Kymlicka further examines the risks involved in nationality-based federations (as opposed to territorial federalism):

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[76] Id., p. 633.
[77] Kymlicka, *supra* note 54, p. 269.
[78] Ibid.
[79] Ibid.
[80] Id., p. 276.
[81] Id. p. 277.
[82] Id. p. 278.

> ... Where national minorities become politically mobilized in this way, secession becomes more feasible, even with the best-designed federal institutions. …
>
> … Multinational federations are often viewed by national minorities as if they were confederations. National minorities typically view themselves as distinct 'peoples,' whose existence predates that of the country they currently belong to. …
>
> … But the political perceptions of national minorities are unlikely to match these legal niceties. For them, the larger country feels more like a confederation than a federation, in the sense that the larger country's existence is seen as morally dependent on the revocable consent of the constituent national units. ...[83]

Contrary to these challenges, "the experience to date in the West suggests that democratic multination federations are remarkably resilient" mainly owing to the focus "on the intrinsic benefits of belonging to a federation-that is, the value of belonging to a country which contains national diversity". In the absence of balance between sense of belongingness to a federation and recognition of diversity, multination federal units in non-democratic countries regress culturally in addition to the risks of ultimate dismemberment. Upon the dissolution of Czechoslovakia, the following reflections from its former prime minister, Petr Pithart, show the magnitude of loss that Prague had encountered due to its failure to embrace diversity under communist regimes:

> In the last 55 years, the Czechs have lost –as co-tenants in their common house– Germans, Jews, Ruthenians, Hungarians and Slovaks. They are now, in effect, an ethnically cleansed country, even if it was not by their own will. It is a great intellectual, cultural, and spiritual loss. This is particularly true if we consider central Europe, which is a kind of mosaic. We are still living touristically from the glory of Prague, which was a Czech-German-Jewish city and a light that reached to the stars. But you cannot win elections with that kind of argument.[84]

Kymlicka agrees with Pithart's reflections that there is often a 'great intellectual, cultural and spiritual loss' under such settings, but he believes that voters can indeed support candidates who oppose ethnically dichotomized constituencies depending on a country's history and the perception of most citizens. He underlines that "average citizens are capable of seeing the benefits of living in a multination federation, and of comparing it with the alternatives,

[83] Id. pp. 286, 287.
[84] Cited in Id., pp. 288, 289.

most (if not all) of which have a much worse track record in dealing with ethnonational diversity".[85]

9. The Tension between Multi-ethnic *Civic Identity* and Article 39(1) of the FDRE Constitution

Barrington discusses the confusion when the word 'nation' is interchangeably used with 'state' which represents "the principal political unit in the international political system corresponding to a territory, a relatively permanent population, and a set of ruling institutions".[86] He also states that it should not be misused as a word which is identical with the word 'country' because the latter is "the territorial component of the state". In short, the words nation, state and country respectively represent *people*, the *political entity* and *territory*.

Moreover, Barrington criticizes the loose definition of 'nation', a point that is very relevant to the current realities in Ethiopia:

> The most basic loose use of 'nation' is the interchanging of the term and 'ethnic group' or 'ethnicity.' ... [N]ations can evolve from ethnic groups ... A nation is more than an ethnic group, differing from such a group because of a nation's belief in its right to territorial control, or what Richmond (1987) calls its 'territorial referent.' Also, and more important, nations need not even be based on a certain ethnic identity. Thus, the words 'shared cultural features' in the definition of nation ... should not be read as 'shared ethnic identity.' What are called 'civic' or 'political' nations in the nationalism literature have shared cultural features but are generally multiethnic in their make-up. ....[87]

The way forward envisages the enhancement of multi-ethnic civic identity among all Ethiopians based on citizenship. One of the factors that may hamper the progressive coalescence of multi-ethnic civic identity seems to be misconceptions about the constitutional 'right to secession' which can be manipulated by ethnic entrepreneurs. The political leadership that managed to have Article 39(1)[88] inserted in the FDRE Constitution seemed to have been satisfied because the sub-article comes prior to other provisions that articulate the core normative principles on self determination, self-government, equality and fraternity. However, the drafting team has substantially watered down the

[85] Id., p. 289.
[86] Lowell W. Barrington (1997), "Nation" and "Nationalism": The Misuse of Key Concepts in Political Science, *Political Science and Politics*, Vol. 30, No. 4 (Dec., 1997), pp. 712-716 Published by: American Political Science Association, p. 713.
[87] Ibid
[88] Article 39(1) reads: "Every Nation, Nationality and People of Ethiopia has an unconditional right to self-determination, including the right to secession."

word 'unconditional' that is embodied in Article 39(1) by articulating procedures and the principles of equality, unity and fraternity.

Until constitutional amendments (such as revisiting Article 39/1) are undertaken, there is the need for clarity regarding its relationship with other provisions. Article 39(1) lays down the principle of the right to self determination which is *unconditional* and whose scope can extend up to *secession*. Article 39(2) articulates the elements of self determination with regard to language, culture and history. Article 39(3) ensures self-government and equitable representation in state and Federal governments, thereby assuring the rights to *self-rule* and *shared-rule*.

Article 39(4) stipulates the procedures under which the right to secession can come into effect, and it thus overrides the word '*unconditional*' (in Article 39/1) in relation to session. The political objectives of these provisions are articulated in Article 88 which provides that:

1) "Guided by democratic principles, Government shall promote and support the People's self-rule at all levels".
2) "Government shall respect the identity of Nations, Nationalities and Peoples. Accordingly, Government shall have the duty to strengthen ties of equality, unity and fraternity among them".

The adverse impact of Article 39(1) of the FDRE Constitution relates to the *perception* it creates because it can be easily susceptible to political and economic elite capture thereby eroding beliefs and thoughts of multi-ethnic civic identity. Article 39(1) traces its roots to Joseph Stalin's views embodied in Article 72 of the USSR Constitution until the breakup of the Soviet Union during the early 1990s. It is to be noted that absence of such provision is not an absolute guarantee against attempts of secession (such as Biafra) and the actual occurrence of secession as in the case of South Sudan. The adverse impact of the provision does not thus mainly lie in its potential to be effectively invoked (in the near future), but in the *misperception* which it creates and the sense of shared citizenship and civic fraternity that it can gradually erode thereby causing challenges in the pace of nation building, economic development, social well-being and environmental sustainability.

Karen A. Cerulo cites Disraeli's observations which states that "[i]ndividuals may form communities, but institutions alone can create a nation", and she notes that "[e]qually important are a nation's symbols, rituals, and traditions" which constitute a nation's identity.[89] These elements in nation building (including the institutions of trust, inter-ethnic fraternity and attachment to the national flag)

[89] Karen A. Cerulo (1993), 'Symbols and the World System: National Anthems and Flags', *Sociological Forum*, Vol. 8, No. 2, p. 243.

are indeed crucial. This calls for addressing the tension between shared civic identity and the 'secession' clause in Article 39(1) of the FDRE Constitution.

It is thus high time to raise the question whether Ethiopia's Constitution – which is currently the only constitution in the world that has a Stalinist provision (in the form of Article 39/1)– can (in light of *Truth* and *Reason*) be 'right' against the entire world. If the breakup of the former Soviet Union and Yugoslavia, and ethnic clashes in Ethiopia are not adequate enough to show us the path to *Truth*, *Reason* and *Critical Thinking* in this regard, we as a nation-state are too naïve to avoid institutional fragility (including justice sector institutions). Such oversight also negates the current trend toward sub-regional and regional integration in Africa *via* free trade areas and customs unions with the optimistic vision of Africa's ultimate political integration in 2063, i.e., a century from the formation of the Organization of African Unity in 1963.

10. Legal Arguments regarding the Emblem on Ethiopia's Flag

The clashes (on September 13th 2018, in Addis Ababa) over flags and emblems are incidences that indicate the need for clarity on the Ethiopian flag which represents Ethiopia's sovereignty. Attachment to a flag, *inter alia*, represents civic membership and commitment. Article 3 of the FDRE Constitution states the horizontal colours in the Ethiopian flag as "green at the top, yellow in the middle, and red at the bottom" that have equal dimensions. It also states that the flag "shall have a national emblem in the centre".

Article 3(2) provides that "the national emblem on the flag shall reflect the hope of the Nations, Nationalities, Peoples as well as religious communities of Ethiopia to live together in equality and unity". Article 3(3) recognizes the rights of members of the federation to have their respective flags determined by their respective legislatures. This provision does not, however, envisage flags of political parties. Of course, political parties have the right to design their emblems, but a flag that differs from the political party's emblem can be confused with flags that are only allowed at a country or regional state level.

There are issues that evoke controversy regarding the mandatory use of the emblem at the centre of the Ethiopian flag and the blue colour that is used as its background. There have been emblems during the previous regimes. However, it has never been unlawful for the public to use flags without emblems, even though flags with emblems were hoisted in key public offices and at the flag posts of some government institutions.

According to Article 3(1) of the FDRE Constitution, the national emblem shall be at the centre. This provision can imply the interpretation that the national emblem shall not go beyond the colour at the centre, i.e. the yellow colour. For example, among Pan-African flags that use green, golden and red (inspired by the Ethiopian flag), Cameroon, Ghana and Senegal use stars as

emblems at the centre. However, the emblems use the colour at the centre as background, and they do not stretch to the upper and lower colours of the flag.

One can interrogate the constitutionality of the Flag Proclamation No. 654/2009 on two grounds. *First*, it introduces a fourth blue colour as background to the national emblem, and *secondly*, it violates the notion of 'centre' envisaged in the Constitution because it provides that the circumference of the blue colour is "curved on the midpoint of the width of both the green and red colours".[90]

Article 3(1) of the Constitution envisages only three colours (green, yellow and red) and the emblem at the centre should have used the yellow in the centre as its background, by using green and/or red for drawing the star and rays. It can thus be argued that Article 6 of the Flag Proclamation is unconstitutional because it introduces a fourth colour to the Ethiopian flag. The fourth colour was initially introduced by the Flag and Emblem Proclamation No. 16/1996. The Proclamation clearly considered the blue as a fourth colour, and gave it a numerical sequence under Article 4. The provision titled "Meaning of the Colours of the Flag" reads:

"The colours of the Flag shall represent the following meanings:

1) the green for labour, fertility [ልምላሜ] and development;
2) the yellow for hope, justice and equality; and
3) the red for sacrifice and heroism towards the prevalence of freedom and equality.
4) The circular blue background of the Emblem signifies peace."

The circular blue colour that serves as background does not add meaning because 'peace' is inseparable from justice, freedom and equality that are already represented by the other colours. The blue colour also disrupts the horizontal equal dimensions stated in Article 3(1) of the Constitution. Even worse, the background blue colour (which had slightly touched the green and red colours under Proclamation No. 16/1996) was enlarged after the enactment of the Flag and Emblem (Amendment) Proclamation No. 48/1996 (so that it could extend to the midpoint of the green and red colours). This enlarged background is adopted in Proclamation No. 654/2009. One can thus argue that Proclamation No. 654/2009 is unconstitutional because, it unduly allows a fourth colour, and the blue circular background disturbs the horizontal alignment and equal dimensions of green, yellow and red (thereby reducing the area of the yellow colour in the flag which represents hope, justice and equality).

[90] Article 6(1) of the Flag Proclamation No, 654/2009

11. Land Tenure Security and the Need to Avoid Role Conflict in Municipalities

The problem related to equity in the economy (social injustice) is one of the factors for public dissatisfaction. This is very relevant in justice system institution building and broad-based economic and social empowerment. It is awkward that Ethiopia (as a primarily rural smallholder farmer economy) turns a deaf-ear to the volumes of academic literature on rural and urban land tenure security that can enhance economic efficiency, social wellbeing and environmental sustainability. For example, the scheme of *land readjustment*[91] accommodates urban redevelopment or urban expansion without evicting urban or peri-urban landholders because the landholdings can be contributed as stock (share) in new investments to the mutual benefit of all parties, i.e. former landholders and investors.

Analogous to Article 39(1) of the FDRE Constitution (highlighted in the preceding section), 'government-ownership' of land in the Ethiopian land law regime is unique and contradicts with all legal regimes in the world. There is no land law throughout the world which states that land belongs to the 'government'[92] even though various countries consider land as state (or public) owned without, however, denying the tenure security of landholders. Even China, that has not yet set aside various communist party policies, recognizes the *land use ownership rights* of landholders (since 2007) while land ownership is in principle held by the state.[93] In China, rights of landholders are transferable via sale, lease, or as stock contribution without the need for pretention and simulation. In Ethiopia, on the other hand, we are fully aware that a 'house' will be demolished by a buyer, and we pretend as if it is the house and not the land that is being sold.

Ethiopia's land regime is also inconsistent with the 'land to the tiller' slogan of the student movement of the 1960s and early 1970s. This motto did not envisage a setting which *de facto* relegates landholders to the position of

[91] *See* for example, Achamyeleh Gashu Adam (2015). "Land readjustment as an alternative land development tool for peri-urban areas of Ethiopia", *Property Management*, Vol. 33 Issues 1 (pp. 36 – 58): https://doi.org/10.1108/PM-05-2013-0034

See also, Kauko Viitanen *et al* (2010). Editor: Stig Enemark, Hanoi Declaration on Land Acquisition in Emerging Economies, International Federation of Surveyors (FIG), *FIG Publication* No. 51. February 2010

[92] *See*, for example, Article 5(6) of the Land Administration and Use Proclamation No. 456/2005 which reads "Government being the owner of rural land, communal rural land holdings can be changed to private holdings as may be necessary".

[93] *See*, Stebek (2015), 'Access to Urban Land and its Role in Enhancing Business Environment: Multi-track *versus* Mono-route Land-use Markets', *Mizan Law Review*, Vol. 9, No. 1 (September 2015), section 7, pp, 23-28: http://dx.doi.org/10.4314/mlr.v9i1.1

disempowered tenants of the government without tenure security whenever the government invokes 'public purpose'[94] even when it seeks to evict landholders and allocate their land to 'investors'.

The proclamations that consider land as 'government-owned' are unconstitutional because Article 40(3) of the FDRE Constitution confers land ownership on the state, nations, nationalities and peoples thereby implying *joint ownership*. At individual level, a rural or urban landholder (is an individual member of a nation, people, etc) and is, in effect, joint owner and not a mere holder who can be arbitrarily evicted. Analogous to an apartment in a condominium, an individual holder of urban or rural land can (under Article 40/3 of the Constitution) be entitled to joint *right in rem* (right over the land), and exclusive *right in rem* over the physical property on the land.

The social movements that started at Ginchi in 2015 and the second wave of protests against evictions due to the new 'master plan' of Addis Ababa were the immediate causes of the civil disobedience that eventually led to the political reforms that are underway. This injustice of land tenure insecurity at the grassroots indeed deserves due attention on both grounds of *equity* and *economic efficiency*. Unfortunately, however, political parties, including the ruling party have not yet included the land tenure security agenda among their urgent concerns. Tenure security is related with the basic needs of people at the grassroots, i.e. daily engagement of citizens in meaningful economic activities and social services, decent meal, clean water, housing, health and education. Decent meal for most citizens at the grassroots, for example, is unimaginable in the absence of one of the core factors of production, i.e. stronger land tenure security which is a precondition for productivity, social wellbeing and environmental sustainability.

Economic and political elites in predatory states benefit from resource capture in the context of grass-root disempowerment. In *business as usual* scenarios, municipalities throughout Ethiopia will continue to be land lease 'boutiques' rather than municipal service providers (including uninterrupted water and power supply) thereby entering into an apparent *role conflict* between revenue generation (by leasing out as much urban space as possible) which clearly contradicts with the proper conduct of their municipal services. For example, the level of deterioration in municipal services in Addis Ababa with regard to water supply shortages, power outages, gaps in waste management, etc., clearly show the impact of the role conflict. We should have been able to

[94] On the need to redefine '*public purpose'*, for the purpose of expropriation, *see*, Muradu Abdo (2015), 'Reforming Ethiopia's Expropriation Law', *Mizan Law Review*, Vol. 9, No. 2 (December 2015), 301-340: http://dx.doi.org/10.4314/mlr.v9i2.3

evaluate the performance of municipalities based on their municipal functions rather than their annual revenue from land lease. This is another feature of Ethiopia's unique malpractice (as opposed to all municipalities in the world).

A Municipality which is the custodian of a Master Plan and municipal functions cannot be entrusted with the opposite task of raising its lease-sale revenue through the sale of urban land through 'lease'.[95] As the practice shows, cohorts of office holders in municipal land administrations face series of corruption charges, and again identical incidences of corruption and arrests repeat themselves in many parts of Ethiopia. Municipalities should thus be restricted to their conventional function of municipal services and the implementation of master plans; and another public authority not accountable to municipalities should be entrusted with land banking and acquisition based on master plans and with due respect to tenure security of landholders.

12. The Need for Normative Gate Keeping against *Predatory* Statehood

Although discontent and social movements have led to failed statehood in Libya and other countries, this has not been the case in Ethiopia –after three years of social movements since 2015– even though the risks of polarized fragmentation were graver. This antidote against failed statehood can only be sustained, *inter alia*, through rule of law which is, *inter alia*, characterized by public trust in all government organs, including the justice sector.

The ruling party claimed to pursue democratic developmental statehood after the 2005 elections. On the contrary, however, Ethiopia's politico-economic realities "were closer to *predatory* rather than *developmental* statehood because state intervention in democratic developmental states such as Botswana, targets at empowering (and not repressing and substituting) broad-based private sector".[96]

A case in point regarding predatory acts in the Ethiopian context includes economic resource grabs by office holders under the *façade* of various front-persons (who cannot explain their windfall 'wealth'). The acts of corrupt office

[95] *See*, for example, Stebek (2013), 'Role Conflict between Land Allocation and Municipal Functions in Addis Ababa', *Mizan Law Review*, Vol. 7, No. 2 (December 2013), 241-282: http://dx.doi.org/10.4314/mlr.v7i2.3

[96] For the contrast between developmental state *versus* predatory state interventions, *see* Section 4 titled "Comparative Experience in State Intervention toward Private Sector Empowerment –versus- Predatory Interventions (pages 45-50)" in Stebek (2017), 'Deliverables and Pledges under Ethiopian Trade Competition Law: The Need for Private Sector Empowerment and Enablement", *Mizan Law Review*, Volume 11, No. 1 (September 2017), pp. 32-63. DOI: http://dx.doi.org/10.4314/mlr.v11i1.2

holders and a significant portion of the economic elite also include contraband trade chains that have considerably displaced the taxpaying private sector. The endpoint of this chain is clearly visible in the magnitude of street vending in cities such as Addis Ababa. Such corruption and claims of phony legitimacy (though elections) cannot thrive in settings where justice sector organs are empowered and independent. Thus, interventions in the mandates and operations of justice sector institutions become inevitable in predatory states.

As Eun Mee Kim observes, predatory states use their power "for capricious extraction and wasteful consumption" and this "diminishes private productive capacities rather than enhancing them" as a result of which welfare and growth suffer.[97] Vaughan and Gebremichael also noted that *developmental patrimonialism* succeeds only when the pot (*ማዕድ*) grows and ensures a "reasonably sustainable access to it", in the absence of which "a transition economy of low productivity, poorly co-coordinated markets, opportunistic rents, unregulated entrepreneurialism has frequently led to non-developmental kleptocracy".[98]

The economic policies in Ethiopia were indeed susceptible to *predatory statehood* which creates and nurtures elites of oligarchs rather than a broader middle class. While few individuals form the political stratum and economic elites usually become *predators* in such settings, the economy at large and the population are *prey* to their predators. In the Ethiopian context, predatory interventions include rigidity against land reform because the political and economic elites have vested interest in land acquisitions in the guise of 'land lease' and 'investments'. Insecure landholding also meant a *carrot and a stick* tool in *controlling voter behaviour* and small-scale enterprise support schemes.

Oligarchs 'benefit' from reflexive 'growth' in predatory states whose eclectic policies and decisions are characterized by whims and haphazard pursuits. Under such settings, elegant formulae of 'economic growth', glittering power-point presentations and fake reports (rather than the reality on the ground) prompt policy decisions. In the context of non-inclusive oligarchy, reflexive decisions have, *inter alia*, brought about waves of haphazard high-rise constructions in Addis Ababa and other cities, excessive foreign debt, currency printouts unmatched by the production of goods and services, imprudent projects, and levying of Value Added Tax (VAT) on basic goods including food

[97] Eun Mee Kim (1993), "Contradictions and Limits of a Developmental State: With Illustrations from the South Korean Case" Social Problems, Vol. 40, No. 2 (May, 1993) p. 247.

[98] Sarah Vaughan and Mesfin Gebrehiwot (2011), 'Rethinking business and politics in Ethiopia The role of EFFORT, the Endowment Fund for the Rehabilitation of Tigray', *Africa Power and Politics*, Research Report 02, August 2011p. 60.

(to make up for excessive government expenditures). As Tekle-Birhan Gebre-Michael duly observes:

> The infrastructure development through currency printing, foreign debt and foreign aid has little contribution to production, and has thus entailed inflation, fall in the exchange rate of Birr, foreign currency shortages, corruption and waste of resources.[99]

The reversal of predatory statehood and reflexive 'growth' calls for *rule of law* and substantial reform of justice sector institutions (including the land law regime). As the justice sector operates within the economic, social and political realities of Ethiopia, any positive development in these sectors toward sustainable development and democratization inevitably facilitates justice sector reform owing to their dialectical and bi-directional causal relationship.

Concluding Remarks

Justice system reform and laws (that constitute rational expressions of the 'general will' rather than a political party manifesto) are among the factors that determine the pace of Ethiopia's overall institutional development. Challenges such as the themes discussed in the preceding sections, i.e. institutional discontinuity, ethnic politics and the land law regime illustrate root causes of problems that render justice system reform difficult.

It is indeed commendable that the revision of Ethiopia's laws in areas such as anti-terrorism and civil societies is given due attention. There are also other areas that need due focus in addition to the ones that have received priority. They include a legal regime on stock market (in the absence of which pledges of privatization of Ethio-telecom, Ethiopian Airlines, Commercial Bank of Ethiopia, etc would merely entrench oligarchy), due attention to quality and standards in education, language policy and Population-Health-Environment (PHE) nexus policy. It is to be noted that the quality and standards of education and due attention to value systems and moral character (such as work ethic) are foundations for every pursuit in nation building, sustainable development, social wellbeing and progress.

Other areas that call for reforms include meritocratic (as opposed to political party-affiliated) assignments in the public service and the levels of remuneration (including the justice sector), the pace of march toward multi-ethnic political party programs, *caveats* against laissez faire hedonism (such as the tchat/khat

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[99] አዲስ ጊዜ፣ ቅፅ 3፣ ቁጥር 72፣ ሰኔ 2010 ዓ.ም.፣ ገጽ 14
"በገንዘብ ሕትመት፣ በውጭ ብድርና እርዳታ የተካሄደው የመሠረተ ልማት ግንባታ፣ (በኢንቬስትመንት) ለምርታ ዕድገት ያደረገው አስተዋፅዖ አነስተኛ በመሆኑ የሕዝቡን ተጨባጭ የኑሮ ዋጋ ንረት፣ የብር የውጭ ምንዛሪ ተመን መውደቅ፣ ከፍተኛ ሥራ አጥነት፣ የውጭ ምንዛሪ እጥረት፣ መሰናና የሀብት ብክነት [አስከትሏል]።"

wave), autonomy of the National Bank of Ethiopia (so that monetary policy including the volume of paper money in circulation can be determined by NBE with due professionalism and independence), the need for transferring constitutional interpretation to courts, reinstatement of shares in private banks that were owned by the diaspora,[100] and many others which have been issues of discourse in various research works. These issues can be incrementally and progressively addressed because they have been themes of academic discourse.

There is no dearth of literature with regard to these and many other pertinent issues as long as prime attention is given to *critical inquiry*, *Truth* and *Reason*. As one of the external assessors of this article duly observed:

> The question of *'who owns and supports justice system reform initiatives in Ethiopia'* is crucial. Is it the government on top? or, justice sector institutions, the general public, donors, the civil society including the legal profession? or all of these together? This is a critical question to ask while addressing the question as to why reforms have not been effective or sustainable. Some researches show that countries can be grouped into three when their legal and judicial reforms are assessed: (i) those where the politicians, legal professionals and the public support reforms, (ii) those where politicians support reforms, but lawyers, the public and other law enforcement organs do not; and (iii) those where only the legal professions want reforms but not the politicians. Only reforms of the *first category* can attain their objectives. ..[101]

The participation of *law professionals* in the law reform process and the level of *political will* are commendable with regard to the efforts and achievements of the Legal and Justice Affairs Advisory Council (highlighted in Section 2.1). However, this cannot be sustainable unless the activities, task processes and achievements of the Council are well-documented and institutionalized thereby leading to entities such as Law Reform Commission (or Law Commission) with a view to sustaining and enhancing institutional memory, institutional continuity, professionalism and public engagement in law reform.

Moreover, mere expression of JLRTI's mandate under Proclamation No. 1071/2018 cannot ensure its effective performance in the absence of the legal profession's active engagement. The construction of premises to JLRTI at the peripheral outskirts of Addis Ababa –that are not easily accessible– does not facilitate such integrated engagements. A few offices at a proximate location

[100] *See*, for example, Tameru Wondim Agegnehu (2017), 'Legal Issues regarding the NBE Guideline on Diaspora-Owned Shares in Banks', *Mizan Law Review*, Volume 11, No. 2, December 2017, http://dx.doi.org/10.4314/mlr.v11i2.6

[101] Second reviewer's comments.

that are convenient to JLRTI staff and easily accessible to the legal profession are far better than buildings and a spacious compound in the outskirts of the city that require hours of transport –while such precious time could be devoted to effective research. The newly constructed premises can thus be assigned to Justice Organ Professionals Training Centre (JOPTC) which can focus on judicial training under the Federal Supreme Court. This author argues that JOPTC (whose function is to, *inter alia*, conduct judicial training) cannot be part of JLRTI as the latter is under the Attorney General's Office in accordance with Proclamation No. 1097/2018.

The way forward requires *political will* in addressing the root causes for the regression of Ethiopia's justice system, and it further calls for joint efforts of all stakeholders including the legal profession and the public. In the course of pragmatic initiatives and pursuits, the unattained elements among the 2002 and 2005 justice system reform recommendations can indeed be utilized (with some updating by the respective institutions as shown in Section 2.2) because they are *a fortiori* relevant today than they were during their formulation.

As Hodgson notes, institutions are "systems of established and prevalent social rules that structure social interactions".[102] These systems envisage a blend of organic and consciously formulated norms, structures and modes of operation. Reflexive and haphazard institutional reforms cannot thus succeed since institution building (including justice system reform) envisages roadmap clarity and because a wrong path does not lead to intended destinations.

However, policy roadmaps in Ethiopia have been blurred and inconsistent. A query that arises is the extent to which policies are informed by particular tracks in the constitutional democracy landscape from social democracy to liberal market economy (with due *caveat* against extremist neo-liberal de-regulation).[103] To borrow some words from Lewis Caroll's famous quote, "[if we] don't know where [we] are going, any road will get [us] there."[104] In the context of the justice sector, piecemeal and reflexive trial and error, which is not based on a proactive strategic roadmap (with due synergy among justice sector institutions) would only pull the justice system to the unknown, and in effect, to further regression. ■

[102] Geoffrey M. Hodgson (2006). "What are Institutions?" *Journal of Economic Issues*, 40(1), p. 2.

[103] The words 'neo-liberal' and 'developmental state' were usually misdefined in official statements since 2005/2006. Criticisms against *predatory* features of the ruling party's interventions were unduly labelled as 'neo-liberal'. However, neo-liberalism refers to extreme de-regulatory prescriptions such as the 'Washington Consensus' of the late 1980s.

[104] "If you don't know where you are going, any road will get you there." (Charles Lutwidge Dodgson, 1832-1898 , known by his pen name Lewis Caroll).

The Right to Cross-Examination and Witness Protection in Ethiopia: Comparative Overview

Tadesse Melaku ♣

Abstract

Cross-examination particularly in the context of criminal trial is a human right recognized in international human rights law and the Ethiopian constitution. However, states are increasingly facing another pressing policy consideration – protecting prosecution witnesses who could otherwise be subject to intimidation, and who could even risk their lives for providing evidence in the administration of criminal justice. Witness protection has become an important public interest that justifies the restriction of the right to cross-examination. Without such protection, witnesses could be uncooperative for fear of reprisal and, in view of this, many countries (including Ethiopia) have introduced measures restricting face-to-face examination through, among others, the suppression of witness identity. A review of foreign academic literature and foreign case law reveals that, when considering demands for anonymity, courts exercise maximum caution to ensure that the right to cross-examine witnesses is not unduly infringed. The writer argues that a recent constitutional ruling by the Council of Constitutional Inquiry in favor of withholding the identity of prosecution witnesses has failed to properly balance between the right to cross-examine against protecting witnesses. The ruling is likely to have a negative effect on fair trial and can adversely affect the fundamental rights of accused persons in Ethiopia

Key terms

Anti-Terrorism Proclamation · Council of Constitutional Inquiry · Right to cross-examination · Ethiopian Constitution · Fair trial · Protection of witnesses and whistleblowers

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Introduction

This article seeks to explore the tension between the right of accused persons to examine state witnesses face-to-face and the need for protectin the safety of

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witnesses. In doing so, the study focuses on examining the validity of the recommendation by the Council of Constitutional Inquiry (hereinafter CCI) that upheld the withdrawal of witness identity in a criminal case. The ruling was made following a petition contesting the validity of the anti-terrorism and the witness protection proclamations by *MehadiAley and others* who were charged with terror-related crimes. The ruling has a direct impact on –if not complete deprivation of – the right of the accused to cross-examine. With a view to draw lessons from other jurisdictions and Ethiopia's tradition, the writer has reviewed the experience of other countries. The choice of foreign jurisdictions is, however, based on availability of source materials.

Cross-examination is key to a fair court trial process. It provides an opportunity to challenge the trustworthiness of a witness and expose lies and contradictions in the oral account by a witness. The demeanor of the witness, the manner of giving her testimony, her physical and emotional reaction to questions in cross-examination may hold the key to ascertaining the veracity of the testimony. The significance of confrontation for the defense is, therefore, very critical. In view of this, the Constitution of the Federal Democratic Republic of Ethiopia and the International Covenant on Civil and Political Rights (ICCPR) embody the right of the accused to cross-examine witnesses.

However, guaranteeing the well-being of those who give evidence essential to establish a criminal act is (and should be) an equally important public policy. If the witness refuses to come forward and give evidence for fear of revenge by the accused and his associates, that would have a chilling effect on the criminal justice system. Accordingly, many states, including Ethiopia, have enacted laws providing for the protection of witnesses. The Ethiopian proclamations on witness protection and terrorism authorize the suppression of information about witness identity and admissibility of hearsay and intelligence reports as evidence in court, thus, restricting the right to confront and examine one's accusers.

Cross-examination is said to be "basic to any civilized notion of a fair trial", "of paramount importance to the rights of the defense and the fairness of the trial"[1] and "the greatest legal engine ever invented for the discovery of truth".[2] Cross-examination is one aspect of the right to a fair and public trial guaranteed in international human rights law[3] and under the Ethiopian constitution.[4] Art

[1] Footnotes omitted. David Lusty (2002), "Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trial", *Sydney Law Review*, vol. 24 <http://www.austlii.edu.au/au/journals/SydLawRw/2002/17.pdf > accessed 23 September 2017, pp. 361-362.

[2] Footnotes omitted. Ibid.

[3] Universal Declaration of Human Rights (1948), Art 10; International Covenant on Civil and Political Rights (ICCPR) (1966), Art 14(5).

[4] *Constitution of Federal Democratic Republic of Ethiopia* (1995), Art 20(4).

14(5) of the ICCPR, which is considered as an integral part of the Ethiopian legal regime[5], guarantees the right of the accused "to examine, or have examined, the witnesses against him".

In *Mattox v. United States*, the US supreme court gave convincing reasons for face-to-face examination: to ensure that witnesses would testify under oath and understand the serious nature of the trial process; to allow the accused to cross-examine witnesses who testify against him; and to assess the credibility of a witness by observing that witness' behavior.[6] The appearance of the witness in the courtroom enables the judge and the accused observe his/her reactions while being questioned and this may be crucial to assess the credibility and trustworthiness of the evidence.[7]

On the other hand, as various foreign case laws indicate, witness safety is a valid ground to restrict the confrontation rule without which obtaining testimonial evidence would be a daunting task. The lack of protection to the witness, her family or property could render the criminal justice system impotent.[8] In light of this, governments are taking steps for increased witness protection, especially in the face of rising organized crime and terror. In Britain, for example, many witnesses experienced one of "the gravest"[9] intimidations in relation to the conflict in Northern Ireland in the early 1970s. Thus, Lusty observes:

> The main obstacle to dealing effectively with terrorist crime in the regular courts of justice is intimidation by terrorist organizations of those persons who would be able to give evidence for the prosecution if they dared... The fear of revenge upon 'informers' is omnipresent… It extends to all classes of society. It is not an idle or irrational fear. It is justified in fact by many well-authenticated instances of intimidation, and not least by the example, familiar to all other potential witnesses, of a witness who was shot dead in his home in front of his infant child the day before he was due to give evidence on the prosecution of terrorists.[10]

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[5] Id, Art 9(4).

[6] *Witness protection during the prosecution and trial*: *Witness protection measures* <https://www.alrc.gov.au/publications/right-confront-witnesses-and-test-evidence> accessed 12 September 2017

[7] Ibid.

[8] Harris quoted in Nicholas Fyfe and Heather McKay (2000) "Desperately Seeking Safety: Witnesses' Experiences of Intimidation, Protection and Relocation" in *The British Journal of Criminology*, vol. 40, no. 4. Oxford University Press. pp. 675-691 <http://www.jstor.org/stable/23638491> Accessed: 21-08-2017

[9] Lusty, *supra* note 1, p. 385.

[10] Ibid.

The first section of this article provides a historical account of cross-examination and its restrictions focusing on its development in Europe and Ethiopia. The second section dwells on foreign laws and court decisions with a view to better understand the concept and the limitations necessitated by the need to protect evidence and the well-being of witnesses. The third and fourth sections respectively examine relevant Ethiopian laws the decision of from the Council of Constitutional Inquiry.

1. Cross-Examination and Witness Anonymity in the Past

In this section, we will examine the development and evolution of cross-examination and its corollary, anonymity, in European and Ethiopian traditions. Although anonymity existed in both Europe and Ethiopia, there are differences in the way it was enforced. In the former, suppression of witness' identity was practiced in exceptional circumstances. Ethiopia's tradition is characterized by an open and confrontational litigation between the accuser and the accused, testimonial statements were given in secret, at least with regard to *afersata*, as we will see later.

1.1 European historical account

The practice of face-to-face confrontation in a court trial goes back to ancient times as the following account reveals:

> An early illustration of this right is provided in the biblical account of the trial of Paul (c 60 AD), who was accused of sedition as 'a ringleader of the sect of the Nazarenes'. Roman Governor of Judea, Festus, refused requests for the summary execution of Paul, declaring: 'It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges'.[11]

However, the cross-examination faced a setback in the Middle Ages after the administration of justice was criticized for being too lenient towards the accused. Then, the Catholic Church and European states introduced stringent procedures in the name of protecting the public interest.[12] A system of inquisitional investigation and prosecution was introduced as a result of which any person could be charged based on a vague and unfounded allegation.[13] Governments legalized torture as a lawful technique of crime investigation.

The church, on its part, employed inquisition to investigate offenses involving heresy and, with respect to this particular offense, it too, used torture

[11] Id, p. 363.
[12] Ibid.
[13] Ibid.

and capital punishment. Restrictions on defense witnesses were strictly applied but those restrictions did not apply to state witnesses, hence, the double standard nature of the trial. As Lusty noted, "All statements adverse to the accused '[were] freely received, whether based on knowledge or prejudice, hearsay evidence, vague rumors, general impressions, or idle gossip". This approach was justified as proper in dealing with the then pressing issue of heresy in view of "the high risk of reprisals against those who testified against their neighbors"[14] The English philosopher Bentham criticized the inquisition as a system whereby evidence was taken under a 'veil of secrecy' and the door was left 'wide open to mendacity, falsehood, and partiality'".[15]

Even then, witness anonymity was considered as an exception that applied only when a demonstrated risk to a witness existed and the matter was to be determined on a case-by-case basis.[16] Put another way, withholding of names and identities of witnesses was not a matter of principle but of exception. Ultimately, the inquisition was abolished in 1834 and the period of its application is described "as among the darkest blots on the record of mankind."[17] It is also viewed as an instrument of revenge for political and personal reasons that paved the way for "perjury and malicious testimony".[18]

At the beginning of the 20th century, face-to-face examination was considered as a valuable means to check the truthfulness of testimonies. In the end, the adversarial system emerged as a mechanism to counterbalance the weight of the testimony of the accuser and ensure the equality of arms in the legal battle.[19]

1.2 Ethiopian Historical Account: Overview of *Afersata* and *Leba Shay*

Ethiopia has a long history and over eighty ethno-linguistic communities. This section focuses on two traditional investigation schemes that were practiced in various parts of the country. Although customary law holds marginal place in the modern state law of Ethiopia, it is still the predominant mode of conflict resolution mechanism outside the state apparatus, including in criminal matters.

[14] Id. Footnotes omitted. p. 366.
[15] *Witness protection during the prosecution*, *supra* note 6.
[16] Footnotes omitted. Lusty, *supra* note 1, p. 368.
[17] Footnotes omitted. Ibid.
[18] Footnotes omitted. Id, p. 369.
[19] The Harvard Law Record, *Confrontation: Getting It Right*<http://hlrecord.org/2015/09/confrontation-getting-it-right/> accessed 20 September 2017

Staley Fisher noted that the multitude of ethnic communities had their own dispute settlement procedures operating parallel to the state structure.[20]

Although the FDRE Constitution confines the power of customary courts to decide personal and family matters and only with the consent of the disputing parties,[21] customary laws are indeed applied in various aspects of social conduct especially in the countryside. As Endalew Lijalem notes:

> In many regions of Ethiopia, the customary norms are stronger, more relevant, and accessible than imposed and top-down legal norms. Moreover, experiences in different regions of Ethiopia show that people, even after passing through the procedures and penalties in the formal criminal court, tend to use the customary dispute resolution mechanisms for reconciliation and in order to control acts of revenge.[22]

Afersata and *Leba Shay* were the two most widely used traditional modes of crime investigation and prosecution. *Afersata* (Afan Oromo) is probably the most widely used mode of crime investigation and prosecution. It is also known as awuchachign in (the former provinces of) Shewa and Wollo; *ewuse,* in Gojam.*[23]* The operation of *Aftersata* is initiated by the injured party and, in case of serious offences by local officials, then the village leader would call a meeting of community for the inquiry. At the gathering, every individual would, turn by turn, communicate to the elderly the name of the person whom he suspects of committing the crime.[24]

Fisher describes the procedure in detail. With regard to the technique of affersata and the incentive to name the offender, he states the following:

> The technique used was to summon all inhabitants of the neighborhood where the crime was committed, and to sequester them until they named the criminal. Failure to attend the affersata was sanctioned by an "absence fine," and the assembly's failure to name the criminal resulted in communal liability to repair the damage caused by the offense. The wish to avoid this liability, together with the serious hardship caused by sequestration of the

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[20] Stanley Z. Fisher (1971), "Traditional Criminal Procedure in Ethiopia" in *The American Journal of Comparative Law***,** vol. (American Association for the Comparative Study of Law), pp. 716-724.

[21] *Constitution of Ethiopia*, *supra* note 4, Art 34(5).

[22] Endalew Lijalem (2014) *Ethiopian Customary Dispute Resolution Mechanisms: Forms of Restorative Justice*? <http://www.accord.org.za/ajcr-issues/%EF%BF%BCethiopian-customary-dispute-resolution-mechanisms/> accessed 20 September 2017

[23] Fisher, *supra* note 20, p. 716. Minor adjustments are made in the spelling of some words to make them consistent with the commonly used approach. For example "iwus" in the original is written as *ewus*.

[24] Aberra Jembere, *An Introduction to the Legal History of Ethiopia: 1434-1974* (Shama Books, Addis Abeba, 2012), p. 239.

> whole community (it was reportedly decreed: "not a cow be milked nor a baby suckled" until the investigation was over), provided ample incentive to name the offender if that was possible.[25]

Affersata was a collective community endeavor to find out a crime suspect and establish his guilt. During this cumbersome process, participants could not go to their homes or attend their livestock and crops. The swearing in the name of God and Virgin Mary must have been a powerful psychological force to persuade the people to speak the truth. One should also note that Ethiopians have been, at least in the past, God-fearing people with deep reverence to spiritual life.[26]

Based on the reliability of the sources, testimonies were divided into three: (i) eye-witnesses, those who saw the commission of the crime firsthand; (ii) those who witnessed relevant facts and circumstances about the occurrence of a crime soon before or after its commission; and (iii) those who would testify based on hearsay.[27] The latter were called *wof* (literally, bird). An appeal was possible against conviction passed based on the testimony of *birds* only. What is interesting is that the identity of witnesses was not known to the accused or the public; the elderly responsible to hear testimony kept their names confidential. As a result, the suspect had no opportunity to confront his accusers.[28] That means the accused could not question the witnesses testifying against him/her. So, traditionally, Ethiopia allowed anonymous testimony.

Afersata became unpopular because of the concomitant incontinence it caused to people who had to endure the sequestration for days, sometimes for weeks, away from their family, cattle and farms. The villagers had to also shoulder the burden of feeding local officials during the event. This is likely to encourage the people to make false accusations or false confessions.[29] Witness anonymity sometimes led to false accusations. Thus, Fisher observed that "some criminals and others reportedly took advantage of the anonymity of the 'birds' to accuse innocent persons, perhaps personal enemies, who could never learn the identity of their accusers."[30] Nonetheless, in the absence of trained professional detectives and prosecutors, it is likely to have served as deterrence

[25] Footnotes omitted. Fisher, *Traditional Criminal Procedure*, *supra* note 20, p. 717.
[26] As Blaten-Geta Mahteme-Selassie WoldeMeskel pointed out, Ethiopians attached great value to the virtues of justice, religion, patriotism and respect for social status. Blaten-Geta Mahteme-Selassie quoted in Aberra, *An Introduction, supra* note 24, footnote 506, p. 238.
[27] Fisher, *supra* note 20, p. 719.
[28] Aberra, *supra* note 24, p. 239.
[29] Fisher, *supra* note 20.
[30] Ibid.

for potential offenders. Owing to the problems related with *Aftersata*, a law was enacted during the reign of Emperor Haile Selassie (the Afersata Proclamation enacted in 1933) to curb unintended consequences of the institution.

The *leba shay* institution was another crime investigation technique among the inhabitants of the highland areas (including present-day Eritrea) and among the Oromo.[31] The method was particularly applied to apprehend thieves and the fruit of their crime. *Leba shay* operated as follows. A young boy, before the age of puberty, is made to drink a beverage made of an intoxicating herb.[32] Then the intoxicated boy is tied with a strip of cloth on his waist and the chief thief-seeker follows him holding the other tip of the strip until the boy is said to have identified the criminal. Both Fisher and Aberra Jembere give similar accounts on functioning of the *leba shay* institution. The following excerpt is from the latter's book.

> … In the house where he [the boy] collapsed he would again be made to drink the beverage so that he could identify the particular individual from among the inhabitants of the house. The boy would push aside anyone he meets entering the house of the suspected culprit. Any person on whom he laid his hand would be taken as a suspect and brought before a court of law.[33]

This practice was clearly irrational and superstitious. First, the boy's "sniffing out" of the accused was considered conclusive evidence to prove guilt. Second, the role of thief-seeker involved a conflict of interest in that the payment for his service came from the fine imposed on the convicted person, thus, the incentive to secure false accusation.[34] Fisher has more on this, "There are numerous reports of such abuses, extending even to accusations that the thief-seeker acted in cahoots with thieves, corruptly agreeing to provide "protection" by seeing that innocent parties were always "tagged" by the boy." Having regard to this, the government of the day took some reform measures to minimize abuses such as setting of a ceiling on the amount of fee and punishing those who falsely accused innocent people.[35]

2. Current Experience of Cross-Examination and Anonymity in Various Jurisdictions

This section highlights the practice of some jurisdictions. It focuses on case law to see how foreign courts handle the conflict between witness protection measures and the face-to-face examination principle.

[31] Ibid.
[32] Ibid.
[33] Aberra, *supra* note 24, p. 238.
[34] Fisher, *supra* note 20.
[35] Footnotes omitted. Ibid.

Witness protection is not in principle available in the US "even in situations where the defendant or her associates threaten the physical safety of the witness."[36] The Constitution's confrontation clause does not have any limitations.[37] The US Constitution guarantees "the right to be confronted with witnesses against him."[38] Despite the absence of constitutionally defined restrictions on the right, judges have qualified it particularly in the aftermath of the women's rights movement that led to the enactment of rape shielding laws. These laws give immunity for rape victims from being questioned about their prior sexual life during cross-examination and courts are consistent in upholding the validity of those laws.[39] Other protection devices include pre-trial detention of the accused and other safety programs. In recent times, federal and state judges have increasingly granted requests for anonymity.[40]

Anonymous informants are also allowed in so far as there is *other* evidence sufficient to prove the charge. For example, in *Romero v. State*, a US court held that, confrontation can be restricted only to uphold "an important public interest and *when the reliability of the testimony is otherwise assured*".[41] Here the *important public interest* is the safety of a witness.[42]

In *United States v. Jesus-Casteneda*, the court of appeal came up with certain criteria to determine admissibility of evidence given in disguise with a witness wearing artificial mustache and wig. The court reasoned:

> Applying that rule here, the CI's [confidential informant] disguise in the form of a wig and mustache was necessary to further an important state

[36] Nora Demleitner (1998) *Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options*, 46 Am. J. Comp. L. Supp. p. 641. <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1271&context=wlufac > accessed 23 Sept 2017

[37] USA and Ethiopia share the notion of constitutional supremacy which places their constitutions at the top of the legal hierarchy within the respective jurisdictions.

[38] The Sixth Amendment to the US Constitution.

[39] Demleitner, *Witness Protection in Criminal Cases, supra* note 36, pp. 641-645.

[40] Ibid.

[41] Emphasis added. *Romero v. State* (2013 discussed in "Open Issue: The Constitutionality of Permitting Testimony by A Disguised Witness", *Federal Evidence Review*) <http://federalevidence.com/blog/2013/february/disguised-witness-and-confrontation-clause> accessed 21 September 2017

[42] Another exception is the case of child witnesses in view of their low level personal emotion. This was the holding of the supreme court in the case of *Maryland v. Craig* whereby the court decided to allow an alleged child victim "to testify by one-way closed circuit television" as, the court added, face-to-face confrontation may cause "serious emotional distress for the child". *Right to Confront Witness* (Legal Information Institute) <https://www.law.cornell.edu/wex/right_to_confront_witness> accessed 20 September 2017

> interest, namely a witness's safety. The government offered reasons for protecting the CI's identity, given his continuing involvement in Sinaloa Cartel drug investigations as an undercover agent. Second, the reliability of the CI's testimony was otherwise assured, because (1) he was physically present in the courtroom, (2) he testified under oath, thus impressing him with the seriousness of the matter and the possibility of penalty for perjury, (3) he was subject to cross-examination while Appellant could see him, (4) despite his disguise, the jury was able to hear his voice, see his entire face including his eyes and facial reactions to questions, and observe his body language. These are all key elements of one's demeanor that shed light on credibility. Thus, we hold that in this case, the disguise in the form of a wig and mustache did not violate the Confrontation Clause.[43]

In *Smith* v *Illinois*,[44] a key prosecution witness testified under a false name. The witness was cross-examined on his testimony, but the trial judge prevented the defense from ascertaining his true name and address. The Supreme Court reversed the conviction by a majority stating:

> In the present case, there was not, to be sure, a complete denial of all right of cross-examination. But the petitioner was denied the right to ask the principal prosecution witness either his name or where he lived… Yet when the credibility of a witness is in issue, the very starting point in "exposing falsehood and bringing out the truth" through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is to effectively emasculate the right of cross-examination itself.

In *R v Taylor* (UK) the court held that '[t]he right of the accused to see and know the identity of his accusers should only be denied in rare and exceptional circumstances. Whether the exception was made out was pre-eminently a matter for the discretion of the court".[45] The court proceeded to set out the following standards in exercising the discretion:

1. There must be real grounds for fear of the consequences if the evidence were given and the identity of the witness was revealed. ...
2. The evidence must be sufficiently relevant and important to make it unfair to make the Crown proceed without it. ...

[43] *United States v. Jesus-Casteneda* (summary of the court's ruling) <http://federalevidence.com/pdf/2013/01Jan/US.v.Jesus-Casteneda.pdf> accessed 7 October 2017

[44] Lusty, *supra* note 1, p. 379.

[45] R v Taylor, cited in Id, p. 393.

3. The Crown must satisfy the court that the creditworthiness of the witness had been fully investigated and disclosed.
4. The court must be satisfied that there would be no undue prejudice to the accused ...
5. The court could balance the need for protection of the witness, including the extent of that protection, against unfairness or the appearance of unfairness.[46]

The European Court of Human Rights (ECtHR) stated that before a suspect is convicted, he/she must, in principle, have an opportunity to challenge the truthfulness and reliability of a testimony.[47] The Court has, however, acknowledged exceptions to the right of the defendant "to be confronted with the witnesses against him".[48] In *Ludi v Switzerland*,[49] the same court overturned a criminal verdict "based on a written statement by an undercover agent and a written transcription of telephone conversations with the defendant". In this case, the accused had no opportunity to examine the state witness before or during the trial.

But in *Asch v Austria*[50], the ECtHR did not find violation of the Convention even though the court of first instance relied on evidence by a police officer and a physician who had examined the victim-witness, although the victim later refused to testify at the trial. Thus, the conviction handed down based on the pre-trial record was affirmed. Here the evidence from the investigating police officer and the physician corroborated the witness's pre-trial statement. In other words, the domestic court did not depend solely on the testimony of the victim-witness.

On the contrary, in *P.S. v Germany*,[51] the domestic court, in finding the accused guilty, relied entirely on a statement of an eight-year-old girl who was allegedly sexually abused by her music teacher. The German court did not require the victim to testify at the trial so as to protect her personal development. The ECtHR considered the conviction as a breach of the suspect's right under the Convention since pre-trial statement of the witness became the sole and

[46] Ibid.
[47] Lorena Bachmaier Winter, "Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law", *Utrecht Law Review* <*https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.246/*> accessed 23 September 2017
[48] European Convention on Human Rights (1950), Art 6(3)(d).
[49] Winter, *supra* note 47.
[50] Ibid.
[51] Ibid.

decisive evidence in finding the accused guilty of the crime he was charged with.

South Africa is said to have "experienced one of the worst intimidations anywhere in the world"[52] during the apartheid era and the threat was directed against former ANC members who appeared in court to testify against their former freedom fighter colleagues. In 1985, the high court decided the case of *S v Leepile* in which the state demanded the withholding of the identity of its witnesses. Rejecting the request, the judge noted:

> (a) No investigation could be conducted by the accused's legal representatives into the witness' background to ascertain whether he has a general reputation for untruthfulness, whether he has made previous inconsistent statements nor to investigate other matters which might be relevant to his credibility in general. (b) It would make it more difficult to make inquiries to establish that the witness was not at places on the occasions mentioned by him. (c) It would further heighten the witness' sense of impregnability and increase the temptation to falsify or exaggerate.[53]

It is also worthy to note that intimidation often results from underlying social grievances. As South Africa's experience shows, prosecution witnesses under apartheid were frequently targeted because their participation as witnesses against their former colleagues was considered as betrayal of a just cause, collaboration with an unjust regime. Thus, it comes as no surprise that the ANC "openly called for the assassination of known informers and detailed brutal killings of former members who served as state witnesses, describing them as 'just reprisals'.[54] We also find a similar account that took place in Europe in the middle ages. Individuals who testified before the inquisition, considered earlier, became targets of violence because their action was deemed to have exposed fellow citizens to unjustified punishment.[55] In short, the motive for revenge is much deeper than just hate to individual witnesses.

In other jurisdictions, witnesses have encountered serious, and in some cases, life-threatening intimidation.[56] The degree of risk also varies greatly.

> [The defense] will often attempt 'to make witnesses appear so inconsistent, forgetful, muddled, spiteful, or greedy that their word cannot be safely believed. … [I]t is of little surprise… witnesses frequently leave the witness

[52] Lusty, *supra* note 1, p. 401.
[53] Footnotes omitted. Id, p. 402.
[54] Id, p. 401.
[55] Id, p. 368.
[56] Karen Kramer, *Witness Protection as a Key Tool in Addressing Serious and Organized Crime* <http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_P3> p. 5. Accessed 5 October 2017

box 'angrily and in tears'. In addition, simply being in the witness box makes individuals vulnerable to verbal abuse and threats shouted from the public gallery or being stared at by the accused. Moreover, when trials end or adjourn, suspects, victims, and witnesses may all move out of the room into the public waiting areas of the court building where further intimidation occurs.

Aside from organized and other serious offenses, most witnesses do not face serious risk to their lives. Rather they tend to experience "verbal threats, intimidation, harassment, assault, property damage or simply fear of reprisal as a result of their cooperation with"[57] law enforcement personnel.

Progress has been made in recent times, mainly due to "the increased impact of organized criminal and terrorist groups".[58] On the global level, the UN General Assembly adopted a resolution which calls for the implementation of "measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their family and witnesses on their behalf, from intimidation and retaliation".[59] As part of this global movement, Ethiopia has enacted legislation governing the protection of witnesses and whistleblowers discussed below.

3. Ethiopia's Legal Framework

3.1 Right to Cross-Examination

Under Art 20(4) of the Ethiopian Constitution, accused persons are entitled to have "full access to any evidence presented against them, to examine witnesses testifying against them".[60] The 1961 Criminal Procedure Code recognizes the same right in Art 136. However, the Code differs from the Constitution with respect to the scope of the right. The Code limits its scope "to show to the court what is erroneous, doubtful or untrue *in the answers given in examination-in-chief*"[61] (emphasis mine). In this regard, the Constitution is progressive in the sense that it stipulates a broader right to accused persons to have "*full access to any evidence* presented against them, to examine witnesses testifying against

[57] Ibid.
[58] Ibid, p. 11.
[59] *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985) (General Assembly resolution 40/34, annex), Parag. 6 of the Declaration(d).
[60] The 1931 and 1987 constitutions of Ethiopia did not specifically guarantee the right to cross-examination. Art 52 of the 1955 constitution, probably modeled after the Sixth Amendment to the US constitution, recognized the right of the accused "to be confronted with the witnesses against him".
[61] Criminal Procedure Code of Ethiopia (1961), Art 137(3).

them" (emphasis mine). Put another way, "full access to any evidence" seems to imply that the personality and credibility of the witness are also the subject of examination by the other side; the testifier and the testimony are inseparable. Furthermore, the reading of the foreign academic literature and foreign case law clearly reveals that the right of confrontation extends far beyond the testimony given in the courtroom). Confrontation offers the accused with the opportunity to discredit the witness's trustworthiness as well.

A literal interpretation of Article 20(4) of the Constitution does not warrant any restriction on the right.[62] However, as discussed before, an absolute cross-examination right is problematic. In the words of Eva Brems, "The priority of human rights that holds in principle does not hold in every concrete case."[63] Similarly, Daniel Betancourt observed that:

> To resolve whether anonymity should be allowed or not, first, we have to consider that law is not an exact science. In law, there are general rules, but always there are some exceptions. It is not possible to have only one formula and give the same interpretation to every case. For that reason, justice needs to adapt and the courts should interpret the legal bodies according to the specific case. Every rule has exceptions[sic], and without doubt anonymity as well.[64]

In the Ethiopian legal system, the Anti-Terrorism Proclamation (ATP) and the Proclamation on Protection of Witnesses and Whistleblowers (PWW) contain limitations on the exercise of cross-examination. This move by the federal legislature appears justified on pragmatic considerations—the interest of the public and of the individual witness. However, these laws contain substantial modification on the constitutional right.

There are also other legal rules that conflict with Art 20(4) of Constitution. *First*, Articles 144 and 145 of the Criminal Procedure Code (CPC) make out-of-court testimony and expert opinion admissible as evidence in court.[65] Art 144(1) reads, "The deposition of a witness taken at a preliminary inquiry may be read

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[62] Whether such limits call for a constitutional amendment is, however, another matter. As the experience of some states of United States reveals, such limits have to be applied only after a constitutional change. pp. 643-644.

[63] Eva Brems (2005) "Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms", *Human Rights Quarterly*. The Johns Hopkins University Press, vol. 27, no. 1, pp. 294-326. <http://www.jstor.org/stable/20069786> accessed 4 October 2017

[64] Daniel Betancourt (2010)*Anonymity as Protective Measure for Victims and Witnesses v. The Rights of the Accused*. Tilburg University, master's thesis. p. 47. < http://arno.uvt.nl/show.cgi?fid=120647> accessed 23 September 2017, p. 48.

[65] The constitutionality of these provisions has not been challenged in Ethiopia to date.

and put in evidence… where the witness is dead or insane, cannot be found, is so ill as not to be able to attend the trial or is absent" from the country. Although US courts permit the testimony of an absent witness,[66] there is a clear divergence between the US and the Ethiopian laws. In Ethiopia, the accused cannot cross-examine the witness at the preliminary inquiry; he is a passive observer while the prosecutor and the judge are the main actors.[67]

Second, the same argument can be made against Art 145 which reads, "The deposition of an expert taken at a preliminary inquiry may be read and put in evidence… although he is not called as a witness."[68] These provisions (i.e. Articles 144 and 145 of the Criminal Procedure Code) deny the suspect the chance to put questions to the public prosecutor's witnesses. They also fail to satisfy the requirement and purpose of oath in court which witnesses must invariably undertake before testifying. The administration of oath sends a message to the witness about the consequences of his word in a court of law and the sanction for perjury.[69] So, Arts 144 and 145 of the CPC override the confrontation and oath requirements which are key reliability-ensuring mechanisms.

Third, as per Article 137 of the CPC, testimony based on one's "direct or indirect knowledge" is permissible as evidence in court. Again, this defeats the rationale for the confrontation right although foreign courts consider hearsay only under strict conditions.[70] Hearsay evidence is given by a person who has no firsthand knowledge of the alleged act and is rather based on what one has heard others say. Such evidence is problematic as the witness is incapable of properly answering cross-examination questions.

The constitutionality of the hearsay rule has never been tested in Ethiopia to date; now, it is also incorporated in the Anti-terrorism Proclamation of 2009. In regard to the position of foreign judges, in the US, it has been ruled that hearsay restricts or violates the confrontation rule[71] but it can be lawful if two conditions are present: when the witness is unavailable and, during previous court proceedings such as a preliminary inquiry, he/she had testified against the same defendant and *was subject to cross-examination by that defendant*.[72] Thus, there

[66] See *Barber v. Page*, in *Right to Confront Witness*, *supra* note 42.
[67] Criminal Procedure Code, *supra* note 63, Art 80. Arts 80 and the following set forth the procedure for a preliminary inquiry.
[68] Id, Art 144(2).
[69] Id. In Art 136(2), the Criminal Procedure requires the administration of oath or affirmation before taking witness testimony.
[70] See, *Barber v. Page*, cited in *Right to Confront Witness*, *supra* note 42.
[71] ***Delaney v. United States,*** ibid.
[72] *Barber v. Page*, ibid.

are legal rules in Ethiopia that evoke concerns regarding their consistency with the constitutional and human right to confrontation.

3.2 Protection of witnesses and whistleblowers

Testimony is perhaps the most widely used prosecution evidence and, without it, the criminal justice system would be ineffective, particularly regarding serious crimes. Without witness protection, the government's ability to prosecute and ultimately safeguard the public from crime would significantly diminish. Those who witnessed the commission of a crime would be discouraged from reporting and testifying for fear of reprisal.

The position of the witness raises both a legal and moral question. This can relate to a person who is trapped by the duty to testify, but not as a matter of personal choice in the case of serious crimes. Failing to do so amounts to "refusal to aid justice"[73] and is punishable criminally.

While the right of the accused is unambiguously stated in the FDRE Constitution and ICCPR, no parallel safeguard exists for the witness. The right of the accused is given due attention in international and national laws. On the contrary, little attention is paid to the well-being of the witness who could be subject to harassment even at the risk of her life for cooperating with the prosecution. In terms of the law, the witness has been 'the forgotten soul of the criminal justice system'.

Lawmakers have been dragging their feet to respond to this pressing social problem. Of course, there are some legal provisions here and there on the subject but they are far from sufficient. To start with the FDRE Constitution, Art 20(1) refers to *in camera* proceedings with the view to ensure the privacy of parties, public moral and national security. Here the word *parties*, if interpreted literally, does not cover the witness. Thus, the personal safety of the witness has no constitutional basis for protection in Ethiopia.[74]

Other piecemeal rules include a provision in the Criminal Procedure Code that requires judges to deny bail if the suspect "is likely to interfere with

[73] Accordingly, Art 448(1) of the *Criminal Code* states:

> "Any person who had been lawfully summoned to appear in judicial or quasi-judicial proceedings as an accused person, witness, expert, interpreter, assessor or juror; or ordered. to produce or send an accused person or evidence: (a) fails or refuses to appear without sufficient cause; or (b) fails to produce or send the accused person or evidence; or (c) having appeared, refuses, contrary to law, to answer questions or to obey orders, is punishable…"

[74] This is also the case in other systems such as the US; but courts elsewhere have read into some overarching interests (such as public policy and the necessities of the case) to limit face-to-face examination. *Anonymous Accusers*, n. 1, p. 377.

witnesses or tamper with the evidence".[75] Once again, the concern here is not the witness's security rather the preservation and integrity of his/her testimonial evidence. If the safety of the witness is protected as a result of the denial of bail, it is incidental. If there is any specific rule on the subject, it is only Article 444 of the Criminal Code which makes it a crime to assault, suppresses or harm *"any person who gives information or evidence to justice authorities or is a witness in criminal cases".*[76]

The only law that provides a comprehensive coverage on witness safety measures and programs in this regard is the *Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation* (PWW), i.e. Proclamation No. 699/2010. It has been enacted "to protect witnesses and whistleblowers of a criminal offense from direct or indirect danger and attack they may face as a consequence thereof and thereby to ensure their safety".[77] This legislation applies to all crimes punishable with rigorous imprisonment for ten years or more (regardless of the minimum prison term threshold) or with capital punishment.[78] The Proclamation puts preconditions before anonymity is granted. The conditions are, *first*, the offence must be such that it cannot be proved by a means other than the testimony of the witness or information from the whistleblower requiring protection and, *second*, there is reason to believe that a threat of serious danger exists to the life, physical security, freedom or property of the witness or his family.

Art 4(1) of the Proclamation provides details regarding the measures and programs applicable, severally or jointly, including the following: physical protection of person, residence and property of the witness; relocation at the expense of the state, change of identity, provision of self-defense weapon, immunity from prosecution for an offence for which he provides information, free medical service in public health institutions, counseling and opportunity for employment and education, covering cost of living in case of loss of capacity to work as a result of reprisal. Most of these programs may not affect the right of the defense to fair trial. As pointed out by Kramer, the purpose of protection "should never provide a motivation to testify but merely remove or counter the witness' view that he or she is in danger if he/she cooperates."[79] Indeed, witness protection should not create an incentive to testify because that would lead to a potential conflict of interests.

[75] *Criminal Procedure Code*, *supra* note 61, Art 67(c).
[76] *Criminal Code of Ethiopia* (2005), Art 444.
[77] *Protection of Witnesses and Whistleblowers of Criminal Offences, Proclamation No.699/2010*, Paragraph 3 of the Preamble.
[78] Id, Art 3(1).
[79] Kramer, *supra* note 56, p. 5.

There are other provisions of the Proclamation that restrict or deny fair trial. The list of such legal rules affecting the accused' right includes changing identity of witness, the prohibition against the accused to contact the witness, taking testimony *in camera* and behind screen and providing evidence via electronic devices.[80] In the face of such measures, it would be difficult, or even impossible, to expose contradictions, lies and prejudices thereby significantly reducing the chances of the defense to refute the charges against him. What if the witness is a false witness? What if the witness has some motive to falsely incriminate the suspect? How can the defense challenge the untrustworthiness of a witness by exposing, for example, his prior criminal record for perjury, misrepresentation or forgery? Should someone spend the rest of her life behind bar or lose her life because of false accusations? There is thus the need for safeguards against such risks, and cross-examination contributes toward fair trial thereby serving as one of the prevention schemes against of unwarranted convictions.

As the American Supreme Court once stated, confrontation is meant to prevent conviction "based on the charges of unseen and unknown –and hence unchallengeable individuals."[81] The way the witness reacts to questions has evidentiary value; it is also part of the broader notion of fair trial. The demeanor of the witness, the manner of her testimony, the behavior she manifests while in the witness box, whether the witness is cooperative, evasive or nervous when answering questions, the character and personal impression she creates, her physical and emotional reaction can be indicative of the veracity of the oral evidence.

In addition to the Witness Protection Proclamation, we should add the Anti-terrorism law which authorizes the removal of witness information from court records (including the publication and dissemination of such information)[82] and the admissibility of intelligence report involving terror (even if such report does not mention the source or method of information gathering)[83] and hearsay evidence,[84] digital or electronic evidence,[85] evidence gathered through surveillance, information obtained through interception by foreign law enforcement bodies,[86] a written confession and voice and video recording.[87] The

[80] *Protection of Witnesses and Whistleblowers, supra* note 77, Art 4.
[81] *Lee v Illinois.*
[82] Anti-Terrorism Proclamation No. 652/2009, Art 32(1)(b).
[83] Id, Art 23(1).
[84] Id, Art 23(2).
[85] Id, Art 23(3).
[86] Id, Art 23(4).
[87] Id, Art 23(5).

law does not provide guidance on how to weigh the probative value of these evidences and whether they are sufficient to make a case against the suspect.

As for intelligence report, the high court of New Zealand rejected a request by the prosecutor to withhold names of undercover agents saying that the officers were of the highest integrity and, if their identity were to be revealed, they would not testify. The judge reasoned that:

> I cannot agree with the submission. The real risk of prejudice to the defense and of' conviction of the innocent would remain. A private assessment by the prosecution of the credibility of a police officer is no substitute in the interests of' justice for a proper check of his background by the accused whose liberty is at stake and who stands condemned on the undercover officer's evidence if his credibility is unchallenged... Unless and until the defense ascertains the officer's name his background cannot be adequately checked in order to see whether there is justification for attacking his credibility.[88]

Both Proclamation 652/2009 and Proclamation 699/2010 are silent as to whether hearsay and intelligence reports are to be used as corroborative or conclusive evidence. In the case of US case law, the non-disclosure of part or all information about a witness is permitted but it has to be corroborated by other evidence.[89] For both American courts and ECtHR, witness anonymity is tolerated only in exceptional circumstances and, when allowed, the testimony is insufficient for conviction. Only time will tell how Ethiopian judges will interpret the law but parliament has failed to stress the place of cross-examination, as a fundamental right, in deciding demands for anonymous testimony.

The two proclamations vary concerning who decides on the issue of witness protection measures. Art Anti-Terrorism Proclamation allows witness protection "where the court, on its own motion or on an application made by the public prosecutor or by the witness, is satisfied that the life of such witness is in danger…"[90]Accordingly, the power to allow or disallow an application rests with the court but Proclamation 699/2010 confers this power on the Ministry of Justice (currently the Federal Attorney General) and the Federal Ethics and Anti-corruption Commission the decision of which is not appealable.[91] It

[88] *R v Hughes* discussed in Lusty, *supra* note 1, p. 399.
[89] Kramer, *Witness Protection as a Key Tool*, *supra* note 56, p. 6.
[90] Anti-Terrorism Proclamation, supra note84, Art 32.
[91] *Witness Protection Act*, 2015 [of India], Art 3(3); In South Africa the director, an appointee of the justice minister, is in charge to decide witness protection applications. Witness Protection Act 112 of 1998, Art 10(3)(a)(b)(c).

follows that Proclamation 699/2010 has impliedly repealed the power of courts under Proclamation 652/2009.

This line of interpretation is further strengthened by the explicit reference to the Federal High Court which is empowered to approve protection agreements made by the Federal Attorney General with child witnesses. As far as adults are concerned, the responsibility is entrusted to the Ministry of Justice (currently the Federal Attorney General) and Ethics and Anti-corruption Commission.[92] This shows usurpation of judicial power by the legislature in favor of the executive.

In contrast to the Ethiopian law, a US judge remarked that "the State or the witness should at the very least come forward with some showing of why the witness must be excused from answering the question. The *trial judge* can then ascertain the interest of the defendant in the answer and exercise an informed discretion in making his ruling."[93] It is a matter of conventional wisdom that judges, if allowed to operate independently, become the custodian of human rights. The transfer of court power to the executive should be, therefore, a matter of grave concern.

4. CCI's Decision in the Case of MehadiAley and others

The case of *MehadiAley and others* involves a constitutional complaint by three persons accused of committing terror offences.[94] During the hearing, they objected to the withholding of names and addresses of witnesses based on Art 32 of Proclamation 652/2009 which bestows power upon judges to allow anonymous applications. The defense argued that the failure to disclose witness identity by the prosecutor violated Art 20(4) of the Constitution. The defense also mentioned the absence of limit to the confrontation provision under the Constitution and demanded the advance disclosure of state witnesses so that they could prepare for the trial. They argued that their prior knowledge of the witnesses was crucial for the preparation of the defense and, ultimately, the fairness of the trial and the search for the truth. Consequently, the court referred the issue to the CCI for a constitutional ruling on the validity of Art 32(b) and Art 4 (1)(h)(j) of Proclamations 652/2009 and 699/2010, respectively.

After considering the petition, the CCI reasoned that:

> "what can be understood from this provision [i.e. Art 20(4)] is that it affirms the right of accused persons to cross-examination but the defense has no right for the disclosure of names and addresses of witnesses. Nor does the

[92] *Protection of Witnesses and Whistleblowers*, *supra* note 77, Art 9(1)(2).
[93] Emphasis added. White J quoted in Lusty, *Anonymous Accusers*, *supra* note 1,p. 380.
[94] *Mehadi Aley and others*, File No. 2356/2009 (Council of Constitutional Inquiry, *Hamle* 29, 2009 E.C.)

Constitution impose the duty on the prosecution to disclose such information. This is categorically expressed in the Constitution…"

The Council, in an apparent attempt to establish the intent of the framers of the Constitution, noted that "the reason for not including a requirement for disclosure in the Constitution is that it would pose danger to the safety of witnesses rather than ensuring the fairness of the trial." This conclusion is rather unwarranted and expansive in view of the fact that constitutions do not deal with such detailed matters. In the end, the CCI did not find inconsistency between the Constitution and the proclamations.[95] Consequently, it ruled the proclamations were constitutionally valid.

Contrary to this, Lusty, while commenting on the US case law, noted that "the right of an accused to know the true identity of his or her accusers lies at the heart of the right of confrontation."[96] Again, in *Barnard* v *Williams*, a New Zealand judge held, "[t]he name could well lead to a line of inquiry that will throw doubt on or even destroy the value of testimony... to suppress identity is to change the character of the proceedings and ignore what I believe is a basic principle"[97] in a court trial. Examples of judicial decisions from other jurisdictions are not of course directly applicable to our legal system. Yet, we can make reference to a principle (that is also recognized under our Constitution) which is in tandem with such rulings upheld by courts of other countries.

The Council of Constitutional Inquiry should have clearly spelled out the absence of any constitutional limit to face-to-face examination. It would make sense if it tried to justify the contested laws based on pragmatic considerations using teleological reasoning. The Council rather offered a remote and unwarranted opinion to conclude that the Constitution anticipated the withholding of witness identity. Furthermore, the CCI has failed to properly articulate the importance of the fundamental human right to cross-examination, and the reasoning fails to appreciate the significance of fundamental rights.

[95] The same conclusion was reached by the House of Federation in the case of *Merera Gudina* who also challenged the constitutionality of withholding names of prosecution witnesses. ታምሩ ጽጌ "ዶ/ር መረራ ጉዲና የአምነት ክህደት ቃላቸውን ሰጡ፤ ስለምስክሮች ጥበቃ የወጣው አዋጅ ከሕገመንግሥቱ ጋር አይጋጭም ተባለ" (*ሪፖርተር* ቅጽ 23 ቁ. 1823) ገጽ 32።

[96] Lusty, *supra* note 1, p. 380.

[97] Id, p. 397.

Conclusion

The right of cross-examination is key feature of fair trial. From the perspective of the accused, it is an opportunity to challenge the credibility of witnesses testifying against him/her. Apart from face-face encounter in the courtroom, a meaningful cross-examination depends on before-trial knowledge of the witness' personal background whether, for example, he had prior conviction for perjury or misrepresentation. Prior knowledge creates avenues to discredit the testimony.

Thus, it comes as no surprise that cross-examination is recognized both in the domestic law of Ethiopia and international human rights law. On the other hand, witnesses may face harassment and life-threatening situations if their identity is disclosed to the defense. This has necessitated the protection of their safety without which the effectiveness of the criminal justice system would be in jeopardy for fear of reprisal.

The federal legislature has passed laws that embody witness protection measures and programs including concealment or change of witness identity. While the need to have witness protection laws is understandable and long overdue, care must be taken during application so as not to stretch them to the extent of jeopardizing the success of the defense and the fairness of the trial. The withholding of witness information can significantly diminish the ability of the accused to show the unreliability of the testimony of a state witness.

In *Mehadi Aley and others*, the CCI has not properly scrutinized the existence of specific factual and legal grounds justifying the suppression of identity of state witnesses. The decision was also reached without balancing the constitutionally guaranteed human right of the defense to cross-examination. Moreover, the CCI has indeed failed to give sufficient reasoning to support the holding. ■

Traditional African Conflict Resolution: The Case of South Africa and Ethiopia

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Abstract

In Africa, traditional conflict resolution is based on values, norms, cultures and beliefs as practiced by the members of the community. Thus, traditional conflict resolution decisions are readily accepted by the community. However, colonialism had very serious impact on African values, norms, cultures and beliefs. It disregarded, undermined and weakened them. Cultural hegemony (as a result of colonialism) and legal transplantation (without adequate attention to traditional systems) have adversely affected traditional conflict resolution in Africa. Nonetheless, the continuous use of traditional dispute resolution mechanisms across African communities clearly demonstrates that they still have a role to play. The article aims to assess the institution of traditional conflict resolution in Africa with particular emphasis on South Africa and Ethiopia. Both countries are multiethnic societies with a variety of cultures, languages and religions. Ethiopia maintained its freedom from colonial rule with the exception of a short-lived Italian occupation and from 1936 to 1941. South Africa was a Dutch colony from 1662 to 1815, a British colony from1910 to 1948 and under the Apartheid era from 1948 to1994. Using case studies of South Africa and Ethiopia, the article examines some of the successes and challenges faced by traditional conflict resolution institutions. The opportunities offered to them by the two legal systems are also examined. The two systems are not selected for the purpose of comparative analysis compared, but are examined as self representative examples in their own historical, political and legal contexts.

Key terms

Tradition · Conflict · Traditional conflict resolution · South Africa · Ethiopia

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Introduction

In actual life, no society is immune from conflict due to differences in interests, goals, values and aims among people.[1] Conflicts occur within families, clans, villages or other small units.[2] Most African communities have their own traditional conflict resolution processes that enable them to prevent, manage and resolve conflict. Most African States are moving towards incorporating traditional conflict resolution mechanisms in their policies, laws and constitutions. Even in countries where there is no formal state recognition, it has remained resilient and continues to exist outside the areas of state influence.[3] Thus, traditional conflict resolution mechanisms are crucial institutions for conflict resolution in Africa.

Many African states (South Africa and Ethiopia included) are grappling with conflict resolution. However, the institutions in African states are not able to cope with the huge demands unleashed by everyday conflict. It is within this context that the complementarity between traditional institutions and the modern state becomes not only apparent but also imperative. The continuing role and influence of traditional leadership in modern Africa is hard to miss.[4]

Even though the relationship between the state (formal) and traditional (informal) institutions is a contested terrain loaded with complexities, the unique features of traditional institutions, due to their endogeneity and use of local actors, enable them to either resist or even sometimes challenge the state. Traditional institutions continue to demonstrate their relevance in post-conflict states. This is especially true in the context of weak states that are overwhelmed with ongoing state-building processes. Though there is no clear-cut formula as to the interactions between traditional and state institutions, a relationship exists which is central in the promotion of sustainable peace in post-conflict Africa.[5]

In this article it is argued that not all traditional dispute resolution institutions are worthy of legal recognition, nor are traditional institutions immune from weaknesses. It is argued that there is a strong case for acknowledging the value of certain traditional institutions, and the rights of people to make use of them in legally recognized ways. Traditional conflict resolution mechanisms can

[1] Fayemi Ademola Kazeem (2009), "Agba (Elder) as Arbitrator: A Yoruba Socio Political Model for Conflict resolution-A Review of Lawrence O. Bamikole" *Journal of Law and Conflict Resolution*, Vol. 1(3) pp. 60-67, August 2009.

[2] Ibid.

[3] Ibid.

[4] Carolyne Gatimu (2014), Traditional Structures in Peace and Security Consolidation: The Case of the House of Elders (GUURTI) in Somaliland, International Support Training Center, Occasional Paper Series 5, No.7, Kenya: Nairobi, p.5.

[5] Martha Mutisi (2012). "Local Conflict Resolution in Rwanda: The Case of Abunzi Mediators." Africa Dialogue Monograph Series 2/2012. ACCORD.

contribute through partnership and collaboration with the formal system to provide culturally acceptable and meaningful justice. What is more, using case studies of South Africa and Ethiopia, the article examines some of the successes and challenges faced by traditional conflict resolution institutions; and opportunities offered to them by the two legal systems respectively. It does not aim to compare the two legal systems. They are simply mentioned as representative examples in their own context, although the article could serve as a basis for future comparative analysis.

The first section of this article deals with an overview on the history, philosophy and methods of African traditional dispute resolution. Sections 2 and 3 respectively discuss the traditional conflict resolution in South Africa and Ethiopia, followed by a conclusion.

1. History, Philosophy and Methods of African Traditional Dispute Resolution: Overview

Prior to colonialism, "many African societies have had their own traditional approaches and methods of conflict prevention, management and resolution."[6] These approaches and methods "were (and still are) deeply embedded in the people's cosmology and culture."[7] Prior to colonialism, "African traditional religions and Islam largely shaped the culture, world-view and civilization of various parts of the continent."[8] Of course, it is good to note that "the orthodox Christian tradition existed in Egypt and also to a larger extent, Ethiopia."[9] Similarly, "the early conquest and settlement of Dutch merchants in the coastal region of South Africa prior to late-nineteenth-century colonialism led to the establishment of the Dutch Reform Christian church in this part of Africa."[10]

The incorporation of Africa into the global system through western colonialism has had extensive effects on the nature of conflicts and the traditional approach and methods of conflict resolution. As Almod and Powell observe, "the traditional African approach has been significantly affected, while some of the related methods have been displaced or significantly transformed by the countervailing imperatives of western civilization and its concomitants of multifaceted liberalism and cultural secularization."[11]

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[6] Kenneth C. Omeje (2008), *Understanding Conflict Resolution in Africa*; In David J. Francis (ed.), Peace and Conflict in Africa, Zed Books, UK: London, p.88.
[7] Ibid.
[8] Ibid
[9] Ibid.
[10] Ibid.
[11] Almond, G. A. & B. Powell (1966), Comparative Politics: Developmental Approach, Boston, MA: Little, Brown.

Considering the serious impact of western cultural influence on African states and societies, Kenneth C. Omeje observes that "many scholars contest the relevance and place of traditional conflict resolution in Africa. Especially by highlighting the complexity of modern social structures and the conflicts they generate in Africa." He further observes that "other scholars also argue that traditional approaches and methods of conflict resolution should be confined to local communities while the modern western alternatives should be applied to the cities, formal-sector institutions and state systems." However, he contends that "such a categorical distinction seems both conceptually and empirically problematic because of the immense diversity and overlapping dynamics of the African heritage."[12]

Post-colonial Africa combines and exhibits a diversified cultural, religious, traditional practices that survived the attack of colonialism and westernization. Accordingly, the African cultures that support the traditional conflict resolution mechanisms are vastly heterogeneous and dynamic. However, it is good to note that there are still a wide range of cross-cutting and overlapping tendencies and practices across a large number of communities and regions.

In Africa, the philosophy in conflict resolution is community oriented. For example, the concept of *Ubuntu* is a humanistic philosophy and it implies 'collective personhood', and is best captured by the Zulu maxims: 'a person is a person through other persons'; 'my humanity is inextricably tied to your humanity';[13] and 'a person is a person because of another person'. It is "an all-embracing, multidimensional philosophy that invokes the idiom and images of group cooperation, generosity, tolerance, respect, sharing, solidarity, forgiveness and conciliation."[14] Unlike the western values which predominantly individualistic.

Ubuntu combines traditional conflict prevention and peace-building concept. It "embraces the notion of acknowledgement of guilt, showing of remorse and repentance by perpetrators of injustice, asking for and receiving forgiveness, and paying compensation or reparation as a prelude for reconciliation and peaceful coexistence."[15] Beyond the process of conflict resolution, *Ubuntu* expresses the African philosophy of 'humanness' and it is a notion that has cultural

[12] Kenneth C. Omeje (2008), *supra*, note, 6, p.88.

[13] Nomonde Masina. (2000) 'Xhosa practices of Ubuntu for South Africa', in I. W. Zartman (ed.), Traditional Cures for Modern Conflicts: African Conflict 'Medicine', Boulder, CO: Lynne Rienner, p. 170.

[14] Ibid.

[15] D. Francis (2007), *'Peace and conflict studies: an African overview of basic concepts'*, in S. G. Best (ed.), Introduction to Peace and Conflict Studies in West Africa, Ibadan: Spectrum Books, p. 26.

significance in diverse African societies, though the concept is widespread in southern, central and eastern Africa.[16]

It is also good to note that the transitional justice system implemented in post-apartheid South Africa, i.e., "the restorative justice-oriented 'Truth and Reconciliation Commission', subsequently adopted in varying degrees by different post-war and deeply divided African societies (e.g. Sierra Leone, Liberia, Nigeria, Burundi), was philosophically informed by the *Ubuntu* tradition".[17] Similarly, the Gacaca transitional justice system enunciated in post-genocide Rwanda, which "combines both punitive and restorative justice and African customary and Western civil laws, is in concept an expression of Ubuntu".[18]

Thus, "it is within the philosophical context of Ubuntu and comparable practices in other parts of Africa that traditional African methods of conflict resolution are essentially situated."[19] With regard to traditional dispute resolution methods, it is relevant to mention that "negotiation, mediation, adjudication and reconciliation have, since pre-colonial history, been developed to different levels and practiced in various African communities"[20] This implies that it would be wrong to consider negotiation, mediation, adjudication and reconciliation to have solely a western origin. In this regard, section 2.2 of this article highlights the application of negotiation and mediation in traditional dispute resolution in south Africa before a case is referred to the traditional leaders for adjudication.

In many African communities, "the practices usually involve the intervention of reputable elders, either on their own initiative or by the invitation of a concerned third party or the disputant(s)."[21] The method "is highly context specific and disputants are expected to honour the outcomes and decisions, which could be more or less binding, depending on the power relations at play and the customs of the community."[22] In Africa, "there are also semi-formal and more formal litigations in which one party could sue another in a royal or customary court; as the case may be"[23] In this case, "adjudication is handled by

[16] Ibid.
[17] Kenneth C. Omeje, (2008), *supra*, note, 6, p.89.
[18] Ibid.
[19] Ibid.
[20] Zartman, I. W (ed.) (2000) Traditional Cures for Modern Conflicts: African Conflict 'Medicine', Boulder, CO: Lynne Rienner.
[21] Kenneth C. Omeje, (2008), *supra*, note, 6, p.90.
[22] Ibid.
[23] Ibid.

a presiding traditional ruler with or without the support of legal counselors".[24] However, it is good to stress that "under most African traditions elders are respected as the communities' repository of functional wisdom and experience and therefore assigned a prime place in community leadership and dispute settlement"[25] This traditional philosophy, Kenneth C. Omeje observes is "the logic behind the creation of the African Union Panel of the Wise, comprising a team of five to seven highly distinguished African personalities constituted to support the conflict intervention efforts of the regional body through preventive diplomacy and peacemaking."[26]

However, it must be underlined that traditional African approaches and methods of conflict resolution are not spared from criticism. They have often been criticized for being arbitrary and disproportionate in passing sanctions.[27] It is also argued that customary institutions that represent dominant interests may pass judgments that are against the interests of vulnerable groups like women, children and minorities.[28] Nevertheless, in general, traditional dispute resolution approaches and methods play significant role in conflict management and resolution.[29]

Currently, many African countries such as Botswana, Zimbabwe, Ghana, Namibia and Uganda have dealt with the question of integrating traditional conflict resolution mechanisms into their post-independence governance systems. Likewise, the South African White Paper on Traditional Leadership which takes a favourable view of the Ghanaian model, that "recognizes the institution of traditional leadership and provides for the establishment of national and regional houses of traditional leadership;" but states that while "traditional leaders have a role to play in issues of development **…** they are forbidden from active participation in party politics."[30]

In Ethiopia, the 1995 Constitution (Article 34(5)) recognizes limited application of traditional law, and encourages people to use customary and religious laws for marital, personal and family rights.[31] Article 78(5) of the Constitution also states that:

> Pursuant to sub-Article 5 of Article 34(5), the House of Peoples' Representatives and State Councils can establish or give official recognition

[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] White Paper on Traditional Leadership and Governance (2003), pp. 12-13.
[31] Constitution of the Federal Democratic Republic of Ethiopia. 1994. Federal Negarit Gazeta, Proclamation No. 1/1994.

to religious and customary courts. Religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organized on the basis of recognition accorded to them by this Constitution.[32]

2. Traditional Conflict Resolution in South Africa

South Africa's legal system is pluralistic. It consists of a number of separate legal traditions: transplanted European laws (Roman-Dutch law at the core, later influenced by English common law), collectively known as the common law, along with traditional laws, referred to as African customary law.

Section 211 (2) (3) of the Constitution of the Republic of South Africa observes, a system of customary law to function with limitations and to be applied subject to the Constitution and any legislation that deals with customary law.[33] Section 212(1) (2) (a) (b) further highlights the role of traditional leaders as a means through which these customary practices may be effected on matters affecting local communities and stresses the significance of the establishment of the house and council of traditional leaders through provincial and national legislation.[34] In theory, the Constitution in Section 211 (3) puts customary law on the same footing as the Roman Dutch Law. However, in practice, cases involving customary law are often dragged and/or approached from a non-customary legal stance with devastating consequences for both parties.[35]

The unique blend of Western and African laws is also detectable in South Africa's national justice system, which is comprised of a justice system based on western values and principles of justice on the one hand and, on the other, a traditional system based on African values and principles. The main goals of African justice have been described as the "search for truth, reconciliation, compensation and rehabilitation" while the goals of Western justice are seen as "procedural justice, retribution, incarceration, and revenge."[36] In spite of the existence of fundamental differences between these two systems arising from their dissimilar values and principles, legal developments over the years inevitably led to cross-pollination and the formation of loose ties between the two systems.

[32] Ibid.
[33] The Constitution of the Republic of South Africa, 1996.
[34] Ibid.
[35] *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others (875/12[2013]*.
[36] P. Holomisa (2011) "Balancing Law and Tradition", *SA Crime Quarterly,* Volume 35, pp.18.

The Constitution makes express provision for the retention of the roughly 1,500 traditional courts in operation in South Africa.[37] Due to the fact that they differ quite considerably from community to community, it is difficult to generalize about their exact nature and structure.[38] Furthermore, at different levels, disputes are evident when the values and interests of communities are challenged or unmet. Security (preservation of culture, language, etc.) and (local) development are often at the forefront of disputes and this is driven by political pulls that disregard the values and practices of communities. The obvious focus of the pre-colonial era was mainly to civilize the indigenous population and to get rid of their customary practices.

This 'civilizing mission' mindset has also been reflected in the government's attempt to introduce Traditional Courts Bill which was not a success story. The Traditional Court Bill has been in making for many years and it seeks to establish constitutional role for traditional leaders. The bill was tabled for the first time in 2008 and it caused tremendous public outcry from rural people, scholars and civil societies. The most serious criticisms raised on the bill from the very beginning were the failure to consult the ordinary rural people and issues regarding the bill's constitutionality. The bill was criticized that it consulted only traditional leaders and members of local government. It was also criticized for been against the principle of equality as enshrined in the constitution, specially, the equality right of women. The problems continued when the same bill was reintroduced in 2012. Accordingly, the bill lapsed in 2014. In 2017 again a new bill was introduced with the need to eliminate discrimination of all kinds in traditional courts. But as Sindiso Minisi Weeks observed, the new bill has ambiguity because "on the one hand it says that traditional courts must operate according to customary law and customs" while on the other hand "it describes them as 'courts of law' allowing them to develop the common law".[39]

Currently, the most contentious issue obstructing the passing of Traditional Courts Bill is the *opt-out clause* which gives residents in traditional areas (expected to be more that seventeen million) the right not to subject themselves to traditional courts. As things stand now, it appears that the bill will not make it into the statute books. Even if it happens that in the future the bill would be passed by a majority vote in the Parliament, it would definitely land in the

[37] T.W. Bennet (2004), Customary Law in South Africa 29 (Juta & Co.), p. 141.
[38] Ibid.
[39] Sindiso Minisi Weeks (2017), South Africa's Traditional Courts Bill 2.0: improved but still flawed, in the Conversation media outlet. (available at; https://theconversation.com/south-africas-traditional-courts-bill-2-0-improved-but-still-flawed-74997)

Constitutional Court. Thus, the fate of the Traditional Courts Bill is not decided yet.

The legal system in South Africa allows customary law –which is based on existing customs and practices of the communities– to be employed in traditional courts. However, it is good to note that there is no legal representation or formal recording of the traditional court proceedings. Rather, the proceedings follow the customs and practices of a particular ethnic group. The goal of the traditional courts is to restore social cohesion. The main actors in the tradition conflict resolution system are often elders of the community.

2.1 Traditional Conflict Resolution in Historical Context

In South Africa, prior to colonialism, dispute resolution was governed by customs and practices of different communities. After colonialism, the Black Administration Act[40] was introduced. The Act allows civil and criminal powers to be vested in traditional leaders.

However, the act required that "the traditional leader must have the Minister's authorization to resolve civil disputes; the claim must be based on customary law; the race of the parties must be African; and the parties or the defendant must be residents within the traditional leader's area of jurisdiction (…)".[41] Some of the civil disputes heard by traditional leaders are "return of dowry (lobolo) or damages for adultery. A traditional leader can, however not determine divorce, nullity or separation matters".[42]

The crimes to be handled by the traditional leaders included common law, statutory and customary law.[43] Crimes for which the traditional leaders have no jurisdiction are listed in the Third Schedule to the Act.[44] Traditional leaders "may impose any punishment under customary law except fines exceeding R100, death, imprisonment or corporal punishment".[45] They can also report a defaulter to a magistrate within 48 hours and the magistrate will order the defaulter to comply (…)".[46] As per Section 20 (8) of the Act, "a person aggrieved by the decision of the traditional leader may appeal to a magistrate".[47]

The Black Administration Act had a devastating impact on customary practices, among others; it was instituted as a tool of control people who were

[40] The Black Administration Act 38, 1927.
[41] Ibid.
[42] Ibid
[43] Ibid, Section 20 (2).
[44] Ibid.
[45] Ibid, Section 2 (5) (a) and (b)
[46] Ibid.
[47] Ibid.

already confined to their homesteads.[48] With regard to the erosion of the legitimacy of the traditions and customary laws, Yoichi Mine observed that during the time of white rulers, ethnic traditions and customary laws were preserved, but the collusion of autocratic traditional leaders with the white government constantly eroded their legitimacy.[49] He exemplified his allegation by mentioning the case of Mangosuthu Buthelezi, the founder of a Zulu nationalist movement, the Inkatha Freedom Party (IFP).[50]

2.2 Traditional Conflict Resolution in Post-Apartheid South Africa

In Post-Apartheid South Africa, a new Constitution was promulgated. As Prince Mashele observed, "there was considerable pressure for the abolition of traditional leadership, yet there were those who cautioned against the exclusion of traditional leaders from modern systems of governance."[51] However, the view that cautioned against the exclusion found considerable support in African National Congress (ANC) circles, although the need to align traditional leadership with democratic principles was emphasized.[52] This approach was to take root in the post-apartheid constitutional framework.[53]

According to Paula Jackson *et al*, "although the institution of traditional leadership continued to exist under apartheid, the impetus for formally recognizing the role and legitimacy of traditional leaders in a democratic system of government is the acknowledgment that the institution was significantly undermined and manipulated by previous colonial and apartheid administrations."[54] To this end, "the 1996 Constitution of the Republic of South Africa set the tone for recognizing traditional leaders in a democratic dispensation".[55] The Constitution particularly Section 211 (1), provides for the recognition of the "status and role of traditional leadership, according to customary law, subject to the Constitution", while Section 212 (2) (a) of the Constitution provides for the creation of houses of traditional leaders at both

[48] Influx Control Act 68, 1986.

[49] Yoichi Mine (2013), "Beyond Ad hoc Power-Sharing: Comparing South Africa and Zimbabwe"; in Yoichi Mine, Frances Stewart, Sakiko Fukuda-Par and Thandika Mkandawire (eds.), 2013, *The Palgrave Macmillan Preventing Violent Conflict in Africa*, Palgrave Macmillan Press, New York, p. 99.

[50] Ibid.

[51] Prince Mashele, (2004) "Two Cheers? South African Democracy's First Decade", *Review of African Political Economy*, Vol. 31, No. 100, pp. 349-354.

[52] Ibid.

[53] Ibid.

[54] Paula Jackson *et al* (2009), *South African Government in Review: Anti-corruption, Local Government and Traditional Leadership*, HSRC Press: Cape Town, South Africa, p. 47.

[55] Ibid.

national and provincial levels, their role being merely to advise on matters relevant to tradition and customary law.[56]

For Prince Mashele, the restriction of traditional leadership to an advisory status "stands in sharp contrast to the position it enjoyed under the homeland system, where chiefs exercised legislative as well as administrative authority".[57] The current constitutional system has therefore altered the power relations between politicians and traditional leaders in favour of the former. Bennett also notes that:

> ... [members of] the new (house of traditional leaders) have only limited powers. They may propose legislation; they cannot generate statutes of their own accord. They may advise and they may insist on being consulted about bills concerning customary laws, but they can do no more than delay the passing of an act.[58]

Subsequent pieces of legislation have been also enacted by the post-apartheid government. These significantly, include the National House of Traditional Leaders Act[59], the Municipal Structures Act[60], the White Paper on Traditional Leadership and Governance[61] and the Communal Land Rights Act[62], as well as a number of provincial statutes.

The National House of Traditional Leaders Act Provides for the formation of the National House of Traditional Leaders, whose function is to "promote the role of traditional leadership within a democratic constitutional dispensation." The Municipal Structures deal largely with the categorisation of municipalities. However, it cursorily touches on issues related to the interaction between elected local government structures and traditional leadership. It provides that " ... traditional authorities that traditionally observe a system of customary law in the area of a municipality may participate through their leaders ... in the proceedings of a municipality ...".

This provision seems to open doors for traditional leaders to influence issues at local government level through municipal structures. With regard to participation "... the traditional leader ... may, subject to the rules and orders of the municipality ... participate in any debate on a matter if she/he is a councillor. This would include the right to submit motions, make proposals and ask

[56] The Constitution of the Republic of South Africa, *supra,* note, 33.
[57] Prince Mashele, *supra*, note, 51, p. 350.
[58] Bennett, supra, note, 37.
[59] The National House of Traditional Leaders Act, (No. 10 of 1997).
[60] The Municipality Structures Act (No. 117 of 1998).
[61] The White paper on Traditional Leadership and Governance, 2003.
[62] The Communal Land Rights Act, (No. 11 of 2004).

questions". Prince Mashele contends that, the participation does not address the concerns of traditional leaders as it denies them voting powers and also representation is limited to less than 10%.[63] However, though not sufficient, one cannot fail to appreciate the move taken by the South African government to involve traditional leaders in the local governance system.

The functions of Traditional Councils are stated in Section 4 of the Traditional Leadership and Governance Framework Act[64]. According to Subsection (1) of Section 4, they are:

- "[a]administering the affairs of the traditional community in accordance with customs and tradition", (Subsection 1(a))
- "supporting municipalities in the identification of community needs" (Subsection 1(c)), and
- "promoting the ideals of co-operative governance, integrated development planning, sustainable development and service delivery" (Subsection 1(h)).

However, in spite of the recognition of the judicial powers of traditional leaders by the law, there are unofficial dispute resolution mechanisms. The first level of unofficial dispute resolution mechanism is usually the *family council* and if the dispute is not resolved, the matter is heard at the *ward* level by ward leaders and their advisers. The methods of dispute resolution at these levels are negotiation and mediation. If the matter is not resolved at these levels, it proceeds for resolution by traditional leaders recognized by law. In this regard, it would be proper to mention briefly the case of *lekgotla* (traditional council) in the North West Province of South Africa in the village of Makapanstad in order to highlight the issue at hand.

Lekgotla is an indigenous mechanism of resolving disputes. As part of customary law, it protects a person's culture and cultural practices. *Lekgotla* strives to promote social units and social restoration. In a narrow sense, the term *Lekgotla* is defined as the council of the people. Broadly, *Lekgotla* is referred to as a cultural group of people who are at the forefront of dispute resolution under the traditional authority of a King or Queen in a designated area and as recognized by their communities.[65] *Lekgotla* involves a process of sustained dialogue where people regularly keep coming back to the table to talk and listen to each other deeply enough about their perceptions, the conflict, and to explore complexities in their relationship.[66] In this process of dialogue, *Lekgotla* does

[63] Prince Mashele, *supra*, note, 51, p. 351.
[64] The Traditional Leadership and Governance Framework Act (No. 41, 2004).
[65] Lencoe Makapan, Bakgatla Ba Mosethla Traditional Council Secretary. Interview for the Lekgotla La Batho community research project on 26 July 2017 in Makapanstad.
[66] Ibid.

not view disputes or conflict as s setback but rather as an opportunity for dialogue, resolution of the conflict and mutual communication between the parties to rebuild their relationship and reality.[67]

A *Kgotla* is a gathering of the members of *Lekgotla* that draws meaning from the two parties involved in a dispute, conflict or crime.[68] Disputes in this (traditional) sense are viewed from the perspective of the broken bonds between two families and it is therefore the responsibility of both families to engage in the conversation to find solutions through *Lekgotla*. Individuals, families and groups involved in disputes approach *Lekgotla* for sessions to negotiate, discuss and to resolve the disputes. It is important to note that individuals, families and groups will remain active in this process through *Lekgotla*.

In the community of Makapanstad,[69] *Lekgotla* revives and actualizes the African values, norms and beliefs of the *Bakgatla Ba Mosetlha*[70] that were weakened, undermined and disregarded by colonialism and Apartheid. In Makapanstad, the King is regarded as the custodian of culture and tradition.[71] The elders in the community are regarded as guardians of the traditional knowledge of dispute resolution. *Lekgotla* is derived from an ideal of social harmony and to maintain peace and order in the community.[72] The members of *Lekgotla* are entrusted with the responsibility to resolve disputes and to bring to life the traditions and practices of the *Bakgatla*.[73]

Thus, as custodians of culture, traditional leaders play a prominent role in the affairs that affect the local communities. Not only do they preserve culture, but they also serve as development agents in their respective communities.

[67] Ibid.
[68] Ibid.
[69] A village in the North West province of South Africa where a system of Lekgotla is in place to resolve local disputes. Also an ongoing research site for Lekgotla La Batho Research project at the Institute for Dispute Resolution in Africa (IDRA), College of Law, University of South Africa from 2016.
[70] This is a collective name for the people who live under the traditional leadership of King Nchaupe Makapan III (the current king of the 32+ villages of his kingdom).
[71] Lencoe Makapan, *supra*, note, 65.
[72] Ibid.
[73] Ibid.

3. Traditional Conflict Resolution in Ethiopia

The legal and judicial system in Ethiopia is "a mosaic of different systems and traditions".[74] It is "a civil law country but the system has also common law elements".[75] What is more, "Ethiopia has a mixture of modern and secular laws, and customary and religious rules". All those systems "work parallel and sometimes even impede each other". This is mainly "the cause for rules and customs whose constitutionality is arguable". However, "discussions and decisions on those different systems are often avoided".[76]

Ethiopia is one typical example where colonial influence had little impact on the construction of its legal tradition. Since its ancient statehood, Ethiopia had independent but fragmented legal tradition. As Singer observes "the Italian occupation [1936-41], though felt in many spheres, did not contribute to the legal tradition".[77] He further observed that "however, Ethiopia, like all other African nations, does have a colonial heritage built into its legal system, albeit a colonialism that is somewhat removed from the usual concepts implied by that term". As Singer notes, in Ethiopia, "instead of domination involving a foreign power, control was established through internal conquest by the politically dominant group".[78] What is more, in Ethiopia, the marginalization of traditional leaders from government apparatus and the existence of a civic space dominated by educated westernized Ethiopians are evident.

Although the similarity and difference between Ethiopia and other African countries requires further research and also depending on how one defines colonialism,[79] monarchial Imperial Ethiopian regimes were in power for many centuries. Feudalism is not a case peculiar to Ethiopia but was also a chapter in the history of European countries in their "advance to modernity".[80] The modern

[74] Federal Democratic Republic of Ethiopia, Ministry of Capacity Building, Justice Reform Program Office, 2005. *Comprehensive Justice Reform Program* (*Baseline Study Report*), Amsterdam: Primavera Quint, p. 157.

[75] Ibid.

[76] Ibid.

[77] Norman J. Singer, (1970), "A Traditional Legal Institution in a Modern Legal Setting: The Atbia Dagnia of Ethiopia", 18 *UCLA L. Rev.* 308 (1970), pp. 308-334.

[78] Ibid.

[79] Historians identify four types of colonialism: settler colonialism, exploitation colonialism, surrogate colonialism, and internal colonialism. See; Healy, Roisin; Dal Lago, Enrico (2014). *The Shadow of Colonialism on Europe's Modern Past*. New York: Palgrave Macmillan, p.126. Internal colonialism is defined as "a notion of uneven structural power between areas of a state. The source of exploitation comes from within the state". *See*; Gabbidon, Shaun, 2010. Race, Ethnicity, Crime, and Justice: An International Dilemma. Los Angeles, CA: SAGE, p. 8.

[80] Peter P. Ekeh (1975), "Colonialism and two publics in Africa: A theoretical statement", *Comparative Studies in Society and History*, Vol. 17, No. 1 (01), pp. 91-112.

Ethiopian state emerged in a feudal structure that imposed the traditional monarchy of northern Ethiopia on much of the country. The feudal system in Ethiopia had a feature of exploitation which according to Markakis was "based on a system of accumulation that depended on coercion and closely resembled Western feudalism".[81]

3.1 Traditional Conflict Resolution in Historical Context

Ethiopia has existed as "a polity, shrinking and/or expanding in shape and power, for more than two thousand years."[82] Its "long history of existence was for the most part dominated by a history of traditional mode of administration and social relationships."[83] Ethiopia's first Constitution was written in 1931 under Emperor Haile Sellassie who reigned from 1930-1974. Before the enactment of this Constitution, customary law and some legal instruments used to govern the socio-political life of the people.

The first attempt to codify laws in Ethiopia date back to the 14th and 15th centuries. "*Ser'ate Mengist*, the Law of the Monarchy was a short collection that contained twenty-one articles of law. It appears to record a continuous legislative activity which started in the 14th century, with King AmdeTsion (r. 1314-1344) and culminated in the 17th with King Fasiledes (r. 1632-1667)."[84]

As Vanderlinden notes this Law mostly deals with religious affairs, but also contains texts on civil and penal matters, scattered among attacks against heresies of the time.[85] According to Aberra "the first codified law of Ethiopia was *Fewuse Menfessawi* (the Spiritual Remedy).[86] It was "compiled by Ethiopian church scholars by the order of Emperor Za'ra Ya'eqob (r. 1434-1468) and contained 24 articles (principles) from the Old Testament of the Bible."[87]

Later, during the rule of the same Emperor, a more elaborate law *Fitha Negest* (Justice of the Kings) that had both secular and religious rules was adopted through reception thereby replacing *Fewuse Menfessawi*.[88] The *Fitha Negest* was introduced into Ethiopia from the Coptic Church of Alexandria and

[81] Markakis, J. 2011. Ethiopia the last two frontiers: Boydell & Brewer Ltd.
[82] Alula Pankhurst.and Getachew Assefa (2008), *Grass Roots Justice in Ethiopia: the Contribution of Customary Dispute Resolution*, Center Francais des etudes Ethiopiennes, Ethiopia: Addis Ababa.
[83] Ibid.
[84] Ibid.
[85] Jacques Vanderlinden (1966), "An Introduction to the Sources of Ethiopian Law from the 13th to the 20th Century", *Journal of Ethiopian Law* , Vol. 3, No. 1, pp. 227-255.
[86] Aberra Jembere, 1988a. *Codification in Ethiopia*, Moscow: Nauka Publishers.
[87] Ibid.
[88] Ibid.

was translated from Arabic into Ge'ez. As Paulos notes it comprises two parts, the first based on biblical texts, and the second mainly on Roman-Byzantine laws.[89]

The *Fitha Negest* was used as a law in both criminal and civil matters from the 16th century onward until the reign of Emperor Haile Sellassie.[90] The first Penal Code of 1930 stated that it was a 'revision' of the Fitha Negest updated to meet the needs of present times and the revision in 1957 and the Civil Code of 1960 also makes reference to it, in effect, creating an impression of continued legitimacy.[91] As Krzeczunowicz observes:

> "the *Fitha Negest* and other written legal instruments were used in areas under the monarchical administration and therefore covered limited areas of the country among Christians, and people living in other areas had their cases adjudicated and disputes settled through customary institutions."[92]

Thus, much of the pre-modern legal tradition used by the monarchs was foreign in inspiration. However, Aberra notes that Emperor Haile Sellassie on assuming power, "stated in the preamble of their first decree that the custom of each and every locality should be respected and that cases were to be adjudicated according to the customary law of the locality".[93] Aberra further stated that "at times customary laws, if found useful, could receive the status of law and be accepted as *atsesir'at*, 'the law of the emperors', which he translates as 'presidential jurisprudence' used as precedent for future cases".[94]

Ethiopia embarked on a politically motivated modernization of its laws with the coming to power of Emperor Haile Selassie I, and the promulgation of the first Constitution of 1931 and more emphatically as of 1955 when the Constitution was revised.[95] As Bahru observes "the 1931 Constitution was drafted by Bejirond TekleHawaryat TekleMariam, and was influenced by the Japanese Meiji Constitution of 1889, (which in turn was influenced by German Constitutions) …".[96] The 1955 revised Constitution of Ethiopia was to a certain

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[89] Paulos Tzadua (2005), 'Fethanägäst' in S. Uhlig ed. Encyclopaedia Aethiopica 2:534-5. Wiesbaden: HarrassowitzVerlag,

[90] Girma Gizaw (2005), The World History of Earn (*sic*) and Legal Institutions: Ancient, Modern and Contemporary. Addis Ababa: Commercial Printing Enterprise, pp. 274-9.

[91] Paulos Tzadua (2005), *supra*, note, 89, p. 535.

[92] George Krzeczunowicz (1965), 'Code and Custom in Ethiopia', *Journal of Ethiopian Law*, Vol. 2, No. 2, pp. 425-439.

[93] Aberra Jembere (2003), 'Customary Law' in S. Uhlig ed. Encyclopaedia Aethiopica, Wiesbaden: HarrassowitzVerlag, p. 839.

[94] Ibid.

[95] Alula Pankhurst and Getachew Assefa (2008), *supra*, note, 82.

[96] Bahru Zewde, 2002b. *Pioneers of Change in Ethiopia: the Reformist Intellectuals of the Early Twentieth Century*. Oxford: James Currey, p.62.

extent influenced by "Anglo-American constitutional traditions [and] the Westminster Model and the 1948 United Nations Declaration of Human rights" and also further consolidated imperial powers including as head of the chilot, the imperial court."[97] It is to be noted that 1931 and the 1955 constitutions did not include a provision related to customary laws.

From 1957-1965, Ethiopia legislated six modern legal codes in a substantial codification project that aimed at modernizing its legal system. These codes were largely receptions from codes of laws of continental Europe, and they seem to bear little relation to the traditional patterns of life prevailing in the country.[98] The chief drafter of the Civil Code of 1960, was René David, and the receptions of laws and legal principles included continental civil codes notably the French, Swiss, Italian and Greek, in addition to which Egyptian, Lebanese, and German codes, and for some provisions from Portuguese, Turkish, Iranian and Soviet codes were consulted.[99]

Although some attempt was made to incorporate certain principles of customary law into the modern codes, they aimed at being comprehensive and governing all the legal relations in the country without leaving any space for the widely-practiced customary mode of dispute settlement.[100] This state policy was clear notably in 3347 of the Civil Code, which reads:

> Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this code *shall be replaced by this code and are hereby repealed*. (Emphasis added).[101]

The repeal under Article 3347 of the Civil Code aimed not only at customary rules that were inconsistent with the provisions of the Code, but it repealed all customary rules concerning matters provided for in the Code, whether they are consistent with the Civil Code or not. Nor did the Code allow some grace period "until the Code could be disseminated – both physically and in content – but rather its immediate enforcement was sanctioned, superseding the customary laws extant in the various groups of the Ethiopian society".[102] With regard to the repeal of the customary practices, the former Vice President of the Federal Supreme Court Menbertsehai Taddesse opines that though we Ethiopians claim not to have been colonised (except the short lived Italian occupation from 1936

[97] H. Scholler (2003), 'Constitutions' in S. Uhlig ed. Encyclopaedia Aethiopica 1:788-91. Wiesbaden: HarrassowitzVerlag, p. 788.
[98] Stanley Z. Fisher (1971), 'Traditional Criminal Procedure in Ethiopia' in the American *Journal of Comparative Law*, 19: 4; 709-746.
[99] Alula Pankhurst and Getachew Assefa, 2008, *supra*, note, 82.
[100] Ibid.
[101] Civil Code of Ethiopia, 1960.
[102] Alula Pankhurst and Getachew Assefa, 2008, *supra*, note, 82.

to 1941) in actual fact that is not the case. Rather, the repeal provision in Art. 3347 in the Civil Code is a testimony to the contrary.[103]

However, as Krzeczunowicz observes "the drafters of the Code in fact made an attempt to include some elements of the customary rules into the Civil Code. Some have claimed that the 'general' custom of the land (its 'common law') in areas of civil matters has been more or less included in the Ethiopian Civil Code".[104] What is more, as Abera and Scholler observe "there are in fact certain examples of inclusion of the pre-existing customs of the Ethiopian peoples in, for example, family matters (concerning betrothal, moral prejudice, kinds of marriage, and intestate inheritance), contracts, property law (about the principle of usucaption, right of way, and rural servitude), and torts (in fixing the amount of fair compensation)".[105]

Alula and Getachew argue that the incorporation cited above cannot be taken as a fair and realistic treatment of the customary law in the country for the following three reasons. *First*, "the examples of incorporation could not possibly represent the customary laws of all the ethno-national groups of the country."[106] *Secondly*, "the incorporation was made in rather limited areas and do not match the body of customary laws with a veritable mass of rules in all areas of the civil and criminal law."[107] *Thirdly*, "formal system did not give any place for the customary institutions that exist in various sections of the society."[108] Accordingly, "all courts of judicature were restricted to be the ones that would be established by the State to apply the State formulated and codified laws."[109]

As Alula and Getachew observe, "the political motives and justifications" for failure to give due attention to "customary law was primarily the belief that providing a uniform and modern legal regime would be necessary for the socio-economic development of the country, and a precondition for effective nation-building".[110] However, "half a century after the enactment of the modern codes and the establishment of a modern judicial system", the much sought legal uniformity has not been achieved, and the modern codes have not been able to "successfully supplant customary laws and institutions of dispute settlement".[111] Rather, "fifty years after the enactment of the Penal Code and the Civil Code

[103] Communication with Menbertsehay Taddesse (PhD) former Vice President of the Federal Supreme Court on March 10, 2018.
[104] Krzeczunowicz, George 1965, *supra*, note, 92.
[105] Scholler (2003), *supra* note 97, p.750.
[106] Alula Pankhurst and Getachew Assefa (2008), *supra*, note, 82.
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] Ibid.
[111] Ibid.

which aimed at providing a comprehensive body of law in the criminal and civil matters, respectively, customary laws and institutions are still active and vibrant. This may indicate that the approaches taken by the modernizers of the Ethiopian law might have been wrong, or at least require rethinking and revision".[112]

The Derg period (1974 – 1991) introduced a socialist orientation reflected in the 1987 Constitution of the People's Democratic Republic of Ethiopia (PDRE), drafted by the Institute for the Study of Ethiopian Nationalities in 1986. It was modelled along the lines of Marxist-Leninist constitutions such as the Soviet Union.[113] Although there was recognition that the Ethiopian state has 'from the beginning been a multi-national state', the Constitution is centralist and the PDRE is viewed as a unitary state, which 'shall ensure the equality of nationalities, combat chauvinism and narrow nationalism and advance the unity of the Working People of all nationalities[114] with only token concessions to the idea of autonomy.[115] Despite the Derg's attempt to instill secular values, the only significant change from the draft to the final text which was debated prior to its adoption was a minor concession to religious interests in the removal of the monogamy clause.[116] Although 1987 Constitution acknowledged equality of nationalities, like the emperor's previous two constitutions, it did not contain a provision that deals with customary laws.

3.2 Traditional Conflict Resolution in Post-Derg Ethiopia

After the defeat of the Derg by the Ethiopian Peoples' Revolutionary Front (EPRDF) in 1991 the new approach based on ethnic federalism was both radical and pioneering.[117] As Clapham observes "the principle of self-determination for federated regional units was a departure from the formerly highly centralized and unitary state which went further than any African state and took ethnicity as its fundamental organising principle to a greater extent than almost any state worldwide.[118]

The approval of the 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution by the Constitutional Assembly reflects these changes in the direction which have a direct bearing on customary dispute resolution and its

[112] Ibid.
[113] Scholler, (2003), *supra* note 97, p. 789.
[114] FDRE Constitution, *supra*, note, 31, Art. 2.
[115] Clapham, Christopher 1988. *Transformation and Continuity in Revolutionary Ethiopi*a. Cambridge: Cambridge University Press, 92-5.
[116] Ibid.
[117] David Tourton (ed.) 2006. *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective*. Oxford: James Currey, p.1.
[118] Christopher Clapham (2002), "Controlling space in Ethiopia". In D. Donham (Ed) *Remapping Ethiopia: socialism & after* (9-30). Oxford, James Currey, p. 27.

relation to the formal justice system.[119] The shift in paradigm in the Constitution with regard to the complex nature of the Ethiopian society and its problems has allowed limited space for customary and religious laws and courts existing in the country. The Constitution clearly recognizes the jurisdiction of customary and religious laws and courts in family and personal matters among the disputants that consent to such a jurisdiction. For instance, Article 34(5) reads: "this Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute. Particulars shall be determined by law." This implies that the Constitution guarantees an *opt-out* clause for the parties in dispute. Article 78 (5) reads: "Pursuant to Sub-Article 5 of Article 34, the House of Peoples' Representatives and State Councils can establish or give official recognition to religious and customary courts. Religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organized on the basis of recognition accorded to them by this Constitution."

As per Article 78(5) of the FDRE Constitution, the Ethiopian state has three ways of giving official status to religious and customary courts. The *first* is the direct establishment of religious and customary courts by the law-making organs at the federal and state level. This involves the process of setting up new religious and customary justice systems on the basis of long-standing religious and customary beliefs. The *second* is the recognition of religious and customary courts, which were functioning as *de facto* informal justice systems by the federal and state legislatures. The *third* is the automatic recognition of religious and customary courts, which were functioning on the basis of official recognition before the promulgation of the FDRE Constitution. As Forsyth observes both cases of establishment and recognition signify that the state would develop standards that need to be observed by the religious and customary systems.[120]

Articles 34(5) and 78(5) therefore imply that at least in those areas mentioned, the Customary Dispute Resolution (CDR) systems can exist separately from, and parallel with the state-sponsored legal-judicial system. In effect, family law and the law of succession are now potentially within the competence of the members states.

Although these constitutional provisions incorporate customary dispute resolution in Ethiopia, "there are also serious risks for individual human rights, notably of women, children and minorities that need to be taken into

[119] FDRE Constitution, *supra*, note, 31.

[120] Forsyth, Miranda (2007). "A Typology of Relationships between State and Non-State Justice Systems", *Journal of Legal Pluralism*, Volume 56, pp. 94.

consideration and protected through federal as well as state legislation and legal provisions".[121] In this respect, the Ethiopian Women Lawyers Association has played a significant role in its efforts and participation toward the enactment of the Revised Family Code in 2000.[122] The Revised Family Code has addressed the discrimination between men and women in the 1960 Civil Code. The Code had different marriage ages for men and women, and it had designated the husband as the household head with the right to choose common residence and manage common property.[123] Likewise, the 1957 Penal Code was revised in 2004. The 1957 Penal Code had criminalized abortion, and it did not address or criminalize domestic violence, or female genital mutilation.[124]

Regarding civil matters other than the issues stated above, the Constitution does not specifically prohibit the operation of traditional conflict resolution systems. Although this could potentially provide the space for the involvement of traditional conflict resolution systems in other legal domains, the fact that traditional conflict resolution is mentioned in the contexts of family and personal law without reference to other legal areas creates an impression that traditional conflict resolution jurisdiction is or should be restricted to family and personal law. Under the system of division of the legislative competence among federal and state governments in Ethiopia, civil matters (other than those specifically mentioned as federal under Art. 55 of the Constitution) fall under state jurisdiction.[125] One could therefore envisage the possibility for States to recognize certain jurisdiction for the traditional conflict resolution systems when they enact laws on civil matters.

With regard to criminal matters, the old philosophy – i.e., the uniformity of criminal law and jurisdiction– still continues. Traditional conflict resolution systems are not allowed to operate in the criminal law areas even if in actual fact they are deeply involved in criminal matters. However, it is to be noted that the formal justice system regularly depends on traditional conflict resolution institutions to solve less serious cases, to bring criminals to courts, to make sure that judgments by traditional conflict resolution institutions are upheld and to attain reconciliation after cases are decided. In this regard, the new Federal Criminal Justice Policy[126] has recognized the possibility of using traditional conflict resolution practices and institutions to resolve criminal cases. This

[121] Alula & Getachew, 2008, *supra*, note, 82.
[122] Ibid.
[123] Ibid.
[124] Ibid.
[125] Ibid.
[126] FDRE (2011), The Criminal Justice Policy of the Federal Democratic Republic of Ethiopia.

implies the importance of clarifying the relationship between state and non-state justice systems. Among the main issues that require clarification are the mandate and level of oversight of the formal state justice system over the non-state justice systems and the jurisdiction of the non-state justice systems.

In Ethiopia, conflicts between the formal, traditional and religious laws persist. This is mostly manifested with regard to the status of women and criminal law. According to most Ethiopian officials (cited in a 2005 Baseline Study Report) "in the current system, where federal law is not forcefully implemented, traditional and religious laws are working well".[127] According to the officials "people at the grass root level are said to be satisfied with it and do not require any change". All the interviewed officials and former judges expressed the strong view that "nothing should be attempted against religious or traditional laws at this stage". Otherwise, "it would most probably be extremely counterproductive and fire back on the government". They emphasized the fact that traditional law is deeply entrenched in people's minds and has been enforced for centuries". As a result, "[t]he central powers in the past never attempted to force and implement effectively central government's laws on people abiding by customary law".[128] Thus, even if the earlier legal regimes in Ethiopia aspired towards social engineering through customary law repeal provision and legal transplantation, the failure to recognize legal pluralism was inappropriate. This is so because the attempted modernization process did not consider the context at the grassroots.

Conclusion

In Africa, colonization introduced a cultural conflict between the African and western cultures. The western culture was viewed as superior and dominant by subjugating African cultures. In a way, cultural hegemony was introduced to the world of African conflict resolution. Indigenous African conflict resolutions were only allowed to guide courts provided they are not repugnant to justice and morality. However, the irony is, repugnancy is to be measured by western sense of justice and morality by relegating the African sense of justice and morality.

In South Africa, broad policy shifts have taken place on the role of traditional conflict resolution since the beginning of democratic rule in 1994. The shifts show that while government was originally indecisive about traditional conflict resolution, it has started to integrate traditional conflict resolution into the constitutional system, even if there is a serious challenge from rural people, scholars and civil societies. However, in the process of integration (drafting

[127] Federal Democratic Republic of Ethiopia, Ministry of Capacity Building, 2005, *supra*, note, 74.
[128] Ibid.

national laws and statutes on traditional conflict resolution), there is a need for transparency and public participation (specially, the rural population).

Traditional leaders who play key role in traditional conflict resolution should not be relegated to mere traditional councilors. The integration requires the importance of cooperative partnership by engaging all stakeholders including the rural community, the house of traditional leaders, the local government and upwards in the governance structure. Moreover, there should exist mutual respect and a deeper understanding of the administrative tasks of traditional leadership. The idea of acknowledging traditional conflict resolution in South Africa should be in line with the constitutional principles and rights enshrined in the Constitution, and it should not be imposed or forced upon the people living under the traditional leadership.

In Ethiopia, the formal and traditional justice systems present a multifaceted network of laws and institutions that make up the national legal system. With regard to the formal justice system of governance, the state justice system is made up of laws and institutions at the federal and regional state levels. The traditional justice systems are made up of religious and customary justice systems. In order to accommodate diversity and pluralism, the Federal Democratic Republic of Ethiopia Constitution recognizes a limited application of religious and customary conflict resolution systems in personal and family matters with the consent of the parties involved in a conflict. However, even if the FDRE Constitution contains provisions on customary laws, it does not clearly specify the relationship between customary and formal legal system.

Traditional conflict resolution systems are extensively employed by the people in the settlement of various kinds of conflict. The Constitutional space for traditional dispute resolution is still limited in Ethiopia, and it has not been followed through with practical provisions and enabling environment. Even if Ethiopia has not been colonized, indirect colonization could be demonstrated by critically examining the magnitude and impact of the modern codification process in the country.

In both South Africa and Ethiopia, the central governments indeed recognize the importance of traditional conflict resolution. However, they should go beyond pledges of recognizing traditional conflict resolution systems by taking positive steps to allocate the required power and provide new authority for traditional conflict resolution. ■

Trust and Distrust Approaches in the Constitutional Lawmaking of Rural Land Rights in Ethiopia: Nature, Drafting and Implications

Brightman Gebremichael ♣

Abstract

Although rural land rights are recognized in the 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE), the academic discourse and policy dialogues on the issue are still underway. However, these dialogues do not comprehensively cover the provisions in the Constitution concerning rural land rights, the *modus operandi* in the drafting approaches of the provisions and their legal implications. Hence, by analyzing the different sections and articles of the Constitution, this article seeks to examine the extent to which rural land rights are defined in the Constitution and the legal implications of its constitutional recognition. This article examines the compatibility of the approach adopted by Ethiopian Constitution makers with the *Trust* and *Distrust* approaches propounded by Rosalind Dixon for drafting of constitutional provisions on rural land rights. Dixon's view is reviewed before considering it in relation with compatibility issues.

Key terms

Rural land rights · Constitutional drafting · Nature of land rights · Ethiopia

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Introduction

Most written Constitutions of nations are, *inter alia*, "devoted to establishing and maintaining a system for the allocation (and reallocation) of power over wealth among individuals, groups and the state."[1] Among others, this may be

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[1] John Henry Merryman (1973), "Ownership and Estate (Variations on a Theme by Lawson)", *Tul. L. Rev.*, Vol. 48, p. 916.

done by recognizing the property rights clause in general without expressly dealing with land rights.[2] In some countries, Constitutions do not express the recognition of property rights, let alone land rights specifically.[3] In countries where there is constitutional recognition of property rights, the extent of specificity of the Constitution varies in dealing with property rights. There is variability in the manner property rights are regulated across constitutions. Depending on the general approach pursued by drafters of constitutions, a highly "codified" or detailed approach to constitutional drafting may be used, or the drafters may rely on a more "framework" style approach;[4].

It is uncommon to find a Constitution that specifically recognizes and defines actual property rights in land. Usually, constitutional laws either state the nature of ownership of land;[5] or the types of land tenure systems adopted which may include the possibility of deprivation of land rights for public interest and defining the structure and power of land administration organ and tribunals;[6] or setting social justice policy objectives revolving around land.[7] However, Ethiopia's Constitution, after distinguishing the nature of land ownership adopted, i.e., ownership by the state and people,[8] further grants actual rights to rural land specifically.[9] Moreover, the Constitution goes to the extent of determining the manner of access to rural land rights[10] and defines the nature of property rights in land.[11]

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[2] Gregory S. Alexander (2009), "Property Rights", in Vikram David Amar and Mark V. Tushnet (eds), *Global Perspectives on Constitutional Law*, Oxford University Press, New York, p. 59.

[3] A case in point is the experience of Canada and New Zealand.

[4] Rosalind Dixon (2015), "Constitutional Drafting and Distrust", *International Journal of Constitutional Law,* Vol. 13, Issue 4 (819–846), p. 820.

[5] *See* for instance, The Constitution of the Republic of Rwanda of 2003 Revised in 2015, Official Gazette No. Special of 24/12/2015, Art. 35.

[6] *See* for instance, Constitution of the Republic of Uganda (1995), Art. 237-243.

[7] *See* for instance, Constitution of the Republic of South Africa (1996), Constitution Seventeenth Amendment Act of 2012 – Government Notice 72 in Government Gazette 36128, dated 1 February 2013. Commencement date: 23 August 2013 [Proc. No. R35, Gazette No. 36774, dated 22 August 2013, Art. 25(4/a), (5) and (6).

[8] Constitution of Federal Democratic Republic of Ethiopia (FDRE) (1995), Art. 40(3).

[9] Montgomery Wary Witten (2007), "The Protection of Land Rights in Ethiopia", *Afrika Focus*, Vol.20, No. 1-2, p. 155.

[10] *See* FDRE Constitution, *supra* note 8, Art. 40(4) and (5) about peasants' and pastoralists' free access to rural land rights respectively and Art. 40(6) about private investors access to land rights through payment arrangements.

[11] See *Id* Art. 40(5) about the pastoralists' property rights in land – use rights; Art. 40(3) in conjunction with Art. 35(7) about peasants' property rights in land – resembling to

The definition of the nature of property right in land (embodied in the Constitution) is not made in the same fashion to all rural landholders. The Constitution expressly grants use rights to pastoralists based on the communal holding nature of the land, whereas, it does not provide an explicit definition in the case of property rights (in land) of peasants and private investors. Rather, it leaves the nature of property rights in land held by peasants and investors to be understood through the canon of interpretation. This is inferred from the cumulative reading of the constitutionally-prohibited property rights in land, and the sections of the Constitution that deal with women's right and the state governments' power of taxation.

The constitutional norm drafting approach adopted by the FDRE Constitution makers in drafting the provisions dealing with rural land rights is detailed or codified. This is inferred by making a comparison with the constitutional norms of other countries on the same issue and reference to the debates in the making of the Constitution.

The existence or nonexistence of constitutional deferral through 'by law clause' or adoption of abstract or vague concepts in a constitution is not by itself sufficient to classify the drafting approach followed in constitution making into 'framework-style' approach or detailed or codified approach.[12]

Rosalind Dixon suggests that the adoption of a particular constitution drafting approach depends on "the perceived congruence between the constitution makers' aims and the constitution interpreters' understandings thereby giving rise to the dichotomy of trust-mistrust approaches." In her view, constitution drafters adopt a detailed or codified approach in constitutional norms drafting because "they to some degree distrust the constitution interpreters –judges in the supreme or constitutional courts, as they may not share the aims and understandings of constitution drafters." In yet another approach the legislature resorts to framework-style constitutional norm drafting when they "highly trust and has faith in the constitutional judges as partners in the process of constitutional design".[13]

It is to be noted that the constitutional recognition of rural land rights under the FDRE Constitution has legal implications on different legal

usufruct rights; and also, Art. 97(2) about private investors and urban land holder property rights in land - usufruct rights.

[12] *See* Rosalind Dixon (2011), "Constitutional Amendment Rules: A Comparative Perspective", in Rosalind Dixon & Tom Ginsburg (eds.), *Comparative Constitutional Law*, Edward Elgar Publishing Ltd, Cheltenham; wherein the claim is made that the constitutional drafting approach adopted in a given constitution making can be determined on the basis of the existence and non-existence of constitutional deferral in the constitution.

[13] R. Dixon, *supra* note 4.

concepts. Particularly, it has a legally constraining effect in terms of imposing a duty on the government, restricting legislative power, restraining the amendments to the land policy and raising the constitutionality issue of other legislation and act of the government. These two broad classifications of approaches consider the role players for interpretation of the constitutional provisions as the Courts of Law. In Ethiopia, the interpreter is the House of Federation, the second house/chamber of the federal government, which gives a different perspective altogether.

The constitutional recognition of rural land rights under the FDRE Constitution has its legal implications on different legal concepts. Particularly, it has a legally constraining effect in terms of imposing a duty on the government, restricting legislative power, restraining the amendments to the land policy and raising the constitutionality issue of other legislation and act of the government.

The first three sections of this article examine the rural land right issues regulated under the FDRE Constitution. This includes access to land, the scope of property rights in rural land, and protections afforded to land rights. In order to determine the approach of constitutional drafting adopted in the making of a given constitution, one has to make in-depth analysis of the level of details and scope in the constitutional regulation of a particular legal issue.

Thus, the manner in which access to land is defined in the Constitution and the practical implications thereof –given the limited nature of land as object of property right– are reviewed. The approacch pursued in the Constitution in defining rural land rights is also examined in view of its effect in delimiting the power of the legislative organ in defining the property rights in land in its legislation. This approach is also examined in relation with clarity in the protection against deprivation of property rights in land and the conformity of other legislation with this constitutional stipulation.

The common practice in constitutional laws is to recognize property rights in general[14] rather than expressly dealing of land rights. Contrary to this, the FDRE Constitution specifically deals with the issue of rural land rights and the general notion of property rights.[15] The recognition of land rights in the FDRE Constitution mainly embraces three socio-economic and legal issues, i.e., the

[14] In fact, there are some constitutions which have not expressly recognised the right to property. A good instance is the constitution of Canada and New Zealand. Constitutions that recognise the right to property vary in terms of providing detailed rules. However, what is common to them is that they forbid arbitrarily deprivation of property rights and provide room for deprivation of property rights for greater societal interest.

[15] *See* the FDRE Constitution, *supra* note 8, Art. 40(1 - 8), Art. 35(7) and Art. 97(2).

mechanism of access to land, the scope of property rights in the land of landholders and the features of deprivation of land rights. These themes are examined in the first three sections of this article.

The fourth section of the article explores the general essence of the approaches of constitutional drafting, the approach adopted in the drafting of rural land rights norms under the FDRE Constitution and its compatibility with the nature of the organ entrusted with the power of constitutional interpretation. Section 5 analyses the implications of the constitutional recognition of rural land rights on the basis of three important legal issues. These issues relate to: (i) restriction to the legislative power, (ii) the obligation of the government to realize land rights, the nature of land policy visa-vise amendment of the constitution, and (iii) the constitutionality of other land legislation. The last section offers a brief conclusion about the potential amendment of the land right provisions in the FDRE Constitution to enable them to be compatible with the needs for periodic changes in land policy and optimal trust-based approach to constitution drafting. The article adopts a doctrinal research method. It mainly focuses on identifying, analyzing and synthesizing the constitutional and other legislation provisions.

1. Access to Rural Land under FDRE Constitution

One of the legal issues revolving around land rights that are regulated in the Ethiopian Constitution is the mechanism of land acquisition. Access to land is "an important issue for the majority of Ethiopian people who depend on agricultural production for their income and subsistence".[16] That is why the proverb in the many languages of the country has it that 'to be landless is to be sub-human' to show that for Ethiopians land is central to life.[17] For example, the preamble of Public Ownership of Rural Lands Proclamation enacted in 1975 during the Dergue regime[18] recognized the centrality of land in the economic, social and political lives of Ethiopians stating that "…a person's right, honor, status and standard of living is determined by his relation to the land…"[19]

Articles 40(4) and 40(5) of the FDRE Constitution respectively entitle the Ethiopian peasants and pastoralists with the right to access to rural lands for

[16] Samuel Gebreselassie (2006), "Land, Land Policy and Smallholder Agriculture in Ethiopia: Options and Scenarios", (Paper prepared for the Future Agricultures Consortium meeting at the Institute of Development Studies, 20-22 March 2006), p. 3.

[17] Paul Brietzke (1976), "Land Reform in Revolutionary Ethiopia", *The Journal of Modern African Studies*, Vol. 14, No. 4, p. 638.

[18] Amharic for 'council' or 'committee' and it is the socialist regime that governed Ethiopia in the year between 1974 -1991.

[19] *See* the preamble of the Public Ownership of Rural Lands Proclamation No. 31/1975.

free.[20] These provisions provide peasants and pastoralists access to rural land without any payment, and they oblige the government to grant the same. On the other hand, investors can be entitled to rural land rights on the basis of payment arrangement which is established by law.[21]

The constitutional right of peasants' and pastoralists' to free access to rural land rights evokes the question whether the rural land use payment imposed on the peasants' especially by subsidiary legislation is constitutional. Most regional states in Ethiopia have enacted laws that levy rural land use payment on peasants and not on pastoralists.[22] One may argue that this is constitutional based on Article 97(2) of the FDRE Constitution, which states that '*States shall determine and collect fees for land usufructuary rights*'.[23] This claim may not be sound for two reasons. First, Article 40(4) of the Constitution clearly states that "Ethiopian peasants shall have the right to obtain land without payment …" and Article 40(5) enshrines the rights of pastoralists to "the right for free land for grazing". Such free access to rural land rights to peasants and pastoralists differs from the duty for payment of land use fees by investors in return to their entitlement to "land usufructuary rights' stated under Article 97(2). Secondly, Article 40(6) of the Constitution expressly states the rights of investors "to the use of land on the basis of payment arrangements.[24]

The other important issue here is the purpose for which peasants and pastoralists acquire rural land rights for free. Article 40(4) of the Constitution, does not determine the purpose to which the land obtained by peasants without payment will be employed, i.e. whether they can use rural land for agriculture or other economic activities like that of investors. With regard to pastoralists, however, Article 40(5) of the Constitution clearly determines the purpose of land use, i.e., –grazing and cultivation.

The failure of the Constitution to specify the purpose of free allotment of land to peasants while determining the same regarding the pastoralists raises the question whether peasants are entitled to use rural land (which they have obtained without payment) for any purpose. One may also question the constitutionality of the rural land laws in specifying the purpose thereof.

There can be two lines of arguments. On one side, it may be argued that the FDRE Constitution aims at allocating rural land to peasants for free for any

[20] FDRE Constitution, *supra* note 8.
[21] *Id* at Art. 40(6).
[22] *See* for instance, the Oromia National State's Revised Rural Land Use Payment and Agricultural Income Tax Proclamation No.131/2007 Art. 3. Most of the States have enacted this type of law that levies rural land use payment.
[23] FDRE Constitution, *supra* note 8, Art. 97(2).
[24] *Id*, at Art. 40(6).

purpose. Thus, the restriction imposed by another legislation on the purpose to which the land is freely given to peasants for agriculture purpose is unconstitutional.[25] This argument may be justified first by the silence of the Constitution because, as stated earlier, Article 40(4) of the FDRE Constitution remains silent about the purpose for which land is intended to be provided to peasants for free. At the same time, Article 40(5) fixes the purpose –grazing and cultivation– to which pastoralists are expected to obtain land. Along this line of argument, one may argue that the Constitution rightly and intentionally makes this distinction among the peasants and pastoralists.

The proponents of this line of interpretation may further rationalize this argument based on the manner of land utilization by peasants and pastoralists. In the case of pastoralists, utilization of land is done communally by a group of individuals; and unless the purpose to which the land to be utilized is predetermined, it will cause conflict among the members since each of the members may have a competing purpose to which they prefer to utilize the land. Thus, the Constitution's specification of the purpose for which land is to be allocated to pastoralists for free may be assumed to be purposeful. In the context of peasants', however, the utilization of land is individual thereby implying that the silence of the FDRE Constitution is meant to avoid limitation on the purpose of free allocation of land to peasants.[26]

This line of argument can further raise social equity justification in ensuring access for the needy to provide them with the means to make a living[27] without restricting the land use of peasants solely to agriculture. This view can be substantiated by the stipulation made in various laws regarding the nature of the purpose for which land can be used by an investor or another peasant who has rented rural land from peasants. In rural land laws enacted at federal and regional state levels, peasants have the right to rent their land to investors or other fellow peasants.[28] Moreover, the federal government's rural land law implies that the investor and peasants can use such land for agriculture or any development project. This inference can, for example, be made from Proclamation No. 456/2005 which provides that "[p]easant farmers, semi-

[25] *See* the Federal Rural Land Administration and Land Use Proclamation No. 456/2005, Art. 5(1/a). The same stipulation is provided in almost all States rural land laws . The rural land laws expressly state that the peasants' free access to rural land is granted only if he/she intends to engage in agriculture as his/her livelihood.

[26] This argument unduly presupposes that the communal use and administration is prone to conflict as though it has no customary system of administration. It also assumes that the private holdings and use of peasants have lesser vulnerability to conflict. Moreover, the argument fails to consider communally used land among peasants.

[27] See Wibke Crewett and Benedikt Korf (2008), "Ethiopia: Reforming Land Tenure", *Review of African Political Economy*, No.116, p. 205.

[28] *See* the Federal Proclamation No. 456/2005, Art. 8(1).

pastoralists and pastoralists who are given holding certificates can lease to other farmers or investors land from their holding of a size sufficient for the *intended development*…"[29] The phrase 'intended development' is broad and includes economic activities which can include agriculture and other activities.

The counter argument of the above line of interpretation is that the FDRE Constitution specifies the purpose for which rural land is allocated to peasants for free, and that the stipulation of agriculture in rural land laws to this effect is constitutional. This view may be based on the general spirit of Article 40 of the FDRE Constitution and the assumption of the Constitution makers. The Constitutional Assembly's minutes imply the assumption that the peasants would use land only for agricultural purpose. The first justification of this argument relies on the adoption of the term 'peasants' in Article 40(4) of the Constitution. Accordingly, when the Constitution grants free access to land for peasants under this provision it etymologically presupposes the person's engagement in agriculture.

This argument can be justified in light of the problem that rural land given to peasants for free can be freely transferred under the guise of a joint investment, while private investors are (based on Article 40(6)) entitled to the right to use of land on the basis of payment arrangement. If rural land is given to peasants for free for any purpose, private investors may avoid payment arrangements in their use of land by accessing land through peasants in the pretext of joint investment,[30] and this, reduces government revenue generated from investors. In fact, one may counter-argue that this form of abuse can be controlled because the government is empowered to approve and register the contract between an investor and a landholder.[31]

The Constitutional Assembly's minutes of the deliberation regarding the form of land ownership implies that the makers assumed that the peasants would use land only for agricultural purpose. Particularly, the justifications (such as agricultural nature of the country's economy and the presence of huge uncultivated-land) that were raised in support of the status quo in land ownership assumed that the landholdings of peasants are only used for agriculture. According to this line of argument, the specification of the purpose for which land is given to pastoralists for free does not imply that peasants would be given rural land to be used for any purpose.

[29] Ibid.

[30] Investors can access rural land from individual peasants by way of rent. This is clearly mentioned in the rural land legislation. Thus, the reason mentioned here has no weight to justify the position taken.

[31] The Federal Proclamation No. 456/2005, Art. 8(2).

To this author, the first view is sound and compatible with the country's pursuits toward economic transformation. Unless we consider the silence of the Constitution as entitlement of peasants to use their landholding for any purpose including agricultural cultivation, we can suggest an amendment of the Constitution to make it compatible with the country's economic policy toward industrialization and modernization of agriculture. The challenge in this regard relates to the stringent procedures of constitutional amendment.[32]

In view the objective reality, there is the need to raise the question whether it is practical to implement the right of peasants and pastoralists to free access to land rights. This is impractical because forty-three percent of rural Ethiopians have no access to rural land.[33] The limited nature of the rural land and the ever-increasing rate of population growth have indeed exacerbated the problems because there cannot be comparable expansion of the size of arable land in the country.[34] Thus, the policy of "guaranteed free access to land" is not sustainable in an environment of rapid population growth, and modern farming which includes animal husbandry should be the main source of subsistence.[35]

2. Scope of Rights in Rural Land under the FDRE Constitution

The FDRE Constitution, uncommon to other constitutional norms,[36] provides its own conception of property rights in general and the nature of property rights to

[32] FDRE Constitution, *supra* note 8, Art. 105(1).

[33] Peter J. Bodurtha *et al* (2011), "Land Reform in Ethiopia; Recommendations for Reform", (Prepared for Solidarity Movement for a New Ethiopia (SMNE)) available at http://ebookbrowse.com/bodurtha-land-reform-in-ethiopia-pdf-d203740328, retrieved on 05/07/2012, p. 1.

[34] *See*, for example, Dessalegn Rahmato (2004), Searching for Tenure Security? The Land System and New Policy Initiatives in Ethiopia (FSS Discussion Paper No.12), p.15 and see also World Bank (nd), "Options for Strengthening Land Administration in Federal Democratic Republic of Ethiopia", Report No: 61631-ET, p. 17 for the current rural population.

[35] Tesfaye Teklu (2005), Land scarcity, tenure change and public policy in the African case of Ethiopia: evidence on efficacy and unmet demands for land rights. (The third international conference on development studies in Ethiopia, Addis Ababa, June 18-19, 2005) p. 19; and *see* also Ethiopian Civil Society Network on Climate Change (ECSNCC) (2011), A Review and Analysis of Land Administration & Use Legislation and Applications of the Federal Democratic Republic Ethiopia and the Four Regional States of Amhara, Oromia, SNNP and Tigray, p. 42.

[36] There can be certain important textual differences among various constitutional property clauses. Nevertheless, the differences do not go to the extent of defining the concept of 'ownership' and 'private property' and listing of the bundle of rights as it is done in the Constitution of Ethiopia. As Gregory S. Alexander noted, constitutional property clauses are not identical even though they can share certain common features such as the recognition of the state's power of property expropriation as limitation to property rights;

different landholders. It adopts the Hohfeldian 'bundle of rights' approach in defining property rights.[37] This is inferred from the elements it provides for the concept of private ownership and the provision regarding the rights on the permanent improvement made on land.

According to Article 40(1) of the Constitution, "private property ownership" is defined by listing the rights an owner has over a thing. It states that "… [the right to ownership of private property] includes the right to acquire [possess in the Amharic version] and to use, and … to dispose of such property by sale or bequest or to transfer it otherwise."[38] According to Article 40(7) of the FDRE Constitution:

> Every Ethiopian shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labor or capital. This right shall include the right to alienate, to bequeath, and, where the right of use expires, to remove his property, transfer his title, or claim compensation for it.

From this provision, it can be inferred that the property rights in the Constitution are understood in terms of the bundle of rights that a person has over objects of property. The other concept related to property rights defined in the Constitution is the concept of private property. The FDRE Constitution under Article40(2), defines private property as:

> any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of an individual citizen, associations (the Amharic version requires the associations to be Ethiopian) which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common.[39]

The FDRE Constitution equates "private property" with a thing or asset/product seemingly having economic value. The drafters of the Constitution have unduly defined property as a thing/product since both concepts refer to two distinct things in legal sense. Bruce has noted their distinction as follows:

> … [P]roperty is not a thing, but a set of relationship between persons governing the use of things. This is particularly true for land law, which is concerned with various rights over and interests in land which of those a

and placing restrictions on the state's power to expropriate property in the form of permitting the expropriation to be done only for "public purposes" or for "public use".

[37] Wesley Newcomb Hohfeld (1913), "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*", Yale L. J*. Vol. 23, p. 22.

[38] FDRE Constitution, *supra* note 8, Art. 40(1).

[39] Id., Art. 40(2).

person can enjoy over his land, which can be enjoyed over that land by his neighbour, and he can enjoy over his neighbour's land.[40]

One may argue that, as the definition of 'private property' currently stands in the FDRE Constitution, *rural land right* is not the property of peasants and pastoralists since they access it for free. This is because it is not an output or a product of the labor, creativity, enterprise or capital of peasants and pastoralists. This understanding, in effect, produces its own legal effect in relation the legal protection and tenure security against eviction discussed in the subsequent section.

Apart from providing definitional clauses for the above two concepts related with property rights, the FDRE Constitution also determines the nature of the land ownership. Accordingly, Article 40(3) accords ownership to the state and people, prohibits transfer of land through sale or other means of exchange. However, the Constitution does not clearly and expressly define the nature of property rights in land –the bundle of rights accorded to the peasants, the pastoralists and investors lesser than the ownership rights (complete/full property rights).

It does not mean that the Constitution totally leaves it to be determined by the legislation of the government as the ruling government may claim.[41] This is because the Constitution (through fragmented provisions) attempts to delineate the nature of property rights in relation with rural land held by peasants, pastoralists and investors. One can argue that the constitutional definition of the nature of property right in land for these three bodies is not consistent.

From *a contrario sensu* reading of Article 40(3) the Constitution, it can be argued that peasants have all the elements of the private 'ownership' rights in land excluding the right to transfer through sale or means of exchange. Unlike peasants', the Constitution has a clear stipulation concerning the property rights in land of the pastoralists and investors. Accordingly, Article 40(5) of the Constitution clearly stipulates that the scope of property rights in land of pastoralists is the use right. The Constitution entitles pastoralists to use rural land for grazing and cultivation purpose. This is in fact based on the manner how pastoralists utilize land – communally. Therefore, letting them other property rights beyond the use right will lead conflict among them since it results in the creation of competing interests.

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[40] Bruce Ackerman (1977), *Private Property and the Constitution*, Yale University Press, New Haven and London as cited in Daniel Chappelle (2006), *Land Law*, (7th ed), Pearson Education Ltd, London, p. 20

[41] Brightman Gebremichael (2013), *The Role of Ethiopian Rural Land Policy and Laws in Promoting the Land Tenure Security of Peasants: A Holistic Comparative Legal Analysis*, (LL.M Thesis, Bahir Dar University, unpublished), p.86.

This intention of the Constitution drafters can be inferred from the debates made on the drafting of the Constitution regarding the ownership of land. Especially, the group arguing in support of the *status quo* of the land ownership and against privatization invoked the uniqueness of pastoral land tenure system. The group stated that even if they go for privatization, uniform private property rights to land across the country could not be realized owing to the unique contexts of pastoralists who are in a continuous seasonal mobility across multiple ecosystems in search of the seasonally varying water sources and pasture.[42] We can thus infer that the drafters intended to differentiate the scope of property rights in land of peasants from pastoralists. Furthermore, it can be inferred from this that the drafters intended to give a broader property right in land to peasants.

In the case of investors too, the Constitution to some extent mentions the nature of property rights in land they will have. This can be deduced from the cumulative reading the two provisions of the FDRE Constitution– Article 40(6) which deals with the manner of acquisition of land rights by investors and Article 97(2) which states the power of regional governments to determine and collect fees in the utilization of land. As per the discussion made in the section dealing with access to rural land in FDRE Constitution above, it has stated that investors could access rural land rights only in payment arrangement, So, when this provision states the phrase land usufructuary rights it in effect is defining the nature of property rights in land of investors.

As the Constitution does not expressly delineate the scope of the property rights of peasants in land, this implies their entitlement to the right to exclude, the right to transfer (without undermining the restriction in the Constitution) and the right to possess and use. This view can also be substantiated with what is provided in the FDRE Constitution with regard to Women's rights. Article 35(7) of the FDRE Constitution that embodies women's right to property also gives a certain clue as to the nature of property rights of peasants in land. It states that: "…In particular, [women] have equal rights with men with respect to *use, transfer, administration and control of land*."[43]

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[42] The Ethiopian Constitutional Assembly Minutes. (Vol. 4, Nov. 23-29/1994, Addis Ababa). Deliberation on Article 40. (Amharic document, author's translation); and *see* also Belachew Mekuria (2009), "Human Rights Approach to Land Rights in Ethiopia" in Murado Abdo (ed), "Land Law and Policy in Ethiopia since 1991: Continuities and Changes", *Ethiopian Business Law Series*, Vol. III, p. 59.

[43] See *id*, at Art. 35(7), Emphasis added. This provision can also apply for the determination of property rights in urban land other than those acquired for investments. For investors acquiring urban land, the nature of property rights in land is similar to their property rights in rural land. This is because Article 97(2) of the FDRE Constitution (that incidentally

This view can be justified based on the intention of the Constitution drafters that is inferred from their debates in the process of drafting various provisions of the Constitution including Article 40. One of the justifications provided during the arguments against private ownership of land was that such right to sell will induce the agrarian poor to *sell land* and migrate to the nearby towns, and it will have the effect of escalating unemployment since industrial and services sectors are unable to accommodate the influx of migrants.[44] The Constitution thus aims at ensuring peasants to have all property rights in land other than the right to transfer through sale or other forms of exchange.

3. Protection against Deprivation of Rural Land Rights in the FDRE Constitution

It is "a universal conviction in comparative constitutional law that the purpose of constitutional property rights clause, in general, is to strike a balance between protection of the existing property rights and the promotion of public interest."[45] This balance involves forbidding arbitrary deprivation other than the exceptional cases of compulsory acquisition of individual or community property rights. To strike this balance, most constitutional laws list the conditions that must be satisfied in the process of expropriation, such as observance of due process of law, expropriation solely for public purpose, and payment of just compensation.[46] These general rules of the constitutional laws are *mutants mutandis* applicable to the property rights in land.

Viewed this way, the FDRE Constitution recognizes the right to property as a human and democratic right. Nonetheless, unlike other constitutions, it does not make an express rule against arbitrary deprivation of property rights; and the deprivation to be done based on law. It rather defines the government's power of expropriation to deprive this right when the private property is needed for public purpose upon payment of the commensurate amount of compensation.[47] It is noted that the laws on expropriation define public purpose so wide that it can

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mentions the nature of property rights in land of investors) is general and does not make a reference to rural or urban land.

[44] See *supra* note 42, the Ethiopian Constitutional Assembly Minutes; and B. Mekuria, p.59. Emphasis added.

[45] Theunis Roux (2006), "Property" in Stuart Woolman, Theunis Roux and Michael Bishop (.eds), *Constitutional Law of South Africa*, (2nd ed), Juta & Co LTD, Cape Town, p. 46-2.

[46] The constitutions vary in the extent of elaborating these concepts. (For details on this point *see* Brightman Gebremichael (2016), "The Power of Land Expropriation in the Federation of Ethiopia: The Approach, Manner, Source and Implications", *Bahir Dar University Law Journal*, Vol. 7, No. 1).

[47] FDRE Constitution, *supra* note 8, Art. 40(8).

also include land to be allocated for investment.[48] Moreover, it does not incorporate the element of *due process* of law in the course of the expropriation proceedings.[49]

The FDRE Constitution protects peasants and pastoralists against deprivation of rural land rights by granting them the right against eviction.[50] This right, as part of constitutional property clause, however, is not extended to other rural landholders, like investors and does not apply to other objects of property on the land. Based on the definition of 'private property under the 'FDRE Constitution (discussed above), and the Constituion's provision on expropriation as an exceptional restriction to deprive 'private property' , it may seem that the right peasants and pastoralists against eviction and displacement from their land is 'absolute' thereby rendering expropriation inapplicable. Such argument is not valid and their land rights can be deprived through expropriation.[51]

The FDRE Constitution also introduces other grounds of deprivation of property rights in land in a general sense while defining the property rights in the permanent improvements made and things built on the land. The provision states that:

> … [full] right shall include the right to alienate, to bequeath, and, where *the right of use expires (the Amharic version says 'when the right of land uses terminates)*, to remove his property, transfer his title, or claim compensation for it."[52]

The English version of this provision implies that the property rights in land of any landholder in Ethiopia will be deprived upon the expiration –coming to an end– of the land rights. This would happen when the land right is time-bound. In such case, even the Constitution entitles the land rights holder to remove his property (i.e., things that can be removed), and *transfer his title or claim compensation* for it (when things are not removable without damage).[53]

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[48] *See*, for example, Muradu Abdo (2015), "Reforming Ethiopia's Expropriation Law", *Mizan Law Review*, Vol. 9, No. 2 (pp. 301-340). http://dx.doi.org/10.4314/mlr.v9i2.3

[49] The due process of law includes the procedural rights such as the right to notice, the right to be heard and the right to appeal. But these elements of due process of law are highly limited in the Ethiopian law of land expropriation.

[50] FDRE Constitution, *supra* note 8, Art. 40(4) & (5).

[51] For details about these two dissenting views see Brightman Gebremichael (2016), "Public Purpose as a Justification for Expropriation of Rural Land Rights in Ethiopia", *Journal of African Law*, Vol. 60, No. 2, pp.200-203.

[52] FDRE Constitution, *supra* note 8, Art. 40(7).

[53] Emphasis added. Under the urban land lease law of Ethiopia, the lessee is required to remove the property on the land when the lease term expires, and does not guarantee the leaseholder to transfer property on the land to the new landholder or even claim compensation for them. So, the law is unconstitutional in this regard.

The Amharic version of this provision employs the word 'terminates' instead of 'expires' and this broadens the grounds by which the land rights are lost in addition to the lapse of the duration and expropriation.[54] One can argue that the Constitution does not foresee such mechanisms of depriving the land rights of peasants and pastoralists. Otherwise, their constitutional right against eviction and displacement becomes superfluous.

The discussion in the preceding sections raises two issues. The first issue relates to the constitutional drafting approach in the 1995 FDRE Constitution along with some discussion on Dixon's categorization of detailed/codified *versus* framework approaches. Secondly, the legal implications of the drafting approach (used in Ethiopia's Constitution) should be examined. The subsequent two sections address these matters.

4. The Nature of Drafting Approach adopted in the Rural Land Rights Clause of the FDRE Constitution

The general approaches in constitutional lawmaking are the 'framework-style' approach in which the constitutional provision embodies "only quite general textual guidance as to the meaning or operation of particular constitutional norms; and a more 'codified' approach, which provides far greater detail or specificity regarding the intended meaning and operation of relevant constitutional norms."[55]

The determination of the approach to be followed in the drafting of a particular constitution does not depend upon the general volume or the number of articles incorporated in a constitution. This is because a given constitution may become bulky because of the numerous constitutional issues it addresses but not because of its details in each constitutional provision. Thus, to determine the approach adopted in the drafting of a constitution the extent to which the constitution has gone to detail in regulating a particular constitutional issue should be assessed. It is to be noted that the two approaches may be followed in a single constitution but on different subject matters.

Before determining whether the drafting approach followed is framework-style or 'detailed,' it is necessary to highlight the core features of the framework

[54] Since the Constitution separately regulates the issue of expropriation in the subsequent provision under Art. 40(8), this provision is intended to allow the government to terminate land rights based on other grounds to be determined by the legislature. For instance, the rural land laws of Ethiopia incorporate failure to use the land for specific period of time, failure to conserve the land, engagement in non-farming activities, and failure to observe residency requirement as a ground to deprive rural land rights of peasants and pastoralists.

[55] Mila Versteeg & Emily Zackin (2014), "Towards an Alternative Theory of Constitutional Design", February 2, 2014 as cited in R. Dixon, *supra* note 4, p. 820.

style or detailed approaches. Indeed, it is not possible to find hard and fast rules in establishing these issues. As Dixon notes:

> [m]ore framework-like approaches will generally involve constitutional provisions in two forms: first, provisions that explicitly defer, or delegate, certain constitutional decisions to legislatures, via the use of language that requires certain constitutional questions to be settled "by law" or by ordinary legislation; and second, provisions that are sufficiently vague or abstract in scope or meaning that they inevitably require some form of judicial interpretation. More codified approaches, in contrast, will generally involve provisions attempting to resolve, rather than defer or delegate, key constitutional questions."[56]

One can argue that the existence of constitutional deferral by way of 'by law' clause or vagueness in the provisions[57] does not necessarily prove the adoption of the framework-style approach in drafting. This is because in constitutional provisions of different countries we find 'by law' clauses or vague or abstract concepts in the form of constitutional deferral on the same subject matter. Such constitutional provisions may differ in the extent to which they regulate the matter.

The rules on compensation upon expropriation of property are illustrative in the constitutions of Ethiopia, Uganda, and South Africa. In Uganda's and South Africa's constitutional provisions on expropriation, there are 'by law' clauses; while the Ethiopian Constitution does not state any 'by law' deferral other than stating an abstract/vague concept of commensurate compensation.[58] In Uganda's Constitution, it is stated that the compulsory taking of possession or acquisition of property is made under *a law which makes provision for* prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property.[59] Under the South African Constitution, it is provided that property may be expropriated only in terms of *law of general application* …subject to compensation.[60] The South African Constitution further deals with the factors to be considered in the determination of the amount of compensation. Unlike the Ugandan and Ethiopian Constitutions, it states that:

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[56] R. Dixon (2011), *supra* note 12.

[57] For detail on the forms of Constitutional deferral, *see* Rosalind Dixon and Tom Ginsburg (2011), "Deciding not to decide: Deferral in constitutional design", *International Journal of Constitutional Law*, Volume 9, Issue **3**-**4**; pp. 636–672, https://doi.org/10.1093/icon/mor041

[58] FDRE Constitution, *supra* note 8, Art. 40(8).

[59] Ugandan Constitution, *supra* note 6, Article 26(2/b-i).

[60] South African Constitution, *supra* note 7, Art. 25(2/b).

> The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
> (a) the current use of the property;
> (b) the history of the acquisition and use of the property;
> (c) the market value of the property;
> (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
> (e) the purpose of the expropriation.[61]

The South African Constitutional provision seems to have adopted the detailed approach in lawmaking, as compared to its Ugandan and Ethiopian counterparts. Yet, all of them provide for defer detail provisions by either using 'by law' clauses or by adopting a vague/abstract concept that requires definition through legislation. The approach adopted in the drafting of a given state's constitutional rules should thus be determined by comparing it with other states' constitutional rules on the same subject.

Rosalind Dixon argues that the choice to adopt either a highly "codified" or detailed approach to constitutional drafting or to rely on a more "framework"-style approach, depends on the perception the constitution makers towards constitutional courts as partners in the process of constitutional interpretation. According to Dixon, "the codified or the detailed approach implicitly assumes at least some degree of *distrust* toward judges as constitutional interpreters, whereas the framework"-style approach is based on a high degree of faith or *trust*, in judges as partners in the process of constitutional design."[62]

Dixon's observations do not explain the constitutional drafting approach adopted in the drafting of rural land rights clause and the nature of constitutional interpreter organ in Ethiopia. The *first* factor relates to the similarity and difference between constitutional provisions of countries that cannot be explained by Dixon's trust and distrust approaches in constitutional lawmaking. As highlighted in the preceding paragraphs, The South African Constitution adopts a detailed or codified approach in drafting provisions of compensation during expropriation of property in contrast to the Ethiopian and Ugandan Constitutions. Nevertheless, with regard to the issue of citizenship, the approach followed by the South African Constitution[63] pursues a more of framework-style as compared to the Ethiopian[64] and Ugandan Constitutions.[65]

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[61] Id at Art. 25(3)
[62] R. Dixon, *supra* note 4, p. 820.
[63] South African Constitution, *supra* note 7, Art. 3. The article entitles all citizens to equal rights, privileges and benefits subject to equal duties and responsibilities, and it totally

This change in the approach of drafting provisions of the constitution may lead to question why South African Constitution that adopts a distrust-based approach in drafting provision of compensation for expropriation adopts trust-based approach regarding the issue of citizenship. Likewise, the Ugandan Constitution adopts a trust-based approach in drafting provision of compensation for expropriation and opts for a distrust-based approach in the case of rules of citizenship. Such variations occur in both constitutions even though the constitutional interpreter is the same body. We can thus conclude that the adoption of framework –style or detailed/codified approach of constitutional drafting does not necessarily depend on the perception of the constitutional makers towards the judges of constitutional interpretation.

Second, the constitutional makers may follow a detailed/codified approach of drafting constitutional provisions even where they have a faith and trust on the constitutional interpreter. For example, the Ethiopian Constitution uses the detailed approach in drafting rural land rights even if all constitutional interpretation constitutional disputes are according to Articles 62(1) and 83(1) decided by a non-judicial organ, i.e. the House of Federation on which constitutional makers have faith and trust.

The existence of this trust can be inferred from the justifications provided for assigning the power of constitutional interpretation to this organ at the time of the constitutional drafting. The justifications are twofold. The first one is related to the belief that the owner of the constitution should interpret it. Accordingly, the FDRE constitutional makers thought that the new federal dispensation is the outcome of the 'coming together' of the nationalities, and the FDRE Constitution is the reflection of their 'free will and consent.' In fact, this is expressly reflected in the preamble and Article 8 of the FDRE Constitution while saying the 'nations, nationalities and peoples are sovereign.' Then the constitutional makers considered the Constitution as 'a political contract' and consequently, only the authors that are the nations, nationalities and peoples should be the ones to be vested with the power of interpreting the Constitution.[66] To this effect, the

defers to the national legislature to determine the manner of acquiring, losing and restoring of citizenship.

[64] FDRE Constitution, *supra* note 8, Art. 6. The article defined the manner of acquiring Ethiopian nationality and how a foreign national can acquire Ethiopian nationality.

[65] Ugandan Constitution, *supra* note 6, Art. 9 to19. The articles in detail regulate all issues revolving around citizenship.

[66] Assefa Fiseha (2007), "Constitutional Adjudication in Ethiopia: Exploring the Experiences of the House of Federation", *Mizan Law Review,* Vol. 1, No. 1, p.10; and also see K. I. Vibhute (2014), "Non-Judicial Review in Ethiopia: Constitutional Paradigm, Premise and Precinct", *Afr. J. Int'l & Comp. L*., Vol. 22, p.128.

constitutional interpreting organ –House of Federation– is composed of the representatives of the various nations, nationalities, and peoples.[67]

The assignment of this power to the House of Federation is also related to the distrust (that the ruling party which controlled of majority votes among constitutional makers had) towards the judiciary. The FDRE constitutional makers perceived that empowering the judiciary, or a constitutional court may result in unnecessary 'judicial adventurism' or what some prefer to call 'judicial activism' in which the judges would in the process of interpreting vague clauses of the Constitution put their own preferences and policy choices in the first place. They believed that this in turn could hijack the very document that contains the 'compact between the nations', 'nationalities' and 'peoples' thereby resulting in decisions that rather fit the personal philosophies of judges.[68]

Therefore, this author argues that the reason for the adoption of the detailed rule regarding the rural land rights can be related with the debates and diversified views at the making of this clause[69] and the level of sensitivity of the issue.[70] The nature of the debate can be inferred from the very close voting made in the enactment of Article 40(3) of the Constitution by the constitutional assembly whereby 499 voted for the retention of state ownership of land, whereas 495 voting for privatization.

In fact, the problem in the adoption of the codified/detailed approach in rural land rights relates to the incorporation of detail rules to regulated rural land rights in the Constitution which should have merely determined the nature of land ownership. The following section discusses the problems that emanate owing to such detail constitutional stipulations on rural land rights.

5. Implications of the Constitutional Recognition of Rural Land Rights under FDRE Constitution

The FDRE Constitution grants actual rights to rural land specifically contrary to the constitutions of other countries and international human rights instruments. As discussed above, Article 40 of the FDRE Constitution expressly grants the

[67] FDRE Constitution, *supra* note 8, Art. 61(1) and (2).

[68] *See* supra note 66, A. Fiseha, p. 11 and K. I. Vibhute, p.128.

[69] Gebru Mersha and M. Githinji (2005), Untying the Gordian Knot: The Question of Land Reform in Ethiopia, (ISS/UNDP Land, Poverty and Public Action Policy Paper No.9, The Hague: Institute of Social Studies).

[70] As stated in the first section (paragraph 1) of this article the sensitivity of the land issue is noted by P. Brietzke, *supra* note 17, p. 638. and the preamble of Proclamation No. 31/1975). With regard to the 'Land to Tiller' student movement that caused the downfall of the last emperor, *see*, for example, Daniel Weldegebriel (2012), "Land Rights in Ethiopia: Ownership, equity, and liberty in land use rights", (FIG Working Week Rome, Italy, 6-10 May 2012) p .4.

Ethiopian peasants and pastoralists with free access to rural land and while private investors are accorded the right based on payment arrangements. The Constitution further also ensures peasants and pastoralists with the right to protection against eviction and displacement. Moreover, the Constitution defines the nature of property rights in land. The level of details in the constitutional recognition of rural land rights will have its implications on the restriction of legislative power and the obligation of the government to realize the land rights.

The *first* challenge that is created by level of details in the Constitution relates to the obligation of the government to ensure the implementation of the constitutional rights of peasants and pastoralists for access to land without payment. To this end, Article 13(1) of the Constitution imposes a duty on the government to enforce the fundamental rights and freedoms embodied therein including access to rural land rights enshrined Articles 40(4) and 40(5).

The *second* implication of the detailed approach in the constitutional recognition of rural land rights in the FDRE Constitution is related with the nature of land policy that need to be flexible so that it can be responsive to changing realities. This creates rigidity on the land regime owing to the stringent procedures in the amendment of constitutions. The details in the constitutional recognition of rural land rights in the FDRE Constitution indeed imply restrictions against the legislative power of the legislature.[71] While regulating the issues of rural land rights under the human rights section, the FDRE Constitution defines the rural land policy of the country. This situation effectively eliminates the possibility of flexible application of policy.[72] The legal framework for land rights should not only be comprehensive, but should also be flexible, allowing for different options depending on population density, the level of economic development, and infrastructure access.[73]

Accordingly, the Ethiopian rural land regime expressed in the Constitution is inflexible to be compatible with the changing socio-economic lives of the society. This is because the modification of the rural land policy of the country needs the amendment of the Constitution which has stringent amendment procedures. Article 40 of which embodies the rights on land is classified under the human and democratic rights section which has a more stringent procedure

[71] Not to enact contradictory rules in enacting legislation. This is because under article 9(1) of the FDRE Constitution it is provided the self-supremacy clause – supremacy of the constitution and declared that *any law*…of an organ of state…which contravenes the constitution shall be of no effect.

[72] S. Gebreselassie, supra note 16, p. 4.

[73] *See* Klaus Deininger (2003), *Land Policies for Growth and Poverty Reduction*, The World Bank, Washington DC, p. 51.

for amendment.[74] Moreover, the inflexibility of the provisions is aggravated by the absence of commitment to that effect from the side of the ruling party which has the lion share of seats in the State Councils of the federative units and the two federal Houses (the House People's Representatives and the House of Federation) which are empowered to amend the constitution jointly.[75] This was clearlly expressed by late Prime Minister Meles Zenawi during his end-of-year report to Parliament in June 2004 when he the announced that the change of land policy in Ethiopia would take place only "over his party's –Ethiopian People's Democratic Revolutionary Front's– tombstone".[76]

The final important implication is that the constitutional recognition of rural land rights in the Constitution will lead to the ramification of the question of the constitutionality of the rural land legislation in regulating the rural land rights. For example, the rural land legislation (with an exception to Amhara State's Rural Land law) prohibits peasants from using their land rights as collateral.[77] As immovable property, land is often the best form of security for a loan. A landholder may grant an interest in his land as security (known as a mortgage) in favor of a person in return for a loan.[78] Access to credit is often a critical question in rural areas which requires land to be used as collateral.[79] As De Soto notes, land tenure could unlock the entrepreneurship of poor people by letting them use their real estate assets (including land rights) as collateral to borrow investment capital.[80]

Contrary to such crucial importance of land rights, the rural land legislation in Ethiopia even impliedly prohibits peasants from using their *land rights* as collateral to access loan. This can be inferred from the definition given to the

[74] FDRE Constitution, *supra* note 8, Art. 105(1)

[75] Since the adoption of the FDRE Constitution in 1995, the seats in all State councils of the federations and the two federal houses have been by dominated by the ruling party, Ethiopian People's Democratic Revolutionary Front (EPDRF).

[76] Stephen Devereux *et al* (2005), "Too Much Inequality or Too Little? Inequality and Stagnation in Ethiopian", *Institute of Development Studies Bulletin*, Vol. 36, No. 2, p.122. However, with the coming into power of Prime Minister Abiy Ahmed there is a possibility of change of the ruling party's rigid position on the land regime.

[77] The 2018 Amhara State's Rural Land Law authorizes the peasants to use their land rights as collateral to secure loan. This stipulation also raises the question whether Regional States in Ethiopia have the power to delineate the property rights in land.

[78] SH Goo (2002), *Sourcebook on Land Law*, (3rd ed), Cavendish Publishing Ltd, p. 813.

[79] Paul De Wit *et al* "2009", Land Policy Development in an African Context: Lessons Learned from Selected Experiences, *FAO Land Tenure Working Paper 14*, p. 63.

[80] Hernando De Soto (2000), *The mystery of capital: Why capitalism triumphs in the West and fails everywhere else*, Black Swan, New York. *See* also Gregory K. Ingram and Yu-Hung Hong (eds) (2009), *Property Rights and Land Policies*, (Proceedings of the 2008 Land Policy Conference) p. xi.

property rights in land of peasants and from the provision of the rural land legislation that allow mortgaging to investors expressly.[81] The rationale that is stated by the Ethiopian government is that the sale, *mortgage, or use of land as collateral* is expressly prohibited to prevent the development of exploitative land arrangements.[82]

Since rights should be interpreted broadly and limitation should be constructed restrictively,[83] it can be argued that this prohibition is unconstitutional. If it is argued that the Constitution does not allow rural land right holders to mortgage their land rights based on the prohibition of sale and exchange (stated under Article 40/3), then the express authorization of private investors[84] and also urban land right holders[85] to use their land rights as collateral will be unconstitutional. It is to be noted that Article 40(3) of the Constitution refers to all landholders including investors and urban landholders. Thus, either way, it raises the question of constitutionality.

Concluding Remarks

A detailed recognition of the rural land rights –more than stating the nature of land ownership and regulating it under the general property rights– in the FDRE Constitution, has resulted in an inflexible land regime which is not responsive to the change of circumstances. This is susceptible to persistent and continued demand from peasants and pastoralists for the realization of their right to free allotment of land, which cannot be achieved owing to the limited nature of the land and Ethiopia's steadily increasing population. As land is inelastic, the government cannot continue providing land to peasants and pastoralists particularly in light of the rate of population growth and Ethiopia's slow pace in industrialization, import substitution and export enhancement that could have reduced the economy's substantial reliance on smallholder rural land cultivation.

Moreover, detailed statements of constitutional rights on land limit the power of the government to define the property rights in land. The paradox in this regard is that such detail constitutional lawmaking against eviction and dispossession of peasants and pastoralists has not inhibited the enactment of

[81] *See* Proclamation No. 456/2005, Art. 2(4) and Art. 8(4).

[82] *See* for instance, PJ. Bodurtha, Peter J. *et al*, *supra* note 33, p. 6; D. Rahmato, *supra* notes 34, pp. iii and 14; Stefan Decron and Daniel Ayalew (2007), "Land Rights, Powers and Trees in Rural Ethiopia", *CSAE WPS/2007-07*, p.6; Government of the Federal Democratic Republic of Ethiopia (2003), *Rural Development Policy and Strategies*,p.24.

[83] Francis G. MorriseyOmi (2012),"Strict interpretation helps avoid Harshness"' *Health Progress*.

[84] See Proclamation No. 456/2005, Art. 8(4).

[85] *See* the Federal Urban Lands Lease Proclamation No.721/2011, Art. 24(1).

unconstitutional proclamations that embody absurd and extensive land expropriation powers of the government. These realities lead to the questionable constitutionality of the subsequent rural land legislation and the acts of the government.

The constitutional drafting approach adopted in the rural land rights clause of the FDRE Constitution is not compatible with Dixon's trust approach. Given that the constitutional interpreter in Ethiopia –House of Federation– is the organ composed of representatives of the (assumed to be) authors of the Constitution – nationalities, the drafters would have followed 'framework-style' approach. However, this state of affairs casts doubt on the validity of the premises in of Dixon's view that relates constitutional drafting approaches with the perception of constitutional makers towards the constitutional interpreter. In her view, constitutional drafters follow a framework-style constitutional drafting approach when they trust and regard the constitutional interpreter as a partner in the constitutional designing. The detailed or codified approach is adopted in case the drafters distrust the constitutional interpreter. She also defines the adoption of a particular constitutional drafting approach based on the presence or absence of 'by law' deferrals and vague and abstract concepts in the Constitution.

I argue that determining the constitutional drafting approach adopted by constitutional makers cannot only be determined by looking into the existence or nonexistence of 'by-law' deferral or vague concepts. It should rather be complemented with the comparative analysis of the constitutional laws of different states on the same subject matters. Furthermore, the adoption of one of the approaches may not be justified only on the trust-distrust dichotomy of the constitutional interpreter. This is because in a given constitution, which is subjected to a single interpreter organ, it is possible to find both drafting approaches in different constitutional matters. Moreover, even in the presence of a trusted constitutional interpreter, the detailed approach of a constitutional clause may be adopted as in the case of rural land rights provision of FDRE Constitution.

Therefore, determination of the constitutional drafting approach followed by a given constitutional drafter should be issue-specific. It should be done by analyzing specific constitutional matters and comparing the existence and nonexistence of constitutional deferral among constitutional laws of different countries. Furthermore, the selection of the approach may not be solely affected by the perception of constitutional drafters towards constitutional interpreters. It, rather, may be influenced by the extent of diversity of views and debates on the issues and by the level of sensitivity of the issue. ■

Walking in the Dark: Lack in the Use of Criminal Statistics for Public Policy and Legislative Actions

Simeneh Kiros Assefa ♣

Abstract

As an exercise of sovereign power, the lawmaker adopts public policies to achieve certain ends. However, public policies need justifications. One such public policy is criminalisation of conduct whereby the lawmaker may have to use both doctrinal and empirical justifications. Such empirical justification is criminal statistics. All the three organs – the police, the prosecution office and the court – are required by law to collect and keep criminal statistics. Statistical data may not be available for initial adoption of legislation; yet they are essential inputs during the revision process. Even though criminal statistics do not define the outcome of the decision of the lawmaker, one would expect that they would be used as one major input for the continuous evaluation of such law. This article examines the use of criminal statistics in the adoption/revision of criminal provisions and finds that no criminal statistics is presented in the legislative process. This appears to be for two reasons. *First*, the various bills were drawn up and presented by agencies claiming to have specialisation on the subject; often, such agencies do not possess criminal statistics. *Second*, even for those bills drawn up by agencies with potential criminal statistics, the lawmaking process is skewed, that it does not demand aspiration to make 'good' laws.

Key terms

Criminal statistics · Criminalisation · Legislative reform · Legislative rationality

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Introduction

Public policy decisions are made to attain certain social, political and economic ends. Criminal law is one such tool of social control and criminalisation is one such public policy decision. When the government decides to criminalise a

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particular conduct, it may be guided by normative (doctrinal) and empirical standards. Criminalisation of conduct is made based on the basic assumption that the criminal law deters such conduct of potential actors. Once the conduct is criminalised, such legislation remains under constant potential revision; such evaluation is made based on evidence of the need to reform.[1] One such evidence is criminal statistics. The criminal statistics may be used, as part of the public policy revision, to criminalise or to decriminalise conduct, and to increase or to decrease the punishment for such crime.

Such data may be collected at different stages of the process. It may be collected by the police, the office of the Attorney General or the court. Each of them may report to the House of Peoples' Representatives about their performance. Included in the report is the analysis and presentation of criminal statistics, which is required by law to be a part of 'the report'. In this report, those agencies presumably identify problems and challenges in the administration of the criminal justice for which they need to provide solutions. If one of the solutions is legislative action, it is the Attorney General's Office – as the legal advisor of the Federal Government– that proposes such public policy action (of criminalisation or decriminalisation, increase or decrease of criminal punishment) in order to address such identified social ill.

However, there are two major shortcomings regarding the practice of use of criminal statistics. First, there are no records that show data were properly collected and utilised for such public policy action. Second, sometimes, the agency which recommends legislative action is not the Federal Attorney General (formerly Ministry of Justice), the legal advisor for the Federal Government. Depending on their claimed area of expertise, it is other administrative agencies, such as, the Ministry of Trade and Industry, and Ministry of Finance and Economic Development, who do not possess such data and could not establish the facts for proper action by the legislative body that propose a bill.[2]

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[1] Wintgens cogently argues that the law should not only be formally valid in its initial adoption, but it must also be effective in order to justify its continued existence. A norm may become effective and justify its continued existence when it is supported by the facts. When a given norm is not supported by the facts, the legislator needs to react; otherwise, the norm becomes unconstitutional by mere passage of time and change of circumstances. L.J. Wintgens (2013) "The Rational Legislation Revisited. Bounded Rationality and Legisprudence" In L.J. Wintgens and A.D. Oliver-Lalana (Eds.) *The Rationality and Justification of Legislation: Essays in Legisprudence*, Heidelberg: Springer, 24, 26-28.

[2] Arts 30 and 38 of the Council of Ministers Working Directives (Addis Ababa, 2003) authorise every Minister to have the power and responsibility to initiate policies and laws, regarding the Ministry s/he leads. This, in turn gives the impression that only the government agencies initiate bills. *See* the process of the adoption of laws under art 40. Further, art 43 provides that such draft bills shall be drawn up by professionals of such agency. This is what is referred to as 'Government Draft Law' in the Federal Democratic

This article discusses how criminal statistics can be used as a justification in criminal legislative reform. The first section deals with the need for criminal statistics, and the circumstances that necessitate the utilisation of criminal statistics. Section 2 discusses the institutions with legal and practical competence to collect criminal statistics which also defines the nature of data to be collected. Section 3 addresses the utilisation of such data by the respective institutions, for various purposes including legislative reform. Section 4 examines the practices of using of such criminal statistics in this legislative reform.

In order to put matters in context regarding the normative and empirical justifications for reform, the article examines areas of penal legislation relatively frequently reformed, such as, vagrancy law, tax laws, commercial registration and trade license, and crimes of terrorism. Deliberately excluded are legislations relating to corruption only for intelligibility of the discussion. Section 5 makes general observations regarding the legislative reform process and use of criminal statistics. The discussion is made based on the frequently revised penal provisions, explanatory memorandum to the revision, and minutes of public and parliamentary hearings.

1. General Background

The criminal law is the most effective social control tool discovered yet. It is believed to have a deterrent effect on potential actors. Thus, it is used to guide the behaviour of citizens in a desired way. As such, it is a prospective norm that states the prohibited conduct the violation of which entails a consequence, usually, punishment. Both the prohibition and the punishment are determined by the lawmaker with a view to achieving certain social, political and economic ends.[3] There are several laws with such objectives in mind, whether it is meant for the maintenance of law and order or demanding the individual to comply with administrative decisions.[4]

Republic of Ethiopia House of Peoples' Representatives Working Procedure and Members' Code of Conduct (Amendment) Proclamation No 470/2005, art 2(18). Even though this legislation lists about 7 organs as having the power to initiate bills (art 6(2)), all legislation containing penal provisions were initiated by agencies only.

[3] This is the principle of legality that the prohibited conduct, the consequences of the violation must be pre-declared and made known to the public through the regular official gazette. Crim. C., art 2. Simeneh Kiros Assefa (2017) "Methods and Manners of Interpretation of Criminal Norms" In 11 *Mizan L. Rev.* No 1, at 104-107.

[4] The recent trends of criminal enforcement of administrative decisions through penal provisions is observed in our discussion on over-criminalisation. Simeneh Kiros Assefa and Cherinet WordofaWetere (2017) "'Over-Criminalisation': A Review of Special Penal Legislation and Administrative Penal Provisions in Ethiopia" in 29 *J. Eth. L.* No 1.

However, it is always the case that the criminal law has a subsidiary function, i.e., it is used when the interest that needs legal protection is an essential interest and it cannot effectively be protected by the administrative measures or civil actions.[5] Therefore, in criminalising a certain conduct, the legislature should first establish whether both the positive and negative requirements are met. As this has never been a point of discussion in any of the criminal legislation adopted so far, the discussion in this article is whether the lawmaker examines evidence of practice when revising a particular legislation and examines the kind of criminal statistics it makes use of.

For instance, the Vagrancy Control Proclamation states that it is adopted because vagrancy had been "increasing and wide-spreading in the country from time to time, thereby creating a threat to the tranquility and order of the people."[6] Therefore, the Proclamation had been adopted to "permanently dispel this threat".[7] Likewise, the Anti-Terrorism Proclamation states that "it has become necessary to legislate adequate legal provisions since the laws presently in force in the country are not sufficient to prevent and control terrorism."[8]

The preambles of these laws indicate that the already existing legislation or provisions are not able to meet their objectives of prevention of vagrancy crimes and crimes of terrorism, respectively. Therefore, the decision to adopt such special penal legislation would have to be based on evidence, one of which, most certainly, is criminal statistics that show rising number of vagrancy and terrorism crimes, instead of just stating that vagrancy or terrorism is 'increasing' or becoming 'widespread'.

Likewise, the Commercial Registration and Trade License Proclamation is continuously revised and contains progressively increased punishments. It has also expanded the scope of criminalised conducts. Initially, criminalisation of trading without a valid permit was introduced in the *Commercial Registration and Business Licensing Proclamation No 67/1997* (Commercial Registration Proclamation No 67/1997"). It was punishable with imprisonment from 3 to 5

[5] This is essentially the principle of *ultima ratio*. See generally, A.M.P. del Pino (2016) "The Proportionality Principle in a Broad Sense and Its Content of Rationality: The Principle of Subsidiarity" in A.N. Martin and M.M. de Morales Romero (Eds.) *Towards a Rational Legislative Evaluation in Criminal Law*, Switzerland: Springer. M.D. Dubber (2005) "Theories of Crime and Punishment in German Criminal Law" in 53 *Am. J. of Comp. L.*, No 3. D. Husak (2004) "The Criminal Law as Last Resort" in 24 *Oxford J. of Legal Studies* No 2. S. Mir Puig (2008) "Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law, as Limits to the State's Power to Criminalize Conduct" in 11 *New Crim. L. Rev.: An Int'l and Interdisciplinary J.,* No 3.

[6] Vagrancy Control Proclamation No 384/2004, preamble, para 1.

[7] Id., para 2.

[8] Anti-Terrorism Proclamation No 652/2009, preamble, para 3.

years and fine twice of the profit said to have been earned. The penalty was increased in *Commercial Registration and Business Licensing Proclamation No 686/2010* ("Commercial Registration Proclamation No 686/2010") to rigorous imprisonment from 5 to 15 years, to fine from Birr 150,000 and Birr 300,000, and confiscation of the production or service rendering materials. Then range of conducts criminalised were expanded in *Commercial Registration and Business Licensing Proclamation No 980/2016* ("Commercial Registration Proclamation No 980/2016"). In such reforms, one would expect data presented to lawmaker that shows the penal provisions have failed to achieve the intended purpose.

There are two *caveats* that are worth mentioning here. The first *caveat* is to note that criminal statistics are about crimes committed and they do not show anything regarding crimes not committed. Second, in continental system, the rationale for a particular rule is found in the preamble. Often, in administrative regulatory proclamations containing penal provisions, the preamble states justifications and objectives of the proclamation. However, it does not contain such justifications for the penal provisions. The objectives of those penal provision may, however, be abstracted from the General Part of the Criminal Code. Thus, there is significant divergence of objectives of the legislation and those penal provisions contained therein. Further, the rationale for the revision may be found in the preparatory works.

Criminalisation and determination of sentence to such conduct violating such prohibition is a public policy decision.[9] It is quintessential state's coercive power. It is believed that the lawmaker desires to make a rational and effective legislation. This is because the lawmaker exercises a constitutional power, which is believed to be limited by the constitution, and is exercised wisely.[10] The lawmaking power may, therefore, be seen from the perspective of the notion of limited government.

[9] *See* generally, A.M. Arenas (2016) "Theoretical and Procedural Aspects of the Evaluation of Public Policies" In Martin and de Morales Romero (Eds.), *supra* note 5.

[10] *See* for instance, Wintgens (2013), *supra* note 1. Also *see*, A. Kristan (2013) "Three Grounds for Tests of the Justifiability of Legislative Action: Freedom, Representative Democracy, and Rule of Law" in Wintgens and Oliver-Lalana (Eds.), *supra* note 1. H. Isola-Miettinen (2013) "The Principles Legislative Strategy: Rationality of Legal Principles in the Creation of Laws?" in Id.; J. Sieckmann (2013) "Legislation as Implementation of Constitutional Law: A Foundation of the Demand of Legislative Rationality" in Id.

2. Institutions Collecting Criminal Statistics and the Nature of the Information

In the establishment proclamations of the respective institutions, it is a part of their duties and responsibilities that the Police, the Attorney General Office, and the Court collect data and analyse and make it an input to discharge their fundamental obligations, such as, crime prevention, and make it part of their report to the House of Peoples' Representatives. However, even though the data to be collected appear to be different (because of the nature of the obligations), those data lead to the formation of shared opinion regarding the administration of the criminal justice.

2.1 Institutions collecting criminal statistical data

The Police – The Federal Police has three fundamental responsibilities in the administration of the criminal justice. It has the principal responsibility of prevention of crimes.[11] As such, the major part of the budget is allocated to deploy police force on the ground.[12] Once a crime is said to be committed, the police have the duty to investigate such crime and forward the investigation report to the Attorney General office for prosecution.[13] The Federal Police conducts investigation on those crimes that are said to fall under the jurisdiction of the Federal Courts. It has organised its activities under two categories: technical and tactical investigation. While the technical investigation is all about expertise, such as, finger prints, document examination and arson investigation, the tactical investigation refers to the ordinary investigation. The latter is,

[11] Ethiopian Federal Police Commission Establishment Proclamation No 720/2011("Federal Police Proc No 720/2011"), art 6(1), (4).

[12] The Federal Police was granted budget separately in 1994 E.C (July 2001/June 2002). Its annual budget was Birr 1,365,800. In 2001 E.C. (July 2008/June 2009) this amount grew to Birr 20,445,100. In the same period, the Budget allocated to the Ministry of Justice was Birr 5,831,000 and 14,516,600, respectively. The budget allocated to the Federal Courts is Birr 17,891,200 and 26,448,500, respectively. There are two *caveats* to this number. First, the Federal Courts are handling all sorts of cases including civil, commercial and labour cases. Second, the Federal Ethics and Anti-Corruption Commission used to prosecute criminal cases and in 2001 E.C. (July 2008/June 2009) its annual budget was Birr 19,206,000. One can make a judgement based on the numbers appearing here.

[13] Federal Police Proc No 720/2011, art 6(1), (4). In addition to the general investigative responsibility of the Federal Police Commission on crimes falling under the jurisdiction of the federal courts, it is given specific jurisdiction for prevention and investigation of crimes that are listed under art 6(5), such as, counterfeit of currencies and payment documents, crimes relating to computers and information networks, and human trafficking and terrorism.

therefore, organised into six investigation departments.[14] Likewise, the Addis Ababa Police has the same responsibilities. Thus, at the Headquarters, it also conducts investigation of crimes in five investigation departments each of which have three divisions under them working on operations, collection of evidence, and archives.[15]

In order to help discharge its crime prevention and investigation responsibilities better, the Police has the responsibilities to "conduct studies" and to standardise police service in the country.[16] Most importantly, it has the responsibility to "collect, analyze(sic) and disseminate to the concerned organs countrywide information on causes of crimes and traffic accidents;"[17] The Federal Police did not have criminal statistics prior to 2006 Ethiopian calendar, and the statistics collected since 2006 E.C., are kept confidential to date.[18] The Addis Ababa City Police does not collect criminal statistics at the Headquarters. Such data are said to be collected at branches in each sub-city; and community policing centres conduct investigation on all other sorts of crimes reported to them.[19] As it is not collected and analysed at the Headquarters, such data is of no use. The police also have the power to maintain central criminal record, which is also used to provide certificate of no criminal record for individuals.[20]

The Federal Attorney General[21]– The Federal Attorney General, representing the Federal Government, "institutes criminal … charges" against alleged

[14] Those departments are investigating (a) crime of terrorism, (b) financial crimes, (c) tax and customs crimes, (d) crimes relating to trademark, (e) corruption crimes, and (f) other crimes falling under the federal courts, such as, human trafficking. One can see that on many of them there are special penal legislation or administrative legislation containing penal provisions. Thus, the departments appear to be organized along a certain legislation. Interview with Inspector Melkamu Mussie, Federal Police, on April 4, 2018.

[15] The departments at the Headquarter are investigating crimes of: (a) robbery; (b) homicide; (c) consumer protection and tax; (d) corruption crimes; and (e) miscellaneous. Interview with Tsegaye Balacha, Addis Ababa Police, Investigation Division Head on April 10, 2018.

[16] Federal Police Proc No 720/2011, art 6(20).

[17] Id., art 6(23). Under the repealed Federal Police Commission Proclamation, No 313/2003, art 7(12), the Federal Police Commission had the same responsibility to "collect and analyse criminal data and statistics …countrywide" which is more accurate description of the responsibility.

[18] Melkamu Mussie, *supra* note 14.

[19] Tsegaye Balacha, *supra* note 15.

[20] Federal Police Proc No 720/2011, art 6(14).

[21] The powers and responsibilities of the former Ministry of Justice (Proclamation No 916/2015) are transferred to the Federal Attorney General office. Federal Attorney General Establishment Proclamation No 943/2016, ("Attorney General Proclamation") art 22.

offenders.[22] Unique to its position, the Federal Attorney General Office is the "principal advisor and representative of the Federal Government" on legal matters.[23] As such, it has the responsibility to draw bills "to be promulgated by the Federal Government; ensure that draft laws prepared by government organs are consistent with the Constitution and federal laws."[24] In order to discharge its responsibilities better, it has the responsibility to "undertake legal reform studies."[25] It further has the responsibility to "establish, and enforce a system that enables the collection, organization, analysis and dissemination of criminal justice information."[26]

The Courts – The President of the Federal Supreme Court has the responsibilities to "prepare and submit to the House of Peoples' Representatives the work plan and budget of Federal Courts and implement same upon approval, forward his opinion on requests for budgetary subsidy to regional courts exercising federal jurisdiction by delegation."[27] He also has the responsibility to "cause the preparation of the statement regarding the activities of the Federal Courts and the submission of reports on the activities of regional courts concerning Federal cases, as supported by statistical data."[28] Finally, he shall "submit to the House of Peoples' Representatives, researched report on the judicial activities of the Federal Courts."[29]

Likewise, the presidents of the Federal High and Federal First Instance Courts have the responsibility to "cause the preparation of statements, supported by statistical data, regarding the activities of the Court."[30] They submit their reports to the Supreme Court President to make it a part of his report to the House of Peoples' Representatives. These reports and statistical data obviously include the criminal cases filed in the courts, cases disposed during the year, case load and case congestion.

The data collected by the court are incidental to opening of new case files; they are not collected in usable format. Such data are not properly tabulated, analysed and interpreted for other purposes. Therefore, the data were never used

[22] Id., art 6(3)(e). Art 8 provides further details regarding powers transferred to it from other prosecution agencies, such as, the Federal Ethics and Anti-Corruption Commission and Ethiopian Revenue and Customs Authority.
[23] Id., art 6(2).
[24] Id., art 6(5)(a).
[25] Id., art 6(5)(b).
[26] Id., art 6(9)(b).
[27] Federal Courts Proclamation No 25/1996, art 16(c).
[28] Id., art 16(e).
[29] Id., art 16(h).
[30] Id., art 18(3).

for reporting; the reports presented to the House of Peoples' Representative are only qualitatively described.[31]

2.2 The types and manners of data collection

The proclamations which require data to be collected, analysed and presented do not provide for the nature of the statistical data to be collected. The data collection is not a separate responsibility; it is associated with the responsibilities of the respective institutions. The collection and analysis of the data may depend on the purpose for which they are required. The police are required to compile data regarding the "causes of crime and traffic accident." The Federal Attorney General is required to collect data regarding the "criminal justice information." The court is required to collect data on cases appearing before such court "supported by statistical data". Therefore, the types of data required to be collected depends on the nature of the responsibilities of the respective institutions.

For instance, the three principal responsibilities of the police are crime prevention, investigation and maintaining criminal record. Therefore, the data to be collected need to be related to the activities undertaken by the police. Because the data at the Federal Police is said to be confidential, we cannot discuss the patterns of such data collection and tabulation. However, in an ideal situation, it needs to show the number of complaints individuals filed before the police, the number of cases that merited investigation, those cases referred to the public prosecutor, the number of cases that required further investigation, and the number of cases that resulted in conviction. The final data need to be classified based on the nature of the crime.

Likewise, the Attorney General's report is required to state the number of cases that are closed by the public prosecutor at the investigation stage. The report should also indicate the number of cases that were closed by the public prosecutor for various reasons, such as, lack of evidence, lapse of period of limitation, for public interest reason. Moreover, the report should state the number of cases that resulted in conviction and acquittal.

It is only after 2002 E.C. (i.e. 2009/2010) that the different branches of the Federal Attorney General's office started sending their monthly report to the Headquarters. At the Headquarters, quarterly report is compiled and it is presented at the national attorney generals' meetings held three times a year.[32]

[31] Interview with Berihu Tewoldebirhan, former Vice-President of the Federal High Court on April 21, 2018.

[32] Interview with BelayhunYirga, Director of the Legislative Research and Drafting Directorate at the Federal Attorney General's Office on April 22, 2018. At such meeting the States' Attorney Generals (Heads of Justice Bureaus) also present their own reports.

This information is only used for the purposes of administrative decisions and internal prosecution policy decisions. To date, the Federal Attorney General has never used empirical data justifying legislative actions.[33]

The responsibilities of the court are hearing and disposing criminal cases. As such, the data that are amenable to the court are the number of cases filed before the court, the number of cases disposed by the court, and the number of cases that could not be completed. Ideally, the data would be coded and classified to put them into usable format making analysis and interpretation possible. This would give good picture, based on the type of such case, regarding how long a given case takes to completion, the number of cases that were overlaid to the following year, i.e., the rate of case congestion.

The police, Federal Attorney General and courts may use the data for administration of their regular business, in order to allocate human and material resources. Such different responsibilities of those institutions may give the impression that the data to be collected by the respective institutions are different. However, looking at the criminal justice administration as 'a system' working in coherence, they refer to the same thing at different stages of the administration of justice. The Attorney General, as the legal advisor of the Federal Government, may use such information for legislative action. Therefore, the ultimate use of the data is for policy and legislative action, which ultimately defines the cross-cutting nature of the data.[34]

3. Use of Criminal Statistics by Those Institutions

The criminal statistics is used for various types of decision making. In the normal discharge of the responsibilities of those institutions, they may be used as a basis for administrative decisions in the court, in the prosecution office and in the police, in the allocation of human and material resources. These data are ultimately used as justification for public policy decision and legislative action.

3.1 Police use of criminal statistics

It is based on such data that the police deploy forces both for crime prevention and crime investigation activities. For instance, if one of the departments such as

Further, the Federal Attorney General intends to introduce National Integrated Justice Information System (NIJIS). This information gathering procedure is said to give the Attorney General national overview of events from the States' Woreda Courts to the Federal Supreme Court.

[33] Ibid.

[34] Some attempt to make distinction between criminal and judicial statistics; but they ultimately mean the same thing. H. Taylor (1998) "Rationing Crime: The Political Economy of Criminal Statistics Since the 1850s" in 51 *Economic History Review,* No 3, at 580, 581.

the department investigating robbery is overstretched because the crime of robbery is said to have increased, the police may allocate its force on the prevention and investigation of the crime of robbery. If the human and material resources are lacking in such department, other members may be transferred to such robber yinvestigation department from other departments not so overstretched. Suppose the number of crimes reported in other departments, such as, trademark related crimes are less frequent, the staff in this department may be transferred to those overstretched departments. The police have a relatively good information regarding the rise and the decline of crime rate at a particular moment. This information is used for decisions within the institution; but it can also be used for criminal legislative reform too.

The Federal Police has participated in (initiated) two major special penal legislations, the Anti-Terrorism Proclamation and Money Laundering and Financing of Terrorism.[35]Even though the contents and findings of the research were not presented to the lawmaker, the records show that the Proclamation adopted to control vagrancy was adopted based on the research that is said to have been undertaken by the Federal Police.[36] These researches could not rely on criminal statistical data because there was no such data at the time of the adoption of the Proclamations. Yet, even if the Federal Police had them, it does not have to be the drafter of the bill for that tends to create a literal police state; such data may rather be used by other agencies, such as, the Federal Attorney General.

3.2 Use of criminal statistics by the courts

The police identifies, investigates and reports a possible commission of crime. Complaints which do not presumably show commission of crime would not worth investigation. In fact, complaints which are initially identified as possible commission of crime might not continue if the evidence shows that there was no crime in the first place.

[35] The minutes of public hearing on the Anti-Terrorism draft Bill, show that the head of the Federal Police is one of the resource persons who appeared before the Security Affaires Standing Committee along with National Security Agency. (*See*, 'A Brief Minutes of Public Hearing with Stakeholders on the Anti-Terrorism Bill Organised by Justice and Administration Affairs and Foreign, Defence and Security Standing Committees' (June 24, 2009, in Amharic, at 3). Likewise, the Minutes of the Public Hearing on Draft Bill on Money Laundering and Financing of Terrorism Proclamation indicate that the Federal Police is also a resource person. One can certainly see that the police leads such the criminal law drafting process. Particularly in legislative process like ours –where the legislative debate is non-existent– it is not a healthy lawmaking process.

[36] 'Explanatory Memorandum on the Draft Vagrancy Control Proclamation' (in Amharic), at 1.

The court serves the public by allocating benches, judges and support staff. Because of the nature of independence of the judiciary, the administration can only support the judges in administrative matters to help them discharge their constitutional duties competently and independently. The number of judges appointed may be determined depending on the steady increase of the cases filed in the courts. In some instances, the legislation specifically requires a special bench, such as, the tax laws.[37] However, as statistical data are not tabulated and analysed to be used to make administrative or policy decisions regarding the number of benches and judges for specific categories of cases, all decisions were normative.[38]

3.3 Use of criminal statistics by the Federal Attorney General

In an ideal situation, the crime investigation arm of the police and the prosecution office work in close collaboration. Thus, the prosecution has the information the police has. This would enable the prosecution office to help the police in investigation and other activities. However, it can also take its own measure in terms of the allocation of human and material resources, focus of the prosecutorial action, and prosecutorial policy decisions. Further, data, such as, prior convictions of defendants are found in the police which helps the prosecutors to lead the prosecution.

The most important use of criminal data is in legislative reform. Ethiopia has decentralised legislative drafting that any agency can submit draft bill to the House of Peoples' Representatives.[39] However, there is a desire to have a centralised draft review system. Therefore, as advisor of the Federal Government on legal matters, the Attorney General itself draws up bills; but it also reviews bills drawn up by other agencies.[40] It is here that the national criminal statistical data are relevant.

3.4 Legislative use of criminal statistics – Principled action and duties of power

The criminal law is the most intrusive state action; as such, legitimacy of the criminal law is a subject that needs to be addressed carefully. Wintgens argues

[37] The Ethiopian Revenue and Customs Authority Establishment Proclamation, No 587/2008, art 17.

[38] Berihu Tewoldebirhan, *supra* note31.

[39] See *supra* note 2.

[40] The Council of Ministers Working Directive, art 42(1)(c), (5)(b) provides that, as the legal advisor of the Federal Government, the Ministry of Justice must be consulted and where new crimes are created or punishments are revised, the Ministry of Justice must be consulted for propriety and conformity with the Penal Code. In the Attorney General Proclamation art 6(5)(a), it is given the power to maintain (universal) coherence of the draft bills drawn up by other agencies.

that legislative action in general and attached sanction in particular should be principled actions which are founded on individual freedom.[41] He argues that freedom is the *principium*; thus, any rule has to continuously justify its existence. In order to justify the existence of a rule (a criminal norm), it is necessary to comply not only with the formal requirements of the lawmaking process, but also with those basic principles.[42] Those principles are "concretisations of freedom as *principium*."[43] The first and the most important principle is *the principle of coherence* by which he means rules need to cohere not only within the legal system but also with reality.[44] The second principle is *the principle of alternativity* which refers to an external limitation to freedom is legitimate provided there is no alternative measure to address the failing social interaction.[45]The third principle is *the principle of temporality*.[46] And finally, there is *the principle of normative density*.[47]

In order to comply with those principles, the legislature has duties to comply with. In making legislations, the lawmaker needs to have both normative and empirical justifications.[48] Normative justifications are doctrinal justifications. Thus, for the purpose of criminalisation of a particular conduct, there has to be positive justification that the protected legal interest needs the protection of the criminal law. The negative requirement is that, the legal interest cannot be protected better (or as well) by other means, such as, administrative measures and civil actions.[49] Embedded in and giving flesh to those normative justifications is empirical evidence. However, those empirical justifications are put in context of those normative justifications, and they have to be discussed that way.

Public policy is always under constant revision; criminalisation is one such public policy.[50] This is better seen in the notion of rationality of legislation. As an essential manifestation of rational lawmaking, the lawmaker has the duty to

[41] L.J. Wintgens (2012) *Legisprudence: Practical Reason in Legislation*, Surrey: Ashgate Publishing, at 231-282. For a concise summary, see Kristan, *supra* note 10, at 53.
[42] Wintgens (2013), *supra* note 1.
[43] Wintgens (2012), *supra* note 41, at 4 – 6, 279.
[44] Id., at 35.
[45] Id., at 258.
[46] Id., at 267.
[47] Id., at 271.
[48] Whether the legislature has to justify its actions and whether it has to provide reasons is beyond the scope of this article. However, the principle of coherence is a binding constitutional principle. FDRE Const., arts 9(1), 13.
[49] See *supra* note 4 and 5.
[50] See generally, Arenas, *supra* note 9.

reflect.[51] This duty to reflect is more than a morality of duty but it refers to the morality of aspirations, excellence. Thus, while the constitution does not impose an obligation of quality of legislation, Wintgens invokes five requirements for assessing the rationality of legislation particularly for those legislation associated with sanction.[52]

3.4.1 Pre-legislative phase

a) A duty to establish the facts

At the pre-legislative phase, the lawmaker undertakes various actions, in establishing the facts.[53] The establishment of such facts refers to identification of the social interest to be protected,[54] including contextualisation of the problem by identifying the "dysfunctional social situation" and whether it requires legislative intervention.[55] It must also indicate that the measure that is identified to address the problem must rationally be linked with addressing such problem.[56] The Council of Ministers Working Directive (2003), art 5(5) requires that "matters (proposals) presented for the decision of the Council shall be based on full understanding of the facts and information helping decision in favour of public interest." [translation mine]. Sub-art (6) further provides that "the decision-making process of the Council shall reflect all relevant matters are investigated into and policies and procedures were considered" [translation mine].

Such fact-finding is supposed to be made by the agency drawing up the bill. Thus, when the lawmaker intends to adopt the Vagrancy Control Proclamation or a tax proclamation containing penal provisions or anti-terrorism law, ideally,

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[51] Taking the German notion of the "duty to reflect", Wintgens initially developed this theory in 2002. L.J. Wintgens (2002) "Legislation as an Object of Study of Legal Theory: Legisprudence" in L.J Wintgens (Ed.) *Legisprudence: A New Theoretical Approach to Legislation* (Oxford: Hart Publishing), at 32-33.

[52] Kristan, *supra* note 10, at 55.

[53] Wintgens (2002), *supra* note 51, at 32.

[54] S.R. Ferrandez (2016) "Legislative Evaluation in Spain: Its Necessary Application in the Approval of Criminal Law Reform" in Martin and de Morales Romero (Eds.), *supra* note 5, at 79.

[55] Ibid.

[56] FDRE Ministry of Capacity Building, (2005) *FDR Ethiopia Comprehensive Justice System Reform Program Baseline Study Report*, Amsterdam: Primavera Quit.

Ethiopia commissioned a baseline research of the justice system. The result of the research indicates that there were various forms of shortcomings of the justice system. In terms of trained personnel, institutions and their facilities, the working of those institutions, etc., were lacking in many aspects. This baseline research was used for the justice system reform involving both the legislative reform, institutional reform and legal education reform.

there are facts that are inquired into. This particularly includes facts that were said to have called for the imposition of a criminal sanction without which the problem cannot be addressed. This inquiry is in conformity with the criminalisation doctrine – that there must be a positive requirement as well as negative requirement.[57]

As legislation is adopted on areas where there were governing penal provisions, the explanatory memorandum should address not only the purpose of the reform but also how those existing provisions fail to address the problem that necessitated the reform.[58] Contrary to these principles, however, the provisions of art 9(6) of the Council of Ministers Working Directive appears to be the most prominent. The documents presented to the Council of Ministers is presented both in Amharic and English languages and accompanied with a brief explanatory memorandum to the bill.

b) A duty to balance

Criminalisation is the most intrusive state action. Therefore, in exercising its criminalising power, the lawmaker needs to balance other values, most important of which is fundamental rights.[59] However, before the state goes into balancing among the various conflicting values,[60] it must select the least intrusive measure from a menu of state action, such as, administrative measures, civil action and maintaining the already existing measures. In the doctrine of criminalisation, the negative requirement is that the criminal law is used as a last resort measure, supplementing all other state measures.[61] This requirement of rationality of legislation is that, the lawmaker, based on the facts presented, would evaluate the alternative measures in light of the potential coercive nature of the designed action and it arrives at such decision after thorough evaluation of those possible alternative actions.[62]

[57] See, *supra* notes 4 and 5.
[58] Ferrandez, *supra* note 54, at 94.
[59] Simeneh Kiros Assefa (2018) "Sovereignty, Legitimacy and Fundamental Rightsas Limitations to Criminalisation Power of the State" In 12 *Mizan L. Rev.*, No 1.
[60] For principle theory of the bill of rights, see Id., section 5.2.
[61] *See* generally, J. Sieckmann (2016) "Rational Lawmaking, Proportionality and Balancing" in K. Meßerschmidt and A.D. Oliver-Lalana (Eds.) *Rational Lawmaking under Review: Legisprudence According to the German Federal Constitutional Court*(Switzerland: Springer); A.M.P. del Pino (2016) "The Proportionality Principle in a Broad Sense and Its Content of Rationality: The Principle of Subsidiarity" in Martin and de Morales Romero (Eds.), *supra* note 5, at 264 - 267.
[62] Wintgens (2002), *supra* note 51, at 33.

c) A duty to prospective evaluation

When the lawmaker adopts measures, it also evaluates the likelihood of the success of the measure as well as other unwanted consequences which could reasonably be foreseen at the time of adoption of such measure.[63] It should also take into consideration the social and economic, legal and institutional implications.[64] The Council of Ministers Working Directive requires that if the bill introduces or modifies criminal sanctions, the Ministry of Justice shall be consulted; and if it has the effect of modifying or creating institutions, the Prime Minister shall be consulted prior to tabling the subject for discussion, and if such bill has financial consequences, the Ministry of Finance and Economic Development shall be consulted and their views form part of the report.[65]

The Directive further requires an express assertion that the bill does not contradict constitutional principles, including fundamental rights, and it actually conforms with the existing legal order including international obligations.[66] Ferrandez refers this action as "legislative impact assessment."[67] However, because the lawmaker is working under time pressure and with "bounded rationality", the possibility of not addressing the problem effectively is real.[68] Therefore, the decision of the lawmaker has to be evaluated continuously to be discharged in the following two additional legislative duties.[69]

d) A duty to take future circumstances into consideration

The legislature is making laws to be applied prospectively. The legislative impact assessment needs to take possible future developments into consideration whether such is the result of change of circumstances or the effects of the legislation.[70] The legislature cannot humanly foresee all possible future circumstances; thus, it must expect problems that might arise at the time of the implementation of such law, which the lawmaker needs to react to.

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[63] Id., at 33. He further elaborated this in later researches that it is one of the difficulties the lawmaker faces that it cannot fully predict the effects of its actions because the knowledge at the time of the making of the legislation is obviously limited. Wintgens (2013), *supra* note 1, at 16 ff. Further on ex-ante evaluation of institutional design, *see* generally, J. Becerra (2016) "Institutional Redesign Proposals for the Preparation of Criminal Policy by the Government: The Focus on Ex-Ante Evaluations" in Martin and de Morales Romero (Eds.), *supra* note 5.

[64] Ferrandez, *supra* note 54, at 89, 90.

[65] Arts 42(1)(c), (5)(b), art 9(5), Art 31(7), and arts 9(4), 31(6), respectively.

[66] Id., arts 46(1)(a), (b).

[67] Ferrandez, *supra* note 54; Id., at 84.

[68] Wintgens calls such limitation in terms of skills, information and time, 'bounded rationality'. Wintgens (2013), *supra* note 1, at 14, 15.

[69] Wintgens (2002), *supra* note 51, at 33.

[70] Id., at 33. Wintgens (2013), *supra* note 1, at 16 ff.

3.4.2 Post-legislative phase: A duty to correct legislation at a later stage

It is indicated that in prospectively applied law, the lawmaker cannot foresee everything. The law must be re-evaluated as it is implemented in order to see whether it has created socially and economically acceptable conditions,[71] whether there are any institutional limitations to achieving its objectives, and whether it addresses the realities of its time. The law is valid not only because it complies with the formal requirements of the lawmaking, but it must also cohere to realties on the ground.[72]

Where there is a problem identified, the lawmaker takes the necessary corrective measures.[73] Therefore, even when the other four conditions of duties were not complied with, it would be of significant to meet the last requirement; i.e., revisiting the laws retrospectively after their adoption. However weak the process may be, it is one method of enforcing the bill of rights.[74] Owing to lack of effective constitutional litigation procedure and practice, and because there is no accountability, the Ethiopian lawmaker does not have incentive for such continuous revision.

4. The Practice of Using Criminal Statistics in Legislative Decisions

It is indicated that the legislature needs to have the criminal statistics, among others. Based on the theory of criminalisation, there has to be an identified social problem, and that social problem could not be addressed by other means but only through the criminal law. Once such initial decision is made based on experts' advise, the legislature has the duty to evaluate whether such policy decision helps achieve its intended purposes. The reason why criminal statistics is used in the evaluation of public policy is that, several of those penal legislation or penal provisions contained in administrative regulations were already in place and they are tested over a certain period.

For instance, by the time the Vagrancy Control Proclamation was adopted, vagrancy was criminalised for several decades already and was governed by art 471 of the 1957 Penal Code. Thus, when the Proclamation states as its motive that "vagrancy [had been] increasing and widespread in our country from time to time" and it had become "a threat to public tranquillity and order of the

[71] Ferrandez, *supra* note 54, at 87.
[72] Wintgens (2013), *supra* note 1.
[73] Wintgens (2002), *supra* note 51, at 33. Arenas, *supra* note 9, at 13, 20.
[74] *See* generally, A.D. Oliver-Lalana (2016) "Due Post-Legislative Process? One the Lawmakers' Constitutional Duties of Monitoring and Revision" in Meßerschmidt and Oliver-Lalana (Eds.), *supra* note 61.

people" and that the Proclamation had been adopted with a view to "dispel this threat," it must first show how the existing criminal norm failed to achieve that purpose.[75] This can be shown principally through criminal statistics; however, there is no criminal statistics presented to the lawmaker that the provisions contained in the Penal Code failed to accommodate. The bill was drawn by the then Ministry of Justice and Ministry of Federal Affairs and it did not present any such evidence to parliament.[76]

Likewise, regarding the criminalisation of engaging in commercial activities without a valid license, the Proclamation regulating commercial registration was adopted without a background study of the problem and justification. However, the Commercial Registration Proclamation No 67/1997 had criminalized engaging in commercial activities without a valid license. It was made punishable with imprisonment from three to five years and fine twice the profit the person is said to have earned in such period, in addition to administrative measures the Ministry of Trade or any other appropriate organ would take.

This Legislation was substituted with Commercial Registration Proclamation No 686/2010. The criminal punishment was increased significantly. Again, there is no statistical evidence that shows the criminal punishment imposed as per Proclamation No 67/1997 failed to help achieve the objectives of the said Proclamation. Yet, while this Legislation was revised in 2016, the punishment for such conducts are maintained as they were in the 2010 Proclamation and other conducts were criminalised too on pretext of 'clarification' of provisions.[77]

4.1 Vagrancy and Vagrancy Control Proclamation

The Vagrancy Control Proclamation No 384/2004 was adopted while there was a provision in the Penal Code punishing vagrancy, art 471.[78] The preamble states increase in vagrancy crime as a justification for adopting the Proclamation. The bill was said to be drawn up in response to the inadequacy of art 471 to address the growing problem. The *travaux préparatoires* indicates

[75] Kristan, *supra* note 10, at 55.

[76] *See* Explanatory Memorandum, *supra* note 36; 'Minutes of Public Hearing Organised by Law and Administrative, and Social Affairs Standing Committees on the Draft Bill to Control Dangerous Vagrancy' (January 12, 2004, in Amharic).

[77] 'Explanatory Memorandum on Commercial Registration and Business Licence Draft Bill' (in Amharic), at 2. 'Minutes of the Public Hearing Organised by the House of Peoples' Representatives Commercial Affairs Standing Committee on the Commercial Registration and Business License Draft Bill' (July 5, 2016, in Amharic). Also *see* section 4.4, infra.

[78] Art 471(1) provides that "[w]hosoever, having no fixed abode or occupation and no regular or visible means of support, and being able-bodied, habitually and of set purpose leads a life of vagrancy or disorderly behaviour, or lives by his wits or by mendicancy, refusing to take honest, paid work which he is capable of doing, thereby constituting a threat to law and order, …"

that, a research conducted by the Federal Police indicated that vagrants with repeated criminal records are increasing in number from time to time in major cities threatening the peace and tranquillity of the public.[79] The reasons for the inadequacy were said to be of two types. The first relates to the vagueness and/or narrowness of the provisions of art 471. The second relates to the lack of procedural guarantees that made the provisions of art 471 ineffective.[80] Thus, the law was drafted in such a manner that a list of conducts said to be conducts of vagrancy are provided for with severe punishment, and the crime is made non-bailable.[81]

The reasons provided, both in the preparatory work as well as at the public hearing, were insufficient and contradictory.[82] However, despite the claim of prior research by the Federal Police, the nature and content of such research was not made known. Having regard to the fact that the Federal Police did not keep criminal statistics prior to 2006 E.C. (i.e. 2013/2014), it is certain, if there was any background research, it would not deal with criminal statistics.

At the public hearing, there were two significant challenges to the bill from two participants. One participant commented focusing on the merit of the draft bill that, it makes vagrancy a matter of status and ends up to be discriminatory contrary to the constitutional provisions, and denying bail for vagrancy is a matter of concern which is evident for any ordinary lawyer.[83]

The other participant's comment focused on the motives of the bill; he stated that it is meant to silence opposition.[84] The preparatory work makes reference to the incidents that took place in 2001[85] relating to the protests of Addis Ababa University students regarding the conditions on campus and demanding academic freedom.[86] They had discussion with the Minister of Education

[79] 'Explanatory Memorandum', *supra* note 36, at 1. Please note that while the preamble of the Proclamation states the increase in vagrancy crime, the Explanatory Memorandum states about the increase in number of vagrants in major cities.

[80] Id., at 12

[81] Vagrancy Control Proclamation, arts 4, and 6(3), respectively.

[82] It is lamented that because of the difficulty of proving each element constituting the crime of vagrancy as provided for under art 471 of the Penal Code, it had been difficult to secure conviction; because the courtused togrant bail to such suspected vagrantsroutinely, the police had find it difficult to complete the investigation, to secure their attendance in court and vast majority of them were discharged or acquitted. Explanatory Memorandum, supra note 36, at 12.

[83] Minutes of Public Hearing, *supra* note 76, at 10, 11.

[84] Id., at 12, 13.

[85] Explanatory Memorandum, *supra* note 36, at 1, 4, 12.

[86] The House of Peoples' Representatives constituted an inquiry commission in order to properly address the demands of the students. ENA 'Students' Demands Discussed by

regarding their claims which 'failed'.[87] The protest spread to the major high schools in the City for which the Federal Police was ill-prepared. As a result, at least 31 people were killed and several hundreds of people were wounded,[88]and significant damage to property occurred.[89]

The Federal Government, the Ministry of Education and the Federal Police, each issued a separate press release 'advising' students and the general public to calm.[90] Each of those press releases alleged that the incident was incited by opposition political parties and human rights NGOs.[91] The victims who died at the incident were portrayed by the police as vagrants with prior criminal records.[92] The bill was tabled in parliament in less than three years and was shadowed by those events.[93] The Ministry of Justice had taken part in the preparation process of this special penal legislation. The principal actor was the Ministry of Federal Affairs.[94]

4.2 Crimes of terrorism and the Anti-Terrorism Proclamation

The Anti-Terrorism Proclamation No 652/2009 is a special penal legislation. It criminalises certain conducts the content of some of which is clear, while the rest is not quite so. The Proclamation also provides for procedural and

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Standing Committees of the House of Peoples' Representatives' *Addis Zemen*, Addis Ababa, May 3, 2001 (in Amharic), at 1, 7. ENA 'Inquiry Begins into the Causes of Unrest and of Damage Associated to Students' Demands' *Addis Zemen*, Addis Ababa, May 6, 2001 (in Amharic), at 1, 6.

[87] ENA 'The Meeting between Addis Ababa University Students and the Minister of Education Ended without Agreement', *Addis Zemen*, Addis Ababa, April 12, 2001 (in Amharic), at 1, 5.

[88] ENA 'Police Announces 31 People Died Following Students' Protest' *Addis Zemen*, Addis Ababa, April 24, 2001 (in Amharic), at 1, 5.

[89] _____, 'Ethiopian Telecommunication Corporation Reported Property Worth 50 Million Birr Damaged', *Addis Zemen*, Addis Ababa, April 21, 2001 (in Amharic), at 1, 5.

[90] 'Press Statement and Resolution from the Ministry of Education' *Addis Zemen*, Addis Ababa, April 17, 2001 (in Amharic), at 1. 'Press Statement from the Federal Police Crime Prevention Department', Ibid.

[91] Ibid. The Federal Government Press Statement makes explicit reference to, more than once, All Amhara Peoples' Organisation and Ethiopian Democratic Party, from political parties and Ethiopian Human Rights Council from NGOs. Just a few days earlier, on April 8, 2001, Prof. Mesfin Woldemariam, Prof. Andargachew Tesfaye and Dr. Birhanu Nega 'participated' in a students'meeting at the National Lottery hall, for which both Prof. Mesfin and Dr. Birhanu were criminally charged. ENA 'Police Announces…' *supra* note 88, at 5.

[92] Id., at 1, 5.

[93] 'Explanatory Memorandum', *supra* note 36, at 12.

[94] 'Report and Recommendation of the Legal and Administrative Standing Committee and Social Affairs Standing Committee on the Vagrancy Control Draft Bill' (January 21, 2004, in Amharic), at 1.

evidentiary matters. The reasons for adoption of such legislation are indicated in the travaux préparatoires, and *inter alia*, states that "there is no separate law governing such heinous crime" as terrorism.[95] It also states that the laws in force "do not carry appropriate and proportional punishment" for such particularly heinous crime as terrorism.[96]

Even though the degree of participation cannot be ascertained from the parliamentary records, the Federal Police took part in the development of the Anti-Terrorism Proclamation. The other participant in drawing up the bill is the National Intelligence and Security Services.[97] Yet, at the public hearing, it had been stated that between 1985 and 1998 E.C. (1992 to 2004/2005), there were various "terrorist accidents" said to have been committed,[98] and there was no data presented at such hearing, nor was there a report showing how the then existing legal framework failed to address those crimes of terrorism. Leaving aside the propriety of the participation of the police in drawing up a special penal legislation bill, and having regard to its responsibilities of collection of criminal statistics, the failure of the Federal Police[99] in producing data that are said to have necessitated the bill is inexcusable.

The demand for criminal statistics is even dire based on the fact that the State was refusing to adopt anti-terrorism law on the ground that the law then in force was sufficient to deal with acts of terrorism.[100] In fact, there were criminal charges against individuals containing the word 'terrorism' for which defendants were convicted.[101]

4.3 Tax related crimes

It is indicated that there were provisions in the Penal Code and in the Criminal Code which punish conducts that are related to tax, that are referred to as tax

[95] 'Brief Explanatory Memorandum on the Draft Anti-Terrorism Bill' (in Amharic), at 10.

[96] 'Minutes of Public Hearing with Stakeholders', *supra* note 35, at 10.

[97] Id., at 3. The Explanatory Memorandum bear the stamp of the National Intelligence and Security Services; at the Committee hearing, the PM's Chief of Staff and the Federal Police Commissioner and representatives of National Intelligence and Security Services and Ministry of Federal Affairs were present, as resource persons to explain the bill.

[98] Ibid. 'Minutes of Public Hearing with Stakeholders', *supra* note 35, at 10

[99] See *supra* note 17.

[100] See Wondwossen Demissie Kassa(2013) "Examining Some of the *Raisons d'etre* for the Ethiopian Anti-Terrorism Law"in 7 *Mizan L. Rev.,* No 1.

[101] See for instance, *Public Prosecutor v Zaid Ahmed Oumer* (Federal High Court, File No 01178, June 4, 2004); *Public Prosecutor v Beyan Ahmed, et. al.,*(Federal High Court, File No 3139, October 15, 2004); *Public Prosecutor v Mohammed Abdella* (Federal High Court, File No 1137, June 15, 2004); *Public Prosecutor v Ahmed Nour* (Federal High Court, File No 1121, March 26, 2004). In those cases, the charges for conducts of terrorism were based on the provisions of art 252(1)(a) of the 1957 Penal Code.

crimes. However, the Ministry of Finance and Economic Development (MoFED) drafted tax legislation containing penal provisions totally disregarding the penal provision in the Penal Code.[102]

The records of parliamentary hearing do not show any substantive discussion on the content of the penal provisions. The manner of inclusion of penal provisions into the Value Added Tax Proclamation (VAT Proclamation) is problematic. The Income Tax Proclamation was drawn up with its penal provisions.[103] The records of the proceedings do not show any discussion on the penal provisions. However, the records of the hearings on the VAT Proclamation indicate that, the penal provision were not initially included in the VAT Proclamation because the Penal Code provisions were deemed sufficient. However, on the recommendation of the experts (from MoFED), the House Standing Committees decided to incorporate the penal provisions in the Income Tax Proclamation into the VAT Proclamation.[104] The revision was not based on criminal statistics or the lack of it. The parliamentary hearing does not mention any of those criminal statistics. The inclusion of those penal provisions could rather be called arbitrary.

4.4 Engaging in commercial activities without a valid licence

4.4.1 Proclamation No 294/1971

The first legislation that criminalized engaging in commercial activities without license for a commercial activity was the Domestic Trade Proclamation enacted in 1971. It applied on persons whose capital is more than birr 1000, and who operate without a valid domestic trade licence. The punishment was a fine up to one thousand birr or imprisonment not exceeding two months or both.[105] The Penal Code only punished engagement in few professional services, such as, medical services, without proof of competence or license.[106]

4.4.2 Proclamation No 67/1997

Engaging in ordinary commercial activities without a license is made a criminal conduct under Proclamation No 67/1997, as part of the trade regime reform.

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[102] *See* for instance, Value Added Tax Proclamation No 285/2002, Income Tax Proclamation No 286/2002, Excise Tax Proclamation No 307/2002, and Turn Over Tax Proclamation No 308/2002.

[103] 'A Brief Explanatory Memorandum on Income Tax Draft Bill' (in Amharic), at 2, 9. There is no mention of criminal responsibilities in other documents submitted to the House, such as, documents addressing major legal issues, forming part of the technical document.

[104] 'Amendments to the Draft Bill on Value Added Tax', at 1, 2.

[105] The Domestic Trade Proclamation, 1971, art 3(3) and 15(1). Note that the exchange rate was 1 Birr = 1 USD.

[106] Pen Code, art 518(1), (2).

Thus, a person who engages in commercial activities without having a valid license shall be punished with fine equal to double the revenue he earned, and with imprisonment from 3 to 5 years.[107] Obtaining a business license or renewing a license based on false documents is punishable with imprisonment from 7 to 10 years.[108] Moreover, violation of other provision of the Proclamation, or the Regulations or a public notice issued under the Proclamation is punishable with "fine from Birr 3,000 to 5,000, … and with imprisonment from 6 months to 1 year."[109] It was further provided that if there is other severe penalty, that other penalty would be imposed, and this criminal punishment is imposed despite administrative measures. The travaux préparatoires depicts the desire to impose "severe" criminal penalty.[110]

Taking lesson from the 1971 Proclamation, the Federal Government Commercial Registration and Business Licensing Council of Ministers Regulations No. 13/1997, arts 21 and 22 provided that persons who are required to get registration certificate are those with capital of Birr 5,000 and above. The reason for requiring registration was the need for information for the Government.[111] Moreover, renewals are required in order to ensure that competence certificates are still valid, and to create conducive conditions for collection of government revenue because tax clearance is necessary to have the license renewed, and to gather relevant information.[112]

4.4.3 Proclamation No 686/2010

Proclamation No 67/1997 was substituted with *Commercial Registration and Business Licensing Proclamation No 686/2010*. The conducts criminalised in the previous legislation remain criminalised in this Proclamation too. However, the punishments are significantly increased. Thus, engaging in commercial activities without a valid licence is punishable with rigorous imprisonment from 7 to 15 years, fine from Birr 150,000 to 300,000 and confiscation of production or delivery equipment.[113] Obtaining a commercial registration or license or renewing same on false document is punishable with rigorous imprisonment

[107] Commercial Registration and Business Licensing Proclamation No 67/1997, art 46(1).
[108] Id., art 46(2).
[109] Id., art 46(3).
[110] 'Minutes of Public Hearing Organised by Economic Affairs Standing Committee' (February 24, 1997, in Amharic), at 2. The parliamentary hearing records show that all the authorities and resource persons present to explain the contents of the draft bill were from the Ministry of Trade and Industry, and a representative from the Ministry of Justice was mentioned (except, he failed to attend the hearing).
[111] Id., at 6, 9.
[112] Ibid.
[113] Commercial Registration and Business Licensing Proclamation No 686/2010, art 60(1).

from 7 to 12 years and fine from Birr 60,000 to 120,000.[114] Likewise, violation of other provisions of the Proclamation, regulation or public notices that may be issued pursuant to the Proclamation may be subject to rigorous imprisonment from 3 to 5 years and fine from Birr 30,000 to 60,000.[115]

The travaux préparatoires states that a study was conducted between 2001/2002 and 2009/2010. And the bill was drawn based on such study and the Industrial Development Strategy. Further, the objective for the revision on renewal of commercial license is strongly linked with tax payment, because tax clearance is necessary for renewal.[116] However, there is no data or criminal statistics presented in support of the increased sentence. In fact, the travaux préparatoires makes a passing remark in one sentence that "leaving aside the conducive conditions created by the draft bill, appropriate penal provisions are included for fine and imprisonment of those who unlawfully register or renew their license" [translation mine].[117]

At the public hearing organised by the HoPR Trade and Industry Affairs Standing Committee, there were serious objections to the criminal provisions both from the Members of Parliament and representatives of Addis Ababa Chamber of Commerce. The objections include, (a) the penal provisions were said to be borrowed from other countries; however, the maximum penalty in those countries is said to be imprisonment for two years; often, such actions in those countries from which we drew experience are subject to fine and administrative measures;[118] (b) the bill prefers a graver penalty if it is provided for in other legislation which is contrary to the provisions of the FDRE Constitution art 22(2), which prefers the lesser penalty;[119] (c) the minimum fine, i.e., Birr 150,000, for commercial activities without licence is unreasonable because the person may have much less amount of capital;[120] (d) it would be utterly impractical to impose a fine not less than Birr 150,000 while we, at the same time, send such person to jail, a circumstance in which such person would not be able to even provide for his family;[121] (e) the criminal responsibilities are also for violations of directives which are not published in the Negarit Gazeta.[122]

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[114] Id., art 60(2).
[115] Id., art 60 (3).
[116] 'Explanatory Memorandum on Commercial Registration and Trade License Draft Bill' (in Amharic), at 1.
[117] Id., at 12.
[118] 'Minutes of Public Hearing Organised by Trade and Industry Affairs Standing Committee on Draft Bills of Competition and Consumer Protection, and Commercial Registration' (June 16, 2010,in Amharic), at 52, 53.
[119] Id., at 58.
[120] Id., at 58, 59.
[121] Id., at 53.
[122] Ibid.

According to the response from the State Minister:

- the previous Proclamation did not help the Government achieve its ends and "unlawfulness grew rampant".[123]
- The criminal penalties in that Proclamation are "inconsiderable fine and imprisonment".[124]
- This legislation is drafted because "unlawfulness has become so common the Government has to make use of all its power to conduct control, to support those operating within the legal framework to help them become successful, and impose the appropriate punishment on those who chose the unlawful conduct in commerce."[125] [translation mine].

The State Minister further equated engaging in commerce without a valid license with contraband, whose punishment is imprisonment for 7 to 15 years.[126] The legal advisor of the Ministry indicated that directives are essential for the administrative and regulatory work; thus, the Ministry does its best to have those directives published in newspapers. He, thus, gave the impression that their being not published in the Negarit Gazeta is 'not a problem'.[127] The records show after such discussion, the Committee, with few minor editorial changes, recommended to the House that the bill be enacted as law.

4.4.4 Proclamation No 980/2016

The Ministry of Trade believes that Proclamation No 686/2010 had made fundamental changes in the realms of commerce. It was amended several times but after having been tested for more than five years, it was further replaced with Proclamation No 980/2016. The factor stated as reason for the revision was "clarifying" several subject matters, including the penal provisions.[128]

Regarding the penal provision, it is stated in the travaux préparatoires that the penal provisions are short and every penal matter was crammed into those short provisions; and it was found necessary to clarify those general statements of the

[123] Id., at 47.
[124] Id., at 61. Please note that when they were initially adopted, those criminal penalties were referred to as 'severe'. See *supra* note 110.
[125] Id., at 61, 62.
[126] Id., at 26, 27. It is needless to state that contraband is classical crime involving illegal crossing of national border importing or exporting prohibited, or restricted goods or without paying the necessary duties; doing business without a valid license had never been a crime until recently for those with least threshold capital. Yet, trading without a valid license also carries administrative measures, fine and confiscation of production materials.
[127] Id., at 65.
[128] Explanatory Memorandum, *supra* note 77, at 2.

penal provisions.[129] In Proclamation No 686/2010, the criminal conducts were engaging in business activities without a valid license, obtaining or renewing a trade license based on false documents and violation of other provision of the Proclamation or of Regulations and Directives to be adopted based on the Proclamation. These are conducts that continued to be criminalised under art 49(2), (3) and (8), respectively, of Proclamation No 980/2016. The facts constituting the crimes and the punishments are not changed.

Sub-art (1) of art 49 of Proclamation No 980/2016 punishes the preparation or use of "false certificate of commercial registration, business license or special certificate of commercial representation …with fine from birr 150,000…to Birr 300,000…and with rigorous imprisonment from 7 … to 15 … years." The conducts criminalised in this provision were not covered by the provisions of the previous Proclamation that it can hardly be said "clarification".

The contents of sub-arts (4), (5), (6) and (7) are obviously new. Sub-art (4) punishes transferring "business licence to third party by way of sale, lease, donation or in a similar fashion" with fine from Birr 50,000 to Birr 100,000 and rigorous imprisonment from 5 to 10 years. However, if the transfer was made to a foreign national, the punishment would be fine from birr 200,000 to 300,000 and rigorous imprisonment from 7 to 15 years. This conduct had always been a legitimate business practice. When such conduct is criminalised under the disguise of 'clarification' of the penal provisions, the Ministry of Trade did not give any reason both in the travaux préparatoires and at the public hearing. It is stated that regulation of transfer of license is good tool for the tax system.[130] It is also indicated that diaspora Ethiopians are taking advantage of another individual's license.[131] However, there is no evidence offered by the experts.[132]

Sub-art (5) punishes failing to notify change of address to the registering office within a period to be specified in the regulations with fine from Birr 5,000 to 10,000 and with simple imprisonment not exceeding three months. Likewise, sub-art (6) punishes failing to notify the registering office within 30 days of

[129] Id., at 3, 6.
[130] Minutes of the Public Hearing, *supra* note 77, at 10.
[131] Ibid.
[132] Setting aside the justifiability criminalization of such conduct, there appears to be two reasons for this provision. There are business areas restricted only to Ethiopian nationals. However, the Ethiopian diaspora is engaging in this commercial activity restricted to Ethiopians only by leasing trade license. *Fortune* 'Threat of Inadequate Knowledge in Prosecution of Business' Addis Ababa, March 25, 2018, at 21, 36. Further, in 2008 E.C., the Coffee and Tea Agency, had performance audit for coffee export conducted for the years between 2000 and 2007 Ethiopian calendar. Based on those findings of the audit, in not few cases, export standard coffee was purchased by licenses that were transferred to others.

"changes that warrant amendments in the commercial registration pursuant to this Proclamation" with the same punishment. Sub-art (7) punishes refusal to provide information or obstruction of supervision works enforced based on the Proclamation or other legislation adopted under the Proclamation. These provisions were not provided for in the previous Proclamation in any form, and the description of the inclusion of those provisions as 'clarification' is indeed a misrepresentation.

There were two meetings to discuss the bill. The first meeting was between the House of Peoples' Representatives Commercial Affairs Standing Committee and experts of the Ministry of Trade, on June 29, 2016, and the second was a Public Hearing organised by the Standing Committee on July 5, 2016. During the June 29th meeting, members of the House raised questions regarding the penal provisions. During the public hearing for the adoption of Proclamation No 686/2010, about four questions were raised by the representative of the Addis Ababa Chamber of Commerce, all of which were about the fairness and propriety of the severe penal provisions.[133] The Ministry of Trade stated that it is aware of the problems and that even judges have difficulty applying the law. It had revised the law and reduced the punishments but, the Council of Ministers rejected the reduced sentence under the revised draft law.[134]

The records do not show substantive discussion in the public hearing. After the Committee's recommendations with a few editorial corrections, the HoPR adopted the bill into law. Despite several revisions and claims of research, there was no data presented supporting such legislative action.

5. Remarks Regarding the Legislative Reform and the Use of Criminal Statistics

As is the practice elsewhere, the executive controls the lawmaking process; the passing through the parliamentary process is a mere formality.[135] In other systems, those legislations are initiated or effectively controlled by the Ministry of Justice.[136] In Ethiopia, any agency initiates a bill it believes it is qualified to work on. Thus, the legal department transforms itself to legislative drafting

[133] 'Minutes of Meting of Commercial Affairs Standing Committee with Experts from Ministry of Trade on the Commercial Registration Amendment Draft Bill' (June 29, 2016, in Amharic), at 5, 6.

[134] Id., at 12, 13.

[135] Ferrandez, *supra* note 54, at 79. The reduction of constitutional separation of power to a 'fiction' is modestly discussed by Assefa Fiseha (2015) "Legislative-Executive Relations in the Ethiopian Parliamentary System: Towards Institutional and Legal Reform" in J. de Visser, et. al., (Eds.) *Constitution-Building in Africa* (Baden-Baden: Nomos).

[136] Id., at 88

department. The tax legislations, for instance, Proclamation No. 285/2002 and No. 286/2002 (including other tax legislation), were drafted principally by the Ministry of Finance and Economic Development and Ministry of Revenue.[137] The continuously revised Commercial Registration and Business License Proclamations were drafted by the Ministry of Trade.[138] The Vagrancy Control Proclamation No 384/2004 was drawn up by the then Ministry of Federal Affairs and Ministry of Justice.[139] The Anti-Terrorism Proclamation No 652/2009 was prepared by the Federal Police and the National Intelligence and Security Services.[140]

Contrary to the requirements of the Council of Ministers Working Directives, none of the explanatory memorandums were sufficient in explaining the subject matter under revision. Often, there is no background research that explains the existing condition that necessitated the revision of the law and its possible economic, social and institutional implications; no declaration is attached whether the bills comply with the Constitution and other existing norms. In rare occasions where there is a background study, the research only explains the subject matter; it does not deal with the problem it is meant to address, nor does it attempt to justify such legislative action. Finally, none of the background studies contains empirical justification for the legislative action.

The laws highlighted in the preceding section have passed in short cuts. Draft bills are submitted to the Council of Ministers by the respective agencies. Obviously, the Council of Ministers is the most powerful organ with invisible hands reaching to the HoPR; thus, the drafting agency need to convince only the Council of Ministers. Once the Council is convinced, it forwards such bill to the HoPR. The House sends the bill to the relevant Standing Committee, such as, the Legal and Administrative Affairs Standing Committee, the National Security Standing Committee, and the Economic Affairs Standing Committee, and sometimes to joint Committees. Such Committee conducts public hearing; and sometimes there can be a hearing with experts so that the Committee can enhance its awareness on the subject. There is no record whether the draft bills were modified according to the proposals and comments made at such public hearing.

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[137] Minutes of Meeting of the Economic Affairs and Legal Affairs Standing Committees with Resource Persons Regarding the Draft Bill on Value Added Tax' (November 7, 2001, in Amharic), at 2; 'Report and Recommendations from the Budget and Finance Affairs Standing Committee to have the Income Tax Draft Bill Adopted into Law' (July 4, 2002, in Amharic), at 1.

[138] 'Minutes of Public Hearing', *supra* note 117, at 2. 'Minutes of Public Hearing', *supra* note 77, at 2.

[139] 'Minutes of Public Hearing', *supra* note 76, at 1.

[140] 'Minutes of Public Hearing with Stakeholders', *supra* note 35, at 3.

The concerned Standing Committee approves the draft with minor editorial changes, and recommends to the full House for the bill's adoption into law. No records show the parliament's inquiry into the validity of such actions based on normative and empirical justifications; and an inquiry into whether such norms comply with the principle of coherence. Nor is there a record of parliamentary debate on the bills by the full House. Once the bill comes back to the full House, it merely involves an up or down vote.

In drafting the bill, the relevant executive agencies are always partial to themselves in a skewed attempt to making their responsibilities easier. The most obvious is that they desire to enforce their administrative responsibilities at the threat of serious criminal sanctions to the individual. To this end, they incorporate various means that would ease their burden. For instance, the evidence that is often presented in prosecution for tax crimes is the Ethiopian Revenue and Customs Authority auditors' audit report. Therefore, arts 44 and 116 (of the and the Value Added Tax Proclamation No 285/2002 and Income Tax Proclamation 286/2002, respectively) provide that "the burden of proving that an assessment is excessive or that the decision of the authority is wrong lies on the person objecting to the assessment or decision." The Anti-Terrorism Proclamation (art 23) provides for the types of evidence that should be admitted by the court, which otherwise were not. The Vagrancy Control Proclamation (art 6(3)) makes the crime non-bailable offence. The Commercial Registration and Business License Proclamation criminally sanctions violations of any part of the Proclamation and the directive (as it may adopt from time to time). The contents of such directives, apparently, is left to the discretion of the agency.

In spite of the severe penal provisions stipulated in the legislation discussed above, and although the Federal Attorney General is the legal advisor of the Federal Government, its participation in the development of such legislation is minimal, and often totally absent. Article 6(5)(a) of the Federal Attorney General Establishment Proclamation No 943/2016 provides that the Attorney General shall "… ensure that draft laws prepared by government organs are consistent with the Constitution and federal laws". It also has the responsibility to "undertake legal reform studies." This should include legislative impact assessment.

There are also few important facts that surfaced several times. For instance, the punishment for commercial activities without a valid license has progressively increased; renewal of license is closely connected with the maximisation of revenue collection by the government for tax clearance is a precondition for license renewal. The so-called tax crimes entail severe criminal penalty and administrative measures. One can, therefore, observe two routes that concurrently punish tax crimes– one is through the tax legislation and the other is through the commercial registration proclamation.

Ending Remarks

The discussion in the preceding sections shows that the lawmaker adopts laws upon the recommendation of agencies without first establishing the facts or without sufficient normative justification. Moreover, the legislature does not seem to balance its coercive actions with the rights of the individual to be protected against cruel, inhuman and degrading punishment. It also seems that the legislature does not take future circumstances into consideration. Most importantly, the lawmaker does not take post-lawmaking measures. These gaps show that the legislature usually fails to effectively undertake its duty, i.e. – making good laws

The lawmaker uses the criminal law to protect certain legitimate interests when civil and administrative measures are not good enough to protect such interest. Once the criminal norm is in place, it is a matter of common sense that reports of its implementation should be presented for evaluation by the lawmaker. That is how criminal statistics come into play in legislative reform.

The various institutions have the responsibility to collect, analyse and interpret criminal statistics in their respective area of competence. The lawmaker revised various special penal legislation, such as, Vagrancy Control or Anti-Terrorism Proclamations, or administrative legislation containing serious penal provision, such as, tax and commercial license related crimes. When these laws were revised, the lawmaker should have required the criminal statistics relating to the draft laws that were presented to it.

Upon the submission of draft laws, reference is made to the aggravated nature of the events that are alleged to be occurring, but never has any agency presented data. The draft bills are presented to parliament by various administrative agencies (rather than by the Ministry of Justice- currently Federal Attorney General), and they do not have the required criminal statistics. Institutions of justice, i.e., the Court, the Attorney General Office, and the Police, have thus failed to discharge their legal obligations of collection, analysis and interpretation of criminal statistics in the realm of their competence.

Indeed, the lawmaking process appears to be skewed in that, any administrative agency can draw a bill on which it claims competence and submit it to the Council of Ministers. From the Council of Ministers, the bill is sent to the House of Peoples' Representatives, which refers the draft law to the appropriate Standing Committee. Often, the Standing Committee recommends the adoption of a bill into law only with editorial changes. Once, it is presented to the full House, it merely appears to be an up or down vote without debate. Where the lawmaker and the executive are composed of members from a single political party, the 'shared' opinion, indeed comes before evidence and the latter may not be 'necessary.' ■

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