Judicial Reform Pursuits in Ethiopia, 2002-2015:

Steady Concrete Achievements - *versus* - Promise Fatigue

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Abstract

Judicial reform constitutes a sub-program within the Justice System Reform Program (JSRP) which is underway in Ethiopia since 2002. Its targets have been consistently articulated in the 2005 Comprehensive Justice System Reform Program, the First Growth and Transformation Plan and various strategic plans. However, the outcome and impact as, *inter alia*, manifested in *public trust and confidence* seem to be declining. The core problems in the Ethiopian justice system (including the judiciary) that were identified in the 2005 Comprehensive Justice System Reform Program were (a) gaps in accessibility and responsiveness to the needs of the poor, (b) inadequacy of "serious steps to tackle corruption, abuse of power and political interference in the administration of justice," and (c) inadequate funding which "aggravates most deficiencies of the administration of justice". As these problems still persist, I argue that future judicial reform pursuits require a new path which facilitates court-level and institution-level reform through grassroots empowerment including enhanced independence and resource allocation. Subject to justice sector reform harmonization, there should be an independent judicial reform which is not conflated with other components of justice sector reform. It is also argued that justice sector reform should not be subsumed under the Good Governance Reform Cluster which should rather be limited to macro-level harmonization of reform pursuits. In the absence of such measures, the various targets, aspirations and pledges for judicial reform may eventually end up in *promise fatigue* and *regression.*

Key terms

Judicial reform, judiciary, judicial independence, rule of law, GTP, Ethiopia

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Introduction

Development pursuits envisage a predictable, coherent, efficient, effective and accessible justice system which, *inter alia*, ensures contract enforcement, (clearly defined, secure and easily transferable) property rights, access to justice and a normative and institutional setting in the context of *good governance.* The justice system is constituted of a legal and judicial system which are inter-related and whose performance and effectiveness are inter-dependent. "An efficient legal and judicial system which delivers quick and quality justice reinforces the confidence of people in the rule of law, facilitates investment and production of wealth, enables better distributive justice, promotes basic human rights and enhances accountability and democratic governance".[1]

The 2005 Baseline Study Report of Ethiopia's Ministry of Capacity Building, i.e. the *Comprehensive Justice System Reform Program* (CJSRP) [2] states *four* core components and a *fifth* crosscutting component of comprehensive Justice Sector Reform. They are (a) lawmaking and revision; (b) the judiciary; (c) law enforcement which includes prosecutors, the police and the penitentiary system; (d) legal education and research; and (e) information flow within and outside the justice system.

This article is an overview of post-2002 reform pursuits in one of the components of the justice system, i.e., the judiciary. The first section highlights the political and economic factors that influence judicial empowerment. Sections 2 and 3 assesses the judicial reform pursuits since 2002 which are embodied in JSRP, in Ethiopia's Growth and Transformation Plans and in the strategic plan of federal courts for the GTP II period. The fourth section compares the projects under the judicial reform sub-program that was underway during the GTP I period with the projects that relate to the judiciary in the strategic plan of the Good Governance Reform Cluster for the GTP II period. Section 5 briefly indicates the independence of the judiciary in a democratic developmental state, followed by the sixth section which highlights current public perception and trust in the judiciary. The article can inspire further research on specific themes related with judicial reform.

[1] Report and Recommendations of the Working Group for Department of Justice for the 12th Five-Year Plan (2012-2017), Department of Justice, Ministry of Law and Justice, Government of India, September 2011.

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

1. Factors toward Judicial Empowerment

1.1 External-driven –versus- largely domestic judicial reform

The *law and development* projects and pursuits of the 1960s primarily focused on legal education and the *modernization of laws* toward social engineering. They were meant to facilitate the 'modernization' of developing countries through the path undergone by the Global North. The subsequent thinking since the 1980s has espoused wider perspectives such as *rule of law* reform, *judicial* reform and *governance.* As reforms that relate to rule of law including judicial reform envisage political will and the necessary domestic factors for their realization, most of the pledges and declarations expressed in developing countries do not match up with real achievements.

As Santos observes, the USAlD identifies four generations of law programmes which prevailed since the early 1960s. "The first generation focused on legal education and law reform; the second, on basic needs legal aid; the third, on court reform".[3] The fourth generation "is the most ambitious and political in the Agency's terms because it encompasses all the concerns of the three previous generations of programmes and broadens their scope while including them in the design and implementation of country democracy programme".[4]

Santos recalls that "the semi-peripheral countries of Europe, Portugal and Spain lived under an authoritarian regime for four decades" during which "the judicial system was either reduced to an appendage of the government –in politically sensitive areas such as political crimes and labour disputes– or kept a low-profile independence and remained utterly isolated from society".[5] Although the democratic transition of these countries in the 1970s brought about "large institutional changes in the judicial system", it "took a decade for the courts to vindicate a more active role in society".[6] Santos notes that the nature and outcomes of judicial reform in the semi-peripheral countries in Europe was different from the judicial reform outcomes in the "semi-peripheral countries of Central and Eastern Europe" after their democratic transitions in the late 1980s.[7]

The reform of courts in Southern Europe was mainly domestic, which reintegrates the judicial system with "the legal culture and the democratic

[3] Boaventura de Sousa Santos (2002). *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, Cambridge University Press, p. 326 (citing USAID 1994, p. 18).
[4] Ibid.
[5] Id., p. 320.
[6] Id. p, 321.
[7] Id., pp. 321 ff.

tradition of continental Europe".[8] However, the reforms in various countries such as Latin America and Eastern European countries mainly resulted from exogenous factors rather than internal dynamic forces of change. In effect, Santos argues that "under these circumstances, the distrust of law and legal institutions cannot be remedied with quick-fix reform".[9]

This should not, however, undermine the positive role of external factors, because in view of the current global interdependence in various economic, social, technological, informational and political realms, judicial reforms indeed benefit from external interventions and support. Nor can largely external-driven reforms succeed because the effectiveness of institutional reforms mainly depends on domestic factors and internal dynamics.

The role of domestic realities in judicial reform can be illustrated by the observations of Faundez in Kazakhstan regarding the adverse impact of "chronic political instability or faltering political commitment" which is "exacerbated by unrealistic and exaggerated expectations".[10] Even though "the objectives of the project was to strengthen judicial independence", the project "failed to take into account that the political elites had no experience of constitutionalism and hence could not be easily persuaded to accept the notion of separation of powers".[11]

According to Faundez a more practical approach in the case of Kazakhstan would have been "less ambitious, but achievable intermediate goals". It is, however, to be noted that the end in view was not problematic. Instead, it was the largely external-driven approach and inadequate attention to the objective realities that brought about the challenges in achievement because the most effective approaches are mainly domestic-driven reforms that can meanwhile obtain external support and partnership.

1.2 Europe's path to rule of law

During the Middle Ages of Western Europe, informal institutions facilitated exchanges and economic activities. As Dam observes, one of the early European substitutes for rule of law in long-distance trade was *community responsibility* in which "city-states (communities) would hold all members of a foreign

[8] Boaventura de Sousa Santos (1999). The GATT, Law and Democracy: (Mis)trusting the Global Reform of Courts, in J. Feest (ed.) Onati Papers 7: Globalization and Legal Cultures, IISL.

[9] Santos (2002), *supra* note 3, p. 322.

[10] Julio Faundez (2009). 'Rule of Law or Washington Consensus: The Evolution of the World Bank's Approach to Legal and Judicial Reform' in Amanda Perry-Kesaris (ed), *Law in the Pursuit of Development*, London: Routledge 2010. [Citing Kazakhstan (2003). Implementation Completion Report on a Loan (US $ 16.5 million) for a Legal Reform Project (World Bank)]

[11] Ibid.

community responsible when any member of that foreign community cheated, or failed to pay a debt to, a local citizen". [12] In case "the foreigner refused to make compensation, goods of that foreigner's compatriots within the local community would simply be impounded for the benefit of the local citizen. In effect, the presence of a debtor's compatriots provided *de facto* collateral".[13]

Even though enforcement by a third party should have been pursued, "no appropriate third party was available where the two communities were not subject to a common sovereign. Neither Italy nor Germany had a single ruler because they were not unified states".[14] Similar practices of "community responsibility system played a role in England as well" because the centralized legal system created by the Normans only covered "the part of England subject to royal control through traveling judges" and "it was a costly and uncertain form of third-party enforcement".[15] As soon as such enforcement became possible, in England, the "Statute of Westminster I of 1275 outlawed the community responsibility system among communities within England", and this practice was substituted by a voluntary registration system "in which debtor and creditor could jointly register a debt, thereby allowing designated local officials to foreclose on the movable property of the debtor in the case of nonpayment [FN10]".[16]

Boycotting was another means of retaliation against deceits in contracts. "Some guilds created what amounted to a multilateral system of boycotting foreign communities whose citizens cheated, stole from, or imprisoned guild members".[17] The more advanced system was based on reputation rather than boycott in which "local traders within a town could rely on local knowledge and experience based on past trading (in other words, on reputation)" thereby, *inter alia*, leading to trade through agents with reputation. Even after the emergence of the nation states of Europe (after the 1648 Treaty of Westphalia), challenges in uniform and predictable adjudication and the vested interests of the monarchy rendered "the transition to a rule-of-law state in most countries" gradual and incremental, and in effect, this involved "an evolution over several centuries".[18] Rule of law did not thus exist in Medieval Europe and it took centuries to have full-fledged development. This does not, however, render rule of law irrelevant

[12] Kenneth W. Dam (2006). *The Law-Growth Nexus: The Rule of Law and Economic Development*, Brookings Institution Press, Washington DC, p. 73.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Id., p. 74 citing Theodore F. T. Plucknett (1949). *Legislation of Edward I*. Oxford University Press, pp. 138–43.
[17] Ibid.
[18] Id., p. 78.

for economic development because even if economic activity can take place in its absence, "rule of law is essential to the efficient functioning of a modern economy".[19]

Unlike Europe's experience, centuries of evolution toward rule of law were not necessary in the USA, Canada and Australia which transplanted it from Europe. The same holds true for other countries subject to the *caveat* that while USA, Canada and Australia were largely countries in which European settlements were predominant, other states which transplanted rule of law had different settings that enhanced the challenges in and complexities of the pursuits.

1.3 Political and economic challenges in judicial empowerment

Judicial independence involves "judicial budget autonomy, the existence of a uniform appointment system, stable terms, disciplinary system for court personnel, and adequate salaries and retirement benefits for judges".[20] To this end, judicial reform programs include "transparent methods of appointment, removal and supervision … in order to ensure personal and functional independence for judges".[21]

In developing countries and other transitional systems, there are two major challenges in *rule of law* and *judicial reform* pursuits. The first challenge relates to the interest of political groups while the second is attributable to resources. Carothers states that the "primary obstacles to such reform are not technical or financial, but political and human. Rule-of-law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law".[22]

> Respect for the law will not easily take root in systems rife with corruption and cynicism, since entrenched elites cede their traditional impunity and vested interests only under great pressure. Even the new generations of politicians arising out of the political transitions of recent years are reluctant to support reforms that create competing centers of authority beyond their control.[23]

Magalhães notes that "judicial institutions in emergent democracies are shaped primarily by the strategies of dominant political actors who attempt to maximize the congruence of the judiciary with their interests and its

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[19] Id., p. 72

[20] Maria Dakolias (1996). *The Judicial Sector in Latin America and the Caribbean Elements of Reform*, The World Bank, Washington DC, p. 20.

[21] Ibid

[22] Thomas Carothers (2006). 'The Rule of Law Revival', in *Prompting the Rule of Law Abroad: in Search of Knowledge*, Carothers ed., Washington DC, Carnegie Endowment for Peace, p. 4.

[23] Ibid.

responsiveness to their priorities".[24] Political actors who are in power have vested interest in "the likelihood of judicial decisions that favor their interests". To this end, they use the "rules regarding the management of judicial careers" in order to "influence the responsiveness of judiciaries to dominant political actors". The influence of the executive in judicial careers includes promotion, assignment and recall that "can be used to condition judicial behavior".[25]

In culturally divided polities, traditionally hegemonic groups can have interest in promoting judicial empowerment. This is because rule of law and empowered judiciary can be effective safeguards against prospective pressure by political actors with majority control of executive and legislative state power. Based on the assessment of "the political vectors behind constitutional reform in Israel (1992), Canada (1982), New Zealand (1990), and South Africa (1993)" and upon examining "the political origins of these four constitutional revolutions", Hirshl observes that "judicial empowerment is in many cases the consequence of a conscious strategy undertaken by threatened political and economic elites seeking to preserve their hegemony vis-à-vis the growing influence of 'peripheral' groups in crucial majoritarian policymaking arenas". According to Hirshl, such "conscious judicial empowerment is likely to occur (a) when the judiciary's public reputation for political impartiality and rectitude is relatively high, and (b) when the courts are likely to rule, by and large, in accordance with the cultural propensities and policy preferences of the traditionally hegemonic elites".[26]

The first core factor in judicial independence is *political will*, because effective judicial independence requires the "de-politicisation of the process by which judicial personnel are appointed and removed".[27] Moreover, "the judicial branch should be financially and administratively independent from executive branch control" and the courts should be empowered "to declare executive and legislative actions unconstitutional".[28]

The second major challenge in the pursuits toward judicial empowerment is inadequacy of resources, remuneration and facilities that have adverse impact on

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[24] Pedro C. Magalhães (1999). "The Politics of Judicial Reform in Eastern Europe". *Comparative Politics*, Vol. 32, No. 1 (Oct., 1999), p. 43.

[25] Id., p. 44.

[26] Ran Hirschl (2000). "The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions". *Law & Social Inquiry*". Vol. 25, No. 1 (Winter, 2000), p. 91.

[27] Bruce M. Wilson, Juan Carlos Rodríguez Cordero and Roger Handberg (2004). "The Best Laid Schemes ... Gang Aft A-Gley: Judicial Reform in Latin America: Evidence from Costa Rica". *Journal of Latin American Studies*, Vol. 36, No. 3 (Aug., 2004), p. 514. Footnotes omitted.

[28] Ibid.

the level of professionalism, integrity, retention and performance of judges. Europe's experience shows causal reciprocity between economic development and judicial independence (in the context of rule of law and robust legal profession). However, developing countries are sailing through a global economy which necessitates rapid institutional reforms. The paradox is that the advance in institutional competence corresponds with higher levels of economic development.

Chang states the role of institutions such as an independent judiciary in relation with "the *functions* that they perform (such as rule of law, respect for private property, government effectiveness, enforceability of contracts, maintenance of price stability, the restraint on corruption)".[29] He notes that the causal relationship between institutions and economic development should not ignore "the important possibility that economic development changes institutions".[30] Yet, he "does not deny the role of institutions in development but envisages a dual and reciprocal relationship between economic and institutional development".[31]

According to Wilson *et al*[32] "the assumed link between the rule of law and economic development predates the current round of judicial reform" and it has long intellectual history as documented by "Rick Messick".[33] They state Messick's observations that:

> this argument was first made by a fifteenth-century English jurist, Sir John Fortescue, later by the eighteenth-century Scottish economist Adam Smith, subsequently by the nineteenth-century German sociologist, Max Weber, and currently by neo-institutional economists such as Douglas North, all of whom outline the important link between a well functioning judicial system, the rule of law and free market economic development. According to this reasoning, which is currently accepted by international development agencies, any country following the rule of law reforms advocated by these institutions should experience free market economic development as predicted.

Dam raises the same question whether independent legal institutions enhance economic development or the vice versa. In the context of the judiciary, he observes that with more money [that can be available in the course of economic

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[29] Ha-Joon Chang (2010). "Institutions and Economic Development: theory, policy and history", *Journal of Institutional Economics* (2011), 7:4, p. 485.
[30] *Ibid*, p. 476
[31] Elias N. Stebek (2012). "Ambiguities and Inconsistencies in the Prescriptions toward Development". *Mizan Law Review*, Vol. 6, No. 2, p. 319.
[32] Wilson et al, *supra* note 27, p. 508.
[33] Ibid, *citing* Richard E. Messick (1999). 'Judicial Reform and Economic Development: A Survey of the Issues,' The World Bank Research Observer, Vol. 14, N o. 1.

development] "judges can be paid more and be provided with … better libraries, thereby insulating them better against political pressures and the temptation of bribes".[34]

1.4 State legitimacy as a factor in judicial empowerment or disempowerment

State legitimacy under absolute monarchy or communism emanates from political myth. While the absolute monarch claims to be "*Elect of God*", Marxist governments claim legitimacy from an ideology which pledges to resolve the contradiction between *social* production and *private* appropriation under capitalism, and in effect, the ideology advocates for working class dictatorship represented by the communist party. Military regimes that usurp state power may attribute their legitimacy to the corruption, inefficiency and atrocities of earlier regimes, and they usually present themselves as provisionally indispensable during the path toward elections and democratization. These categories of governments have vested interest against judicial independence whenever such empowerment is in tension with their interests.

There are some authoritarian and semi-authoritarian regimes that influence the judiciary only in selected cases which they consider as 'politically sensitive'. Where interventions in 'politically sensitive' cases are subtle, most citizens may not realize them. Yet, the impact of executive intervention which is initially prompted by political interest gradually nurtures widespread corruption and influences the judiciary's organizational sub-culture. Eventually, this corrodes the impartiality of courts and extends to court cases that purely involve private citizens.

As judicial reform is an incremental process, its strength and magnitude depend on the ideas of and commitment to constitutionalism commensurate with the political, social and economic realities. Ideas "were critical factors driving judicial empowerment ([in] Turkey, Israel, Canada, and the United Kingdom)", and they "were part of a wider set of forces driving judicial empowerment, such as the case of Spain, in which a process including opposition political parties was key". [35]

Woods and Hilbink further observe that "rational-strategic approaches have tended to emphasize politicians' or judges' abilities to read the implications of current events for predicted changes in the future".[36] In addition to such possibilities, "those who supply judicial empowerment may do so reactively, as

[34] Dam, *supra* note 12, p. 52.
[35] Patricia J. Woods & Lisa Hilbink (2009). 'Comparative Sources of Judicial Empowerment: Ideas and Interests'. *Political Research Quarterly*, Vol. 62, No. 4 (Dec., 2009), p. 750.
[36] Ibid.

a response to past experiences that they want to prevent from reoccurring".[37] Woods and Hiblink suggest that "judicial empowerment is a process that often occurs over time rather than through discrete, momentary changes".[38]

A case in point is the change that is underway in China's judiciary. China does not claim state legitimacy from constitutional democracy, but from the ideology of "socialism with Chinese characteristics" which blends communism with market economy. Yet, there are trends of change in the scope of judicial functions mainly owing to the demands of economic activities. For example, China's rating in contract enforcement (according to the June 2015 World Bank data) is commendable.

According to Peerenboom, courts in China "handle more than 8 million cases a year" and judicial independence "is not an issue in many cases, nor is the source, likelihood, or impact of interference the same across cases".[39] As Peerenboom observes, China pursues "a two-track approach to legal development that emphasizes commercial law while imposing limits on the exercise of civil and political rights". In this regard, he notes the need to identify the "costs of this gradualist approach" and poses questions whether China will "be able to maintain and deepen the reform agenda", or whether the reform process will "stall, leaving China another example of a dysfunctional middle-income state that once showed great promise".[40]

Ji Weidong raises a similar question regarding the way forward in China and observes that China is at cross-roads. He suggests that "the critical nexus of institutional designing of good governance is an independent judiciary following the principle of procedural fairness".[41]

> [I]t is necessary for China to first establish the courts' authority through judicial reforms, laying the institutional foundation of rule-of-law. … More importantly, an independent judiciary functions as a neutral arbiter of conflicting interest groups and a third-party enforcer of contracts, which enhances the predictability of market transactions and safeguards fair competition. Compared with structural shift of political power, judicial reform is relatively less difficult and more practical. … This roadmap, of

[37] Ibid
[38] Ibid.
[39] Randall Peerenboom, in *Judicial Independence in China*. R. Peerenboom, Editor (2010), Cambridge University Press. (*citing* Randall Peerenboom, *China Modernizes: Threat to the West or Model for the Rest?* (London and New York: Oxford University Press, 2008). pp. 3, 4
[40] Id., p. 4.
[41] Ji Weidong (2013), 'The Judicial Reform in China: The Status Quo and Future Directions', *Indiana Journal of Global Legal Studies*, Vol. 20, No. 1 (2013), p. 185.

> course, has preconditions, that is, that the ruler has adequate practical rationality and that society reaches consensus on rule-of-law.[42]

In the Ethiopian context, the roadmap is already articulated in the FDRE Constitution which expressly provides for *rule of law* and *judicial independence*. The preamble of the Constitution, *inter alia*, declares a "political community founded on the rule of law". The Constitution guarantees an independent judiciary (Art. 78/1), and states that judicial powers are vested in the courts (Art. 79/1). According to Article 79(2), "Courts of any level shall be free from interference of influence of any governmental body, governmental official or from any other source." Article 79(3) further guarantees judicial independence by providing that "Judges shall exercise their functions in full independence and shall be directed solely by law". Steady pursuits toward *rule of law* and *judicial reform* that target at the attainment of the standards enshrined in the Constitution are among the duties of the state. These pursuits are not thus options or executive discretions in Ethiopia, but mandatory constitutional guarantees which are among the factors that determine state legitimacy.

1.5 Rule of law –versus- rule by law

The United Nations Security Council defines *rule of law* as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards". UNSC's definition further requires "measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency".[43] It is this roadmap of *rule of law* and *judicial independence* that Ethiopia has pledged to pursue under the 1995 FDRE Constitution.

In spite of Peerenboom's arguments (highlighted earlier) regarding China's march in the 'rule of law' landscape, what China can utmost attain (under its current ideology) is '*rule by law*' rather than '*rule of law*'. As Carothers observes:

> The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as

[42] Ibid.

[43] United Nations Security Council (UNSC), *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004), UN Doc S/2004/106, para. 6.

> universal human rights over the last half-century. … The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.[44]

Carothers criticizes the narrow scope of '*rule by law*' in regimes which "focus on the regular, efficient application of law but do not stress the necessity of government subordination to it. In their view, the law exists not to limit the state but to serve its power". [45] He states that this narrow conception is more accurately "characterized as rule by law rather than rule of law".[46]

Moustafa and Ginsburg argue that in the efforts of authoritarian regimes for legitimacy they "often seek to justify their continued rule through the achievement of substantive outcomes, such as income redistribution, land reform, economic growth or political stability in post-conflict environments". According to Mustafa and Ginsburg, such authoritarian rulers "may also attempt to make up for their questionable legitimacy by preserving judicial institutions that give the image, if not the full effect, of constraints on arbitrary rule".[47] They further note that such states may strive to make use of courts to "maintain social control, attract capital, maintain bureaucratic discipline, adopt unpopular policies, and enhance regime legitimacy".[48]

Courts under such regimes may "also have the potential to open a space for activists to mobilize against the state" [49], and synergistic alliances sometimes form with judges who also wish to expand their mandate and affect political reform". Under such circumstances, "authoritarian rulers work to contain judicial activism through providing incentives that favor judicial self-restraint, designing fragmented judicial systems, constraining access to justice, and incapacitating judicial support networks".[50] However, such efforts "may not be completely effective" and may cause "a lively arena of contention" out of what seems to be "the least likely environment for the judicialization of politics".[51]

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[44] Carothers, *supra* note 22, p. 4.
[45] Id., p. 5.
[46] Ibid.
[47] Tom Ginsburg & Tamir Moustafa, eds. (2008). *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press (Introduction: The Functions of Courts in Authoritarian Politics, by Moustafa & Ginsburg, p. 5).
[48] Id., p. 21.
[49] Ibid.
[50] Ibid.
[51] Ibid.

2. Post-2002 Justice System Reform Pursuits under JSRP and GTP I

2.1 Justice system reform initiatives and challenges, 2002-2005

Ethiopia's Justice System Reform Program (JSRP) "was established in 2002, under the authority of the Ministry of Capacity Building, to assess the performance of the various institutions of justice and to propose appropriate reforms".[52] At the outset of the reform initiatives, a workshop was organized by the Ministry of Capacity Building which had 166 participants drawn from various stakeholders and international experts in the field. [53] As Anne Lise Sibony noted during her presentation at the workshop, assessment of justice reform "is about measuring outcomes, impact of policies as opposed to mere measurement of inputs (funds invested, number of people working on a programme) or output (e.g. number of cases handled, number of hours taught in an education programme)".[54]

Based on the experience of State courts in the United States, she states the most comprehensive system for court assessment in the US, i.e. the Trial Courts Performance Standards (TCPS). It includes 22 standards that are covered under five areas of performance, namely (a) access to justice, (b) expedition and timeliness, (c) equality, fairness and integrity, (d) independence and accountability, and (e) public trust and confidence.[55] Even though the twenty-two measurement standards in TCPS cannot be readily used in all countries, they provide "a methodology to assess the actual functioning of courts".[56] These measurement standards assess "a wide range of aspects, from very material ones, such as audibility of court debates to more substantial ones such as the conformity of rulings with the law". They cover "the organizational quality of the courts" and further assess "personal and professional quality of judges and staff and substantial quality of court work".[57] These standards can indeed be customized to the objective realities of various settings. It must, meanwhile, be noted that the five areas of performance under TCPS are embodied in the vision, mission and values of Ethiopian courts stated in Section 4.3 of this article.

Sibony notes the criticisms against comparing performance among courts and she states that the assessment does not negate the independence of the judiciary

[52] CJSRP, *supra* note 2, p. 48.
[53] Ministry of Capacity Building, *Justice Reform System in Ethiopia: Proceedings of the Workshop on Ethiopia's Justice System Reform*, Africa Hall, 7-8 May 2002, pp. 205-211.
[54] Id., p. 74.
[55] Id., p. 76.
[56] Id., p. 77.
[57] Ibid.

because the standards "were elaborated by a commission consisting of a majority of judges (including a court administrator and a few academics), and [because they are] meant to be implemented by the courts." She further indicated that "the results are not intended to be known to the executive branch".[58] This does not, however, mean that courts will be non-transparent, and this statement merely indicates that reporting to the executive branch is not among the targets of court assessments.

The 2005 Comprehensive Justice System Reform Program was an outgrowth of the *Justice System Reform Program* which was formulated in 2002. "In a document published in April 2002[59], the JSRP identified a number of major problems hindering the machinery of justice". The document looks into the justice system as a coherent whole and it notes that "fragmented and piecemeal approaches in reforming and building the capacity of justice institutions could not solve all problems and bring the intended results". [60] To this end it calls for "effective resource utilisation in the sector" which can "be achieved by working towards a comprehensive justice system reform program".[61]

This holistic approach corresponds with the core themes stated in the World Bank's "*Initiatives of Legal and Judicial Reform*", 2002.[62] It suggests the following:

> Laws must simultaneously incorporate world-class best practices and be tailored to the particular country. Wholesale importation of foreign laws cannot take root when the laws are alien to the culture and values of the people. Well-drafted laws themselves are not self-executing. Complementary institutions and well-trained staff must be present to implement those laws. The judiciary must have independent judges with the utmost professional integrity; law schools need to educate the country's lawyers, making them better professionals; legal services must reach the poor and the vulnerable. In sum, these pillars are the underpinnings of a holistic approach to legal and judicial reform projects.[63]

Two years later, the World Bank's 2004 assessment on Ethiopia's legal and judicial sector reiterated the need for holistic approach in justice system reform.[64] With regard to the judiciary, the assessment mainly focused "on issues concerning the qualifications, training, and selection of judges, judicial independence and accountability at state and federal levels, and, to a much

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[58] Ibid.
[59] Justice System Reform Program, Ministry of Capacity Building, Addis Ababa, April 2002
[60] CJSRP, *supra* note 2, p. 48.
[61] Ibid.
[62] World Bank (2002), *Initiatives in Legal and Judicial Reform*, Washington DC.
[63] Id., pp. 15, 16.
[64] World Bank (2004), *Ethiopia: Legal and Judicial Sector Assessment*. Washington DC.

lesser extent, certain issues regarding basic court functions and administration".[65] The assessment states that "In general, the judicial branch in Ethiopia suffers from dismal conditions of service, staff shortages, a lack of adequate training, debilitating infrastructure and logistical problems".[66]

It also notes a "long history of centralized governmental authority and a judiciary subjugated to the executive branch" that "has fostered a weak judicial branch with reduced capacity to exercise genuine independence, as well as a reticence of other branches to treat the judiciary as either truly independent or co-equal".[67] The assessment thus suggests the need to address and overcome "various practical and structural impediments to judicial independence", and it identifies four categories of issues, namely, "constitutional decision-making authority in the parliament instead of the judiciary, the composition of the Judicial Administration Commissions, independence issues at the federal judicial level, and independence issues at the state judicial level".[68]

The 2005 CJSRP identified the following three core problems with regard to Ethiopia's justice system including the judiciary:

> *Firstly*, it is neither accessible nor responsive to the needs of the poor. *Secondly*, serious steps to tackle corruption, abuse of power and political interference in the administration of justice have yet to be taken. *Thirdly*, inadequate funding of the justice institutions aggravates most deficiencies of the administration of justice. [69]

These challenges require enhancing access of the poor to justice, addressing the issues of corruption, abuse of power and interference in the administration of justice, and the need for adequate funding of justice institutions. With regard to judicial independence, the Baseline Study reads:

> The perception of the independence of the Judiciary is very low. The operation of the courts is managed and supervised by the court presidents who therefore act both as judges and administration officials accountable to the President of the Supreme Court. Potentially this compromises their independence. Besides, the process of selection and promotion of judges is insufficiently transparent and lacks inputs from other legal professions. The same can be said of performance evaluation.[70]

The CJSRP states the gaps in judicial training, the weaknesses in case management, the substantial increase in caseload during the years that preceded

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[65] Id., p. 10.
[66] Ibid.
[67] Id., p. 19.
[68] Ibid.
[69] CJSRP, *supra* note 2, p. 14.
[70] Ibid

the study, and limited access to all kinds of legal information.[71] According to CJSRP, "the judges' poor working conditions threaten their independence, reduce their efficiency and constitute incentives for corruption".[72]

Ato Mandefrot Belay who was head of the Justice System Reform Program Office at the Ministry of Capacity Building (during the initial years of the reform) had duly noted the following, regarding the pace and achievements of the justice system reform pursuits (which includes the judiciary):

> One of the main challenges in the implementation of the Justice System Reform Program has been its complexity and the desire to undertake many reform projects in a short time. Each of the five components of the program are wide in scope requiring change and reform in the legal framework, institutional arrangement, streamlining working systems and procedures and institutional coordination. The Justice System Reform Program attempted to work on all these at once and in a short time. Annual implementation plans and accomplishment targets were often highly ambitious and sometimes unrealistic. [FN].[73] ... Big projects are usually difficult to manage and co-ordinate and hence, tend to fail. Such risks are usually mitigated by starting small and progressing in phase. Although the JSRP has not failed, it has lagged behind in many of its components.[74]

2.2 Elements of judicial reform under GTP I: Strategic directions, objectives and targets

Section 7.3 of GTP I (2010/11- 2014/15) deals with the justice sector. It states the following *strategic directions* of the justice sector:

> The overall strategic direction for the justice sector is to contribute to establishing a stable democratic and developmental state. Contributions made by the justice sector in this direction, will be to establish a system for citizens to access judicial information and ensure that the justice system is more effective. Steps will be taken to ensure that implementation and interpretation of laws are in conformity with the Constitution; where they are not, they will be amended. The independence, transparency and accountability of courts, and of the judicial system as a whole, will be assured. Law enforcement

[71] Ibid.

[72] Ibid.

[73] [FN 29] For example in 2004/2005 budget year, it was planned to implement all court reform projects in 721 court sites throughout the country. Actually, only 72 courts were covered in that year. Similarly, when revision of the codes started the plan has been to complete revision of all codes in two years. Revision of most codes has actually taken more than seven years.

[74] Mandefrot Belay (2008), "A Review of the Ethiopian Justice System Reform Program ", in *Digest of Ethiopia's National Policies, Strategies and Programs*, Taye Assefa, Editor, Forum for Social Studies, Addis Ababa, p. 442.

agencies will be strengthened by strengthening human resource skills and adequate equipment….[75]

During the plan period of GTP I, the *objectives* of Ethiopia's justice sector were "to strengthen the constitutional system and ensure the rule of law, make the justice system effective, efficient and accessible as well as more independent, transparent and accountable". [76] The objectives further included consolidating "the process of creating a democratic, stable and strong federal system that ensures peace and security of citizens". [77]

GTP I stated categories of targets that were expected to be achieved during the period 2010/11-2014/15. It also had stated the implementation strategies of the targets. Although the categories of targets were stated in paragraphs, *fifty-three* targets can be identified under the ten categories stated in GTP I. Out of the eight *targets* that can be identified from the paragraph that deals with *human resource capacity development*,[78] (i) pre-service training for newly appointed prosecutors and judges; (ii) short-term training "at least once a year for judges and prosecutors serving at all levels ranging from Woreda to Federal Supreme Courts" and other targets are related with the judiciary.

The second category of targets under GTP I aimed at *improving the transparency and accountability of the justice system.*[79] The third category of targets expressly and specifically referred to the judiciary. [80] The *enhancement*

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[75] Ministry of Finance and Economic Development (2010), *Federal Democratic Republic of Ethiopia, Growth and Transformation Plan*, 2010/11- 2014/15, Volume I, Main Text GTP I. English Version, November 2010, Addis Ababa, page 101.

[76] Id., p. 102

[77] Ibid.

[78] Ibid.

[79] Ibid.

The *six targets* under this category addressed the *independence, transparency and accountability of the judiciary.* It pledged: (i) full establishment of a system that enhances transparency and accountability; (ii) establishing a mechanism to evaluate the effectiveness of the professionals; (iii) making ethical principles known and so that they can be fully implemented by the professionals involved; (iv) strengthening complaint handling offices; (v) establishing and implementing effective and cost saving resource management system; (vi) establishing strong monitoring, evaluation and support systems; and (vii) putting in place hearing process in fully open courts. These targets are generic and were thus applicable to all components of the justice sector including the judiciary.

[80] Ibid.

The *six targets* under this category addressed the *independence, transparency and accountability of the judiciary.* It pledged:

i) to establish a system to ensure accountability, while guaranteeing the judiciary's independence;

of service accessibility (six targets) constituted the fourth category of targets under GTP I.[81]

The *fifth* category addressed seven targets on *the rehabilitation of prisoners*.[82] The remaining five categories of targets of the justice sector under GTP I dealt with *strengthening the federal system*[83] (seven targets); *increasing public participation*[84] (two targets); *improving sector communication* [85] (two targets); *enhancing the use of ICT in the reform process* [86] (six targets) which include the establishment and putting in use a national integrated justice information system (NIJIS); and *ensuring the mainstreaming of cross cutting issues in the justice sector* [87] (two targets) with regard to rights of women, children and persons living with HIV/AIDS.

ii) appointment of judges based on competence and ensure fair regional and gender representation;
iii) to expand the performance evaluation system for judges, ensuring the continuity of the evaluation system and improving the screening process;
iv) to establish a system 'for the speedy resolution of disciplinary matters that are brought before the Judicial Administration Council';
v) improvements 'based on consultations with and contributions from service users and stakeholders'; and
vi) timely availability of cassation decisions and laws to judges.

[81] Id., pp. 102, 103.
These targets aimed at (i) providing 'standardized accommodation in which justice agencies and courts can work in an integrated manner and which are more accessible'; (ii) expanding the 'initiatives to provide the services of the courts throughout the year' to all courts, and the provision of court 'services 24 hours-a-day'; (iii) Full implementation of 'efforts that have been started to make the courts more accessible to women and children' and expanding same 'to all courts in the country'; (iv) expanding and implementing the 'initiatives that have been started to make the court environment friendlier for users'; (v) providing 'adequate legal counsel, aid and translation services' to indigent litigants; and (vi) increasing the number of judges to ensure that it 'corresponds to the size of the population they serve.'

[82] Id., p. 103.

[83] Ibid.

[84] Ibid.

[85] Ibid.

[86] Ibid.

[87] Ibid.

3. Judicial Reform Components in GTP II

3.1 GTP II's evaluation of performance during GTP I

The performance of GTP I is assessed in Part I of GTP II (December 2015),[88] under Section 5 titled *Capacity Building and Good Governance* (**የማስፈጸም አቅም ግንባታና መልካም አስተዳደር**). Subsection 5.2 (titled Developmental Good Governance/ **ልማታዊ መልካም አስተዳደር**) devotes two paragraphs which specifically make reference to the justice sector. The word *developmental* as a qualifier for good governance seems to be redundant in accompanying 'good' because good governance naturally enhances and facilitates development. Adjectives qualify nouns and the usage of the qualifier 'developmental' to 'good governance' gives the inference that there can be good governance which is not developmental.

One of the paragraphs in Subsection 5.2 that evaluates the performance of the justice sector during GTP I embodies ten elements out of which the last two elements[89] specifically refer to the judiciary. GTP II identifies various gaps in its evaluation of the justice sector's performance during GTP I. [90] These gaps relate to all components of the justice sector. The last two paragraphs of the sub-section (i.e. Subsection 5.2) on good governance deal with the public service in general and the role of the Anti-Corruption Commission in good governance.

The shortcomings of the earlier (April 2015) Draft GTP II are repeated in GTP II (December 2015) with regard to the evaluation of the performance of the

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[88] **የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ፣ የሁለተኛው አምስት ዓመት የዕድገትና ትራንስፎርሜሽን ዕቅድ** (2008-2012)፣ **ጥራዝ 1፣ ዋና ሰነድ፣ ብሔራዊ የፕላን ኮሚሽን፣ ታህሳስ 2008፣ አዲስ አበባ፡፡**,
Federal Democratic Republic of Ethiopia, Second Five Year Growth and Transformation Plan (2015/16- 2019/20), Volume 1, Main Text, National Planning Commission, December 2015, Addis Ababa (Amharic version)

[89] Id., p. 40 paragraph 3. The two sentences which refer to the judiciary state that:
- 'The Constitution ensures judicial independence and at the same time makes it accountable in accordance with the law, and positive achievements have been accomplished with regard to judicial independence'.
- 'There are developments with regard to enabling the judiciary to be subject only to the law, and to enable courts operate free from any influence particularly interference and pressures from the executive, and at the same time free from any external interference or pressure'.

[90] Id., p. 40 para 4.
The gaps include (i) problems regarding attitudes and professional competence; (ii) various factors that are attributable to corruption and gaps in impartiality which adversely affect justice and the rule of law; (iii) gaps in harmonizing the capacities of various justice sector institutions that have inter-dependent functions; (iv) the need to strengthen the justice sector institutions closer to the public in the lower administrative units; and (v) the need to give due attention to enhance the accessibility, efficiency, transparency and rule of law.

justice sector during GTP I. The evaluation was expected to follow the classification of the *fifty three* targets of GTP I so that the level of performance and challenges could be objectively and clearly assessed.

3.2 Judicial Reform Components in GTP II

3.2.1 Targets in the earlier Draft GTP II (April 2015)

In Part 2 of the earlier Draft GTP II (April 2015 version)[91], the third section of Chapter 3 was titled 'Major Targets' (**ዋና ዋና ግቦች**). Out of the nine targets that can be identified from the *second paragraph*, the six targets were related to the judiciary. [92] Even though the element which had pledged to conduct research and implement "a judicial policy in tune with the concept of the developmental state" is omitted in GTP II (December 2015), it deserves attention. It is thus discussed in the fifth section of this article which examines whether democratic developmental statehood warrants intervention in the independence of the judiciary. Ten targets can be identified from the *third paragraph* five of which were directly or generally related to the judiciary. [93] Three out of the five targets in the *fourth paragraph* in the April 2015 Draft were also related to the judiciary.[94]

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[91] **የኢትዮጵያ ፌዴራዊ ዴሞክራሲያዊ ሪፐብሊክ፣ የሁለተኛው አምስት ዓመት** (2008-2012) **የዕድገትና የትራንስፎርሜሽን ዕቅድ የመጨረሻ ረቂቅ፣ ሚያዝያ** 2007፣ **አዲስ አበባ።**
Ethiopian Federal Democratic Republic, Second Five Year (2015/15- 2019/20) Growth and Transformation Plan, Final Draft (Amharic version), April 2015 (Miazia 2007 EC), Addis Ababa .

[92] Id., p. 173.
The targets that relate to the judiciary in the earlier April 2015 Draft GTP II were:
- 'research and implementation of a judicial policy in tune with the concept of the developmental state that can serve the demands of a developmental state, developmental investors and citizens';
- 'research and putting in place specialized benches for cases that have significant impact on development';
- 'reduction of attrition rates and attention to summary and accelerated proceedings';
- 'correct and enforceable judicial decisions';
- 'publication and distribution of binding cassation decisions'; and
- ensuring that judicial decisions are in conformity with the Constitution.

[93] Ibid.
These five targets were: (a) 'increase in the number of decided cases'; (b) 'reduce congestion of cases and the current level of case loads'; (c) reduce duration until judicial decision to at least below six months; (d) 'adequate and effective performance by opening additional benches for cases that need particular attention due to state and public interest'; and (e) 'sustain the tasks that are underway toward due process of law'.

[94] Id., p. 174.
These three targets were: (a) 'improve case flow management'; (b) 'implementation of sentencing guidelines throughout the country' and preparation of directives to that comparable sentences can be imposed on offences that are not covered in the sentencing

3.2.2 **Targets in GTP II** (December 2015)

Part 2 of GTP II embodies Ethiopia's Growth and Transformation Plan for the years 2015/16- 2019/20. The last theme in Section 7.1.4 embodies the five paragraphs which include the main targets of the justice sector during the GTP II period. Among the six targets embodied n the *first paragraph*, the third element which reads "Ensuring the independence, transparency and accountability of the judicial system and courts" refers to the judiciary, while the fourth element which states the need to strengthen "the capacity of justice system institutions with regard to human resources, knowledge, skills and equipment" applies to the judiciary and other justice sector institutions. We can identify the following *eight* targets under the second paragraph:

a) Adequate legal framework required for development and democratization;
b) Ensure rule of law through the implementation and interpretation of laws based on their purpose.
c) Bring about institutional reform towards the attainment of [the objectives hereabove, i.e., democratization and rule of law] and toward the pursuit of accelerated and sustainable development;
d) Establish public empowerment structures which encourage comprehensive public participation and enhance law-abiding and peaceful citizenry;
e) Efficient dissemination and distribution of laws to the public;
f) Provision of efficient and modern judicial services;
g) Tasks that strengthen the processes, organization and human resource toward effective justice system;
h) In collaboration with the public, combat the tendencies of corruption and gaps in fair trial, and enable the justice system to win public confidence.

The third paragraph of GTP II, Section 7.1.4 embodies the following *three* targets relating to human resource development, ICT Support and judicial independence along with transparency and accountability:

a) Capacity building with regard to justice system institutions and their human resource, and building the human resource capacity of justice sector institutions in a planned and institutional approach through training to enhance capacity in attitudes, integrity, knowledge and skills;
b) Enhance ICT support to judicial services, plasma services for court proceedings, expansion of circuit and other benches, court services throughout the year;

guidelines'; and (c) 'full implementation of the tasks that are underway toward authentic data on execution of judgements'.

c) Strengthen the tasks that are underway toward adequate independence, transparency and accountability of the justice system, with a view to ensuring the efficiency, effectiveness, accessibility, fairness, independence, transparency and accountability of the justice system.

While the *sixth* and *eighth* items of paragraph 2, and the second and third items of paragraph 3 specifically make reference to the judiciary, most of the items in the paragraphs apply to more than one justice sector component, including the judiciary.

4. Justice Sector Five Year Plans and Projects under GTP I and GTP II

4.1 The justice sector's Five Year Plan during GTP I : An overview

The Strategic Plan of the justice sector for GTP I's period 2010/11- 2014/15 [95] states the *vision* and *mission* of the justice sector. The *vision* of the justice sector foresees Ethiopia where "good governance prevails, human rights and democratic rights are ensured, peace and security prevails, rule of law is ensured, and where there is effective, efficient, accessible and independent judicial system with due accountability and public confidence".[96] As vision statements go beyond five-year plan periods it applies to the GTP II period as well. The *mission statement* of the justice sector for the GTP I period was the following:

> The mission of the justice sector is to ensure peace and security of citizens and residents, respect and protect the human rights and democratic rights of citizens and residents, ensure rule of law, and provide speedy, equitable, cost-effective and accessible justice for all.

The objective of the Justice System Reform Program stated in the Five-Year Plan for the GTP I period reads: "to comprehensively examine and reform the justice system and provide efficient, effective and quality services which satisfy the public, and in effect ensure rule of law at all levels, and ensure that the justice system shall render its decisive contribution to the development of a democratic system, sustainable development and good governance".[97] The Five-

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[95] Five Year Plan of the Justice Sector for the period 2010/11- 2014/15, approved on Nehassie 13-15፣ 2003 EC (August 19-21, 2010), Joined-up Justice Forum, (የፍትሕ አካላት የጋራ ጉባዔ) Hawassa.

[96] The Amharic text of the vision reads "መልካም አስተዳደር የሰፈነባት፣ ሰብአዊና ዲሞክራሲያዊ መብቶች የተከበሩባት፣ የዜጎች ሰላምና ደህንነት የሰፈነባት፣ የሕግ የበላይነት የተረጋገጠባት፣ ውጤታማ፣ ቀልጣፋ፣ ተደራሽ፣ ነፃና ተደራሽነት ያለው የሕዝብ አመኔታ የተቸረው የፍትሕ ሥርዓት የሰፈነባት ኢትዮጵያን እውን ማድረግ ነው።"

[97] The Amharic text of the objectives of the Justice System Reform Program reads: "የፍትሕ ሥርዓት ማሻሻያ ፕሮግራም ዓላማ የፍትሕ ሥርዓቱን በሁለንተናዊ መልኩ በመፈተሸና በማስተካከል ሕዝቡን

Year Plan of the justice sector further identifies *seven* specific objectives for the plan period, and it also states three sub-programmes of the Justice System Reform Programme (namely the sub-program for judicial reform, the sub-program for law enforcement reform, and the sub-program for reform in legal education, training and research). As the following section shows, specific reference to these sub-programs is missing in the current Strategic Plan for the Good Governance Reform Cluster.

4.2 Good Governance Reform Cluster's Five Year Plan during GTP II

4.2.1 Strategic Plan for GTP II period and the institutions involved

The strategic plan of the justice sector for the GTP II period (2015/6 – 2019/20) is included in "Good Governance Reform Cluster Second Five-Year Growth and Transformation Plan".[98] The second part of the document states the strategic plan of the Good Governance Reform Cluster during the GTP II period.[99] The vision and mission statements refer to Ethiopia's vision and the mission of the

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የሚያረካ ውጤታማ፣ ቀልጣፋና ብቃት ያለው አገልግሎት በመስጠት በሁሉም ደረጃ የሕግ የበላይነትን ማስፈንና የፍትሕ ሥርዓቱ ለዲሞክራሲያው ሥርዓት ግንባታ፣ ለዘላቂ ልማትና ለመልካም አስተዳደር የበኩሉን ወሳኝ ድርሻ እንዲወጣ ማድረግ ነው።"

[98] Good Governance Reform Cluster Second Five-Year Growth and Transformation Plan 2015/16- 2019/20, Ministry of Justice, March 2015፣ (**የመልካም አስተዳደር ሪፎርም ክላሰተር፣ የሁለተኛው አምስት ዓመታት የእድገትና የትራንስፎርሜሽን ዕቅድ፣** 2008-2012፣ **ፍትሕ ሚኒስቴር፣ መጋቢት** 2007 **ዓ.ም.**)

[99] Id., pp. 39 – 52. The targets of the Cluster are the following:

i. Human resource development (p. 39),
ii. Improve organizational structure and processes:
   (a) effectiveness and efficiency (pp. 40-41)
   (b) accessibility of services (pp. 41-42),
   (c) transparency and accountability (p. 42),
   (d) judicial independence, transparency and accountability (pp. 42-43),
   (e) combat against and control of corruption and rent seeking (pp. 43-44),
   (f) coordinating activities of justice sector institutions (p. 43),
iii. Ensure rule of law (p. 43, 44),
iv. Enhance public participation (pp. 44- 45),
v. Strengthen the federal system (pp. 45-46),
vi. Strengthen the justice administration system
   (a) criminal justice system administration (pp. 46-47)
   (b) enhancing civil justice administration (pp. 47-48)
   (c) prison administration, handling, correction and rehabilitation (pp. 48-49)
vii. Enhance change communication (**የለውጥ ኮሙኒኬሽን ማሳደግ**), p. 49
viii. Enhance performance capacity through ICT support (**በኢንፎርሜሽን ኮሚኒኬሽን ቴክኖሎጂ ተደግፎ የመሥራት አቅምን ማጎልበት**), pp. 50-51.
ix. Enhance performance by mainstreaming cross-cutting issues (pp. 51-52).

Cluster. The strategic directions, objectives and targets stated in the document also relate to good governance at large.

Moreover, the document states implementation strategies (p. 52), forty projects (p. 53), and summary (pp. 54-82) of outcomes, indicators, annual rates of achievement and organs responsible are set out in the Strategic Plan. The summary of the goals and the organs in charge of implementation indicate that the cluster includes various institutions at federal and regional levels. In the sequence of the matrix for activities (pp. 54-82), they are: the Ministry of Public Service and Human Resource Development, Federal and State institutions, Police, Prison Administration, Federal Courts, Federal Charities and Societies Agency, Anti Corruption Commission, Federal and State anti-corruption commissions, Ministry of Federal Affairs, Regional states, Ministry of Justice, and Justice and Legal System Research Institute.

4.2.2 Good Governance Reform Cluster –*versus*- justice sector strategic plan

Unlike the strategic plan of the justice sector for the GTP I period, the strategic plan for the Good Governance Reform Cluster does not make direct reference to the 'justice sector' in its title. Four challenges can emerge from generic strategic plans that are not accompanied by specific strategic plans which target at justice sector institutions. The *first challenge* relates to the gap that will be created due to the substitution of the justice sector's *vision, mission and objectives* (stated above in Section 4.1) by other general formulations applicable to the good governance reform cluster. *Second,* the reform pursuits which directly relate to the core components of the justice sector run the risk of being diluted (in content and focus) thereby spreading out thin in the midst of generic reference to good governance. The *third* challenge relates to the adverse impact of this approach on institutions outside the justice sector if it involves the formulation of a strategic plan that predominantly refers to the justice sector while it bears the title of 'Good Governance Reform Cluster'. The *fourth* challenge can be susceptibility to a predominantly legalistic approach while good governance – which addresses various dimensions of how well a country is governed– is mainly nurtured and honed bottom-up.

As proactive peacemaking and peace building are more effective than prevention and control, addressing the elements, the sub-elements and the micro-elements of justice sector reform components that were identified in the 2005 Comprehensive Justice System Reform Program are among the factors that can bring about good governance, an *enabler* which in return facilitates the steady march toward the attainment of the vision and mission statements of Ethiopia's justice sector institutions. It is against this backdrop that the following comparison is made between the justice sector reform projects under GTP I and GTP II that relate to the judiciary.

4.2.3 Sub-program for judicial reform GTP I projects –*versus*- Good Governance Reform Cluster –GTP II projects

The Justice Sector Reform Program had *fifty four* projects for the GTP I period. The projects were classified into three sub-programs namely: (a) Sub-Program for the Reform of Courts (**የፍርድ ቤቶች ማሻሻያ ንዑስ ፕሮግራም**): 16 projects; (b) Sub-Program for Law Enforcement Reform (**የሕግ አስከባሪ አካላትን ማሻሻያ ንዑስ ፕሮግራም**): 30 projects; and (c) Sub-Program for Enhancing Legal Education, Training and Research (**የሕግ ትምህርት፣ ሥልጠናና ምርምር ማጠናከሪያ ንዑስ ፕሮግራም**): 8 projects. Most of these projects are inherently continuous, while some can be operational activities during GTP II period rather than projects.

Out of the 16 projects of court reform, the following *nine* projects are not included among the 40 projects listed in the Good Governance Reform Cluster Projects for the GTP II period:

- Judgement Execution Enhancement Project;
- Project to ensure the constitutionality of judgements and decrees;
- Project to enhance the system that ensures the independence, transparency and accountability of judges;
- Project to strengthen Judicial Administration Council;
- Project to formulate procedures for public assessment on courts;
- Project to enhance and strengthen Alternative Dispute Resolution;
- Project to support city courts, Sharia courts, military courts, and administrative tribunals;
- Project to improve public defender's services
- Project to enhance public participation in courts.

It is impossible to incorporate all projects of the justice sector in the Good Governance Reform Cluster because the cluster includes other sectors as well. Attempting to include all justice sector targets and projects in the Good Governance Reform Cluster transforms the cluster into the justice sector. Moreover, the predominance of justice sector elements in the Cluster's targets and projects will inevitably affect the fair representation of non-justice sector institutions. Thus, such clustering of strategic plans can neither adequately incorporate justice sector targets and projects; nor can it fairly represent the strategic plans of other institutions outside the justice sector.

4.3 Strategic Plan (2015-2020) of Federal Courts

Reference to the strategic plan of the federal courts for the five years ahead (including the current budget year) gives insight into the reform pursuits of courts that are underway. The Strategic Plan of Federal Courts for the Period 2015/16- 2019/20 has six parts. Part I assesses the external national environment and institutional issues. Parts 2 and 3 of the Strategic Plan state areas of focus and strategic goals. The last three parts deal with the relationship between the

strategic goals (Part 4), Targets of the strategic goals (Part 5) and Implementation strategies (Part 6).

The introduction of the Strategic Plan states that "the judiciary is the organ which enables citizens to enforce their human rights and democratic rights enshrined in the Constitution or in other laws free from the intervention of any government organ or individual".[100] It further notes that courts should provide "efficient, quality and accessible judicial services to enhance the satisfaction and confidence of the public".[101] In its assessment of the external environment, the Strategic Plan, *inter alia*, states the steady increase in the complexity of issues and the number of cases that are brought to courts in the course of Ethiopia's economic development.[102] It underlines that:

> Commensurate with the pace of Ethiopia's economic development and in the context of judicial independence, courts are required to resolve the issues in the cases brought to them by rendering efficient, quality and accessible services. When courts perform their functions properly, they have an indispensable role in attracting investment and enhancing goodwill; and on the contrary, their inability to catch up with economic development will have adverse impact on the sustainability of the development which is underway.[103]

It further assesses current social and technological changes that need the enhancement of human and other resources. In the schedule that analyzes opportunities and challenges, the *opportunities* in the political environment are (a) the constitutional guarantee for rule of law and separation of powers, (b) constitutional guarantee for judicial independence and accountability, (c) favourable government policies and strategies, and (d) government efforts toward success in judicial reform.[104] The *challenges* stated in the schedule are (a) erosion of judicial powers through enactment of various laws, (b) the level of confidence of the executive in the judicial services rendered by courts, (c) inadequacy in the pace of reform, and (d) attempts of undue intervention of the executive in judicial independence.[105]

The challenges stated in the preceding paragraph such as judicial power erosion through enactment of various laws and attempts of undue executive intervention in judicial independence are inconsistent with the opportunities noted in the same paragraph, which include favourable government policy and

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[100] *Strategic Plan of Federal Courts* for 2015/16 – 2019/20, Federal Supreme Court, June 2015, p. iv.
[101] Ibid.
[102] Id., p. 2.
[103] Ibid.
[104] Id., p. 5
[105] Ibid.

strategy and government efforts toward success in judicial reform. Under such circumstances the challenges can easily cancel out the opportunities in case this is caused by regression in political commitment. Yet, constitutional principles should be able to render sufficient protection to the independence of the judiciary. As noted in Transparency International's Global Corruption Report 2007 "there are two types of corruption that most affect judiciaries: political interference in judicial processes by either the executive or legislative branches of government, and bribery". [106]

The strategic plan for federal courts makes comparisons of opportunities and challenges with regard to the economic, social and technological environment.[107] The Strategic Plan further makes institutional assessment on the responsibilities and duties of courts, the strengths and weaknesses in leadership, human resource, structure and operations (during the preceding Strategic Plan period).[108] The assessment also identifies stakeholders and analyzes their needs in detail.[109]

The gaps identified are "inadequate awareness of vision and mission, gaps in planning and inadequate monitoring and evaluation of performance, gaps in effective system for transparency and accountability, inadequate staff for research, and gaps in overall implementation".[110] The Strategic Plan notes the need to address these gaps so that courts can duly play their role in the realization of GTP II. To this end, eight strategic directions are identified.[111] The core themes of these strategic directions are in short reformulated as:

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[106] Transparency International (2007). Global Corruption Report 2007, *Corruption in Judicial Systems* (Cambridge University Press), p. xxii.
[107] *Strategic Plan of Federal Courts, supra* note 100, p.5.
[108] Id., pp. 6-11.
[109] Id., pp. 14- 22.
[110] Id., p. 23.
[111] Ibid.
They are:

i. Human resource development;
ii. Reform in institutional structure and operations:
   a) Enhance effectiveness and efficiency in performance,
   b) Enhance the judicial independence, transparency and accountability,
   c) Combat and control rent gathering (corrupt) attitudes and practices,
   d) Enhance coordination in performance;
iii. Ensure rule of law;
iv. Enhance the participation of citizens;
v. Strengthen accessibility;
vi. Improve change communication (**የለውጥ ኮሙኒኬሽን ማሻሻል**)
vii. Enhance capacity in using ICT by supporting the judicial reform by ICT
viii. Implement cross-cutting issues.

- "judicial independence, transparency and accessibility,
- enhance efficiency and effectiveness of judicial services,
- enhance access to judicial services,
- enhance quality of services,
- enhance capacity building activities,
- strengthen the sustainability of change management,
- ensure good governance, and
- enhance popular participation and change communication".

These directions are categorized into three pillars of excellence namely: (a) excellent judicial services, (b) elevated performance and goodwill, and (c) good governance.[112] In the course of pursuing these strategic directions and pillars of excellence, the *vision* of Ethiopian Federal Courts is to "attain high level of public confidence in 2022/23 (በ2015 ያደገ የሕዝብ አመኔታ ያለው ፍርድ ቤት ሆኖ መገኘት)".[113] The *mission statement* reads "rendering judicial services which ensures rule of law (የሕግ የበላይነትን የሚያረጋግጥ የዳኝነት አገልግሎት መስጠት)".[114] The strategic plan of Ethiopian Federal Courts further states the following fifteen values: [115]

i. Independence and accountability (ነፃነትና ተጠያቂነት)
ii. Impartiality (ገለልተኝነት)
iii. Transparency (ግልጽነት)
iv. Equality (እኩልነት)
v. Integrity (ታማኝነት)
vi. Confidentiality (ምስጢራዊነት)
vii. Fairness (ሚዛናዊነት)
viii. Sustained professional competence (ሁልጊዜ ራስን ማብቃት)
ix. Responsiveness (ምላሽ መስጠት)
x. Quality Service (የአገልግሎት ጥራት)
xi. Readiness for change (የለውጥ ዝግጁነት)
xii. Participatory (አሳታፊነት)
xiii. Rapid and equitable judicial decisions (የተፋጠነና ፍትሐዊ ዳኝነት)
xiv. Rule of law (የሕግ የበላይነት)
xv. Punctuality (ቀጠሮ አክባሪነት)

The Strategic Plan defines the values listed above in order to enhance clarity.[116] The mission, vision and values of Ethiopian federal courts reflect the mandate entrusted in Ethiopian courts by virtue of Articles 78 to 82 of the

[112] Id., pp. 27, 28.
[113] *Federal Courts Annual Plan* for the 2015/2016, June 2015, Addis Ababa, page 1.
[114] Ibid.
[115] Strategic Plan of Federal Courts, *supra* note 100, p. 24.
[116] Id., pp. 25, 26.

FDRE Constitution. The strategic directions and the three pillars of excellence indicated above are further transposed to strategic goals in the third part of the Strategic Plan.[117]

The indicators of performance in the fifth part of the strategic plan are meant to be used in the monitoring and evaluation of performance. To this end, each annual plan evaluates performance of the preceding year. For example, the evaluation in the Annual Plan of Ethiopian Federal Courts (2008 EC, i.e. 2015/16) shows the performance of federal courts in deciding cases during a period of seven months that were covered in the evaluation. "The Federal Supreme Court has rendered decision on 7,489 cases during the seven months that were evaluated while the number of decisions expected during the period were 6,748"; its performance percentage is 110.98%.[118] The decisions that were expected from federal high courts and federal first instance courts during the same period of seven months were 18,417 and 47,691 respectively. The decisions rendered in federal high courts were 11,189 (60.8% of target), while federal first instance courts rendered decisions in 78,319 cases (thereby attaining a performance percentage of 164.2%).[119] The number of decisions that were planned for the budget year at the three levels of federal courts were 9,640 (Federal Supreme Court), 26,310 (federal high courts) and 68,130 (federal first instance courts).

These figures indicate case loads of federal courts, and they also give insight into case loads in regional state courts. One of the values of Ethiopian Federal Courts is "*Rapid and equitable adjudication*", and this envisages not only rapid judicial decisions, but also considers the quality of the decisions. This renders the other values of rule of law, judicial independence, accountability, impartiality, transparency, equality, integrity, etc. expedient. The number of cases decided during the period indicated above and the need for quality decisions are related with human power, budget, resources and remuneration of judges and other staff in courts. While some elements of the reform such as judicial independence need political will and commitment to the FDRE Constitution, various dimensions of the reform require budget, including autonomy and efficiency in resource management:

> … There is increasingly growing concern about the level of competence in many courts which can be attributable to the unsatisfactory remuneration and other factors which need to be addressed so that judges with exemplary competence and integrity can be retained. … The judiciary can hardly attract and retain such judges under the current remuneration scale and prevailing

[117] Id., pp. 27-38.
[118] Federal Courts Annual Plan, *supra* note 113, p. 5.
[119] Ibid.

non-financial incentives. … This raises the issue whether a country's treasury should generate revenue from court fees, or whether such fees can be ploughed back to the judiciary. … In the realm of non-financial incentives, there is the need to enhance rule of law, the independence of courts as enshrined in the Constitution and the tenure of judges…. [120]

5. The Notion of 'Developmental State Judicial Policy' in the Earlier Draft GTP II (April 2015 Version)

As indicated in Section 2.2, "establishing a stable democratic and developmental state" was stated as an overall strategic direction in GTP I. Meanwhile, GTP I states 'the independence, transparency and accountability of courts, and of the judicial system as a whole'. In effect, the context in which the notion of the *democratic developmental state* was used in the strategic direction of the justice sector in GTP I was consistent with Article 79(3) of the FDRE Constitution which provides that: "Judges shall exercise their functions in full independence and shall be directed solely by law."

Any policy or law which infringes this constitutional provision is void, and in effect, it was improper for the April 2015 version of Draft GTP II to make the pledge (indicated in Section 3.2.1) towards "research and its implementation in the creation of a judicial institution and formulation of a judicial policy in a manner that can serve the demands of a developmental state, developmental investors and citizens, and in tune with the concept of the developmental state".[121]

This pledge is duly omitted in GTP II.[122] Yet, the issue deserves a brief discussion. Reference to various parts of the earlier April 2015 version of Draft GTP II gives insight into how the developmental state was perceived. For example, the last sentence of Item 3.12 in Subsection 3.4 (titled *Popular Participation, Democratic System Building and National Consensus*) reads "substitution of neo-liberal curriculum by developmental democratic curriculum; and applying the same in the fields of legal education and economics" (**የኒዮ ሊበራል ካሪኩለም በልማታዊ ዲሞክራሲያዊ ካሪኩለም መተካት፤ የሕግና የኢኮኖሚክስ መስኮችም በዚሁ እንዲቃኙ ማድረግ**).[123] The same sentence had

[120] Hailu Burayu, Elias N. Stebek & Muradu Abdo (2013). "The Judicial Protection of Property Rights in Ethiopia", *Mizan Law Review*, Vol. 7. No. 2, December 2013, p. 367.

[121] Draft GTP II, April 2015 version, *supra* note 91, p. 173. The original Amharic version reads "**የልማታዊ መንግሥት፣ የልማታዊ ባለሀብትና የቤጋውን ጥያቄ ሊያስተናግድ በሚችል አግባብ እንዲሁም በልማታዊ መንግሥት ጽንሰ ሓሳብ የተቃኘ የዳኝነት ተቋም ለመፍጠርና የዳኝነት ፖሊሲ ለመቅረጽ የሚያስችል ጥናት ተካሂዶ ተግባራዊ ይደረጋል**".

[122] GTP II, *supra* note 88, pp. 40,41, 168, 169.

[123] Draft GTP II, April 2015 version. *supra* note 91, p. 177.

reappeared in the last sentence of Item 3.16[124] which had envisaged revision in the curricula for the media, communication and creative arts.

Such pledges are omitted in Section 7.2 of GTP II titled *Building Democratic System* (pp. 169-172). Yet this notion of substituting 'neo-liberal curriculum by developmental democratic curriculum' deserves a brief clarification regarding the risks of using the word 'developmental' in the contexts of ambiguity and ambivalence.

Clarity in meanings requires the synchrony between the *referent*, the *reference* and the *symbol*. In the absence of harmony between this triadic interface, any word or phrase (i.e. *symbol*) can represent different feelings, thoughts, actions or events (*referent*) unless the *reference* made to a word or phrase has uniform meaning for all members of a target audience. Such reference is said to be valid when the reference made to a word or phrase (symbol) by the speaker or writer is given the same meaning by any other person. In the absence of such validity in meaning, words become ambivalent and vague because they can conceal motives and intentions that may contradict the meaning they purport to represent. For example, an investor, a public office holder or a judge who claims to be 'developmental' can, under such settings of ambiguity in meaning conceal acts of bribery, embezzlement or nepotism in the course of his/her acts, decisions or orders that depart from laws, processes and procedures.

One of the features of a developmental state is that its pursuits and the outcomes of development speak for themselves. The word developmental is a designation used by academics and researchers in making reference to the model of state intervention in South Korea, Singapore, Taiwan, etc. (in *post facto* narrations and analyses). The developmental states of the 1960s and 1970s were not thus concerned with the label, and merely focused on their pragmatic policy content which harnessed extremist market deregulation and at the same time facilitated development through private sector empowerment (as opposed to private sector substitution).

On the contrary, predatory states overuse the 'development' label to conceal corrupt practices in the name of 'development'. Evans distinguishes developmental states from 'predatory' states. The latter, according to Evans "control the state apparatus" and they "seem to plunder without any more regard for the welfare of the citizenry than a predator has for the welfare of its prey".[125]

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[124] Ibid.

[125] Peter B. Evans (1989). 'Predatory, Developmental and other Apparatuses: A Comparative Political Economy Perspective on the Third World State," *Sociological Forum*, Vol. 4, No. 4, pp. 562 & 563.

Evans considers the Newly Industrialized Countries (NICs) of East Asia as developmental states, and Zaire [of the late 1980s] as the 'predatory state'.[126]

The notion of the 'developmental state' is not an economic theory or philosophy. Nor is it an economic system. It merely rectifies the downsides of laissez-faire deregulation, and it meanwhile avoids the Marxist model of paternalistic over-regulation through command economy. The developmental state model is a *post-facto* narration and analysis of the entry points, the nature, consequences, and the exit points of the state's regulatory intervention in the operation of market forces. In fact, the success of a developmental state marks its *exit point* because the enhancement of the private sector and institutions bring about a steady decline in authoritarian policy interventions and it marks an *entry point* into mature levels of free market and democratic systems.

> As Korea's experience indicates, there is a phase of obsolescence of the developmental state during which its role in enhancing economic development outlives its usefulness because wider state intervention in the economy eventually becomes undue patronage and red tape, as marked by the massive labour unrest of the 1980s and Korea's 1997 economic crisis.[127]

The limits of the developmental state are caused by the contradictions inherent in the model. The capitalist class which steadily grows in the course of the state interventions at a certain stage regards the interventions as unnecessary and red tape.[128] The role of the state as provider of long-term goals declines upon the success of the developmental state.[129] The state also loses its autonomy due to the gradual fusion of economic interests between the economic actors and the political elite.[130]

The policy interventions of a developmental state, *inter alia*, relates to the coordination of investment plans, the role of the state in facilitating development through visionary national development, and the state's tasks of institution building to cause vibrant economic development.[131] However, such interventions and other features of the developmental state are different from the Leninist-Stalinist model of intervention. Developmental states of the 1960s and early

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[126] Ibid.

[127] Elias N. Stebek (2013). "Overview of Country Experience in Land Rights and Developmental Statehood", *Mizan Law Review*, Vol. 7, No, 2, December 2013, p. 218

[128] 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. 231-232

[129] Ibid.

[130] *See* id., pp. 232-233.

[131] *See*, Ha-Joon J Chang, (1999). 'The Economic Theory of the Developmental State' in Meredith Woo-Cumings (ed.), *The Developmental State*, Cornell University Press, pp. 182-199.

1970s did not mechanically combine certain elements of communism with other elements of free market economy. In spite of their wider interventionist policies in the path of development, they remained within the landscape of market economy. As Chalmers Johnson observes:

> The achievements of the Japanese developmental state were inconvenient to both sides of the debate. They illustrated to the West what the state could do to improve the outcome of market forces, and they illustrated to the Leninists that their big mistake was the displacement of the market rather than using it for developmental purposes.[132]

Developmental states did not thus substitute market economy but rather facilitated its effective performance. Their salient features include a strong private property legal regime, robust private sector, meritocratic and depoliticized state apparatus, national consensus, and autonomy of the state structure from opportunistic benefits in economic activities while at the same time being embedded[133] in the economic life of the societies through regulatory interventions.

Japan pursued interventionist policies during the 1950s and 1960s without, however calling itself a developmental state. In spite of such policy intervention to regulate market forces, "courts in Japan had formal power to review legality and constitutionality of administrative actions and laws" regarding the "protection of property rights against arbitrary governmental interference".[134] Kahase cites Ginsburg[135] and states:

> Kings of Japan … started to give the judiciary an autonomous role … since early twentieth century with the aim to promote economic predictability and generate revenue. [FN 181]. The judicial power in the protection of property rights and enforcement of contracts also continued during Japan's decades of developmental statehood. [FN 182] [136]

In Japan, the role of the judiciary "in the economic domain and the relative stability of property rights and contract enforcement regimes indeed led authors

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[132] Chalmers Johnson (1999). 'The Economic Theory of the Developmental State' in Meredith Woo-Cumings (ed.), *The Developmental State*, Cornell University Press, p. 49.

[133] The principle of '*embedded autonomy*' refers to the balance that developmental states maintain in being autonomous from opportunistic economic gains of office holders while retaining the state's supportive link with all economic actors (owners, managers and labour unions).

[134] Kahase Gebrehiwot (2014). *The Role of the Judiciary in Developmental States*, LL.M Thesis, Addis Ababa University School of Law, Unpublished, June 2014, p. 46, (citing Article 81 of the 1947 Constitution of Japan).

[135] Tom Ginsburg, 'Dismantling the Developmental State; Administrative Procedure Reform in Japan and Korea', *American Journal of comparative Law* (49), 2001, pp 585-622 at pp 590.

[136] Kahase, *supra* note 134, p. 45. Footnotes omitted.

to note that developmental state pursuits in Japan demonstrated liberal legalism in the economic sphere". [137] Likewise, the experience in South Korea (in the 1960s and early 1970s) indicates judicial autonomy even during the decades of authoritarian economic policy interventions:

> An assessment of practical experience of courts of South Korea … shows that the judiciary in South Korean developmental state enjoyed genuine autonomy in enforcing regimes of property rights and contracts between individual actors when they chose it [FN 244]. In spite of the authoritarian nature of governance in … Korea, the 'economy put first' policy [FN 245] of leaders induced them to be credible to economic predictability allowing courts to decide civil and commercial disputes without any fear and interference.[138]

Ethiopia pledges to pursue the policy of a democratic developmental state. The word 'democratic' is meant to distinguish the policy from the elements of authoritarianism that were manifested in the degree of state intervention in South Korea, Taiwan and Singapore during the 1960s and early 1970s. This is because the level of authoritarianism in the 1960s that was 'tolerated' by the international community in the midst of the East-West polarities of the cold war does not fit to current global realities. As the strategic directions of GTP I (indicated at the beginning of this section) shows, Ethiopia's pledge to pursue the policy of a democratic developmental state is required to be in conformity with the FDRE Constitution thereby rendering any act of encroaching on the independence of the judiciary unconstitutional.

Botswana is a democratic developmental state whose ranking in Africa with regard to political rights and civil liberties shows that its developmental pursuits are not tradeoffs to the rule of law including the independence of the judiciary:

> Democracy as well as development are processes, which require constant attention. To date, however, Botswana has a commendable record in the African context. In the Freedom House Index of political rights and civil liberties there are, as of 2009, only two African democracies (Cape Verde and Ghana) in the top group of free countries which have a higher rating than Botswana; and Botswana in 2009 continues to be ranked as the least corrupt country on the African continent according to the Corruption Perception Index (CPI) published annually by Transparency International, … [ranking

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[137] Id., p. 47, citing, for further reading: Stephan Haggard, Andrew MacIntyre,and Lydia Tiede, *Rule of Law and Economic Development*, California University Press (2008), p. 209; Tom Ginsburg, *supra* note 130 and Katharina Pistor and Philip A. Wellons.

[138] Id.,, p. 55 (citing FN 244: James Palais, Politics and Policy in Traditional Korea, Cambridge, Harvard University Press, 1976 pp 22; FN 245: Huck-ju Kwon, Advocacy Coalitions and the Politics of Welfare in Korea after the Economic Crisis, Policy & Politics, Vol. 31, No.1, 2002, pp.69-83 at pp 74.

37th out of 180 countries], followed by Mauritius (42nd) and Cape Verde (46th).[139]

Transparency International's 2014 Corruption Perception Index (CPI), shows Botswana's improved rank (31st out of 175 countries), thereby maintaining its ranking as the least corrupt country in Africa. It is followed by Cape Verde (another democratic developmental state in Africa) which is 42nd in world ranking and is considered as the second least corrupt country in Africa.[140] Ethiopia's ranking in Transparency International's 2014 Corruption Perception Index is 110th out of 175 countries.[141]

Botswana's standing among *free* democracies[142] is also commendable. In contrast, the performance of various Sub-Saharan African countries in the Freedom House Index, including Ethiopia, evokes concern. The themes that that are used in assessing performance in the Freedom House Index include political rights and civil liberties under which (a) electoral process, (b) political pluralism and participation, (c) functioning of government, (d) freedom of expression and belief, (e) associational and organizational rights, (f) rule of law, and (g) personal autonomy and individual rights are assessed.

In spite of Botswana's commendable achievements since its independence in 1966, there are yet outstanding issues such as minority rights, fragmented opposition parties and relative weaknesses in civil society activities (attributable to the performance of civil societies rather than legal restrictions). Although "Botswana does not constitute the best practice model" in all aspects of the democratization process, there are general lessons such as the role of "*a ruling political party to direct the trajectory of economic development*".[143] Cases in point are Botswana's "decision to nationalize mineral wealth" and extract "rents from the mineral sector to found a developmental state" and "a sound development planning and budgeting regime and institutions".[144] Botswana has meanwhile developed "*a legal-institutional framework of mineral wealth*

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[139] Peter Meyns and Charity Musamba *(eds.)***,** *The Developmental State in Africa Problems and Prospects*, INEF-Report, 101/2010 (Institute for Development and Peace), p. 55.

[140] Transparency International <https://www.transparency.org/cpi2014/results>, Accessed: 22 November 2015.

[141] Ibid.

[142] Freedom House, Freedom in the World 2015 < freedomhouse.org/regions/sub-saharan-africa>, Accessed: 22 November 2015

[143] Emmanuel Botlhale (2015), *The Building a Democratic Developmental State in Botswana* Regional Conference on Building Democratic Developmental States for Economic Transformation in Southern Africa (20-22 July 2015, South Africa)

[144] Ibid.

management" thereby demonstrating that "resource blessings need not degenerate into resource curses".[145]

> Alongside the creation of a public service based on merit, Botswana's political leadership also had an interest in ensuring the autonomy of the bureaucracy so as to allow it to pursue the country's developmental objectives. Holm asserts that Botswana's first two presidents, Khama and Masire in particular, 'protected the civil service from most political interference' (Holm 1996: 101) thereby shielding it from corruption and guaranteeing its professionalism, and turning it into a powerful agent of development.[146]

The nature of the judiciary in a democratic developmental state can be observed from Botswana's experience. "The Judiciary is independent from other arms of government; that is the executive and the legislature" and to "further reinforce the independence of the Judiciary and to ensure that it is insulated from interference from the other arms, the Constitution creates the Judicial Service Commission" that is entrusted with the responsibility of assessing and recommending appointments for Judicial posts".[147] Judicial Independence is indeed a right that citizens in Botswana "demand and enjoy".

Thus, the concept of democratic developmental state does not envisage intervention in the independence of the judiciary in the name of 'developmental state judicial policy' as it was envisaged under the earlier draft of GTP II, April 2015 version. The risk of such 'policy' is its propensity to avail discretion to office holders to intervene in the independence of the judiciary in violation of the FDRE Constitution, and it goes against the independence of the judiciary in democratic developmental states such as Botswana. In fact, such policy would have repeated the fatal errors of the former Soviet Union and various Leninist regimes whose misperception about the convergence of the law and the state, led them to gross encroachments on the independence of the judiciary.

6. Public Trust and Confidence in the Judiciary

Three core problems were identified in the 2005 Comprehensive Justice System Reform Program in relation with the justice system including the judiciary. As stated in Section 2.1, these problems are (a) gaps in accessibility and responsiveness to the needs of the poor, (b) the need for "serious steps to tackle corruption, abuse of power and political interference in the administration of

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[145] Ibid.

[146] *Peter Meyns and Charity Musamba (eds.)*, *supra* note 139, p. 47.

[147] Republic of Botswana, Government Portal <http://www.gov.bw/en/PrintingVersion/?printid=1854> Accessed: 20 November 2015.

justice", and (c) "inadequate funding of the justice institutions" which "aggravates most deficiencies of the administration of justice".

The 2005 Comprehensive Justice System Reform Program also notes the low public perception regarding the independence of the judiciary and indicates that the power entrusted on court presidents who "act both as judges and administration officials accountable to the President of the Supreme Court" compromises their independence. The Study further states the gaps in the transparency of "the process of selection and promotion of judges" and their performance evaluation which according to the Study "lacks inputs from other legal professions".[148] There are some improvements in the transparency of selection processes upon initial recruitment at the level of lower courts. However, the achievements attained should be seen in light of the aspirations and promises of the Justice System Reform Programme. For example, "complaints from the business community with regard to gaps in the justice sector, *inter alia*, relate to contract enforcement".[149] Moreover, "corruption is a major factor that is being raised by the business community; there are also complaints regarding the need to enhance the efficiency of court procedures in order to make them business friendly".[150]

As stated in Transparency International's 2007 Report, a corrupt judiciary harms economic development because "it diminishes trade, economic growth and human development; and, most importantly, it denies citizens impartial settlement of disputes with neighbours or the authorities".[151] The report underlines that "Judicial systems debased by bribery undermine confidence in governance by facilitating corruption across all sectors of government, starting at the helm of power. In so doing, they send a blunt message to the people: in this country corruption is tolerated".[152]

Although the Anti-Corruption Commission, the Ethiopian Human Rights Commission, the Ethiopian Institution of the Ombudsman and the Auditor General have significant contributions to good governance, the challenges of corruption and maladministration are still issues of concern in various sectors. As one of the external assessors of this article duly observed, "the level of concern expressed by authorities on the problem of judicial corruption in Ethiopia is very high. However, a robust and targeted program of action to tackle it as part of the reform agenda is yet to come".

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[148] CJSRP, *supra* note 2, p. 14.
[149] Interview with Fekadu Petros, Assistant Professor, Addis Ababa University School of Law, and Expert at Ethiopian Chamber of Commerce and Sectoral Associations, 25 November, 2015.
[150] Ibid.
[151] Transparency International (2007), *supra* note 106, p. xi.
[152] Ibid.

In Cressey's Fraud Triangle there are three factors that are conducive to corruption. They are *motivation* (pressures), *opportunities* and *rationalization*.[153] In the context of a judge, low levels of remuneration and benefits under settings of steadily rising inflation can bring about *pressures*. Any form of executive intervention in the judiciary can then widen the *opportunities* and *rationalization* of discretion. For example, a judge whose decision is influenced by any direct or indirect intervention from an executive official (which in the Soviet Union was labelled as 'telephone justice') can gradually incline to use such discretions as *opportunities* and r*ationalizations* toward doing the same for a relative, a friend or an acquaintance. At an advanced level of ethical decline, bribery can set in by gradually corroding the level of integrity required in the profession. At this stage, corruption usually starts as facilitative corruption (speed-up bribery) to merely render rapid decision in accordance with the law, which can then gradually, with regard to some judges, develop toward corruption that circumvents judgements.

At the Workshop on Indicators to Combat Corruption in Ethiopia's Justice Sector, Ato Ali Suleiman, Commissioner of the Federal Anti-Corruption Commission stated that a corrupt justice system cannot provide equal treatment to citizens thereby affecting contract enforcement which is the core foundation for free market; and he stated that Ethiopia cannot attain the economic development it aspires and attract the desired level of investors in the absence of a judiciary free from corrupt practices.[154] He noted that the justice system is the ultimate forum to combat corruption, and if corruption becomes widespread in this sector, all anti-corruption efforts will be ineffective.[155] The workshop included participants from the Federal Supreme Court, Federal High Court, First Instance courts, prison administration, federal police, Addis Ababa Police Commission, public prosecutors and other institutions.

The Commissioner underlined that if justice organs are not protected from various forms of corrupt practices, and unless their activities are rendered transparent for the public along with their accountability in the event of failure to comply with the processes and procedures stipulated by the law, the problems will go beyond the control of the justice system and can bring about national crisis.[156] With regard to the independence of the judiciary, he remarked that

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[153] Donald R. Cressey, in Joseph T. Wells, *Principles of Fraud Examination*, Wiley, 2008.

[154] Ali Suleiman, Opening Remarks at the Workshop on Indicators to Combat Corruption in Ethiopia's Justice Sector, A research conducted by Justice and Legal System Research Institute, Ghion Hotel, October 20, 2015. (ጥቅምት 9 ቀን 2008 ዓ.ም. ‹‹በኢትዮጵያ ፍትሕ ዘርፍ መሰናን ለመከላከል የሚያስችሉ፣ የፍትሕ ዘርፍ አገልግሎት አሰጣጥና አፈጻጸም አመላካቾች››, The *Reporter*, Amharic Version, 21 October 2015, Reported by Tamiru Tsige.

[155] Ibid.

[156] Ibid.

"interpretation of the law is the mandate entrusted on judges" and "intervention to promote individual interest in the guise of public interest should cease".[157]

After the Commissioner's opening speech, the researchers[158] who conducted the study (initiated and sponsored by Justice and Legal System Research Institute) presented their research findings and recommendations. They underlined the need to render court operations efficient, enhance the ethical standards of court employees, ensure accountability, enhance transparency, ensure the independence of the judiciary, and address the problems related with inadequate remuneration which create pressures toward corruption. They further noted the need for qualified staff, better information and document management, monitoring schemes, avoiding conflict of interest and dealing with the causes of corruption identified in the study.[159]

The concern regarding the level of corruption in the justice sector was also underlined in the *Joined-up Justice Forum*[160] which was held in Hawassa on November 9 and 10, 2015.[161] The Forum included justice sector organs (i.e. courts, Ministry of justice, justice bureaus, Police Commission officers, prison administration, etc.) from the federal city administrations of Addis Ababa and Dire Dawa and regional state stakeholders. In his opening speech at the Forum, Ato Getachew Ambaye, Minister of Justice, stated that the justice sector is expected to contribute to Ethiopia's pursuits of peace, development and democratization.[162] He recalled the achievements made during GTP I to make the services rendered to the public by the justice sector efficient, transparent and accountable, and he stated that there are still challenges in the sector that require substantial efforts as observed in the evaluations conducted at various levels.[163]

The challenges stated by the minister include gaps in "the initiatives and commitment of the leadership in the justice sector, and weaknesses in goal-orientation, attitudes, professional competence, skills, integrity and other problems at operational levels".[164] The minister underlined the need for further attention to public grievances that are caused by the exposure of the justice

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[157] Ibid. "ሕግ መተርጉም ለዳኞች የተሰጠ ኃላፊነት ነው። ነገር ግን ዳኞች ሕግን በነፃነት እንዳይተረጉሙ ለሕዝብ ተቆርቋሪ በመምሰል የግል ፍላጐትን ለማሟላት በዳኝነት ሥራ ላይ የሚደረገው ጣልቃ ገብነት ሊወገድ ይገባል።"

[158] Ibid. Dr. Dejene Girma, W/t. Maereg Geberegziabher and Ato Aron Degol.

[159] Ibid.

[160] In various documents the Forum is referred to as "የፍትሕ አካላት የጋራ መድረክ", የፍትሕ አካላት የምክክር መድረክ", or "የፍትሕ ዘርፍ የጋራ መድረክ".

[161] Ethiopian News Agency, November 9 November 2013. Available at <http://www.ena.gov.et/index.php/social/item/9066-2015-11-10-00-03-16>, Accessed: 23 November 2013

[162] Ibid.

[163] Ibid.

[164] Ibid.

sector to economic rent gathering and poor governance.[165] According to Ato Getachew, focus will be given to adequately respond to the public demand for justice and resolve problems related with good governance during the plan period of GTP II.

President of the Federal Supreme Court, Ato Tegene Getaneh expressed similar concerns at the Forum. He stated that there are many gaps in the delivery of services and good governance at all tiers and noted the need to address the problems of poor governance and rent gathering attitudes in all institutions of the justice sector so that these problems would not hamper development.[166]

The discussion above clearly indicates the level of attention which should be given to judicial reform. Indeed, there is the need to enhance judicial independence, resources and facilities including substantial raise in remuneration to attract and retain competent and experienced judges and other staff. Lessons can be drawn from Singapore's experience regarding the positive impact of judicial independence accompanied by substantially high benefit schemes for judges. Unlike economic plans, the budgetary and other resource inputs in the judiciary may not provide visible statistical figures of 'physical growth'. Yet, effective, efficient, predictable and accessible judicial system is inevitable to render the economic, social and governance dimensions of development pursuits functional.

Concluding Remarks

The academic discourse on the relationship between judicial reform and economic development does not deny the importance of judicial reform in development, but rather lies "on what makes for a successful judicial reform project".[167] While "some argue that reform cannot be achieved without a society-wide consensus", there are others who "contend that the reform project can help create this consensus".[168] Hammergren believes that "institutional strengthening should always follow structural reforms and measures to increase access to the judicial system" and "she observes that institutional strengthening can pave the way for broader reforms".[169] Setting aside such debates on the cause-effect relationship between the various components and factors of judicial reform, it is to be noted that institution-level empowerment is one of the key

[165] Ibid.
[166] Ibid.
[167] Richard E. Messick (1999). 'Judicial Reform and Economic Development: A Survey of the Issues', *The World Bank Research Observer,* vol. 14, no. 1 (February 1999), p. 117
[168] Ibid.
[169] Id., p. 125, citing Hammergren, Linn A. (1998). 'Institutional Strengthening and Justice Reform.' USAID, Center for Democracy and Governance, Washington, D.C.

factors. Such empowerment does not only relate to judicial reform, because it is not a stand-alone pursuit and its effectiveness envisages corresponding reforms in other components of the justice system as well.

In the realm of its contribution to development, judicial reform "aims to buttress the rule of law and assure entrepreneurs that contracts will be enforced. Yet other institutions within society perform these same functions".[170] In other words, judicial reform envisages concurrent unfolding of other factors which consolidate and reinforce its pursuits. The same holds true regarding the necessity of judicial reform in pursuits of reforming the justice system. In the course of justice system reform process in various countries, there was "greater familiarity with the sector's weaknesses" and eventually attention was turned to "measures to strengthen judicial independence, reduce politicization of the appointment process, and increase the professional quality of judges and other officials and staff and to augment the general efficiency of courtroom and system wide administration".[171]

As Tamanaha notes, "the Western situations in which legal institutions evolved in sync with advances in capitalism are totally unlike what developing countries face today in their attempt to leap into the global capitalist marketplace while nurturing legal institutions still at a nascent stage".[172] These developing countries need to enhance their legal institutions, including judicial reform in the context of unfavourable realities such as inadequate resources, weak governance and gaps in the legal profession. Their efforts are also expected to strategically aim at high thresholds of achievement along with engagements in incremental steady pursuits and concrete attainments.

In an interview with the Reporter, Professor Kenichi Ohno who, since 2008, has been in contact with Ethiopia's high government officials notes that 'to have a fast going idea is one thing, but we want to see the quality in policy making".[173] He added "Japanese are always slow and steady movers. Ethiopians are fast movers. I think we can work together reminding each other of that. The speed as well as the quality is important". He suggested that these two factors, i.e. speed and quality should interact in a positive way.[174] A similar *caveat* is

[170] Messick, *supra* note 167, p. 128.
[171] Andrian Bedner (2008), *Court Reform*. Law, Governance and Development, Policy Notes, Leiden University Press, p. 10.
[172] Brian T. Tamanaha (2009). 'The Primacy of Society and the Failure of Law and Development', *Legal Studies Research Papers Series*, St. Johns University School of Law, July 2009, p. 18.
[173] The *Reporter*, 16 August 2014, Birhanu Fikade's interview with Professor Kenichi Ohno and Professor Izumi Ohno, who are Japanese professors of economics and have wide experience in areas of policy formulation dialogues and in advising governments in Asia.
[174] Ibid

expressed in the Ethiopian adage 'ሲሮጡ የታጠቁት ሲሮጡ ይፈታል' which warns against 'running while dressing up'. One of the core conclusions that emerges from the preceding sections substantiates this point regarding the need for due attention to *steady* and *concrete* achievements in judicial reform.

As indicated in Section 2.1, justice system reform, including judicial reform is expected to give prime focus to "measuring *outcomes* and *impact*" which is wider in scope than "mere measurement of inputs" such as premises, number of judges, ICT inputs and number of cases handled. To this end, frameworks such as the five areas of performance noted in Section 2.1, i.e. (a) access to justice, (b) expedition and timeliness, (c) equality, fairness and integrity, (d) independence and accountability, and (e) public trust and confidence[175] can inform assessments in the accessibility, efficiency and quality of judicial services in Ethiopia. These five areas of performance are indeed in tandem with the vision, mission and values of Ethiopian courts highlighted in Section 4.1.

The march of judicial services toward such thresholds is nurtured, honed and enhanced through *steady* and *concrete* pursuits and achievements rather than mere pledges, plans and promises. Attainments or regressions in the realms of such outcomes and impact are self-evident because all these five areas of measurement are easily observable facts thereby becoming apparent public knowledge. The level of *access to justice* is objectively visible in any location and at any court. The same holds true for the *timely adjudication and decision* of cases without undue delay. Any claim or report that negates the reality cannot conceal clearly visible facts that emerge from actual public experience and observations with regard to the level of *impartial and equal treatment* of parties in litigation, *fairness and the integrity* of judges and other staff in a certain court, and regarding the *independence and accountability* of the judiciary. *Public trust and confidence* emerges, grows or regresses depending upon these factors. Unfortunately, the level of public trust and confidence on the judiciary seems to be steadily declining in Ethiopia as briefly highlighted in Section 6.

There is thus the need for a judicial reform programme which is independent but concurrently conducted with reforms in the other components of the justice sector. The independence of judicial reform does not mean seclusion from the other elements of the justice sector reform, but requires management of the reform by the judiciary itself, of course, subject to due harmonization with other components of the justice sector, the Joined-up Justice Forum and the Good Governance Reform Cluster.

As the judiciary is one of the organs of the state, its independent reform needs due attention. Nor should its budget, including remuneration scales, be determined by another organ other than procedures and schemes of transparency

[175] Proceedings, *supra* note 53, p. 76.

and accountability. In addition to its budget, revenue from all court fees can be ploughed back to top-up the resources allocated for the judiciary's projects. This should not, however, denote a judiciary that funds itself, because this would adversely affect access to justice.[176]

The problems in Ethiopia's judicial reform pursuits are mainly related with grassroots empowerment in the implementation of reform plans, merit-based judgeship, the need for substantial raise in remuneration, judicial independence and meritocratic judicial support personnel. In the absence of steady, concrete and incremental measures and achievements that address these challenges, the various grand aspirations and pledges for judicial reform may eventually end up in *promise fatigue* and *regressio*n. ■

[176] Judicial services are rights that can be claimed by citizens and not services to be bought. Court fees are thus incidental sources of state revenue which should not be regarded as sources of budget, but revenue categories, which, analogous to research funds, can be ploughed back to projects of judicial reform that can, for example, be used during the year subsequent to their collection.

Legal Sector Reform Pursuits in Ethiopia: Gaps in Grassroots Empowerment

Elias N. Stebek ♣

Abstract

The initial phase of Ethiopia's Justice System Reform Program (which includes legal sector reform and judicial reform) was very ambitious with exemplary levels of zeal, budgetary allocation and commitment. This seems to have been followed by the *fragmentation* of reform efforts in the midst of inadequate grassroots empowerment (in decision making and resource management) while at the same time the legal sector espoused comparably similar aspirations. There is thus the need for distinct institution-level reform tasks and empowerment in legislative drafting, law enforcement, legal education (including research and training) and access to justice. The reinvigoration of legal sector reform in Ethiopia envisages merit-based recruitment and promotion accompanied by grassroots empowerment in decision making and resource management in the context of *adequate harmonization* among organs and institutions of the sector. It also envisages broad-based participation including enhanced involvement of civil society organizations. This article briefly examines the level of attention given to and the gaps in reform pursuits in lawmaking, law enforcement, legal education and access to justice.

Key terms

Lawmaking, law enforcement, legal education, access to justice, legal information, the Bar, legal aid, civil societies, Ethiopia

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Introduction

Positive development in each component of the justice system contributes to the overall improvement in the realms of rule of law, good governance and democratization; and meanwhile, the justice system benefits from the positive causal reciprocity of each element or subsystem that determines the strengths or

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shortcomings of the aggregate. In other words, success or failure in each component positively or negatively contributes to the progress or regression of the justice system. The 2005 Comprehensive Justice System Reform Program[1] (CJSRP) had thus duly adopted a holistic approach in addressing the gaps and challenges in Ethiopia's justice system.

Ethiopia's Comprehensive Justice System Reform Program (CJSRP) included institutions and processes that come under different organs of the state. On the other hand, the holistic nature of the reform had created synergy and harmony in spite of functional divergence attributable to the legislative, judicial and executive nature of the specific mandates and responsibilities of the various components of the justice system.

It is indeed commendable that the CJSRP opted to pursue a holistic approach in justice system reform rather than fragmented and piecemeal reform pursuits. It is equally important to note that such holistic approach can further include other components of the justice system in addition to the categories stated in the 2005 CJSRP. However, such frontier expansion of justice system components requires safeguards against the risk of diluting or weakening the efficiency and effectiveness of reform at the grassroots.

The *four* core components and a *fifth* crosscutting component of comprehensive Justice System Reform Program identified in the 2005 Baseline study involved (a) lawmaking and revision; (b) the judiciary; (c) law enforcement which includes prosecutors, the police and the penitentiary system; (d) legal education and research; and (e) information flow within and outside the justice system. These can be reformulated as five components and one enabler as *indicators* Ethiopia's justice sector reform: (a) institutions, processes and procedures in lawmaking and revision, (b) the judiciary; (c) law enforcement with particular reference to the police, public prosecutor services, and prisons; (d) legal education, training and legal research; (e) access to justice which include legal information, the Bar, legal aid, alternative dispute resolution, traditional systems that are in conformity with the FDRE Constitution, and the engagement of the legal profession and civil societies in enhancing access to justice; and (f) good governance in the justice sector. The first five components encompass the *justice system loop* that is interconnected, and they also require the sixth component, i.e., *good governance* as a cross-cutting *enabler*.

The component of judicial reform is covered in a separate article published in this issue (pp. 215-257), and this article deals with reform pursuits and challenges in the remaining elements of justice system reform. The following sections respectively highlight the pursuits of reform and challenges in

[1] Ministry of Capacity Building, Justice System Reform Program Office (2005), *Comprehensive Justice System Reform Program Baseline Study Report*, February 2005

lawmaking and revision, law enforcement, legal education, access to justice and good governance. These components indeed deserve separate scholarly articles, toward which this article can provide an introductory discussion so that further research can separately address the components and sub-components in depth.

1. Lawmaking and Revision

1.1 Some Views on Drafting Effective Legislation

Robert Seidman and Ann Seidman suggest a problem solving methodology in lawmaking. According to the normative methodology advocated by the Seidmans, lawmakers are expected 'to describe and explain the behaviours that block good governance and development, i.e. the behaviours that are targeted in development oriented legislation".[2] This methodology requires drafters to "be engaged in the process of fact-finding and analysis" so that they "can design proposals and norms likely to induce a positive change of behaviour. After a bill made based on this has been enacted into law, the law's progress should be monitored and evaluated".[3]

> The Seidmans contrast their problem-solving lawmaking process with two earlier models: the ends-means methodology that defines an end and looks for the most efficient means to achieve such end, and incrementalism, which tries to stay closest to the current situation at hand and recognises the difficulty of large changes. Seidman and Seidman's contribution also explores the question of how law can induce the desired social change necessary for development.[4]

Arnscheidt *et al* outline a set of *seven* interrelated causal factors which, according to the Seidmans, facilitate the drafting process. These steps are expressed with the acronym ROCCIPI which represent:

- *Rules* (prescribing how actors should behave),
- *Opportunity* (the environmental circumstances which facilitate or thwart the specified problematic behaviour),
- Capacity (the actor's ability to behave as prescribed in the law or contrary to it),
- *Communication* (whether the actor knows the rules),
- *Interest* (factors which the actors view as incentives for behaving as they do),
- *Process* (the procedures by which the actor decides whether or not to obey the rule), and

[2] J. Arnscheidt, B. van Rooij & J.M. Otto (editors), 2008. *Lawmaking for Development*, Leiden University Press, p. 15.
[3] Ibid.
[4] Ibid.

- *Ideology* (the actors' own values beliefs, attitudes that influence their behaviour). [5]

Seidman and Seidman note that the quality of rules depends on "the extent to which the law is able to affect these factors". This methodology "was used in Zambia to do research preparation for a new law proposing to establish a Commission on Law and Integrated National Development". It aspired to "end arbitrary lawmaking of the past". This methodology, according to the Seidmans can come up with well-made and well-founded research report which "ought to persuade the 'rational sceptical reader' and lead to the adoption of the actual law and enhance the chances of its implementation".[6]

However, Van der Vlies raises the question at to "how responsive legislation – laws that respond to values, interests, needs, and demands in society– can be made given the fragmentation of such societies" particularly where a legislation operates at a global scale.[7] In relation to such legislation, she suggests "exchange of knowledge by legislators in different countries, comparison of rules in different countries, legislative transplantation, and the preparation of treaties".[8]

Based on his experience in GTZ projects, Deppe discusses the legal reform in Central Asia which at first "meant making new laws, often even the direct copying of laws, from Western countries".

> By doing so, Western donors wanted to strengthen Central Asia's commercial ties with the West, focusing on the reform of civil and trade laws. Success was measured by the number of laws passed or by polling the opinions of the business community. However, the results of such legislative reform were disappointing. As Deppe argues, this was largely due to the fact that the original reforms lacked realism, patience, and local suitability. In addition, there was too little attention paid to implementation, which the author holds does not come automatically. He concludes that successful legal reform first of all needs time, which many of the current projects with their two to five year time span do not have. Second, reforms need to be holistic, combining legislative assistance with legal training, dissemination, public information, institution building, harmonisation, and monitoring.[9]

[5] Id., p. 16.
[6] Ibid.
[7] Id. p. 16, 17.
[8] Id. p. 17.
[9] Ibid.

1.2 Overview of Ethiopia's legislative drafting reform pursuits

The aspirations of Ethiopia's Justice System Reform Program transcend the technical skills of drafting and amending laws. To this end, a manual [10] was prepared which, *inter alia,* underlines the need for *research* as the foundation of legislative drafting. As Section 3.1 of the draft indicates, "[a] drafter is the craftsperson" who writes down "public policies and ideas into a textually rigid form that can be given legal effect" and "whose task is to help resolve a problem by legislative means".[11] The Manual underlines that legislative "drafting shall be preceded by a thorough appraisal of the real problem and proper understanding of the nature of policies to be implemented, which can be properly attained through *research*".[12] In short, "research is an integral part of legislative drafting".[13]

According to the Manual, drafters should address the following in their research in connection with policies:

a) Determine the nature and scope of the policy sought to be implemented;
b) Identify, if there are any, other policies that have direct or indirect relationship with the policy sought to be implemented;
c) Determine the possible options for giving effect to the policy;
d) Decide whether the policy [can] be realized through legislation rather than by non-legislative means;
e) Identify whether the policy must be dealt with by primary legislation (proclamation) or secondary legislation (for example, regulation);

Effective legislation is the realistic textual articulation of policies and values toward solving problems based on research. It can also serve as proactive means of averting problems prior to their occurrence. Research that serves as the basis for effective legislation is forward looking and it facilitates upcoming progress and development. The Manual notes that research should pay attention to the following prior to drafting:

a) "Define the problem(s) correctly in terms of: [i] Nature, [ii] Scope, [iii] Frequency, [iv] Consequence (effect) … etc;
b) Determine whether government action is justified to deal with the problem; because, sometimes, a problem may be effectively handled and resolved by, for example, non-governmental actors;
c) If government action is justified, identify the options for dealing with the problems, i.e. [whether] legislative or non legislative options [are appropriate];

[10] *Legislative Drafting Manual*, Justice System Reform Program, December 2007.
[11] Id., Section 3.1.3
[12] Ibid.
[13] Ibid.

d) Study the likely benefits from each option in terms of: [i] Effectiveness, [ii] Cost, [iii] Gains, etc;
e) If legislation is the preferable form of government action, make sure that the matter cannot be dealt with under existing law;
f) Identify whether the appropriate legislation is proclamation or regulation."

Justice and Legal System Research Institute (JLSRI) had organized a workshop on legislative drafting in 2008. Based on the initiative of Adamseged Belay[14], an invitation (for trainers) was sent to renowned professors in the field of legislative drafting. The following paragraph of the letter sent to professors at Boston University, indicates the purpose of the training:

> The purpose of the workshop is capacity building in legislative drafting expertise with the objective of institutionalizing a learning process for equipping participants with legislative theory, methodology and methods of drafting effective legislation in tune with Ethiopia's development. Participants of the workshop will be lawyers from various institutions whose jobs are related to drafting and instructors from law schools who teach legislative drafting.[15]

Based on this invitation, the Training on Legislative Drafting was conducted in 2008. As the introductory outline of the Training on Legislative Drafting developed by Robert Seidman, Ann Seidman and Lorna Seitz indicates, the detailed provisions of a bill (draft law) constitute a design for legislative solution "grounded on facts [that are] logically organized" and which are "likely to overcome the causes" of the problems.[16] To this end, pre-drafting tasks include (a) "identifying alternative possible solutions, (b) showing 'preferred solutions' that are logical and that overcome causes of problematic behaviours"; and (c) showing that "estimated social and economic benefits" of the law to be legislated "outweigh probable social and economic costs".[17]

The capacity enhancement aspirations of the justice sector reform in lawmaking and revision had targeted at enhancing professionalism in drafting

[14] Director General, Justice and Legal System Research Institute (2006-2010).
[15] Letter from Ato Adamseged Belay, Director General of JLSRI, to Professor Anne Seidman and Lorna Seitz dated, February 28, 2008, Ref. No. 02/13/35-2/1, paragraph 2.
[16] The training was conducted by Professor Ann Seidman and Lorna Seitz, Boston University, in May 2008. The training was a take-off point in capacity building in the realm of legislative drafting. Although the legislative drafting is usually perceived in a simplistic context of drafting laws based on policy decisions, effective lawmaking involves deeper issues and considerations. *See* for example, Ann Seidman and Robert B. Seidman (2009), "ILTAM: Drafting Evidence-Based Legislation for Democratic Social Change", *Boston University Law Review*, Vol. 89, pp. 435-485.
[17] Introductory outline of the Training on Legislative Drafting, Ibid.

laws with particular attention to organs that have active involvement in drafting and enacting laws. In the absence of sustained reform and capacity building in legislative drafting, laws can continue to be spontaneous, fragmented, inconsistent and largely uncertain. Under such circumstances, new laws or amendments can be counterproductive by bringing about heavier social and economic cost in comparison with the purpose they purport to serve. Examples in this regard include (a) hasty lawmaking which can be counterproductive due to gaps in research and stakeholder engagement, (b) provisions that encourage arbitrary executive behaviour thereby prompting wider rooms for corruption and abuse of power, and (c) ambiguities and fragmentation in the law which can cause miscarriage of justice due to unpredictable judicial and administrative decisions.

1.3 The lawmaking component in GTP II

Section 7.1.4 of GTP II (December 2015) embodies Ethiopia's Growth and Transformation Plan for the years 2015/16- 2019/20. It has five paragraphs[18] which include the main targets of the justice sector during the GTP II period. The elements that specifically refer to lawmaking and revision in paragraphs 1, 2 and 5 are:

- ensuring that the drafting, revision, enforcement and interpretation of laws are in conformity with the Constitution (paragraph 1),
- adequate legal framework required for development and democratization (paragraph 2),
- The preparation and implementation of Manual for legal drafting (paragraph 5), and
- Ensuring that international agreements are signed and ratified based on their conformity with the Ethiopia's national, foreign and security policies and ensuring their contribution to the political, social and economic interests of the country (paragraph 5).

The fourth paragraph of Section 7.1.4 of GTP II embodies *eleven* elements that can be identified as targets in the domain of lawmaking and revision during GTP II. These targets are stated after the following introductory statements that can serve as framework for the targets:

> "Rule of law is one of the principles of good governance and it requires all political activities to be conducted in accordance with the Constitution and

[18] የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ፣ የሁለተኛው አምስት ዓመት የዕድገትና ትራንስፎርሜሽን ዕቅድ (2008-2012)፣ ጥራዝ 1፣ ዋና ሰነድ፣ ብሔራዊ የፕላን ኮሚሽን፣ ታህሳስ 2008፣ አዲስ አበባ፣ ገጽ 168፣ 169።

Federal Democratic Republic of Ethiopia, *Second Five Year Growth and Transformation Plan* (2015/16- 2019/20), Volume 1, Main Text, National Planning Commission, December 2015, Addis Ababa, (Amharic version), pp. 168, 169.

other laws, and it indicates that all are equal before the law and accountable thereof. The achievements in this regard will be enhanced to higher levels. Accordingly, laws will be drafted and implemented based on research to ensure that they are in conformity with the Constitution and current global realities".

The laws that are expected to be drafted (during the GTP II period) and submitted to the relevant organs are:

a) the Criminal Procedure Code;
b) Administrative Law;
c) Private International Law (conflict of laws);
d) Alternative Dispute Resolution draft laws;
e) Draft Proclamation for the Licensing and Administration of Advocates;
f) Proclamation to Protect Witnesses and Informants (ጠቋሚዎች) in criminal cases along with regulations and directives;[19]
g) Draft Proclamation to amend the Criminal Code;
h) Draft Regulations on Advocate Licence fee;
i) Amendment regulations for the administration of federal prosecutors;
j) Amendment of the Labour Proclamation in accordance of the Labour Policy and in accordance with Ethiopia's interest in development and investment; and
k) draft amendment on the law of extra contractual liability (torts) based on research to evaluate its current state.

Even if GTP II gives due attention to various law revisions, the most important factor in lawmaking is the level of attention that should be given to research and the adequacy and validity of assessments that should precede lawmaking and revision. "Most of these drafts have been a work in progress over ten years" and "there are even some official reports which had created the assumption that some of the draft revisions have been completed".[20] Although there is concern about the decline in quality of legal drafting in Ethiopia, the pace of the reform toward addressing the challenge seems to be very slow.

The tasks of legislative drafting in the targets stated above will indeed benefit from the "preparation and implementation of Manual for legal drafting", which is one of the targets for the GTP II period. This target is expected to have a broader conception of legislative drafting which involves the tasks of research and analysis (or problems and options of solution) rather than the mechanical transposition of policy decisions into legal provisions.

[19] Moreover, a system shall be formulated regarding the implementation of the services of witnesses and informants.
[20] Comment from one of the external assessors.

The issues (in Section 1.1) raised by the Seidmans, Vlies and Deppe can indeed inform the lawmaking and law revision plans that are stated in Ethiopia's GTP II. The measure of achievement in the eleven categories of laws (stated above) that are planned to be drafted during the GTP II period does not solely lie in their drafting and enactment. The laws will rather be evaluated on the basis of their *outcomes* and *impact*. This requires reinvigorating the wider conception of legislative drafting that was espoused during the earlier phases of the justice sector reform program, as highlighted in Section 1.2.

In the absence of such precautions, the problems of fragmentation of laws and their impact on legal uncertainty are bound to increase. As Tariku Wondimagegnehu notes, "laws enacted by various institutions are becoming too fragmented and confusing" and thus "the laws should be streamlined through a single institution".[21] This calls for research-based and analytic approach to lawmaking and revision. Good practices show that law commissions are entrusted with the tasks of legislative drafting so that laws can be integrated and coherent. In the Ethiopian context, the Ministry of Justice and JLSRI (Justice and Legal System Research Institute, which is currently under the supervision of the Ministry) are expected to play the role of legal expertise and advising in legislative drafting. According to Desalegn Mengistie, "there is a recent decision to harmonize drafting of laws, and all executive offices should submit their drafts to the Ministry of Justice before they are sent to the HoPR as draft laws", and he expects that "this will be practical soon".[22]

Fragmentation does not only bring about ambiguities, over-regulation and uncertainty, but it also causes inefficiency and duplicity of efforts. A case in point was the 2004 Criminal Code which was revised and re-drafted during the early stage Ethiopia's justice system reform pursuits. The "fragmentation of criminal law through the inclusion of penal provisions in the draft proclamations prepared by different institutions was an issue of concern. This problem of fragmentation persists after over a decade of reform efforts. This shows absence of adequate harmonization at various levels".[23]

Harmonization does not only refer to lawmaking, but also relates to the harmony and interdependence between the various reforms in the other components of the justice system. The initial justice sector initiatives in Latin America, for example, focused on law reforms. However, it soon became clear

[21] Ato Tariku Wondimagegnehu, Ministry of Public Service & Human Resource Development, Panel Discussion (organized by Ethiopian Lawyers Association) on *Justice Sector Reform Components in GTP I and Draft GTP* II, 11 December 2015, Churchill Hotel.

[22] Ato Desalegn Mengistie, Director, Justice System Reform Program, Ministry of Justice, Panel Discussion, *Panel Discussion*, Ibid.

[23] Comments from one of the external assessors.

that in the absence of other changes law reforms have little impact.[24] There was thus "growing recognition and incorporation of additional elements to turn legal theory into practice". Bedner states that these included:

> "training programs, the creation of new organizations (public defense and prosecution), restructuring and reorientation of existing ones (the courts, police, …, public ministries responsible for prosecution), provision of new equipment and infrastructure more compatible with the new procedural requirements, education of private lawyers and law students, and public information campaigns.[25]

Lawmaking is not thus an end-in-itself, but a component that should be accompanied by appropriate, effective and efficient *interpretation* and *implementation*.

2. Law Enforcement Organs

2.1 GTP II Targets in Law Enforcement

The following targets in the *first paragraph*[26] of Section 7.1.4 of GTP II refer to law enforcement:

- Strengthening the effectiveness of justice through enabling the justice system to obtain valid and truthful evidence;
- Ensuring that the drafting, revision, enforcement and interpretation of laws are in conformity with the Constitution;
- Strengthening the capacity of justice system institutions with regard to human resources, knowledge, skills and equipment;
- enhancing the culture and habit of peaceful resolution of conflict.

Among the eight targets under the *second paragraph*[27], the following are relevant to the law enforcement component of justice sector reform:

- Ensure rule of law through the implementation and interpretation of laws based on their purpose;
- Bring about institutional reform towards the attainment of [the objectives here-above, i.e., democratization and rule of law] and toward the pursuit of accelerated and sustainable development;
- Tasks that strengthen the processes, organization and human resource toward effective justice system;

[24] Andrian Bedner (2008), *Court Reform*. Law, Governance and Development, Policy Notes, Leiden University Press, p. 10.
[25] Ibid, footnotes omitted.
[26] GTP II, *supra* note 18, p. 168.
[27] Ibid.

- In collaboration with the public, combat the tendencies of corruption and gaps in fair trial, and enable the justice system to win public confidence.

The first target item in the *third paragraph*[28] applies to all justice sector institutions. It aims at "capacity building with regard to justice system institutions and their human resource, and building the human resource capacity of justice sector institutions in a planned and institutional approach through training to enhance capacity in attitudes, integrity, knowledge and skills." Among the ten targets that can be identified in the fifth paragraph,[29] the following directly or generally relate to law enforcement:

- The preparation and implementation of crime prevention strategy;
- Monitor and support the effective implementation of the National Human Rights Action Plan to ensure respect for human rights; and
- Enhance good governance through awareness against corruption and raising awareness about its adverse social and economic impact so that the society does not tolerate corruption.

2.2 Law Enforcement in Criminal Justice

The criminal justice process involves (a) interrogation of accused persons by the police (b) investigation by the public prosecutor which institutes charge, and (c) enforcement of committal for trial or enforcement of sentences by prison administrations. As these three organs enforce the law, their success or failure is not measured by the number of convictions or case attritions, but by the level of their professionalism and integrity in the course of fair, competent, responsible, effective and efficient performance in accordance with the law.

A criminal justice system may have a spectrum of features ranging from primacy to *due process* vis-à-vis focus on *crime control.* The determinant factors may be the level of peace, shared values, democratization, crime rates, government legitimacy, national consensus, and other variables. Even when criminal justice systems are forced to give primacy to the *crime control* model rather than the *due process* model, they are expected to consider potential infringements of due process as transient (that would recede proportionate to the decline of crime rates, civil wars or terrorism). The justice system in such settings is expected to consider its emphasis on crime control (rather than due process) as *transient*, because it envisages that the *due process model* ultimately deserves to be in the mainstream.

The distinct functions of the Police and the Public Prosecutor under the Ethiopian Criminal Procedure Code reflect the *due process* model so that the police and public prosecutor would independently conduct their law

[28] Ibid.
[29] Id., p. 169.

enforcement mandates. However, in settings of rising crime rates (as in the case of substantial numbers of petty theft "in locations such as Addis Ketema, regional bus terminal in Addis Ababa"[30]) the *due process model* may tend to create case loads on both parties, and the pursuit of efficiency may, at times, give primacy to the 'efficient' means of search for truth through the functional coordination of the police and public prosecution. This is because the dictum 'justice delayed is justice denied' may require the option of embracing the lesser evil. Law enforcement agencies under such settings may thus encounter push factors toward giving primacy to faster means of managing cases.

Real Time Dispatch (RTD) which allows the joint tasks of the Police and Public Prosecutor falls under the *crime control* model. Yet, justice systems are not expected to consider such schemes as their ultimate aspiration in strategic five-year plans. Targets (iii) and (vii) which were embodied in the earlier April 2015 Draft of GTP II respectively had aimed at:

- 'a system which ensures and evaluates the effectiveness and efficiency of the criminal justice system with particular attention to attrition rates, conviction rates etc.'; and
- 'capacity enhancement in the investigation, prosecution and conviction of persons accused of corruption and confiscation of property obtained by corrupt practices'.

The fourth target under the third paragraph of the April 2015 version of Draft GTP II, pp. 173- 174, had stated "increase in conviction rates' (**የጥፋተኝነት ምጣኔ ከፍ እንዲል**) as one of the targets. GTP II has duly omitted such targets toward increasing conviction rates. The percentage of convictions among the cases handled by a public prosecutor cannot be an objective threshold of evaluating professional service and effectiveness. The police and the public prosecutor are entrusted with the task of enforcing the law, and not enhancing conviction rates. A case which, for example, results in the release of a suspect from custody due to inadequate evidence does not prove the weakness of the police in charge. The same holds true for acquittal after charge. Criminal investigation or criminal prosecution is not a competitive game, and a verdict of not guilty shall not represent 'underperformance' for the police or the public prosecutor. The ultimate *raison d'être* of both institutions is law enforcement, including the release of innocent persons.

At a recent workshop, a practicing attorney raised a question: "In view of current efforts to raise the conviction rate in Ethiopia to nearly to 100%, why

[30] This example was raised during interview with Ato Desalegn Mengistie, Justice System Reform Program Director, Ministry of Justice, November 24, 2015.

should there be discussion about public defender services and legal aid"?[31] He meant to imply that the decision is already made by the organ which files the charge if the conviction rate is planned to be close to 100%. The question evoked many reflections and observations. According Ato Tamrat Kidanemariam, "the purpose of a criminal justice system is to punish the offender and to acquit the innocent, and in effect, non-conviction of innocent persons cannot be regarded by the public prosecutor as losing a case".[32]

There can be an argument that such conviction rates may serve as disincentive against filing charges on cases in which the likelihood of conviction is uncertain. However, such disincentives should not come from the evaluation of the performance of public prosecutors based on the rates of convictions in the cases they handle, but from the proper enforcement of the law which protects innocent persons from conviction based on the thresholds embodied under the Criminal Procedure Code or other laws of procedure.

One of the themes of focus in the 2005 Comprehensive Justice System Reform Program is the demilitarization of the police in training and institutional arrangements thereby "treating the police as service rather than a force. The same focus and attention was also given to reforming the penitentiary system".[33] Although "significant achievements were recorded during the first phase of the reform including changing the legal framework, the organizational and functional structure, the training system and abolishing the military ranking of police and prison officers",[34] sustained attention is expected in this aspect of the reform.

Another concern in the realm of law enforcement that was stated in the 2005 CJSRP Baseline Study was the fragmentation of prosecutorial authority. This challenge is steadily growing as the criminal law regime and public prosecutors in charge are becoming fragmented. As stated in Section 1.3, there is a plan to amend regulations for the administration of federal prosecutors under GTP II. There is also a project to establish General Prosecutor's Office as one of the forty projects for the GTP II period under the Good Governance Cluster Reform. Yet, these statements are too general and they should be interpreted to mean the establishment of the General Public Prosecutor's office which is independent and which resolves the challenges and gaps in the fragmentation of prosecutorial authority.

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[31] Validation workshop organized by Ethiopian Lawyers Association on "Public Defender's Services in Ethiopia: Assessment of Current Gaps and the Way Forward", Jupiter Hotel, 16 November 2015.

[32] Ibid.

[33] Comment from one of the external assessors.

[34] Ibid

Moreover, combating corruption in law enforcement is among Ethiopia's justice sector reform pursuits. A study presented at the Workshop on Indicators to Combat Corruption in Ethiopia's Justice Sector[35] has presented findings on the various institutions of the justice sector including the police, public prosecutor offices and prison administrations. The study identifies the types of corruption to which these organs are exposed. The corrupt practices in law enforcement institutions include taking bribes, poor performance (**ሥራን መበደል**), embezzlement, misuse of authority (**በሥልጣን መነገድ**) and unlawful enrichment.

The study attributes these acts of corruption particularly to inadequate knowledge and skills, low salary scales and low level of financial benefits, discretionary powers, lack of transparency and service delivery systems.[36] According to the study, other factors that induce corrupt practices in the police include closer relations with offenders, poor level of recognition given to good performance, and failure to disclose corrupt practices due to the level of friendship which prevails among colleagues in the same unit.[37] The specific factors that are challenges in prison reform include problems of inadequate prison space, level of awareness in prison handling, and unprofessional relations with prisoners.

2.3 Civil Justice Reform

Law enforcement in the civil justice system involves many institutions of the executive. One of the areas of focus in this regard should be the susceptibility of administrative tribunals to arbitrary decisions in interpreting laws and regulations. Cases in point are administrative tribunals that deal with urban land expropriation, eviction and compensation. These tribunals established under the administrative authorities (that are parties in the litigation) are empowered to adjudicate and decide cases in spite of their interest in the outcome of the case.

> The extent to which ambiguities and discretionary power are avoided in the demarcation lines between administrative and legislative functions, or between administrative and judicial functions determine the level of check and balance against abuse of authority by administrative entities. … The advantage of administrative tribunals relates to efficiency and effectiveness in contrast to judicial processes that might cause delay. However, experience in the complaints against expropriation and the amount of compensation

[35] Workshop on Indicators to Combat Corruption in Ethiopia's Justice Sector, A research conducted by Justice and Legal System Research Institute, Ghion Hotel, October 20, 2015. (**ጥቅምት 9 ቀን 2008 ዓ.ም. ‹‹በኢትዮጵያ ፍትሕ ዘርፍ መሰናን ለመከላከል የሚያስችሉ፣ የፍትሕ ዘርፍ አገልግሎት አሰጣጥና አፈጻጸም አመላካቾች››**, The *Reporter*, Amharic Version, 21 October 2015, Reported by Tamiru Tsige.

[36] Ibid.

[37] Ibid.

> show that equal attention ought to be given to the issue of impartiality through, for example, judicial review and stakeholder representation when members of administrative tribunals are appointed.[38]

As Aron and Abdulatif noted, although "modern states cannot effectively function without allowing the administrative agencies to have such roles" this should be done with "the *caveat* that the agencies should be kept in check by procedural stipulations and schemes".[39] They duly underline the "gap in the Ethiopian legal regime due to the absence of administrative procedure law"[40] even though the Draft Federal Administrative Procedure Proclamation (2004) was drafted a decade ago.

Fair adjudication requires safeguards of stakeholder participation in the membership of all administrative tribunals and it envisages judicial review upon exhaustion of all administrative remedies. Likewise, administrative rulemaking procedures should clearly regulate the rulemaking function of administrative agencies. In the absence of these safeguards against arbitrary decisions without judicial scrutiny and unless administrative remaking is harnessed by administrative procedure law, civil justice can hardly be possible. GTP II does not address the gaps in the civil justice system with regard to stakeholder representation in administrative tribunals and judicial review. As indicated in Section 1 above, GTP II states *administrative law* as one of the laws that will be drafted and submitted to the relevant organs. This law is, *inter alia*, expected to include *administrative rulemaking* and delimit the scope of authority of administrative tribunals.

3. Legal Education, Research and Training

About two decades ago Dakolias had, in the context of Latin America, stated the following on the role of legal education in justice system reform:

> Legal education and training is fundamental for judicial reform. … The quality of law schools has been deteriorating ... . In most Latin American countries the public universities have no entrance requirements, and each school establishes its own graduation requirements. Due to low salaries, law professors usually work on a part-time basis, and therefore, have little time to devote to research. As a result, judges often are not prepared for the bench.[41]

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[38] Elias N. Stebek (2013), "Role conflict between Land Allocation and Municipal Functions in Addis Ababa", *Mizan Law Review*, Vol. 7, No. 2, p. 263.

[39] Aron Degol & Abdulatif Kedir (2013), "Administrative Rulemaking in Ethiopia: Normative and Institutional Framework", *Mizan Law Review*, Vol. 7, No. 1, p. 1.

[40] Ibid.

[41] Maria Dakolias (1996). *The Judicial Sector in Latin America and the Caribbean Elements of Reform*, The World Bank, Washington DC, p. xiv

Dakolias states the importance of training programs for judges"[42] and the need to enhance the legal awareness of the public including "better education and access to the population at large".[43] These pursuits of training programs and public awareness enhancement are expected to be conducted as tasks that supplement legal education.

The positive impact of legal education on the service quality of the justice sector does not lie in the number of graduates, but in the thresholds of competence, commitment to professional services and integrity upon graduation. This explains the *caveat,* underlined by Dakolias, against unrestricted access to public legal education because this can cause "excess supply of lawyers and therefore, a misallocation of resources"[44] which could have been used for enhanced quality in legal education. The risk of unemployment after LL.B graduation, for example, is that law schools will eventually find it difficult to attract adequate percentage of candidates with a relatively high academic base during admission. This can have long-term adverse impact in legal education and the legal profession at large.

Ethiopia's legal education reform program is one of the components of the Justice System Reform Program. It had four pillars:[45] (a) curriculum (b) delivery and assessment (c) law school management (which required autonomy of law schools in self-management including budget execution), and (d) research, publications and consultancy services. Community services (including legal aid in clinical programs and externship) were considered as part of the second pillar, i.e., delivery of legal education. The revised curriculum which was effective since September 2006, changed the years of legal education from four years to its previous duration of five years, introduced various skilled courses including externship and also introduced exit exam which is still in force.

One of the achievements of the legal education reform was the preparation of teaching materials which are made available to all Ethiopian law schools. Course Syllabi and teaching materials have been prepared for all LL.B courses. Teaching materials for 67 courses were "assessed at different workshops by assessors and different participants from law schools and other stakeholders" out of which 16 were "identified as below standard".[46] There were plans to submit the latter to other course developers for upgrading. Moreover, some teaching materials that were rated as having excellent standards by the Curriculum

[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Justice and Legal System Research Institute, *Ethiopian Legal Education Reform Program*, 2006.
[46] Memo, Tasks on Curriculum Implementation, presented to Technical Committee for Ethiopian Law Schools, (Justice and Legal System Research Institute, January 03, 2011).

Committee based on their content and form were expected to be upgraded and be published as books.

The category of targets under GTP I titled 'Human Resource Capacity development[47] had envisaged the *eight* targets out of which the following *seven* targets expressly made reference to legal education, training and research:

- The full implementation of the new LL.B curriculum;
- The preparation, evaluation and regular updating of teaching materials for the LL.B curriculum;
- Pre-service training for newly appointed prosecutors and judges;
- Short-term training "at least once a year for judges and prosecutors serving at all levels ranging from Woreda to Federal Supreme Courts";
- Enhance the capacity of other professionals;
- Equip training institutes at federal and regional levels;
- Encourage 'research works that help build the capacity of professionals working in the justice sector'.

However the performance in this regard is not evaluated in GTP II. Nor does GTP II include a target toward the pursuance of the legal education reform which is underway since 2005/2006. The full implementation of the new LL.B curriculum that was expected during GTP I had envisaged the accomplishment of various projects based on the Guidelines that were developed through substantial inputs in expertise, budget and time. These Guidelines were meant to ensure the quality and standards of legal education with a view to preparing law graduates to the justice system commensurate with the level of competence, integrity, sense of citizenship and professional responsibility necessary for the sector. These instruments include:

- Regulatory Framework on Legal Education in Ethiopia;
- Regulatory Framework for Distance Legal Education in Ethiopia;
- Regulatory Framework for Short-Term Training in Ethiopia;
- Regulatory Framework on Continuous Legal Professional Development;
- Guidelines on Delivery and assessment;
- Guidelines on Research, publication, Consultancy and Community Service.
- Guideline for Teaching Material and Textbook Preparation
- Manual for Externship and Code of Conduct Governing Students engaged in Externship and Clinical Legal Education
- Manual on Exit Exam, and
- Other guidelines and manuals.

[47] Ministry of Finance and Economic Development (2010), *Federal Democratic Republic of Ethiopia, Growth and Transformation Plan*, 2010/11- 2014/15, Volume I, Main Text GTP I. November 2010, Addis Ababa, English Version, p. 102.

With regard to graduate studies, the joint LL.M and PhD programmes with University of Alabama and University of Warwick were meant to lead to sustainable capacity building in the host law schools of Addis Ababa University and Mekelle University. Clusters were also formed so that more graduate programmes could be conducted (through twinning) to enhance the capacity of all clustered law schools. Even though the reform project has enhanced the tradition and outputs of research and publications, the pace at which it is progressing is slower than what was anticipated.

The third component of the legal education reform, i..e, the autonomy of law schools has not been implemented in most law schools. The level of autonomy in the various law schools is largely determined by the discretion of the university senates and presidents rather than the standards that were envisaged in the legal education reform program. Law schools are usually among the first faculties that are opened whenever a new university is established. It may seem easy to purchase some codes of law from Berhanena Selam Printing Press, print out the teaching materials prepared under the auspices of Justice and Legal System Research Institute (JLSRI), duplicate some books from a law school library, employ about four or five LL.B graduates and then admit law students in a newly opened university. However, the ultimate adverse impact of this rush (toward numbers, statistics and enrolment/graduate reports) is apparent. Even if the legacy of legal education was too elitist for a long time since the 1960s, the recent trends of abrupt overexpansion is bound to bring about graver harm to the legal profession and the justice system at large.

The challenge encountered by most law schools is the focus accorded to faculties and colleges based on the number of their students rather than the significance of the respective faculties, departments or colleges (irrespective of their enrolment size). Moreover, the focus on statistical figures of graduates (caused by a university's targets) has brought about pressure on law schools from university administrations which promote the motto of 'student enablement' (ማብቃት).[48] Although the principle seems legitimate, its extremist interpretation of enabling nearly all students (who are enrolled) to graduate adversely affects the efforts of students in the learning process thereby harming quality and standards of legal education. This exerts pressure on instructors to give tutorial assistance and make-up exams to students below 'C' grades. It can also be a push factor for instructors to provide 'C' grades as the minimum threshold (for students who would have scored 'D' or 'F') in order to avoid the inconvenience of tutorials and make up exams.[49]

[48] Interview with a law school instructor who seeks anonymity; 18 December 2015.
[49] Ibid.

During the initial years of legal education reform, JLSRI was the hub for the reform process by facilitating the coordination of Ethiopian Law Schools to own and manage the reform pursuits. JLSRI was in the midst of coordinating various legal education reform projects when it was required to leave its premises which were located in the compound of the Ministry of Finance and Economic Development at Sidist Kilo. The location was very convenient in view of its proximity to the Federal Supreme Court, Addis Ababa University, Ministry of Education and other stakeholders. It was also convenient for all law school representatives to use JLSRI offices and JLSRI Library during their stay in Addis. The projects of legal education reform were transferred first to Ministry of Justice and then to Higher Education Strategic Centre (HESC) at the Ministry of Education, thereby losing momentum and pace. At present, most of the elements of the legal education reform program are shelved except the Exit Exam which is still underway.

There is the need for enquiry regarding the reasons behind the relegation of legal education reform to the back seat. While change of hands between the JLSRI, Ministry of Justice and Ministry of Education in the coordination of the reform are the core factors for the decline in the pace and scope of the reform, the core motive that brought about steadily declining political commitment in legal education reform deserves a thorough research which is beyond the scope of this article.

GTP II does not make reference to legal education and research except the incidental mention that was made (in the earlier April 2015 version) which had expressed its aspirations toward the substitution of neo-liberal curriculum by developmental democratic curriculum; and applying the same in the fields of legal education and economics (**"የኒዮ ሊበራል ካሪኩለም በልማታዊ ዲሞክራሲያዊ ካሪኩለም መተካት፤ የሕግና የኢኮኖሚክስ መስኮችም በዚሁ እንዲቃኙ ማድረግ"**.[50] The last sentence of Item 3.16 of the earlier April 2015 Draft of GTP II [51] had reiterated the need for such curriculum revision. This statement is duly omitted from GTP II. Yet, the issue deserves some discussion.

It is to be noted that neo-liberalism is a policy of extreme market deregulation, and it is already in the back seat in many countries after its 'years of blossom' known as the 'Washington-Consensus' of the late 1980s and early 1990s. Law curriculum which is based on ideology and indoctrination cannot be effective in preparing law graduates with analytic skills, diversified

[50] Ethiopian Federal Democratic Republic, Second Five Year (2015/15- 2019/20) Growth and Transformation Plan, Final Draft, (Amharic version) April 2015 (Miazia 2007 EC), Addis Ababa , Amharic version (**የኢትዮጵያ ፌዴራዊ ዴሞክራሲያዊ ሪፐብሊክ፤ የሁለተኛው አምስት ዓመት** (2008-2012) **የዕድገትና የትራንስፎርሜሽን ዕቅድ የመጨረሻ ረቂቅ፤ አዲስ አበባ፤ ሚያዝያ** 2007), p. 177.

[51] Ibid.

perspectives, competence, integrity and responsibility. This is because any ideological patronage in legal education corrodes the key competence of being analytic and critical; it rather prepares graduates who are mostly 'fence-sitter'[52] paralegal clerks rather than lawyers.

As Frere[53] notes, effective education is different from the 'banking model' in education which is analogous to depositing data in the minds of students and making inventories during exams. Effective legal education empowers and nurtures students with the cognitive, affective and behavioural competence and integrity in analysis, synthesis, problem solving and evaluation. It is in light of the need for such minds and souls that legal education reform should steadily continue during GTP II.

This should not, however, be misinterpreted as 'legal education for its sake'. Law curricula are expected to give due attention not only to 'black letter law' but also to the 'law in action' or the 'law in context'. Ethiopia's 2002 Policy Document titled 'Capacity Building Strategy and Programs'[54] notes the significant role of lawyers in economic development and states that legal education should not only focus on the letters of law but should also consider the law in the context of principles and objectives of economic development.[55] What development pursuits require from legal education curricula is thus due attention to the *law in action*, by including relevant courses that give wider context to the contents of the curriculum. In other words, what is required of legal education is the preparation of students toward the graduate profile expressed in the curriculum which goes beyond 'black letter law'.

To this end, the revised LL.B curriculum has new courses, and one may argue that the gaps mainly relate to resources, effective delivery, periodic updating of the curriculum, and law school autonomy. As realities are dynamic, the curriculum (whose components including law school autonomy have not yet been fully implemented) requires further updating commensurate with unfolding global realities and advances in information technology. Apparently, the human resource base of the all justice sector institutions (and the legal profession at large) is legal education. Thus, the reinvigoration of the 2006 Legal Education

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[52] '*Fence-sitters*' are persons with workplace attitudes of just doing what the superiors assign based on the instructions and work rules.

[53] Paulo Frere, *Pedagogy of the Oppressed*, 1970 (Translation into English by Myra Ramos), New York: Continuum, 2007.

[54] Government of Federal Democratic Republic of Ethiopia, Capacity Building Strategies and Programs, February 2002 (**የኢትዮጵያ ፌዴራላዊ ዴሞክራሲያዊ ሪፐብሊክ መንግሥት፣ የማስፈፀም አቅም ግንባታ ስትራቴጅና ፕሮግራሞች፣ የካቲት 1994 ዓ. ም.**

[55] Id. p. 292. The Amharic text reads: "… **የሕግ ሙያተኞች በኢኮኖሚ እንቅስቃሴው ውስጥ ከፍተኛ ግምት የሚሰጠው ሚና ያላቸው በመሆኑ ሥልጠናቸው ሕጉን በተናጠል ሳይሆን ከበስተጀርባው ካሉ የኢኮኖሚ ልማት መርሆችና ዓላማዎች ጋር አስተሳስረው እንዲመለከቱት ለማድረግ የሚያስችል ሊሆን ይገባል፡፡**"

Reform Program including the autonomy of law schools in admissions, course delivery and assessment, resource allocation and management, and other avenues of empowerment and de-politicization (of assignments to offices, the learning and research environment, and employment opportunities after graduation) will determine the quality and features of Ethiopia's justice sector in the years and decades ahead.

4. Access to Justice

Access to justice involves various elements that are necessary for the effectiveness of claims and rights. For example "Ghana has an impressive record of encouraging public education on fundamental human rights as a means to improve citizens' access to justice" and this task involves NGOs "engaged in human rights promotion campaigns to complement education programmes conducted by two constitutionally mandated institutions".[56] There were challenges identified in the context of Ghana which included "geographical imbalance in the distribution of courts", corruption, shortages of judges at lower courts, rigid and formal court procedures, lack of legal aid, inadequate avenues of alternative dispute resolution and the "need to recognize important traditional court institutions". [57]

The experience of various countries shows that steadily increasing attention is being accorded to access to justice. Since the 1990s, most justice sector

[56] *Ghana: Justice Sector and the Rule of Law*. A Discussion Paper. (A review by AfriMAP and The Open Society Initiative for West Africa and The Institute for Democratic Governance), An Open Society Network Publication, 2007, p. 17.

[57] Id., pp. 17, 18. The summary of the challenges states the following:

- geographical imbalance in court distribution tilted to favour areas with higher economic activities rather than areas with high density of population;
- corruption in the justice system and unreasonable delays [that] have resulted in erosion of the people's confidence in the courts;
- significant shortages of judges at [lower courts] …;
- the cost of legal advice as an important impediment to accessing justice;
- a highly formalised court system, with strict rules of procedure for submitting a complaint;
- lack of adequate legal aid although the Constitution provides for legal aid for the indigent;
- the need for the promotion of alternative dispute resolution (ADR) to divert cases from the courts;
- the need to recognize important traditional court institutions which have important *de facto* jurisdiction, while ensuring that they are respectful of human rights, especially in relation to gender equality.

reforms in Latin America include access to Justice. According to Maria Dakolias, the elements of judicial reform in Latin America have been:

- judicial independence through changes to judicial budgeting, judicial appointment, and disciplinary systems improving court administration through adoption of case management and court management reforms;
- adopting procedural reforms;
- providing alternative dispute resolution mechanisms;
- enhancing the public's access to justice;
- incorporating gender issues in the reform process; and
- redefining and/or expanding legal education and training programs for students, lawyers and judges.[58]

Dakolias further states the areas that need attention to enhance access to justice which include "the proper functioning of the [justice] system as a whole".[59] She raises various factors in the evaluation of access to justice which include "the time it takes to adjudicate a case, the parties' direct and indirect costs of litigation (filing expenses, court and bailiffs' fees, attorneys' compensation, lost wages, etc.), the ability of the potential users to have knowledge of, understand and follow the procedural steps during the life of a case, and the physical access to the courts".[60] The judicial system may thus "present *economic, psychological, informational and physical barriers* for individuals who need its services".[61] The solutions toward overcoming or lessening certain *economic barriers* to justice include "reducing incidental costs to litigation, providing efficient legal aid programs and creating less expensive, alternative forms of justice[62] which include Alternative Dispute Resolution Mechanisms.[63]

As Hammergren notes, ensuring the availability of the services whenever they are needed is important, "but it is a condition for, not the essence" of the services that are provided as *public good*.[64] In the context of access to justice, "the *public good* derives from broad and equal access for all citizens to services intended to resolve their disputes and rectify alleged violations of their legally and constitutionally protected rights".[65] Thus, 'the usual indicator of success' in

[58] Dakolias *supra* note 41, p. vii.
[59] Id., p. 36.
[60] Id., p. 37, citing Venezuela: Judicial Sector Assessment
[61] Ibid, citing Earl Johnson, "Thinking about Access: A Preliminary Typology of Possible Strategies," in Access to Justice 3 (ed. Mauro Cappelletti, 1978).
[62] Ibid.
[63] Id., pp. 37-43
[64] Linn A. Hammergren (2007), *Envisioning Reform: Improving Judicial Performance in Latin America*, The Pennsylvania State Printing Press, p. 131.
[65] Ibid.

access to justice is the actual provision of the services and 'not abstract protection', and the indicators further include "more effective legal framework, or a reduced level of conflicts".[66]

Hammergren states the difficulty in integrating the various elements of access to justice. Yet, she underlines that judicial reform and access to justice should be undertaken simultaneously.[67] Justice system reform does not thus necessarily bring about access to justice unless it is part of the reform and if simultaneous efforts are not made to address the barriers of access to justice. This is also reflected in various development cooperation policies:

> Legal development co-operation efforts have traditionally sought to promote 'the rule of law' through legal reform and institutional strengthening (mainly of the judiciary). While access to justice has sometimes been a part of these programmes, it was not their main goal. More recently, under the influence of the global struggle against poverty, legal reform programmes have shifted their focus to the justice seeker, in particular the poor and the marginalised, in particular women and indigenous people. This shift from top-down institutional reform to bottom-up intervention informs the new focus on access to justice and the new strategy of legal empowerment.[68]

Article 37 of the Constitution guarantees "the right to bring a justiciable matter to, and obtain decision or judgements by, a court of law or any other competent body with judicial power".[69] Such right can be invoked by individuals, [70] or by any association which represents "collective or individual interest of its members",[71] or by "any group or person who is a member of, or represents a group with similar interests".[72] The constitutive ingredients of

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[66] Ibid.

[67] p. 166. She notes:

> "Rather than treat this as a chicken-and-egg proposition, the dilemma would appear to argue for a simultaneous (and, one would hope, better coordinated) or iterative approach on both fronts. Strengthening the judiciary first, without attending to access, could reinforce isolation. Pushing access without other improvements may be costly, unnecessarily difficult, and unrewarding. The current tendency to parallel, but less coordinated programs is not quite the answer. Still, like all the partial approaches, it has been the easiest for the participants to adopt."

[68] Ineke van de Meene and Benjamin van Rooij (2008), *Access to Justice and Legal Empowerment*, Leiden University Press, p. 6.

[69] According to Article 79(1) of the FDRE Constitution, "Judicial powers, both at Federal and State levels, are vested in the courts." The words 'any other competent body with judicial power' in Article 37 are given restrictive interpretation and they refer to forums such as arbitration, etc.

[70] FDRE Constitution, Art. 37(1).

[71] Id., Art. 37(2)(a)

[72] Id., Art. 37(2)(b)

Article 37(1) include the right to institute a claim, and the right to obtain decision or judgement. These core elements presuppose:

a) awareness about the law and the accessibility of laws and other data which are relevant (i.e. legal information including registration and accessibility of various data);
b) professional advise or representation in preparing claims, counter-claims, defences, arguments in court, etc.
c) obtaining judgement in accordance with the law within reasonable time.

As Tamrat Kidanemariam (president of Ethiopian Lawyers Association) observes, the right of access to justice "envisages factors from three dimensions, namely the law, the bench and the parties to the suit or trial".[73]

> The *first* factor requires laws, processes and practices which do not deny or restrict the right to bring justiciable matters to courts of law (or other relevant tribunals). The *second* factor relates to independent, competent and impartial courts in the context of integrity against corruption. And *third*, legal services should exist, and in particular, persons who do not afford to hire a lawyer should be provided with free legal service.[74]

Access to justice presupposes the existence of *the normative dimension* that relates to the content and form of laws, and the *adjudicative dimension* to which the claims are made and from which decisions and judgements are sought. These two settings enable access to justice only when adequate public awareness and (fairly comparable) legal services of advising and representation exist to both sides of the litigation. While the normative and the adjudicative preconditions for access to justice relate to *lawmaking* and the *judiciary*, the realization of access to justice require *access to legal information and the availability of legal services*.

These core elements of access to justice were not addressed in the earlier April 2015 Draft GTP II, other than the brief reference made to the 'publication and distribution of binding cassation decisions'[75] and reference to capacity building of "institutions that are in charge of registration of vital events" and enhancing their performance in the registration of vital events such as birth, marriage and death.[76] This gap is (to some extent) rectified in GTP II because it incorporates targets that relate to legal information, the Bar and ADR.

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[73] Foreword, in Abera Hailemariam (2015). "Public Defenders Services in Ethiopia: Assessment of Current Gaps and the Way Forward", EN Stebek, ed. (Ethiopian Lawyers Association, December 2015), p. 5.
[74] Ibid.
[75] April 2015 Draft GTP II, *supra* note 50, p. 173.
[76] Id., p. 174.

Six issues deserve attention in relation with access to justice. They are legal information, the Bar, legal aid, alternative dispute resolution (ADR), recognition of traditional systems (that are in conformity with the FDRE Constitution), and the role of the legal profession and civil society organizations in access to justice and justice system oversight.

4.1 Legal Information

There are indeed achievements in the accessibility of legal information. They include online accessibility of proclamations, regulations and Federal Supreme Court cassation decisions. Yet, there is much to be done by the respective organs of the justice sector in availing legal information on websites that are functional and updated. One of the components of justice sector reform in the 2005 CJSRP refers to 'information flow within and outside the justice system'. The ambitious project on 'National Integrated Justice Information System for the Ethiopian Justice Institutions' (NIJIS) seems to take longer that what was anticipated.

> World Bank and other donors were involved in the NIJIS project. A significant budget was allotted to it. And a very extensive field work was done. The project envisages three phases. Now that the first phase is done, focus should be given to the next phases". [77]

Legal information to the wider public and within institutions of the justice sector can have modest start ups and organically develop onto steady achievements toward long-term goals. For example, law blogs such as Ethiopian Legal Brief,[78] Abyssinia Law[79], etc. deserve appreciation. Another commendable initiative in the avenue of legal information is a project that is initiated by African Law Library[80] to support the enhancement of access to legal information in Africa. One of the outcomes of this project is *EtLex* Volume 1[81] in which English translations of one hundred Federal Supreme Court Cassation Division decisions were published along with thematic index to all proclamations and regulations enacted from 1995 to 2012. As Dr. Menberetsehai Tadesse (former Vice President of the Federal Supreme Court) noted, even if the project was "a small addition in the justice process, it will have a big impact" as a contribution in the domain of legal information.[82] The lesson that can be drawn from the

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[77] Interview with Belen Teferi, November 19, 2015, International Cooperation on Legal Affairs Directorate Public Prosecutor, Ministry of Justice.

[78] Available at <http://chilot.me/>

[79] Available at <http://www.abyssinialaw.com/>

[80] Available at <http://www.africanlawlibrary.net/>

[81] EtLex Vol. 1, *Selected Federal Cassation Decisions, and Ethiopian Law Index* (1995-2012), Justice and Legal System Research Institute, December 2013.

[82] Task Launching Event of African Law Library Project (organized by Justice and Legal System Research Institute In collaboration with two other members of the Ethiopian Legal Information Consortium), August 22, 2013. Dr. Menberetsehai Tadesse (former Vice

good practices in Ghana (indicated above) is the need to enhance public awareness which is among the core factors that enhance legal information.

4.2 The Bar and the Legal Profession

Professional associations are standard bearers, gate keepers and watchdogs with regard to the level of professionalism and legitimate practice of any occupation. For example, the American Bar Association sets the standards in legal education (used in all law schools) and it is also in charge of Bar exams that are entry points to law practice. Members of a professional association benefit from various professional development schemes in competence and integrity. Such levels of professionalism are crucial in economic development because they facilitate predictability, efficiency, effectiveness and integrity in the justice system in general. This in return facilitates the quality, efficiency and effectiveness of the justice sector.

The Communiqué of the *Joined-up Justice Forum* (issued on 10 November 2015) notes the adverse impact of some corrupt advocates who broker court decisions thereby putting pressure of corruption on the judiciary.[83] This concern was also stated in the *Justice Sector's 2015-2016 Good Governance Movement Launching Document* which (under Section 5.3) expresses its concerns regarding the standards of competence and integrity in the Bar.[84] Enhancing the competence, integrity and responsibility of associations in the legal profession including the Bar and other civil society organizations (involved in activities relevant to the justice sector) positively contributes to the quality of performance in all components of the justice system.

As various participants of the panel discussion on Justice Sector Reform Components in GTP I and Draft GTP II noted, the Bar and the legal profession in general are among the key factors in justice sector reform. The following remarks were made during the Panel Discussion:

- "Lawyers associations should be given attention comparable with other components of the justice system".[85] Practicing lawyers are "components of the justice system. There is the tendency of giving more emphasis to the controlling aspect and magnifying the weaknesses of persons who only

President of the Federal Supreme Court) was the Director General of JLSRI (2010- 2014), and he was chairperson of the Ethiopian Legal Information Consortium in 2013-2014.

[83] Joined-up Justice Forum, Communiqué, 10 November 2015, Hawassa, p. 2, Item 6. (አገር አቀፍ የፍትሕ አካላት የጋራ መድረክ አቋም መግለጫ፣ ጥቅምት 30 ቀን 2008 ዓ.ም. ሐዋሳ)::

[84] የፍትሕ ዘርፉ የ2008 ዓ.ም. የመልካም አስተዳደር ንቅናቄ ማቀጣጠያ ሰነድ፣ መስከረም 2008 ዓ.ም. (*Justice Sector's 2015-2016 Good Governance Movement Launching Document),* September 2015, pp. 13-14.

[85] Ato Reshid Seid, Ethiopian Young Lawyers Association, Board Chairperson, Panel Discussion, *supra* note 21.

represent few practicing lawyers. This cannot be generalized for the entire profession". [86]

- "The criticism is not against all lawyers. But there is the tendency from various persons with court cases to inquire whether an attorney knows the judge. Good governance in the justice sector envisages professional integrity and the competence of practicing lawyers".[87]
- "Participation is one of the principles pursued by the Ministry of Justice and practicing lawyers will be encouraged to participate in various pursuits of the Ministry of Justice. For example, Ethiopian Lawyers Association can be invited to participate in drafting, training and similar engagements".[88]
- "Ethiopia's legal services should be at a level that is required by the pace of economic development, contract enforcement and investment. Legal Service Provision, as a component of justice sector reform, does not only include practicing lawyers, but it also encompasses lawyers that are employed in the public and private sector to advise and represent institutions. The relevant government organs should not only have positive attitudes toward practicing lawyers, but should also regard them as partners in the efforts toward justice sector reform. The capacity building pursuits during GTP II should also include practicing lawyers".[89]

4.3 Legal Aid

Legal aid to the indigent is one of the areas that need due attention in the realm of access to justice. The right of an accused person to be provided with the legal service of representation at the state's expense –if he/she cannot afford to hire a lawyer– is ensured under Article 20(5) of the FDRE Constitution. However, studies show gaps in this regard owing to the legal framework and other constraints including budgetary, human power and institutional challenges that are encountered in public defender's services.[90] The gaps in this regard are so wide that they can neither be covered by the *pro bono* services to be provided by

[86] Ato Tamrat Kidanemariam, President of Ethiopian Lawyers Association, Panel Discussion, Ibid.

[87] Ato Desalegn Mengistie, Director of Justice System Reform Program Office, Ministry of Justice, Panel Discussion, Ibid.

[88] Ato Fekadu Demissie, Director of Advocates Licensing and Administration Directorate, Ministry of Justice, Panel Discussion, Ibid.

[89] Ato Gebreamlak Gebregiorgis, Ethiopian Lawyers Association, Chairman of Legal Aid Committee, Panel Discussion, Ibid.

[90] See, for example, Abera Hailemariam, *supra* note 73; and Hussein Ahmed Tura (2013), "Indigent's Right to State Funded Legal Aid in Ethiopia". *International Human Rights Law Review*, 2.

practicing lawyers in Ethiopia[91] nor the clinical legal aid programmes that are underway in various law schools. Significant achievements in this regard require the establishment of an independent *Public Defender's Office* with due autonomy, budget and professional staff during the GTP period.

4.4 Alternative Dispute Resolution

GTP II envisages the drafting of laws on Alternative Dispute Resolution.[92] The earlier April 2015 Draft GTP II had also included a target regarding the need to encourage 'the public to use Alternative Dispute Resolution (ADR) schemes such as reconciliation and arbitration'.[93] As Ato Gebreamlak Gebregiorgis duly observes, Ethiopia's justice sector "should be able to provide legal services such as alternative dispute resolution forums and facilities at the level that is acceptable by international institutions of arbitration and investors" because "efficient economic activities and investments seek wide and effective opportunities for alternative dispute resolution".[94] He further notes that in the absence of such ADR forums "arbitration at international forums will be very costly for Ethiopia".[95]

4.5 Recognition of Traditional Systems

Institutions of justice include not only formal institutions but also embrace traditional institutions that offer access to justice as long as the content of the traditional normative system and the process are not in violation of the Constitution. Enhanced legal pluralism is envisaged during GTP II. There are commendable achievements in the avenue of research and publications (on traditional legal systems) by Justice and Legal System Research Institute (JLSRI), and this is expected to sustained.

4.6 Public Participation and the Role of Civil Society Organizations

The various elements of access to justice evoke the issue of public participation and the role of civil society organizations. GTP II embodies a target regarding the need for establishing "public empowerment structures which encourage comprehensive public participation and enhance law-abiding and peaceful citizenry".[96] Public participation becomes meaningful if it goes beyond

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[91] Pursuant to Article 49 of the Federal Court Advocates' Code of Conduct Regulations No. 57/1999 practicing lawyers are required to provide *pro bono* services for at least fifty hours a year.

[92] GTP II (December 2015), *supra* note 18, p. 168.

[93] April 2015 Draft GTP II, *supra* note 50, p. 174.

[94] Gebreamlak Gebregiorgis, Panel discussion, *supra* note 21.

[95] Ibid.

[96] It reads "የጎበረተሰቡን ሁለንተናዊ ተሳትፎ የማጐልበት ሕግና ሥርዓት የሚያከብርና የሕግ ማስከበር ሥራውን በንቃት የሚደግፍ የሕዝብ አቅምን አደረጃጀት መፍጠር", GTP II, December 2015, *supra* note 18, p. 168.

spontaneous engagements which lack continuity and institutional memory. For example, if the participants are different persons who merely speak out their views without formal records and in the absence of a steady transfer of information to persons who will be engaged in future public participation, the forums cannot be effective.

Section 7.2.1 of GTP II (titled Strengthening Public Participation) states that follow up and support will be made to societies and charities during GTP II period.[97] Even though the section that deals with the justice sector does not address the role of civil society organizations in relation with access to justice, the target mentioned in Section 7.2.1 of GTP II can have positive impact in this regard. Civil society organizations not only enhance legal information, the performance of the Bar, legal aid, ADR, the recognition of traditional systems, and public participation, but they also serve as instruments of oversight and feedback. This issue is briefly discussed in Section 7.

5. Good Governance

Kaufmann, Kraay and Mastruzzi define *governance* as "the traditions and institutions by which authority in a country is exercised". This, according to Kaufmann *et al*, includes "(a) the process by which governments are selected, monitored and replaced; (b) the capacity of the government to effectively formulate and implement sound policies; and (c) the respect of citizens and the state for the institutions that govern economic and social interactions among them".[98] In other words, the *first general component* relates to the legitimacy of holding power, deserved and merit-based assignments to office or position, control over and the accountability of office holders or persons with authority including the capacity to recall and replace them. The *second general component* of good governance refers to effective performance through sound policies, while the *third general component* focuses on the domain of outcomes and impact as, *inter alia*, manifested in the confidence of citizens and the state in general on the institutions that govern their economic, social and political interactions.

Kaufmann *et al* have formulated two measures of governance which correspond "to each of these three areas, resulting in a total of six dimensions of

[97] GTP II, *supra* note 18, pp. 170-171. The original Amharic version reads "**የብዙሃንና የሙያ ማኅበራት እንደዚሁም የበጎ አድራጎት ድርጅቶች ባለው የአገሪቱ ሕግ መሠረት ግልፅነትና ተጠያቂነት የሰፈነበት አሠራር ተከትለው ለአገሪቱ ልማትና የዲሞክራሲ ሥርዓት ግንባታ የበኩላቸውን ሚና እንዲያበረክቱ ለማድረግ በዕቅድ ዘመኑ ክትትልና ድጋፍ ይደረግላቸዋል፡፡**"

[98] Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi (2010), *The Worldwide Governance Indicators: Methodology and Analytical Issues*, Global Economy and Development at Brookings, p. 1.

governance" [99] namely: voice and accountability, political stability and absence of violence, government effectiveness, regulatory quality, rule of law and control of corruption.

This model avoids the pitfalls of extremely wide and narrow definitions of governance, and it also provides holistic approach in which the dimensions are interrelated. As Kaufmann *et al* illustrate "accountability mechanisms lead to less corruption, or that a more effective government can provide a better regulatory environment, or that respect for the rule of law leads to fairer processes for selecting and replacing governments and less abuse of public office for private gain".[100]

These six dimensions are currently in use as Worldwide Governance Indicators.[101] The *first* dimension relates to the foundation of state legitimacy, and, in the context of the justice system, it requires merit-based assignments, appointment and accountability. The *second* dimension refers to peace and

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[99] Id., p. 4.

They are:

(a) The process by which governments are selected, monitored, and replaced:

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.

(b) The capacity of the government to effectively formulate and implement sound policies:

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.

(c) The respect of citizens and the state for the institutions that govern economic and social interactions among them:

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.

[100] Id., p. 5.

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

stability (in which the justice sector plays a crucial role and) which constitute *a sine qua non* condition for social, economic and political interactions in society. As the justice sector is part of the public service, the *third* dimension, i.e., *government effectiveness* applies to the justice sector as well. The *fourth* and *fifth* dimensions specifically relate to the justice sector, because, the dimension of *regulatory quality*, inter alia, relates to the lawmaking component of the justice system, while the *rule of law* dimension is relevant to most components of the justice sector. The *sixth* dimension, i.e. the *control of corruption,* is relevant for the entire public service including the justice system.

Reform toward good governance thus requires a comprehensive approach to these dimensions in which the justice system plays an important role. Vanda argues that governance reforms can succeed only if "the state and governing institutions [are] reformed and strengthened; effective democratic institutions established; and effective participation, strengthened accountability, and enhanced rule of law instituted" with a view to ensuring "sustainable good governance".[102]

The Joined-up Justice Forum that was held in Hawassa on November 9 and 10, 2015 has evaluated reform and good governance in the various organs of the justice system, and has also stated the directions to be pursued by the institutions in the sector. After having examined the internal and external environment in which the justice sector functions,[103] the issues that were raised include performance and challenges regarding leadership, employees, public participation, private law practice, and legal education, training and research.[104] Problems and potential solutions were identified with regard to the problems related with good governance in the police, public prosecutor services, courts, and prisons. The Forum has further formulated a system of follow up and support.[105] The problems identified by the Forum regarding good governance are related to processes in operations (**አሠራር**), institutional framework (**አደረጃጀት**), human resource and laws.[106] In general, it is believed that the sector has substantial gaps in performance and the Forum has underlined the need to address these gaps and challenges.[107]

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[102] Ved P. Nanda (2006), "The 'Good Governance' Concept Revisited', *The Annals of the American Academy of Political and Social Science*, Vol. 603, Law, Society, and Democracy: Comparative Perspectives (Jan., 2006), p. 281.

[103] Report of the Joined-up Justice Forum, November 9 & 10, 2015, Hawassa.

[104] Ibid.

[105] Ibid.

[106] Ibid.

[107] Ibid. The Amharic text of the Report Summary reads "**በአጠቃላይም ዘርፉ ተቋማዊ የአፈፃፀም ችግር በሰፊው እንደሚታይበትና በቀጣይ መቀነስ እንዳለበት ከስምምነት ላይ ተደርሶ ከዕቅዱ ጋር የሚነካቱ ነጥቦች እንዲገቡ ተወስኗል።**"

Various parts of GTP II address the issue of good governance. The themes apply to the justice sector as well because they make reference to the civil service in general. All components of the justice sector involve governance. And every gain in any of these components positively contributes to good governance which cannot be imposed 'top down' or be legislated as law. Good governance emerges and develops through the dynamics that nurture and enhance its elements. On the other hand, weak governance is, *inter alia*, related with gaps in governing institutions, and in return these institutions are weak because of their economic, social, cultural and political realities.

At the national level, the chicken-egg paradox related with governance cannot be resolved by purely legalistic means or through policy declarations. The vicious cycle in the causal link between weak governance and deepening impoverishment (even in the midst of non-inclusive 'statistical claims of growth') pushes a country toward poverty and fragility traps. And on the contrary, every success at the foundational ingredients of sustainable development including components of the justice sector will positively contribute toward transposing the negative vicious cycle onto a positive *virtuous cycle* whereby the dimensions of progress enhance the levels of democratization and rule of law.

6. Projects under Justice Sector Reform Program - *versus* - Good Governance Reform Cluster Strategic Plan

The Justice Sector Reform Program had *fifty four* projects for the GTP I period' which included *thirty projects* under the Sub-Program for Law Enforcement Reform and *eight projects* under the Sub-Program for Enhancing Legal Education, Training and Research. *Three* out of *eight* projects under the latter Sub-Program are not included in Good Governance Reform Cluster projects for the GTP II period. They are (a) the projects that deal with strengthening and reforming legal education, (b) establishing a system to evaluate the effectiveness and education and training institutions and (c) IT enhancement project for law schools, JLSRI and JOPTC.

The projects during GTP I under the Sub-Program for Law Enforcement (የሕግ አስከባሪ አካላትን ማሻሻያ ንዑስ ፕሮግራም) were the following:

1	Human resource development project	16	Project for the enforcement and enhancement of Alternative Dispute Settlement schemes
2	Capacity building project for administrative and security affairs offices	17	Legal aid services improvement project
3	Capacity building project for the police	18	Project for the rehabilitation, correction and administration of prisoners
4	Project for community police capacity building and assignments	19	Federalism and inter-state relation enhancement project
5	Project to enhance and consolidate community-based crime prevention system	20	Project to enhance values of peace
6	Project for the formulation and enhancement of a system for witnesses and crime victims	21	Project to enhance systems for pre-conflict interventions and post-conflict responses
7	Criminal and civil justice reform project	22	Project to enhance public participation in the justice system
8	Project for registration of vital events	23	Project to strengthen lawyers associations
9	Forensic investigation and laboratory establishment and enhancement project	24	Project for follow up and support system of charities, civic societies and private security guard entities
10	Project for firearms and armaments administration and procedures	25	Justice sector organs coordination project
11	Prosecution file system project	26	Project to enhance the operations of law enforcement organs by ICT
12	Project for legal drafting in accordance with the Constitution, and consolidation of laws	27	National Integrated Justice Information System (NIJIS) project
13	Project to establish a system for public evaluation of justice organs	28	Justice Organs Integrated Information Center establishment project
14	Project to enhance the awareness of the public on law	29	Project to dispose of dead files
15	Project for premises and other facilities	30	Project to enhance and strengthen performance in cross-cutting issues

Eight projects stated under serial numbers 4, 10. 11, 16, 20, 21, 23 and 24 here-above are not included in the list of Good Governance Reform Cluster Projects for the GTP II period.

7. The Role of Civil Society Organizations in Justice Sector Reform

Civil society organizations in their modern conception emerged as entities outside the periphery of the state, and there is the propensity toward harmony and tension between them depending on the avenues of (a) cooperation and conflict, and (b) the level of democratization in a country. They are voluntarily established and registered non-governmental and non-profit entities that operate in accordance with the law. The Charities and Societies Proclamation[108] states the need "to aid and facilitate the role of Charities and Societies in the overall development of Ethiopian Peoples".[109] It classifies civil society organizations into various categories[110] and regulates their establishment, registration, source of fund and operations. The Proclamation shall not apply to religious institutions, *Edir*,[111] *Equb*[112] and societies governed by other laws.[113]

Civil society organizations do not compete for political office. Nor is the purpose of civil society organizations dissident or oppositional resistance to government. Yet, they have significant roles in tasks that positively contribute to economic development, social wellbeing and environmental sustainability. Civil society organizations involve themselves in hands-on activities which they consider is to the benefit of citizens. Their salient features include "the establishment of legal boundaries" that can ensure "an independent public space from the exercise of state power, and their ability to "influence the exercise of [state] power.[114]

There are historic events whereby political parties in power or office holders within a party brought about substantial reforms as in the case of *perestroika* and *glasnost* in the former Soviet Union. The same holds true for changes in China since the late 1970s. This shows that civil society organizations are not

[108] The Societies and Charities Proclamation No. 621/2009, *Negarit Gazeta*, 15th Year, No. 25. 13th February 2009.
[109] Id., Preamble, paragraph 2.
[110] "Ethiopian Charities" or "Ethiopian Societies, "Ethiopian Residents' Charities", "Foreign Charities", and "Mass-Based Societies" which include "professional associations, women associations, youth associations and other similar Ethiopian societies."
[111] *Edir* is a traditional self-help association in Ethiopia established among neighbours for mutual support during difficulties such as funerals and to bear various responsibilities in organizing tents, etc during events such as wedding and mourning.
[112] *Equb* is a traditional saving scheme in Ethiopia in which members periodically deposit a certain amount of money (weekly, monthly, etc), so that the amount collected from members can be paid to each of them based on sequence determined by drawing lots.
[113] Proclamation No. 621/2009, *supra* note 108, Art. 3(2).
[114] Michael Bernhard (1993), "Civil Society and Democratic Transition in East Central Europe", *Political Science Quarterly*, Vol. 108, No. 2 (Summer 1993), p. 308.

sine qua non reasons for reforms, although they can be contributory factors. Tolerance of a regime to civil society organizations does not also necessarily buttress their activities because the performance of civil society organizations in Botswana, for example, is not as strong as it could have been. On the other hand, Mexico is a good example for the substantial engagement of civil society organizations and their resultant impact in justice sector reform:

> Mexico has historically featured a relatively weak civil society, due to the influence of corporatist structures controlled by the Mexican state. Yet, with regard to the criminal justice system…, Mexican civil society has recently shown some encouraging signs of engagement and activism in response to significant rule of law and security concerns. Specifically, with regard to judicial reform, Mexican civic activists were very engaged in the historic 2008 constitutional and legal reforms that produced one of the most important changes in Mexico's contemporary history.[115]

Civil society organizations can play significant roles "in complementing the activity of the state by filling [gaps]".[116] The fifth component of the justice system reform program that was identified in 2002 was 'professional and civic legal associations".[117] Moreover, 'enhancing the 'role of civic societies and stakeholders in good governance and development activities' was one of the implementation strategies under GTP I. Likewise, Section 7.2.1 of GTP II states the need for following up and supporting societies and charities. As the following paragraphs indicate, civil society organizations can play constructive roles in all components of legal sector reform.

7.1 Lawmaking

Civil society organizations can support effective lawmaking through awareness enhancement about the problems they witness in the course of their activities. This serves as vital input in the course of policy decisions and legislative reforms. It enables the legislature to have wider perspectives on issues, problems, options in the solution of the problems and good practices of other countries. A case in point is the role played by Ethiopian Women Lawyers

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[115] Octavio Rodríguez Ferreira (2013), "Civic Engagement and the Judicial Reform: *The role of civil society in reforming criminal justice in Mexico"*, Working Paper Series on Civic Engagement and Public Security in Mexico (Woodrow Wilson International Center for Scholars; the University of San Diego) August 2013.

[116] Sisay Gebregziabher (2002), "The Role of Civil Society Organizations in Democratization Process in Ethiopia", Paper Presented at the Fifth International Conference of the International Society for the Third-Sector Research (ISTR) "Transforming Civil Society, Citizenship and Governance: The Third Sector in an Era of Global (Dis) Order", July 7-10, 2002, University of Cape Town, South Africa, p. 9.

[117] Ministry of Capacity Building, *Justice Reform System in Ethiopia: Proceedings of the Workshop on Ethiopia's Justice System Reform*, Africa Hall, 7-8 May 2002, p. 43.

Association (EWLA) in its awareness creation efforts toward reforming Ethiopia's family law under the 1960 Civil Code and its role in the lawmaking process of the 2000 Revised Family Code. It also had an important contribution during the revision of the 2004 Criminal Code. Members of the then Ethiopian Bar Association, (currently Ethiopian Lawyers Association) also had significant contributions during the revision of various laws, and many active members and participants were involved in law revision committees. Engaging civil society organizations and professional associations is thus expected to continue throughout the GTP II period.

7.2 Law Enforcement

Civil society organizations enhance public awareness about rights and capacity building. These are crucial factors in development and good governance. The contribution of Prison Fellowship-Justice for All in prison reform and in the various aspects of justice sector reform in general is commendable. Its partnership in various projects involves not only prison administrations, but other justice sector institutions as well.

The contribution of APAP[118] illustrates the role that can be played by civil society organizations in law enforcement. It had "the aim of promoting accountability and transparency in the operation of low level government administration and law enforcement organs". To this end, it had "organized zonal level (the lowest political administration unit next to *woreda*) human rights education and training workshop for judges, prosecutors, administrators and police officials in different parts of the country".[119]

APAP's contribution in enriching Ethiopian jurisprudence in the area of public interest litigation is exemplary. On March 16, 2006, APAP had filed a suit at the Federal First Instance Court (Ref No AP/3. APN/045/98) against the Environmental Protection Authority. It required the respondent to have due diligence in taking the necessary measures that can stop the environmental pollution of Akaki River. In this public interest litigation, APAP requested the court to order the Environmental Authority to "enact laws which are delegated to it, and to exercise its power to fulfill its duties" [120] and "avert the pollution on the rivers and to clean up the pollution of the rivers".[121] It also requested that "a commission from governmental and non-governmental organizations" be established to "follow up the measures taken by the Environmental Authority

[118] Action Professionals Association for the People, established in 1993
[119] Sisay Gebregziabher, *supra* note 116, p. 10.
[120] Tsegai Berhane and Merhatbeb Teklemedhin (2009), Environmental Law Teaching Material (Prepared under the sponsorship of Justice and Legal System Research Institute), pp. 133-141.
[121] Ibid.

and submit report on the date fixed by the court".[122] This illustrates the positive role of civil society organizations in law enforcement oversight. Even if discussing the merits of the case is beyond the scope of this article, it is worth to note that, a decade after APAP's suit against EPA (for lack of diligence in protecting Akaki River), the pollution has grown worse.

7.3 Legal Education and Research

Ethiopian legal education reform had envisaged the transfer of the reform program to Association of Ethiopian Law Schools (AELS)[123], which was one of the projects in legal education reform. It was envisaged to be an association comparable to law school associations in other countries. The goals were envisaged to be:

"- Facilitate networking of law schools and external links;
- Create conducive forum for exchanging best practices and research outputs; and
- Strengthen efforts towards quality legal education".[124]

The thresholds of '*quality of legal education*' are articulated in 60 standards. The standards have a general part (Standards 1-4), Standards for Curriculum (5-17), Standards for Delivery and Assessment (18-28), Standards for Management, Leadership and Organization (29-48), and Standards for Research, Publications and Consultancy Services (49-58), Other programs (Standard 59), and Quality Assurance (Standard 60).[125] The Consortium of Ethiopian Law Schools was established and registered as a prelude to the establishment of the Association of Ethiopian Law Schools. However, the regression in the pace and scope of legal education reform (briefly indicated in Section 3) has not yet enabled the Consortium to develop onto an association.

In the realm of positive contributions for legal education and research, there are achievements of Ethiopian Lawyers Association (ELA) in publishing series of issues of a law journal, *Ethiopian Bar Review*. Legal education and the profession at large will benefit if Ethiopian Lawyers Association resumes the publication of its journal. Another noteworthy achievement by a civil society organization is the sustained publication of '*Wonber*' (**ወንበር**), which in Amharic means 'The Bench'. It is a periodical published by Alemayehu Haile Foundation.

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[122] Ibid.

[123] Action Plan Item 28, Part VIII, *The Ethiopian Legal Education and Training Reform Document* , Justice and Legal System Research Institute (2006)

[124] Association of Ethiopian Law Schools: Concept Paper Background: Objectives of AELS and Problems to be addressed, Justice and Legal System Research Institute, August 2009.

[125] "Standards for Law Schools", *Ethiopian Journal of Legal Education*, Justice and Legal System Research Institute, Vol. 2, No. 1, January 2009, pp. 97-136.

In the realm of textbooks, there was a significant achievement by a civil society organization, the American Bar Association Rule of Law Initiative (ABA ROLI)[126] Legal Education Support Program in publishing law textbooks at enhanced level of content and standard through rigorous review processes which involved academics in and outside Ethiopia. As Mandefrot Belay, who was director of the program, recalls:

> "the legal education support program was meant to enhance the overall capacity of the Ethiopian legal education system through reform projects focused on providing improved access to legal education resources *via* the development and publication of textbooks, building the skills of law students and enhancing the capacity of law school faculty as part of USAID`s program of support to the Ethiopian Justice Sector reform. The publication of textbooks and other research outputs by Ethiopian scholars and academics through funding by the program was a preferred option and this was thought to have positive impact in terms of building local capacity compared to earlier interventions such as book donations from abroad". [127]

Mandefrot further notes that "the program facilitated the review process and publication of six textbooks on the core subjects of the Ethiopian Legal Education Curriculum which was a rare success after nearly forty years of the publication of the first law textbooks by the Law School of Addis Ababa University". The books were distributed to Ethiopian Law Schools free of charge. "The next phase in the project was to proceed toward the publication of six other textbooks, and facilitate the 2nd Edition of the textbooks published during the first round of textbook publications". [128] Unfortunately, however, the project could not continue owing to the challenges it encountered in relation with registration.

7.4 Access to Justice

One of the components of the justice sector which benefits from enhanced involvement of civil society organizations is access to justice. EWLA, for example, represents indigent women. It has continued its active engagement in legal aid in addition to which it undertakes awareness creation including radio

[126] ABA ROLI did not continue with its project initiatives because its formal registration request as a foreign non-profit organization was rejected by Charities and Societies Agency. If registered, the office was meant to serve as a regional center for similar support in Africa in legal education and research as well, in view of Addis Ababa's location as seat of AU Headquarters.

[127] Interview with Ato Mandefrot Belay, former Director of the National Justice System Reform Program at the former Ministry of Capacity Building of the Government of Ethiopia on November 25, 2015.

[128] Ibid.

and TV programmes.[129] EWLA has conducted survey on domestic violence,[130] and this enables it to undertake its activities in the realm of access to justice based on research findings.[131]

As stated earlier, the right to legal aid to the indigent at the state's expense is enshrined under Article 20(5) of the FDRE Constitution. However, the facts at the grassroots show gaps between what the law envisages and the actual level and quality of legal aid which is available. This is an area of intervention that needs enhanced engagement of civil society organizations.

Another area of intervention that benefits from civil society organizations is alternative dispute resolution. For example, Addis Ababa Chamber of Commerce is facilitating ADR. Yet, there is the need for robust ADR forums in Ethiopia in view of the case load of courts, the delay that can result from court proceedings and the interest of parties to solve their disputes out of court. The Ethiopian Arbitration and Conciliation Center was a civil society organization which had commendable achievements in mediation and arbitration. The Center "used to work in five regions and the number of disputes settled out of court by mediation from September 2012 to October 2013 involved 29,142 (twenty nine thousand one hindered and forty two) cases".[132] Haregewein Ashenafi, who was Executive Director of the Center, stated that "mediation was conducted (1) in kebeles, i.e. cases that come to Social courts; (2) in relation to cases that are handled by Community Policing and (3) at first Instance courts".[133] The publication of four volumes of arbitration awards by the Center was another major contribution to Ethiopia's jurisprudence on arbitration, in addition to the importance of the volumes in legal education and research.[134]

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[129] Interview with W/ro Zenaye Tadesse, Executive Director, Ethiopian Women Lawyers Association, 22 December 2015.

[130] Ibid

[131] Ibid.

[132] Interview with W/ro Haregewein Ashenafi, Former Executive Director of Ethiopian Arbitration and Conciliation Center, Nov. 30, 2015.

[133] Ibid

[134] *Report of Arbitral Awards*, Published by the Ethiopian Arbitration and Conciliation Center, Volumes 1 to 4. The volumes embody selected arbitral awards rendered over a period of over three decades. The volumes were the following:

- Ethiopian Arbitration and Conciliation Center (2008), *Report of Arbitral Awards*, Volume 1, August 2008.
- Ethiopian Arbitration and Conciliation Center (2010), *Report of Arbitral Awards*, Volume 2, June 2010.
- Ethiopian Arbitration and Conciliation Center (2011), *Report of Arbitral Awards*, Volume 3, November 2011.
- Ethiopian Arbitration and Conciliation Center (2012), *Report of Arbitral Awards*, Volume 4, November 2012.

7.5 Good Governance:

As Weiss observes:

> "good governance is more than multiparty elections, a judiciary and a parliament, which have been emphasized as … Western-style democracy. The list of other attributes, with the necessary resources and culture to accompany them, is formidable: universal protection of human rights; non-discriminatory laws; efficient, impartial and rapid judicial processes; transparent public agencies; accountability for decisions by public officials; devolution of resources and decision making to local levels from the capital; and meaningful participation by citizens in debating public policies and choices.[135]

Good governance –as briefly discussed in Section 5– is a process and not a single-step accomplishment. Nor can it emerge from promises and pledges. The elements of good governance thus involve standards of behaviour in all institutions of the legal sector with due *caveat* against exaggerating performance and downplaying weaknesses. This presupposes not only pursuits of the institutions in charge, but also requires stakeholder engagement and public participation including civil society oversight.

Concluding Remarks

Ethiopia's justice reform program has gone through various phases and institutional arrangements of coordination. The lessons drawn are the need to avoid being too ambitious (accompanied by over-centralization) and due caution against the other extreme of fragmented pursuits that lack grassroots empowerment and harmonization. The targets of the Justice Sector in GTP I for the period 2010-2015 had narrowed down the ambitious pursuits envisaged in the 2005 Comprehensive Justice System Reform Program (CJSRP). The 2005 CJSRP Baseline Study had recommendations, implementation strategies and action plans with specific objectives and actionable items that cover the components of the Judicial and legal sector reform. However, "the performance and challenges in the CJSRP have not been periodically evaluated by independent teams of experts based on well-developed evaluation tools and techniques".[136]

> The CJSRP is a long term reform program intended to support development at all levels of the Ethiopian society. Its success can only measured by the

[135] Thomas G. Weiss (2000). "Governance, Good Governance and Global Governance: Conceptual and Actual Challenges", *Third World Quarterly*, Vol. 21, No. 5 (Oct., 2000), p. 801

[136] Comment from one of the external reviewers.

> impact it brought about on the lives of the people and not just by the materials or inputs that go to it or by the number of people trained or the number of laws enacted. It requires commitment at all levels of leadership. In spite of the reform pursuits for over a decade, there are still major concerns which must be addressed. In some cases there is even an indication of backslide, and these are among the issues which must be investigated in future research.[137]

Even though the scope accorded to justice sector reform in GTP I was not as extensive as the initial years of the reform, the attention given to the sector was not peripheral. However, the scope of coverage given to the justice sector is further reduced in GTP II. Had this been caused by the level of attainment of the targets that were envisaged in the 2005 CJSRP and GTP I, the steady decline in the number of targets which specifically refer to the justice sector would have been acceptable. However, most of the concerns that prevailed during the take-off point of the Justice System Reform Program are still relevant.

The assumption of responsibilities of reform by the respective organs during GTP I was indeed commendable. However, it could have been more effective in the context of enhanced institution-level empowerment in decision making and project implementation subject to sector-level harmonization. The earlier phases of the reform (2005-2010) were coherent and harmonized, *inter alia*, through a Steering Committee chaired by the Minister of Capacity Building. At present, there is *Joined-up Justice Forum* which meets twice a year in which various institutions of the justice sector participate. Each sector is in charge of its reform activities with some oversight. However there is the need for clarity as to which authority is at the wheels regarding the task of overall harmonizing. Such meaningful harmonization goes beyond organizing forums and reports. The gaps are thus two-fold owing to inadequate institution-level empowerment and the need for effective and efficient harmonization beyond the Joined-up Justice Forum.

Harmonization calls for effective coordination which can bring about higher impact in the performance of the entire justice system. Consistent alignment between the various elements is thus necessary so that each element facilitates the whole justice system and meanwhile avoids duplicity and fragmentation of efforts. This requires clear mandates and coherent management. However, the current institutional organs that are in charge of the various components of the reform are so fragmented that effective harmonization is inadequate.

The harmonization and strategic guidance of the reform at the level of the justice system in general does not have the requisite empowerment beyond a few modest tasks of coordination. This is contrary to the level of coordination

[137] Ibid.

that existed during the initial phases of the reform. Such harmonization in the context of grassroots empowerment calls for reform management beyond periodic coordination and experience sharing that is facilitated by the Joined-up Justice Forum. Even though "the meeting of justice sector actors in the Joined up Justice Forum (twice a year) can be used as an important instrument in the dialogue between justice sector institutions and donors," the Forum "cannot substitute a well structured national justice system reform program management and coordination arrangement".[138]

It is at this juncture that the legal and judicial system reform pursuits are clustered into the *Good Governance Reform cluster*. It is impossible to incorporate all projects of the justice sector in the Good Governance Reform Cluster because the cluster includes various institutions outside the justice sector as well. Moreover, the exhaustive inclusion of justice sector targets and projects will rather alter the cluster onto the justice sector thereby adversely affecting the fair representation of other institutions in targets and projects. This challenge is already visible in the proportion of justice sector projects among the cluster's forty projects for the GTP II period. Thus, clustering strategic plans, targets and projects in a single document inevitably encounters challenges. Instead, clustering could have focused on harmonizing strategic plans at the macro level, and empowering the respective sectors and institutions in the formulation and implementation of their plans and projects.

The initial phases of the justice system reform had some challenges and gaps which do not, however, undermine the achievements and the level of vision, enthusiasm and commitment at all levels. Program reviews and evaluations could have been made in relation to each reform component. While regular monitoring and reviews could have been conducted to evaluate periodic performance, special reviews could have been made with regard to particular challenges and opportunities in program implementation. As one of the reviewers of this article noted "the main purpose of the review and evaluation should be improved management, more accountability and learning from experience".[139] This envisages looking into the intended or unintended outcomes of the reform program at early stage, so that the reviews can facilitate the assessment of the reform "in relation to the higher level national objectives, i.e., impact, relevance and sustainability".[140]

In contrast to the earlier features of high thresholds of targets, the pace of justice system reform pursuits in GTP I (i.e. 2009/10 – 2014/15) reflects over-reaction against centralized reform program rather than a synthesis that avoids

[138] Ibid.
[139] Ibid.
[140] Ibid.

the pitfalls of the two extremes. The current measures of clustering in GTP II (2015/16 –2019/20) can aggravate the problems if the Good Governance Reform Cluster, substitutes the Justice System Reform Program targets and projects. Such clusters are merely expected to facilitate the harmonization of relatively independent (but not fragmented) reform programs which should be accorded autonomy in planning, decision making and budget administration.

Good practices in developmental states show the need for merit-based job placements and promotions at every unit and in all components of the justice sector. This further envisages resources (financial, physical, technological, and informational), processes, organization and leadership. Ethiopia's legal sector should thus deal with the roots of weak governance in the context of commitment to address the gaps and challenges thereof. This renders grassroots empowerment –in decision making and resource management– expedient. Such empowerment meanwhile presupposes *harmonization* among organs and institutions of the legal sector, and broad-based participation including enhanced involvement of civil society organizations in various pursuits of legal sector reform.

The balance in this regard should thus avoid the extremes of mechanical fragmentation and over-centralization. This needs a holistic justice system reform which facilitates synergy, harmony and experience sharing, while at the same time ensuring relatively autonomous legal sector reforms with the bigger justice system framework in view. In other words, each component deserves a reform programme and implementation plans of its own with due autonomy in needs assessment, planning, organizational arrangements, manpower, resource allocation, implementation, monitoring and evaluation subject to the need for horizontal and vertical synergy and harmonization within the justice system. This is because every positive change in each component enhances the level of efficiency, quality and public confidence in the justice system. To reiterate a point noted in Section 5, such changes and achievements can indeed positively contribute towards transposing vicious traps onto a positive *virtuous cycle* of progress, democratization and rule of law. ■

Reforming Ethiopia's Expropriation Law

Muradu Abdo ♣

Abstract

Ethiopia is increasingly using expropriation as the single most important device to take land particularly from small landholders to supply it to corporate farmers and industrialists with a declared intention of boosting economic growth. This is happening in the context where expropriation laws are inadequate to protect peasants and pastoralists. The state is not paying cash compensation for land use rights, compensation for property on the land is paltry, and uniform rehabilitative schemes are absent. There are also no sufficient administrative and judicial mechanisms in place to restrain the government in exercising its power of expropriation. This is lax expropriation system that runs counter with the country`s Constitution which pledges tenure security for small landholders. This article recommends enhanced judicial scrutiny of expropriation, recasting land use rights as human rights, and emphasis on the quality of projects that necessitate expropriation. Ethiopia should expedite these and related measures in the interest of justice, securing the livelihoods of the masses and national stability.

Key terms

Expropriation, public purpose, compensation, land use rights and rehabilitation

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Introduction

Ethiopia`s recent economic growth has generated unprecedented demands for land for urban expansion, infrastructure, manufacturing, corporate farming and mining. The state is trying to meet these rising demands through two main routes. The first is through invoking the 'empty land' narrative (i.e., unoccupied land) which, *inter alia*, entails the designation of communal lands as 'government owned land' in order to render use of expropriation unnecessary.

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The other is use of the power of expropriation which focuses on land taking primarily from smallholders. This article focuses on the latter.

In Ethiopia, there is lack of comprehensive data on how frequently and extensively, for what purposes as well as with what impact the state is actually using its power of expropriation. This hampers an empirically grounded study of expropriation.[1] However, legal research through the analysis of Ethiopian law of expropriation, and its substantiation by various research findings and some fieldwork reveal a trend that raises concern. The trend implies a reordering of the land tenure system of Ethiopia increasingly in favor of capital.[2] This implies a remaking of the extant land tenure system which is dominated by smallholder agriculture through expropriation of land from such smallholders for 'public purpose' to lease it out to capital. This in turn suggests the beginning of a shift from a land tenure system dominated by subsistence farm holdings to a system whereby land is increasingly deployed to the service of commercial farmers and industrialists with a declared purpose of enhancing economic development. This shift contradicts state policies and laws that at the same time pledge to enhance the tenure security of small landholders through the 'land for all' narrative.

The first section considers the present state of Ethiopian expropriation law and practice in light of three basic ingredients of expropriation; namely, public

[1] This is true in other jurisdictions as documented by Antonio Azuela and Carlos Herrera-Martin (2009), "Taking Land around the World: International Trends in Expropriation for Urban and Infrastructure Projects" <DOI 10.1007/978-1-4030-8862-9_13>, pp. 337, 342 & 359 (accessed March 13, 2011). In the Ethiopian case, the following recent studies with some empirical element should be credited: Daniel W/Gebriel (2009a) *infra* note 21; Girma Kassa (2011) *infra* note 21; Belachew Yirsaw, (2013) *infra* note 47; Daniel Weldegebriel (2014d) *infra* note 47; Anthony Harris (2015) *infra* note 76; Daniel Woldegbriel (2013c) *infra* note 139.

[2] A rise in the use of expropriation by the Ethiopian state is contrary to what has been asserted as a decline in some other jurisdictions. For example, Antonio Azuela and Carlos Herrera-Martin, note 1, pp. 337, 344, 347, 350-351 & 358, have stated that the power of eminent domain has generally declined globally in the sense that states are facing difficulties in expropriating private property because of structural adjustment programs, social resistance (motivated by opposition to the very idea behind certain mega projects, contesting public purpose or for cultural reasons, general anti-expropriation public sentiment, and a strong tradition of an independent and assertive judiciary, rising expropriation costs to the state due to improved compensation or question of post-expropriation rehabilitation and strict legal restrictions and pro-investor international commitment of the concerned country). Such decline is reflected legislatively by demanding governments to pay market value of the property they take, and subjecting them to more stringent procedures, even if such trends do not include the definition of public purpose. Contrary to these developments elsewhere, expropriation in the Ethiopian context and broadly in the context of the so called emergent economies is well alive and in fact on the rise generally without significant constraints.

purpose, compensation and legal recourse. The section also provides a brief discussion of incompatibilities between federal and regional expropriation laws, and between bilateral investment treaties and the expropriation law of the country. The second section examines the 'transformative expropriation' purportedly advanced by the Ethiopian government. That is, it presents the manner in which the state explains its expropriation law including the underlying thinking behind Ethiopia`s expropriation law. The third section considers three forms of reforming Ethiopia`s expropriation regime. These are judicial scrutiny, recasting land use rights as human rights and post-expropriation development.

These three sections are informed by the lessons that Ethiopia can draw from comparative experiences of India, Ghana and Kenya. These countries are chosen because they are predominately agrarian countries with massive smallholder population, and they have registered recent economic growth that has enhanced the demand for land which primarily comes from smallholders *via* expropriation. Law reforms in these jurisdictions also involve land matters including issues of eminent domain that give due emphasis to the need for adequate compensation and effective access to regular courts.[3]

The overall argument of the article is that current expropriation laws are inadequate to protect small landholders because they over-privilege economic development projects. This is related with the fact that the Ethiopian state is not legally obliged during expropriation to pay compensation for land use rights nor is it obligated (or at times not feasible) to give a substitute land. It is also argued that compensation for property on the land is inadequate and that legally and institutionally backed uniform rehabilitative schemes are not built into expropriation measures. The discussion and analysis in the following sections show that legal mechanisms to harness the government in exercising its power of expropriation are insufficient. This brings Ethiopia close to countries with "high economic growth rates in which strong states, with corresponding weak rule of law, make extensive use of the power of eminent domain…" [4]

[3] In the case of Ghana, the Report of the Constitution Review Commission of Inquiry (2011), <www.ghana.gov.gh/images/documents/crc_report.pdf> (accessed 12 August, 2014) has devoted one chapter to land and natural resources, where the issue of adequate compensation is raised and got accepted by the Government of Ghana in its White Paper on the Report the Constitution Review Commission of Inquiry (2012), <ghanaoliwatch.org/images/Articles/crc_white_paper_report.pdf> (accessed 12 August, 2014) that also set up a Constitution Review Implementation Committee. Kenya in fact has gone ahead of Ghana in commissioning land matters, land policy formulation and adoption in 2009, setting up a constitution review commission, followed by an adoption of a revised constitution in 2010 and then enactment of three land acts in 2012.

[4] Antonio Azuela and Carlos Herrera-Martin, *supra* note 1, p. 334.

1. Elements of Expropriation

The power of expropriation in Ethiopia is vested in the state by virtue of Article 40(8) of the FDRE Constitution (the Constitution) which provides that "the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property".[5] This has been amplified, in addition to bilateral investment treaties, by the following statutes:

- Expropriation of Landholdings for Public Purpose and Payment of Compensation Proclamation (the Expropriation Proclamation), 2005,
- Payment of Compensation for Property Situated on Landholding Expropriated for Public Purposes Regulations, 2007,
- The Civil Code of Ethiopia, 1960, Articles 1460-1488,
- Urban Lands Lease Holding Proclamation, 2011, Articles 26-31,
- Investment Proclamation, 2012, Article 25, and
- Regional rural land use and administration laws.

This article pays attention to the Expropriation Proclamation since it is the principal instrument which governs expropriation in contemporary Ethiopia. The central objective of the Expropriation Proclamation is to take land for investment activities.[6] It has three main aspects: provisions relating to public purpose, compensable property, and procedural recourses. If properly formulated and implemented, the requirements of public purpose, of compensability and of procedural recourses would have the effect of disciplining government authorities since such procedures would force the state to carefully re-examine its projects, thereby serving as a buffer zone for property holders and preventing overtaking without necessarily handcuffing such authorities.[7] Upon examination of the Expropriation Proclamation from the perspective of peasants, one observes that the law is deficient in these three counts. This section considers these three components of Ethiopia`s expropriation law in the sense of permanent physical takeover of farmland by

[5] The Constitution, Article 40 (8).

[6] Deliberations of Public Hearing Organized by the Standing Committee for Legal and Administrative Affairs of the House of Peoples` Representatives on the Expropriation Proclamation, May 2005 (hereafter May 2005 Deliberations) (Unpublished, on file with the author) p. 2.

[7] Chenglin Liu (2008), "The Chinese Takings Law from a Comparative Perspective", *Journal of Law and Policy*, vol. 26, pp. 302-3, it is stated that there are at least four administrative costs associated with expropriation: costs relating to procedural guarantees including public hearing to determine the existence of public purpose, costs of appraising the amount of compensation, the compensation itself and costs of litigation, and these four costs would hinder governments from rampantly engaging in takings.

documenting the state of expropriation law in Ethiopia and the practice thereof with a focus on farmland expropriation.[8]

1.1 Public purpose

The main aim of public purpose in connection with expropriation is to restrain the discretionary power of government authorities. Public purpose can be understood in different ways. Yet, one finds a couple of general articulations. They may be referred to as minimalist and maximalist views of public purpose.[9]

The adoption of the *minimalist* conception precludes state authorities from undertaking expropriation to transfer the property of one person in order to enrich the patrimony of another, i.e, taking private property for solely private purpose. The test of *public purpose* under this view concerns itself with the question: *what is done with the expropriated property*? If the property taken is used to exclusively benefit private persons, then the expropriation cannot be said to have been done for a public purpose. Hence in this view, public purpose shall be interpreted to mean: "private property taken through eminent domain must provide its intended use to the public. The public must be entitled, as of right, to use and enjoy the property".[10] On the other hand, the *maximalist* view holds that public purpose includes:

[8] This Article does not consider issues of regulatory taking, which is the case where the state 'excessively' interferes with property rights in such a way that it is seen as good as physical takeover of the property itself. For this, refer to John A. Kupiec (2008), Returning to Principles of "Fairness and Justice": The Role of Investment-Backed Expectations in Total Regulatory Taking Claims, B.C. L. Rev., vol. 49; Michael C. Blumm (2005), "Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses'', *Harv. Envtl. L. Rev., vol*. 29; James Gordley (2008), ''Takings", *Tul. L. Rev.* vol. 82; and Joseph L. Sax (1964-1965), ''Takings and the Police Power'', *Yale L. J.*, vol. 74.

[9] Antonio Azuela and Carlos Herrera-Martin, pp. 353-354 state that public purpose might be addressed at constitutional level confining its application to matters of public use only (e.g., many common law countries); or the constitutions might come up with a detailed list of things which are deemed to constitute public purpose or leave the matter for legislative action, in the latter category legislation might be issued that come up with a limitative precise list of matters that constitute public purpose (e.g., Japan) or the definition of public purpose might be left to the judiciary (e.g., USA). Or as the present Article shows, the concept of public purpose can be left for the discretionary of the executive branch without the possibility of judicial review (e.g., Ethiopia and China). The discussions in this sub-section of the Article (Sub-section 1.1) are primarily based on the author`s article entitled "Legislative Protection of Property Rights in Ethiopia: An Overview" (2013), *Mizan Law Review*, vol. 7:2, pp. 184-187.

[10] Chenglin Liu *supra* note 7p. 326; see also Jarrett Nobel (2009-2010), "Land Seizures in the People`s Republic of China: Protecting Property while Encouraging Economic Development", *Pac. McGeorge Global Business & Dev. L. J.*, vol. 22, p. 368.

> …anything which tends to enlarge the resources, increase the industrial energies and promote the productivity of any considerable number of inhabitants or a section of the state, or which leads to the growth of towns and creation of new resources for the employment of capital and labor, contributes to the general welfare and prosperity of the whole community. [11]

In this broad view, public purpose is conceived to include not only "uses directly beneficial to the public, such as roads, but also uses that promote the general welfare and prosperity of the whole community."[12]

The Expropriation Proclamation subscribes to both minimalist and maximalist approaches but for different purposes. Some articles of this expropriation legislation have been influenced by the maximalist perspective, especially when the authorities seek to expropriate land from non-investors chiefly from peasants and pastoralists. For instance, Article 2 (5) of this law defines public purpose as:

> the use of land defined as such by the decision of the appropriate body in conformity with urban structure plan or development plan in order to ensure the interest of the peoples to acquire *direct or indirect benefits* from the use of the land and to consolidate sustainable socio-economic development (emphasis supplied).

Article 3(1) of the same provides that the appropriate government authority has the power to expropriate land for the public purpose:

> … where it believes that it should be used for a better development project to be carried out by public entities, private investors, cooperative societies or other organs, or where such expropriation has been decided by the appropriate higher regional or federal government organ for the same purpose.

Such legal description is as good as having none because the authorities can attach the 'public purpose' label to virtually any project of their liking. As the observations during a focus group discussion indicated:

> The definition given to public interest in rural and urban land laws is extremely broad and vague. Its meaning permits to take property from one person and give it to another without the need to establish any public purpose at all. What is public interest: when a road is to be built or a factory is to be established or a restaurant to be opened, a residential villa to be constructed in place of another residential house, etc? It is not a constraining factor at all.[13]

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[11] Bin Cheng (1958), "The Rationale of Compensation for Expropriation", *Transactions of the Grotius Society*, vol. 44, p. 292.

[12] Chenglin Liu *supra* note 7, p. 326.

[13] Summary of Focus Group Discussion on Property Rights Protection. The discussion involved land law specialists, judges and land administrators, July 13, 2013,

This expansive approach to public purpose is pursued as a trend in the acquisition of urban land including farm lands in peri-urban areas.[14] The Urban Land Lease Holding Proclamation, 1993, reflected this view in stating that the public interest would not be violated by the state expropriating property solely to generate money. According to the preamble, urban areas must be permitted to lease lands so that they can obtain sufficient revenues to provide much needed social facilities and infrastructure. Its successor, the Urban Lands Lease Holding Proclamation, 2002, is even more explicit about this broad notion of public purpose. It, under Article 2(7), defines public interest as: "…that which an appropriate body determines as a public interest in conformity with Master Plan or development plan in order to continuously ensure the direct or indirect usability of land by peoples and to progressively enhance urban development". This is reiterated in the Urban Planning Proclamation, 2008, which describes public purpose, in Article 2(5), as that which "continuously ensures direct or indirect utilization of land by people and thereby enhances urban development."

However, when the state expropriates land from investors, public purpose is construed restrictively to mean taking property including land held by investors under lease only for the purpose of undertaking publicly used projects. This, in legal terms, makes it more difficult to expropriate land held by an investor under lease than that held by a private person. Thus, Article 3(2) of the Expropriation Proclamation states: "…no land lease holding may be expropriated unless the lessee has failed to honor the obligations he assumed under the Lease Proclamation and Regulations or the land is required for development works to be undertaken by government." What is stated in this provision was documented during its enactment:

> … in case where land under lease contract is to be expropriated, public purpose would be construed narrowly to permit land taking when government needs the land or where the investor could not honor his obligations under the lease contract because land is inextricably linked to investment.[15]

This differentiated understanding of public purpose is a departure from the past since previous expropriation legislation of the country understood public purpose narrowly and uniformly without distinguishing peasants from investors.[16] For example, the predecessor of the Expropriation Proclamation, that is, the expropriation law issued in 2004, was enacted exclusively with intent

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[14] See Misganaw Kifelew (2009), "The Current Urban Land Tenure System of Ethiopia", in *Land Law and Policy in Ethiopia since 1991: Continuities and Changes*, Muradu Abdo, (ed.) *Ethiopian Business Law Series* vol. 3, pp.187-8.

[15] May 2005 Deliberations, *supra* note 6, p. 3.

[16] Daniel Weldegbriel (2013b), "The History of Expropriation in Ethiopian Law", *Mizan Law Review,* 7:2.

to obtain land for government projects. Accordingly, this expropriation statute embodied a *restrictive interpretation of public purpose* for it conceived public purpose in terms of land taking for public works. It defined 'public works' as:

> the construction or installation, as appropriate for public use, of highway, power generating plant, building, airport, dam railway, fuel depot, water and sewerage telephone and electrical works and the carrying out of maintenance and improvement of these and related works and comprises civil, mechanical and electrical works.[17]

This indicates that the public purpose of expropriation as envisaged in this 2004 expropriation legislation was meant to enlarge land in the public domain of the state, not to expand property in the private domain of the government and private persons as is the case in the current Expropriation Proclamation. Additionally, this restrictive interpretation of public purpose goes in line with the tradition of the Ethiopian Civil Code of 1960 (the Code) and laws enacted by the Derg.[18]

Some regional rural land laws include provisions that incorporate the narrower rendition of public purpose. This is witnessed for example, by using such expressions as 'public uses' and "public common service obtained from infrastructure such as school, health, road, water, etc" and by further stipulating that land users shall lose their holdings only for public use understood in this narrow sense.[19]

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[17] The Appropriation of Land for Government Works and Payment of Compensation for Property Proclamation, 2004.

[18] The Civil Code of Ethiopia, Article 1464, reflects this view in providing that a competent authority cannot initiate expropriation for the exclusive aim of obtaining money: '(1) Expropriation proceedings may not be used for the purpose solely of obtaining financial benefits. (2) They may be used to enable the public to benefit by the increase in the value of land arising from works done in the public interest.' Expropriation may ultimately bring money to the treasury but that must not be its sole purpose. The Amharic version of the title of that section of the Code which deals with expropriation reads: *le hizbe agelgelot ymitqemu nebrtoch sele maseleqeqe,* which means the state authority is supposed to construct facilities accessible to the public in place of the property it expropriates. The Public Ownership of Rural Lands Proclamation, 1975, under Article 17(1), provides that: "The Government may use land belonging to peasant associations for public purposes such as schools, hospitals, roads, offices, military bases and agricultural projects."

[19] The Southern Regional State Rural Land Administration and Use Proclamation, 2007, Articles 2(23), 7(3) and 13(11); the Oromia Regional State Rural Land Use and Administration Proclamation, 2007, Article 6 (10 &11).

1.2 Compensation

There are good reasons to require the state to compensate for expropriation. The time honored principle that no one including the state shall be permitted to enrich themselves at the expense of another is one reason. If the state were not required to compensate private property holders for taking their property, people would be unlikely to invest their time, labor, energy and resources in developing and improving their property and investors would be discouraged from investing in the country. Both would adversely affect economic development. That is another justification. Finally, the constitutionally enshrined requirement to pay compensation prevents wanton, destructive and arbitrary taking of private property. Compensation during expropriation should ideally aim at putting affected people into the position they would have been had the expropriation not been undertaken. It should not worsen their situation through under-compensation, nor should it enrich them through over-compensation. Those are the basic parameters in measuring the amount of compensation.

Of late, researchers have generally questioned the adequacy of compensation being paid to affected people in Ethiopia.[20] There is empirical support for their findings. For example, a peasant who lost a farmland recounts:

> I was paid 120,000 Birr, calculated [at] 6 Birr per meter square. I spent some of this money to celebrate the wedding of my two daughters. I spent the remaining money for food and other daily basic needs. Now I am left with nothing while my family is displaced. My sons have migrated to Addis Ababa and work on their labor while my daughters have dropped out of school and work as housemaids.[21]

Similarly, another farmer said,

> I lost my two hectares of land in 2004 E.C. for private investors. My land was valued for only 90 cents per meter square and 9,000 Birr per hectare. I used to harvest 18 quintals of *teff* per hectare every year before my land was taken and 36 quintals on the two hectares of land expropriated. I was paid

[20] Dustin Miller & Eyob Tekalign (2008), ''Land to The Tiller Redux: Unlocking Ethiopia's Land Potential'' *Drake J. Agric. L.*, vol., 13, p. 363; Imeru Tamrat (2010), ''Governance of Large Scale Agricultural Investments in Africa: The Case of Ethiopia'' <http://siteresources.worldbank.org/EXTARD/Resources/336681-1236436879081/5893311-1271205116054/tamrat.pdf> (visited January 11, 2012) pp. 11-14; see Daniel W/Gebriel (2009a), ''Compensation During Expropriation'' in Land Law and Policy in Ethiopia Since 1991: Continuities and Changes (Muradu Abdo, ed.) *Ethiopian Business Law Series,* vol. 3. (Addis Ababa: Addis Ababa University Faculty of Law), pp. 232-233; *see* also Girma Kassa (2011), "Issues of Expropriation: the Law and the Practice in Oromia", (LL.M Thesis, Addis Ababa University, unpublished, Graduate School Library).

[21] As quoted in Girma Kassa, *supra* note 20, p. 107.

> only 18,000 Birr for the two hectares of land. This money was insignificant and I could not buy food for three years with this money. My family has been displaced and we are now leading a devastated life.[22]

And, as a focus group discussion revealed, "Compensation is low for … rural land expropriation. It is much less than the loss incurred by affected people; the amount being paid worsens people`s existing situation instead of making it up for the losses they incurred due to the expropriation".[23]

Generally, the condition is not any better in urban context. Evidence shows that,

> … the money paid as compensation to replace a demolished house is short of the necessary sum. It could not replace any standard house as per the requirements of the city regulations. The prices of materials and labor, the two most important components of valuation calculation, are not frequently updated in a way that reflects the existing market and inflation rates. The depreciation allowance deducted from the estimated value takes away more than half of the sum.[24]

A recent directive issued by the Addis Ababa City Administration clearly shows the insufficiency of compensation during expropriation.[25] Several aspects of the expropriation law contribute to the insufficiency of compensation. The issues that need some discussion in this section are: compensable interests, basis of reckoning displacement compensation, substitute land, normative contradiction and lack of uniformity, the concept of a landholder, and implementation matters including lack of rehabilitation scheme.

a) Compensable interests:

In the Ethiopian context, the loss of any property right including that of land use rights is, in principle said to be compensable upon expropriation.[26] However, the Constitution is both broad and narrow in respect of the determination of compensable property. It is broad because a joint reading of sub-articles 2 and 8

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[22] *Ibid*.

[23] Summary of Focus Group Discussion *supra* note 13.

[24] Daniel W/Gebirel, *infra* note 138, p. 282.

[25] See the Revised Addis Ababa City Administration Directive No. 16 2006 E.C. for Payment of Compensation for Property Situated on Landholding Expropriated for Public Purposes.

[26] Payment of Compensation for Property Situated on Landholding Expropriated for Public Purposes Regulations (hereafter the Regulations), 2007 in Article 19 states that there shall be no payment of compensation with respect to any construction or improvement of a building, any crops sown, perennial crops planted or any permanent improvement on land, where such activity is done after the possessor of the land is served with the expropriation order. The discussions in this portion of the Article (Sub-section 1.2 a) are drawn on p. 188,

of Article 40 of the Constitution conveys a message that the expropriation of any sort of private property is compensable, regardless of whether it is movable or immovable, or corporeal or incorporeal. Conversely, the Constitution seems to narrow down the scope of compensable property interests by adopting the labor theory. This means that individuals are entitled to have private property in property on land that is linked to their labor or capital or enterprise. The position reflected in the Constitution[27] appears to be allowing compensation to the extent of labor or capital value added to lawfully possessed land that has been expropriated but not for the economic value of use rights over the land.

The Expropriation Proclamation has the Constitution`s approach in providing for the manner in which people affected by land taking might get compensated for the property on the land, not for the land itself. Thus, pursuant to this legislation, compensable interests are: utility lines,[28] permanent improvements to land,[29] property situated on the land which can be removed and relocated, property which can be removed for consumption (e.g. standing crops) and property which cannot be relocated (e.g., a house).[30]

This expropriation law does not consider loss of land use rights due to expropriation as compensable unless the administration is able and willing to give land in the form of displacement compensation to the affected person. In other words, the law in question does not view the taking of land from a landholder as an expropriation.[31] Thus, no compensation is payable (perhaps excepting displacement compensation) if, for example, the state requires land held by a landholder, and there is no property on or improvements to such land. This is because no expropriation is considered as having been undertaken in respect of such land. The expropriation law in question assumes that the State is merely retaking public land in this case, not taking private property, which is conceived as taking labor-related tangible immovable property belonging to the landholder situated on the land.

Even in cases where there is property on land subject to taking, compensation relates to the property, not to the land *per se*. It is stated that,

> Compensation is given only to fixtures on land and land has no economic value to the holder upon expropriation. Land`s value is zero. Land`s economic value is fully captured by the state. The Constitution says land is the joint property of the state and the people. If land is really a joint property,

[27] The Constitution, Article 40 (2, 3 & 7).
[28] The Expropriation Proclamation, Article 2 (7).
[29] *Id.*, Article 7(1).
[30] *Ibid*.
[31] See the use of the phrase, "shall be given compensation proportionate to the *development he has made on the land and the property acquire*d..." in the Expropriation Proclamation, Article 7(3) (emphasis supplied).

> it means your right as a landholder is short of ownership including the right to reap the economic value of your land use rights. But the expropriation law does not permit you to capture enhanced value of land. Yet, the individual shall be allowed to share the enhanced value of the land instead of being diverted to state treasury as a whole.[32]

The rule that there shall be no monetary compensation where there is no property to be removed from the land at the time of expropriation invited objection and criticism during the enactment of Ethiopia`s present Federal rural land law. In connection with which, it was stated that:

> The right to use rural land would be made secure not by merely issuing land certificate but by fully protecting the rights of peasants as provided for in the Constitution. Complaints among peasants indicate that like what happened during the Derg period, there is an increasing tendency to evict farmers from their lands in the name of promoting the interest of the people without payment of commensurate compensation.[33]

The idea of not treating use rights over land as having economic value upon expropriation has nevertheless found its way into the current rural land law of Ethiopia. Courts have also subscribed to it. The Cassation Division of the Federal Supreme Court has decided that:

> …the earth and rock related materials are natural resources and as natural resources are owned by the people and state, the people and state may use these resources without any payment. Therefore, even if the respondent has obtained from the relevant regional authority lease right to extract sand and gravel, as sand is a natural resource,… he cannot have ownership over sand, and … the respondent is entitled to claim for the price of extracting the sand but not for the price of the sand itself since such claim has no legal basis. The decision of the lower court that awards the price of the sand in the form of compensation is hereby reversed. [34]

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[32] Interview with a land law specialist, July 13, 2013. *See* also Solomon Fikre (2015), "The Challenges of Land Law Reform, Smallholder Agricultural Productivity and Poverty in Ethiopia", <http://warwick.ac.uk/wrap/71012>, accessed September 9, 2015, pp. 226-27.

[33] Deliberations of the Parliamentary Public Hearing Organized by the Standing Committee for Rural Development and Pastoral Affairs of the House of Peoples` Representatives on Draft Federal Land Administration and Use Proclamation, March 2005 (hereafter March 2005 Deliberations), pp. 6-7.

[34] *The Ethiopian Roads Authority v. Issa Mohammed*, Fed. Sup. Ct. (Cassation File No. 30461, 2007), *Mizan Law Review*, 3:2 (2009), p. 379. There are also two other similar cases, though disposed on different grounds. In *the Ethiopian Roads Authority vs. Kebede Tadesse* (Fed. Sup. Ct., Cassation File 34313, March, 2008, Unpublished, on file with the author), the respondent (the latter) alleged that the applicant took away 10,859 cubic meter sand and occupied the quarry land leased by him from a regional government,

It should be noted that such interpretations in this rulings of the Federal Supreme Court's Cassation Division are legally binding on all levels of federal and regional courts in the country.[35] Various rulings of the Supreme Court essentially uphold that land use rights of a landholder do not have a transferrable economic value in the context of people`s ownership of land in today`s Ethiopia.[36]

The narrow conception of compensable interests goes beyond and above counting out economic value of land use rights. There is a related idea of cost replacement approach which is embodied in the Expropriation Proclamation. Article 7(2) of the Proclamation stipulates that the "amount of compensation for property situated on the expropriated land shall be determined on the basis of replacement cost of the property". The application of the approach excludes legitimate interests. It has been correctly pointed out as follows:

> Even though it is possible to reach market value through the use of replacement cost approach, the Ethiopian replacement cost approach is defective as compared to the international practice. It does not at all give market value for the displaced people. For example, it does not consider the value of … the location on which the building rests ... it [also] disregards all incidental and consequential damages, such as additional cost incurred as a result of change in location, reduction in market value for property leftover after partial expropriation, lost income because of delay in expropriation process, and business closure as a result of public construction works.[37]

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causing an interruption of current and of future income therefrom. The Cassation Division disposed of the case on procedural grounds. Also in the *Ethiopian Roads Authority* vs. *Genene W/Yohanne*s (Oromia Supreme Ct. File No. 57593, 2008, (Unpublished, on file with the author), the respondent claimed that he had a license to extract sand and gravel; that the applicant took the quarry land from him for the purpose of a road project. He sought compensation for the expenses incurred in connection with making the quarry land ready for extraction of materials as well as for a certain quantity of sand, mined and readied for sale, taken by the applicant from him. The Oromia State Supreme Court decided partly in favor of the respondent and partly rejected his claim on the ground of lack of evidence.

[35] Federal Courts Amendment Proclamation, 2005, Article 2, provides "Interpretation of a low (sic) by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be binding on federal as well as regional council at all levels."

[36] *GebreEgziabher v. Selamawit*, Federal Supreme Court Cassation Division Cassation, File No. 26130, 2008; for comments on this case, *see* Alem Asmelash (2010), ''Comments on Some Land Rights Related Decisions of the Federal Supreme Court Cassation Division'', *Journal of Ethiopian Legal Education*, 3:2, pp. 153-160; *see* also Filipos Aynalem (2009), ''the Interpretation of Rights over Urban Land'', *Journal of Ethiopian Law*, 22:1.

[37] Daniel W/Gebriel *infra* note 138, p.282.

Nor do projects compensate for quarry land and indirect expropriation brought about by particles from quarry sites that cause damage to adjacent farmlands and crops.[38] Moreover, the cost replacement method suffers from lack of clarity. Even though the method pledges to entitle replacement cost upon expropriation, it does not provide clear answers to questions such as: what does replacement cost mean? Does it exclude depreciation? Does it mean the amount paid to a person whose house is taken must enable her/him to construct a similar type of house? The challenges are further exacerbated because authorities require a person who lost a house, say, made of mud, to build a house at a standard that may require corrugated sheets, steel, cement and stone even if the amount paid as compensation renders such inputs unaffordable. The issue as to who bears this additional cost if the person is financially unable to do so[39] was among the questions raised during a focus group discussion.

Ethiopia should draw lessons from Ghana's good practices in this regard. Article 20(2) of the Constitution of the Republic of Ghana (1992) provides that "[t]he various claims for which an expropriated owner may be compensated are: market value of the land taken; or replacement value of the land taken; and cost of disturbance; and other damage (severance and injurious affection)''.[40] Kenya follows a similar normative approach.[41]

b) Reckoning displacement compensation:

The rules on displacement compensation evoke concerns. If a rural landholder's land is expropriated permanently and where substitute farm land is unavailable, the displacement compensation is equivalent to ten times the average annual income that was secured during the five years preceding the expropriation of the land.[42] In case of a rural landholder whose land has been expropriated provisionally and substitute farmland is unavailable, displacement compensation for lost income shall be paid until the repossession of such land, which shall be based on the average annual income secured during the five years preceding the expropriation of the land[43] provided, however, that such payment shall not exceed ten times the average annual income the rural smallholder had secured during the five years preceding the expropriation of the land.[44] The displacement compensation to be paid to rural landholders who have lost their land either

[38] Interview with a practicing lawyer, Southern Regional State, September 25, 2012.
[39] Summary of Focus Group Discussion, *supra* note 13.
[40] The Constitution of the Republic of Ghana (1992).
[41] The Constitution of the Republic of Kenya (2010)
[42] Article 8 (1) of the Expropriation Proclamation.
[43] Such displacement compensation should in the first place be the average annual income of such provisionally taken property times the number of years for which the property is taken. See Article 18 of Regulations No. 135/2007.
[44] Article 8 (2) of the Expropriation Proclamation.

permanently or provisionally shall only be equivalent to the average annual income secured during the five years preceding the expropriation of the land where a substitute land is available.[45]

These rules of displacement compensation have shortcomings. *First*, these provisions are arbitrary in selecting the ten year criterion if, during expropriation, small landholders lose their land use rights for an indefinite period of time. The same can be said regarding the five-year threshold as basis of calculating compensation. 'Five years' or 'ten years' appear to be magic numbers that do not offer valid justification. *Second*, the selection of five years as a factor in reckoning compensation is backward looking. In doing so, it counts against landholders because it does not take present and future inflation into account.[46]

c) Substitute land:

Another factor that contributes to inadequate compensation in today`s Ethiopia relates to the impracticality of providing in kind compensation in the form of land because of land scarcity. As rightly observed, "[d]ue to acute land scarcity in highland areas where most land expropriations would take place, a comparable substitute land is not feasible, which means resort to payment of meager amount of compensation, which would not support the future livelihood of the victim of government taking".[47] This is in spite of the fact that the law envisages the possibility of providing a substitute land to peasants who lost their land under expropriation where there is land available and that it is perhaps a popular kind of compensation. It is remarked that "… households who are evicted are farmers who face difficulty in starting a new livelihood if they do not get another piece of land to farm because this is the only skill they have".[48] Even where a substitute land is available, the meaning of the terms 'comparable', 'fertility', 'location' and 'size' that accompany the notion are not clarified. In

[45] Article 8 (3) of the Expropriation Proclamation.

[46] Daniel W/Gebriel, *infra* note 138; Belachew Yirsaw, (2013),"Expropriation, valuation and compensation practice in Ethiopia", *Property Management*, 31:2, pp. 132-58; and Daniel Weldegebriel (2014d), "Compensation for Expropriation in Ethiopia and the UK: A Comparative Analysis", FIG Congress 2014 Engaging the Challenges – Enhancing the Relevance Kuala Lumpur, Malaysia 16--21 June 2014.

[47] See the Minutes of the Deliberations of the Parliamentary Standing Committee for Rural Development and Pastoral Affairs of the House of Peoples` Representatives on Draft Federal Land Administration and Use Proclamation, March, 2005 pp.19 & 25; see March 2005 Deliberations note 29, p. 4 and May 2005 Deliberations note 5, pp. 4, 7, 8 and 12.

[48] Solomon Bekure *et al* (2006), ''Removing Limitations of Current Ethiopian Rural Land Policy and Land Administration,'' Workshop on Land Policies & Legal Empowerment of the Poor, November 2-3, 2006, World Bank Washington D.C.

effect, Regions have failed to pass directives that clarify these components of a substitute land.

d) Contradiction and lack of uniformity:

One of the sources of lack of uniform treatment is lack of detailed regional laws on compensation:

> Regions do not have detailed law on expropriation. Where there is a gap, the regions act arbitrarily. For example, Amhara Region pays compensation for naturally standing trees on land subject to compensation but Oromia Region does not pay compensation in this case as they think that the property on the land must be the result of capital or labor.[49]

Besides, there is conflict between federal and regional laws regarding public purpose and the approaches toward compensation. Three regional land laws appear to have adopted a narrow interpretation of the term 'public purpose' while one regional land law uses the term 'actual compensation'; pre-expropriation public hearing is required in another regional land law.[50] Thus, in spite of an apparent upward delegation by regional states of their power to pass expropriation laws to the Federal Government, regions still tend to assert some legislative power over expropriation.[51]

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[49] Interview *supra* note 32.

[50] This tension arises due to a reluctance on the part of regions to discontinue legislating on expropriation matters even if they have apparently delegated their power to legislate on this to the federal government; for the narrow interpretation of public purpose, see the Southern Regional State`s Rural Land Administration and Use Proclamation and the Oromia Rural Land Use and Administration Proclamation; The Benishangul Gummuz Region rural law defines public purpose seemingly in narrower sense compared to the federal legislation as: "a service given to the public directly or indirectly, such as government office, school, health service, market service, road, religious institutions, military camps, and the likes, and includes activities assumed important to the development of people by the Regional Government and to be implemented on the rural land." Benishangul Gummuz Region Rural Land Administration and Use Proclamation, 2010, Article 2.24. The Tigray Regional State Revised Rural Land Use and Administration Proclamation No. 136, 2007, Article 25 for use of the word 'actual compensation'. The Amhara state's legislation demands public hearing of the *kebele* residents where it is found that the purpose of land expropriation is directly interrelated with development of local community or where the community itself is being a payer of compensation thereof: ''Where a landholder or user who may concern the matter has legal ground of rejecting the request of land expropriation, he may submit his complaints to the government office next to the body that has given the decision within 15 days from the date of his communication of the notice in writing.'' Amhara Rural Land Regulations, 2007, Article 29 (2).

[51] See May 2005 Deliberations *supra* note 6 where it was stated that regions agreed to surrender their power to pass expropriation law to the national government.

There is lack of uniformity in the rules as well. One manifestation of absence of uniformity in the rules is "Lack of standardized valuation and compensation methods and procedures [which is] causing different valuations by different land taking agencies, resulting in different compensation values for similar lands".[52] Expropriation laws of Ethiopia are meant to apply uniformly across the country without factoring in the specific notion of property that prevails in the pastoral areas. The definition of property in terms of things attached to the land which is a product of labor and/or capital implies the rejection of customary land rights.

There is a differentiated treatment between investors and other persons in relation to public purpose and compensation. This emanates from bilateral investment treaties Ethiopia signed with 29 countries as of the end of June 2012.[53] The bilateral investment treaties have become incompatible with the Expropriation Proclamation as the former (as opposed to the latter) embody market value approach to compensation in the tradition of liberal property rights notion which is promoted by developed nations in the international arena.[54] The treaties also appear to envisage a broad right to judicial review. For example, the bilateral investment treaty Ethiopia has signed with the United Kingdom of Great Britain and Northern Ireland requires payment of, "prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated…"[55] In terms of recourse to the courts, it provides "The national or company affected shall have a right … to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment …".[56] Therefore, a joint reading of the Expropriation Proclamation and the BITs implies three hierarchies. These are investors protected under BITs, investors without BITs and other persons. The most legislative protection is given to those investors who come from a home country which has signed a BIT with Ethiopia.

e) A landholder:

The law addresses the issue of who might be entitled to receive compensation in such a manner that would exclude certain individuals who could rightly be

[52] Solomon Bekure *et al infra* note 62.

[53] UNCTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development*, (United Nations Publication, Switzerland, 2013) p 101.

[54] Martha Belete *infra* note 129 and Alec R. Johnson *infra* note 129.

[55] Article 5 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Federal Democratic Republic of Ethiopia for the Promotion and Protection of Investments (unpublished, on file with the author).

[56] *Ibid;* Article 4 of The Agreement between the Republic of Turkey and The Federal Democratic Republic of Ethiopia Concerning The Reciprocal Promotion and Protection of Investments (unpublished, on file with the author) is worded in a similar fashion.

regarded as enjoying property interest in land subject to expropriation. Under Article 5(2) and Article 13(1) of the Expropriation Proclamation, compensation shall be paid to "holders of expropriated land." It defines a holder in Article 2(3) as "an individual … [who] has lawful possession over the land to be expropriated…" The concept of landholder is further amplified by subsequent laws defining it to mean he/she who produces ''proof of legitimate possession of the expropriated landholding…".[57] By incorporating an individualistic notion of landholding, this formulation of the law excludes secondary land users from demanding compensation. The restrictive appreciation of the term landholder leaves out millions of individuals in peri-urban areas that obtain land informally to provide themselves with a shelter. The law should in principle[58] be formulated broadly along the line of the Code, that is, in such a manner that any person who establishes the existence of a property right in their favor over the land expropriated is given the opportunity to demand compensation.[59] In relation to the effect of gaps in inclusiveness, it is observed that:

> …the use of the power of eminent domain is depriving people not recognized as owners of the land of their means of subsistence. Tenants, herders, and agricultural laborers are among those paying the highest social cost of expropriation because they are not recognized as holding any property rights.[60]

Ethiopia's legal regime can benefit from the experience in Kenya whose law of compulsory land acquisition provides leeway to compensate occupants in good faith including customary land rights holders that may not hold title to the land.[61]

f) Gaps in Implementation:

Some projects go ahead toward implementation with little or no budget for compensation for people who will lose their possessions. A report puts the situation as follows:

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[57] The Regulations, Article 22.

[58] Exceptions might be provided as is stated in the Regulations, Article 19 and in the French version of Article 1414 as translated by Bilillign states: For this, see Bilillign Mandefro (1973-1975), ''Revised Unauthorized Unofficial Translation of Arts. 1126-1674 of Book III of the Ethiopian Civil Code (1960) From the French Original Draft'' (Addis Ababa University, Law Library Archive).

[59] The Code, Articles 1461, 1466 (2), 1468 (1) and 1471, read together suggest that any interest in an immovable might be compensable, even though the emphasis in those provisions appears to be on ownership, servitude and usufruct.

[60] Antonio Azuela and Carlos Herrera-Martin, *supra* note 1, p. 358.

[61] Nelson Awori (2012), "Review of the Land Bill (2012) and the Land Registration Bill (2012)", Land Development and Governance Institute, (accessed November 19, 2013).

> …regional agencies, mainly municipalities that are zoning large expanses of land … are facing cash flow problems. While they are evicting farmers … they have to pay compensation immediately, [but] they will be leasing the land and receive fees in the future. There is no bridging finance available … This is leading to undervaluing … land and property to match the available funds which are unfair to those losing their lands and have to establish new livelihoods … [62]

As an informant states:

> Local government officials pressurize those who demand compensation before handing over the land by saying land belongs to the state and such demand is not proper. If they do not budge, they are likely to be tagged as 'obstructer of development or anti-development element.' The designation can entail locking them up in prison. Local governments tend to carry out projects such as health clinics and schools which require land expropriation without any budget for compensation.[63]

And it was said,

> In case where expropriation is carried out for federal projects, compensation is paid if there is a total taking; but due to corruption, the amount of compensation paid to the person whose land is taken is low because evaluators and local officials take a good amount of it. The state pays it but the money goes to the wrong pocket. The state even complains about payment of exorbitant compensation which discourages the initiation of new projects.

Paltry compensation also arises from lack of implementation of the valuation aspects of the Expropriation Proclamation. Even if "…the law says that the property valuation shall be made by private experts and that in the meantime by a committee … there are no expert valuators or institutions that give license to expert valuators. Thus, valuation of property continues to be made by committees".[64]

There are frequent changes in the rules pertaining to capacity building that has bearing on the implementation of valuation provisions. Article 12 of the Expropriation Proclamation provides that the Ministry of Federal Affairs (now the Ministry of Federal and Pastoral Affairs) shall give technical and capacity building support to regions and prepare national valuation formula for the determination of compensation. These responsibilities seem to have been

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[62] Solomon Bekure *et al* (2006), "Removing Limitations of Current Ethiopian Rural Land Policy and Land Administration", Workshop on Land Policies & Legal Empowerment of the Poor, November 2-3, 2006, World Bank Washington D.C.

[63] Interview with a Supreme Court Judge, Southern Regional State, September 25, 2012.

[64] *Ibid*.

transferred to the Ministry of Works and Urban Development, which became the Ministry of Urban Development and Construction, the Ministry of Urban Development, Housing and Construction (and at present, the Ministry of Urban Development and Housing).[65] The transfer appeared to have occurred even before the former commenced implementation. Frequent power transfers make it difficult to clearly identify the public authority in charge of ensuring the implementation of the provisions of the Expropriation Proclamation including issues of expert valuations.[66]

There is also an outright breach of a clear rule in the process of expropriation as exhibited by cases where compensations are paid well after dispossession in violation of the clear constitutional right that forbids dispossession before compensation.[67] An informant had recalled the following:

> My farmland was taken by the local government administration to build a school. I had permanent crops such as *enset* [aka false banana] on the land. I was allowed to prematurely consume such crops as they were constructing the school. They promised me a substitute land. They did not give it to me yet. Nor did they pay me compensation. Now I have vacated the land. It has been two years since they took possession of my land. I repeatedly went to the administration pleading for compensation and a substitute land. It seems to me that there is no hope of getting it.[68]

g) Rehabilitation:

The compensation approach alone is inadequate to restore the livelihood of those affected by expropriation even where compensation is adequate. To this end, there is a law which provides that local authorities undertaking expropriation shall, to the extent possible, rehabilitate the expropriated in addition to the payment of compensation for property on the land and displacement compensation.[69] The following illustrates the need for rehabilitation toward new livelihoods in addition to compensation:

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[65] The Expropriation Proclamation and Article 36 (7) of Powers and Duties of the Executive Organs Proclamation No. 691, 2010.

[66] *Ibid*.

[67] Daniel W/Gebriel *infra* note 138

[68] Interview with a Member of Land Use and Administration Committee, September 19, 2012.

[69] The Regulations, Article 13 (1); see also the preamble of the same, which stipulates that the purpose of expropriation law is 'not only paying compensation but also to assist displaced persons to restore their livelihood.' It is a mistake to consider, as some writers have already done, displacement compensation as compensation for the land rights peasants have lost as a result of expropriation because the law gives displacement compensation, though a reduced one, even to those peasants who have received a substitute farmland. See, for example, Daniel W/Gebriel *supra* note 20, pp. 215-219.

> A negative aspect of rural land taking by federal and regional agencies is that households who are evicted are farmers who face difficulty in starting a new livelihood if they do not get another piece of land to farm because this is the only skill they have. Mechanisms are not in place to train them in new skills and provide them with social, financial and management advice in starting new livelihoods. Few are those that find new employment in the enterprises developed on their old farms. Some evictees squander the compensation they receive not knowing what to do with it. This needs serious attention by both the federal and regional governments.[70]

Daniel captured the situation fittingly by indicating the gaps in the clarity of the law regarding the duty of the government toward the resettlement and rehabilitation of evicted smallholder farmers:

> …the requirement of resettlement and rehabilitation program during expropriation event lacks clarity. Apart from a confusing provision in the Constitution, there is no specific legal basis nor a systematic policy and measures in place for resettlement of displaced farmers. In other words, whether the government is required to resettle and provide rehabilitative assistance to those people who are displaced as a result of expropriation procedure is not clear.[71]

Assisting expropriated peasants to start generating regular income from non-farming sources would be more sensible where the state could not provide them with "a substitute land which can easily be ploughed and generate income".[72] Even though the option of substitute land is favored equally both by the expropriator and the expropriated, it is becoming difficult, if not impossible, in peri-urban areas where land is scarce. Thus, the concept of rehabilitation suggests helping the expropriated resume their normal farming life or helping them change their calling entirely where a substitute farmland is unavailable. But the notion of rehabilitation is not elaborated in the law, and the nature of the rehabilitation strategy is not clarified. Nor is the source of the rehabilitation fund indicated.[73] The practice is inconsistent.

> Whereas in projects that are supported by the World Bank, the state and private investors are trying to carry out resettlement and rehabilitation programs, in most other cases, there are no such practices performed either by a public or private operators. Only in selected huge public projects does the state try to give resettlement and rehabilitation assistances. This creates a

[70] Solomon Bekure *et al* (2006), *supra* note 62.
[71] Daniel W/Gebriel *infra* note 138, p. 187.
[72] The Expropriation Proclamation, Article 8 (3).
[73] The Regulations, the Preamble and the Expropriation Proclamation, Article 13(1); see also May 2005 Deliberations note 6, pp. 8-10.

> double treatment of displaced people in the absence of clear and comprehensive guidelines as to when and how this should be provided. The result of this disregard leaves farmers untended with all the cash money in their hands and unwise decisions in their 'minds'. This eventually leads to a spendthrift behavior of the farmers which made them end up in poverty.[74]

As another study suggests, absence of principled rehabilitation program is not just extravagant spending of monetary compensation award. It is also about imprudent investment, for instance, in the form of depositing money in bank and thus exposing it to the vagaries of inflation. Harris says, in addition to increasing their consumption expenditure,

> …by far the biggest and most striking result is that most of the compensation payment is left in the bank…With the exception of a few households that made very large investments, most households have done very little with their money.… Land in Ethiopia also serves as more than just a productive asset: it serves as insurance and security in old age when it is used for sharecropping. Compensation payments should assist households in making the transition from small-scale agriculture to other income generating activity and yet, in this short time period, it seems that the majority of households are not able to do so.[75]

There is thus the need for a policy and legal measures which underline that "people affected by development projects should be able to improve, or at least be well-off after the project as without the project".[76] In this respect, there is a need to introduce the concept of social impact assessment, which would require projects to be preceded an assessment aimed at "analyzing, monitoring and managing the intended and unintended social consequences, both positive and negative, of planned interventions and any social changes brought about by those interventions".[77]

If we take the experience of India as an example, it is recognized at policy level that "traumatic, psychological and socio-cultural consequences on the displaced populations … call for affirmative state action for protecting their rights and the need for active participation of affected persons".[78] India has recently introduced a draft bill which considers land acquisition and

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[74] Daniel W/Gebriel *infra* note 138, p. 280.

[75] Anthony Harris (2015), "Expropriation, compensation and transitions to new livelihoods: Evidence from an expropriation in Ethiopia", CSAE Working Paper WPS/2015-04

[76] Gebre Yntiso (2008), "Urban Development and Displacement in Addis Ababa: The Impact of Resettlement Projects on Low-Income Households", *Eastern Africa Social Sciences Research Review*, 24:2, p. 59.

[77] Saptak Sanyal and Aditya Shankar (2008-2009), "Property Rights and Sustainable Development in India", *Colum. J. Asia. L.*, 22:2, p 254.

[78] Saptak Sanyal and Aditya Shankar, *supra* note 77, pp. 248-249.

rehabilitation of affected people as two sides of the same coin.[79] This is on the top of payment of the market value of the land to the affected people. The Indian draft land acquisitions bill construes people affected by land acquisition broadly to include those working on the land who are taken as tenants. Ethiopia can also emulate from Ghana where the 1992 Constitution of that country in Article 20(3), provides for resettlement of "displaced inhabitants on suitable alternative land with due regard for their economic well-being and social and cultural values".[80]

The Indian and Ghanaian approach to land acquisition is lacking in Ethiopia. As indicated above, Ethiopia needs to work out the details of the notion of rehabilitation of evictees which is vaguely mentioned in the law. In the context of farmers who lose their lands for urban expansion purposes, this rehabilitation scheme might, for instance, mean putting an alternative livelihood framework "to integrate them into the urban economy and society…" by offering them with "Access to credits and savings opportunities" and giving them the requisite training in alternative livelihood strategies tailored to their specific local circumstances.[81] Whatever mode of rehabilitation strategy may be adopted in Ethiopia, it is imperative that the country move away from the mere compensatory approach it is pursuing at present.[82]

1.3 Procedural safeguards

Procedural safeguards with regard to expropriation suggests observance of *due process of law* whose absence has been equated with "…being deprived of land rights or lacking access to legal remedy to defend them" which constitutes "the ultimate state of vulnerability…".[83] Proper and effective procedural safeguards are believed to contribute to the protection of property rights for they have a restraining effect both on the executive and the legislature.

However, the expropriation law in force in Ethiopia manifests a deficiency in this regard. The Constitution, in its draft stage, included a clause providing for a public forum at which the concerned public authorities would be required to

[79] The Draft Land Acquisition and Rehabilitation and Resettlement Bill, Foreword I, July 2011, at <www.thehindu.com/multimedia/archive/.../The_Draft_National__738172a.pdf> (accessed January 4, 2012). Interestingly this bill also seeks to absolutely prohibit acquisition of "multi-cropped, irrigated land" for non-agricultural uses; and it also provides that the land would be taken away from the developer if he fails to use it for the intended purpose for five years.

[80] The Constitution of the Republic of Ghana (1992).

[81] Kenate Worku (2008), "The Expansion of Addis Ababa and Its Impact on the Surrounding Areas: A Preliminary Study of the Nefas Silk Lafto District", *Journal of Oromo Studies*, 15:2, p. 126 & 127.

[82] Gebre Yntiso *supra* note 76.

[83] *Id.,* p. 340.

prove that expropriation was the only available option under the circumstances. The draft also required the authorities to establish a genuine case of public interest and compelled them to give an opportunity for potential land losers to explain their own version of the intended project.[84] However, this was removed from the final version of the Constitution. Thus, as the law stands, the requirement of public consultation is absent; it shows a regression in this regard from the Code which in early 1960s required the authorities to organize a public inquiry under certain conditions.[85]

Under the Expropriation Proclamation, expropriation is crafted largely as a matter that involves reaching a decision by an executive organ followed by simple notification of such decision to the expropriated. The process requires going through a series of administrative decisions. Some of these include reaching a decision on public purpose, determining whether the land has been lawfully acquired, fixing compensation and notifying the expropriated the time within which the land has to be cleared and taking over the land.[86] Among these, matters of compensation can be contested in the regular courts by way of review.[87] The expropriated cannot contest certain aspects of decisions of the authorities be it in an administrative or in judicial forum. This is true, for instance regarding the need for a specific project or whether the project advances public interest. This also holds true in connection with legality of the land possession and the appropriateness of the timing of dispossession. These issues appear to be left entirely to the discretion of the authority undertaking the expropriation. In such matters the administration reigns unchecked. The Expropriation Proclamation`s exclusion of vital matters from the purview of regular courts relies on the Code`s tradition of confining the power of regular courts to compensation issues. It has been remarked, "Looking into the Ethiopian procedure reveals the conspicuous absence of courts in the process. The involvement of courts in the process is minimal in that most cases do not even reach the courts".[88] A judge described the restrictive nature of the expropriation law as follows:

> There are restrictive provisions in the expropriation law. People can appeal to regular courts only on compensation issue. The law prevents them from

[84] Dustin Miller & Eyob Tekalign, *supra* note 20, p. 363. Discussions in this sub-section (Sub-section 1.3) are based on "Legislative Protection of Property Rights in Ethiopia: An Overview" (2013), *Mizan Law Review*, vol. 7:2, pp. 188-190.

[85] The Code, Article 1465.

[86] The Expropriation Proclamation, Article 4 cum Articles 5, 6 & 10.

[87] The 2005 Expropriation Proclamation, Article 11, and May 2005 Deliberations *supra* note 6, p. 9 and the Urban Land Lease Holding Proclamation, 2002, Article 18(4), which, as revised in 2011, has also retained the position that courts may entrain appeal from the expropriated only in respect of compensation issues.

[88] Daniel W/Gebriel *infra* note 238, p. 187.

> coming to court where they want to raise legal issues not related to compensation. Affected persons are required to adduce evidence showing that they have handed over the property to the authorities as a condition for appeal in regular courts; but many petitioners do not meet this requirement because they do not know this requirement of the law. As a result, those affected by expropriation file cases to the regular court before handing their land over to the authorities. We are constrained by the law. We reject their case telling them that the law does not allow them to go to the court to challenge expropriation before they hand over the property in question to the authorities. It narrows judicial remedies.[89]

A property law expert also says "Courts should be empowered in regard to property. Their involvement shall be enhanced. Property disputes which do not entail the involvement of courts shall be reduced. Currently, power in regard to expropriation … gravitates towards the administration".[90] It has further been stated:

> Property is insecure. The Constitution says people have full private ownership over property attributed to their capital and labor. But authorities change directives regarding land and immovable property frequently. The law says [landholders] shall be given 90 days to clear their property after receiving expropriation order. But occasionally [they] are ordered to remove their property in less than 90 days. The authorities in charge of land matters possess wide discretionary power. They can revoke land certificates without judicial scrutiny and they can do so easily. There shall be laws which allow review of decisions of administrative authorities in regard to revocation of land certificates.[91]

The Expropriation Proclamation, therefore, appears to imply that the expropriated cannot challenge the decision of administrative bodies regarding the existence of public purpose, be it in administrative or judicial forum. The law conveys this message by restricting appeals to matters pertaining to the denial or amount of compensation.[92] The law seems to take the decision of the concerned executive authority on the existence or otherwise of public purpose in a given project as a final one. And in making the issue of determination of public purpose non-justiciable, the Expropriation Proclamation has followed the path taken by the Code.[93]

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[89] Summary of Focus Group Discussion *supra* note 13.
[90] Interview *supra* note 32.
[91] Summary of Focus Group Discussion *supra* note 13.
[92] The Expropriation Proclamation, Article 11.
[93] The Code, Articles 1473-1479.

> …[A]ll property owners in Ethiopia, especially those who live in the city center and the verge of it are under perpetual threat of expropriation. Even those land holders in transition zone (between center and periphery) are, in principle, under the risk of losing their land, because someone with better economic means may claim their land for "better use" of it. The role of courts in interpretation and restricting the administrative decision of public purpose is not known. The silence of the law may be interpreted in some quarters and by some courts as if courts are denied such power. In current Ethiopia where the independence of courts is not encouraging, the tendency will be that they may not 'dare' to restrict the government from its decision of expropriation.[94]

Kenya and Ghana are better than Ethiopia in empowering courts to review a wide range of expropriation issues. Article 20(2) of the Constitution of Kenya states that compulsory acquisition of property by the State shall "only be made under a law which makes provision for a right of access to the High Court by any person who has an interest in or right over the property whether direct or on appeal from any other authority, for the determination of his interest or right and the amount of compensation to which he is entitled". This constitutional requirement has been elaborated in Kenya`s Land Acquisition Act.[95]

Likewise, Ghana possesses a relatively similar normative framework. Yet, both countries face practical drawbacks. This means one should be able to see the practice under the veneer of robust legal stipulations. A review of Kenya`s law of compulsory land acquisition shows that sufficient guidance is included at the level of the Constitution, stipulating for prompt and fair compensation; providing leeway to compensate occupants in good faith who may not hold title to the land and land administration, and hence decentralization of expropriation to county level.[96] The problems in the implementation of the law of compulsory acquisition of land rights in Ghana are summarized as follows:

> … [The problems include] the acquisition of lands far in excess of actual requirements, unpaid compensation in respect of some of the acquisitions, change of use of compulsorily acquired land as against the purpose of the acquisition, lands occupied by the state without any acquisition, depriving the land owners the opportunity to demand compensation. The result is loss of public confidence in the state machinery for the management of land,

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[94] Daniel W/Gebriel infra note 138, p. 217.

[95] See Section 28 (1) of the Act.

[96] Nelson Awori (2012), "Review of the Land Bill (2012) and the Land Registration Bill (2012)", Land Development and Governance Institute, (accessed November 19, 2013). Wafula L. Nabutola (2009), "Compulsory Purchase and Land Acquisition in Kenya", (7th FIG Regional Conference Spatial Data Serving People: Land Governance and the Environment – Building the Capacity, Hanoi, Vietnam) p. 20.

leading to tension between the state and customary land owners, massive deliberate encroachment of state lands, and challenging the state's legitimacy to claim control over compulsorily acquired lands.[97]

Inadequate compensation, failure to take the value of land into account during compensation, narrow interpretation of the term 'landholder or landowner' in a way that excludes some legitimate property right holders and lack of representation of affected persons in the process of determination of compensation are issues of concern in Ghana`s expropriation regime.[98] Hence, the lesson that can be taken from the eminent domain laws and practice of the two countries is that even fairly elaborate constitutional provisions supported by long established subsidiary expropriation laws could lead to a wide interpretation of public purpose, a paltry compensation and frequent violation of legal procedures. These lessons show that the problems do not merely relate to the embodiment of the rights in the law, but also pertain to their justiciability and access to courts in order to prevent arbitrary or corrupt official behaviors.

2. Government Narrative: 'Transformative Expropriation'

The discussion and analysis here-above imply a loose expropriation legal framework that tilts towards the state. This lopsided expropriation legal arrangement is reflected in the construction of public purpose, the removal of land use rights from compensable items, payment of insignificant amount of compensation, and above all, making virtually all administrative decisions pertaining to expropriation immune from judicial review. As a result, checks and balances have been removed. It has cleared the road for the government to transfer land to the private sector with few shackles.

Once the land expropriated from peasants is transferred to investors, legally speaking, it becomes harder for the state to expropriate such land from the latter.

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[97] Wordsworth Odame Larbi (2008), "Compulsory Land Acquisition and Compensation in Ghana: Searching for Alternative Policies and Strategies", FIG/FAO/CNG International Seminar on State and Public Sector Land Management Verona, Italy), p. 1.

[98] Wilfred K. Anim-Odame (2011), "Compulsory Acquisition and Compensation in Ghana: Principles & Practice", Paper presented at the American Real Estate Society Conference in Seattle-Washington, USA <http://www.afrer.org/docs/pdf/DrWilfredAnim-Odame_Paper.pdf> (accessed November 13, 2013); P. K. Asamoah (2012), ''Government's Compulsory Land Acquisition and The Right to Property: the Case of Mining Communities in Ghana'', (Masters Thesis, University of Oslo) pp. 48-50 <https://www.duo.uio.no/bitstream/handle/10852/34056/ASAMOAH-xMASTER.xpdf.pdf?sequence=2> (accessed November 11, 2013); Albert Adu-Gyamfi (2012), "An Overview of Compulsory Land Acquisition in Ghana: Examining Its Applicability and Effects", *Environmental Management and Sustainable Development*, 1:2. pp. 187, 188 & 201.

This comes from its own legislative commitments as embodied in bilateral investment treaties and the Expropriation Proclamation. The land use rights of peasants, after it is transferred to the investor through the instrumentality of eminent domain, becomes part of the domain of more secure long term lease right. This seems to be a bid to offer the necessary legal security to the property of investors in a country that is trying to change its previous anti-private property impulse.

This in turn is meant to attract more investments leading to the creation of more tax revenues, more and secure jobs, acceleration and increase in the volume of capital inflow and transfer of technology and ultimately bringing about economic development. As one of the poorest countries, Ethiopia puts a premium on economic growth and consequently aspires to raise the income level of its poverty-stricken population. With this in mind, the state decidedly favors the transfer of land from peasants to investors through takings. In so doing, the state aspires to fundamentally alter the existing structure of the Ethiopian economy, which is dominated by subsistence agriculture where land is held in the hands of the majority.

The state thinks that such land tenure transforming mandate comes from the idea that land is the 'common property' in the sense that every Ethiopian has an indivisible ownership claim over every piece of land located within the bounds of the Ethiopian territory.[99] Yet, each Ethiopian citizen may not necessarily realize this ownership right in the sense of being entitled to a share in every plot of land. The state seems to believe that it is incumbent upon it, as a holder and manger of this common resource in the form of trusteeship, to ensure that all citizens would at least indirectly benefit from the use of such common asset.

This line of analysis views expropriation as a beneficial measure in the sense that land would be taken from the multitude who are using it for subsistence purposes and be transferred to investors who are supposed to invest on it to benefit the majority through the creation of jobs and the development of economic and social infrastructure. In this policy context, land would be given swiftly and cheaply to what the state calls *limatawi balehabt* ('developmental investors') and such developmental investors in return are required to use the land so given for the intended project within the agreed time-frame. Failing this would entail, land retaking and monetary sanctions. This seems to be a sound rendition of expropriation in the context of the state`s economic policy which is anchored on the idea of rapid 'inclusive economic growth'.[100]

[99] Article 40 (3) of the Constitution, which provides ''Land is a *common property of the Nations, Nationalities and Peoples of Ethiopia*...'' (Emphasis supplied).

[100] Government of Ethiopia (2001), ''Rural Development Policies and Strategies of Ethiopia'', (Addis Ababa, The Ministry of Information).

This vision of land expropriation will not, however, bear these anticipated fruits automatically.[101] Its fruitfulness is rather contingent upon the monitoring and follow-up capacity of the state authorities, the integrity of the process of land expropriation, the officials in charge as well as the soundness of investment projects. It also rests on the willingness of officials to take effective measure against those investors who take land for speculative purposes. The vision of transformative land takings also hinges on the capacity of investors to put the land they take to use for productive activities.

Nevertheless, empirical studies suggest that expropriated lands are often taken for speculative purposes, or the purposes for which projects are approved are unilaterally changed; researches also indicate lack of consistent and effective sanctions against those investors who leave such land unused for several years.[102] These failings have readily and frequently been admitted by the authorities themselves.[103]

At the heart of this beneficial expropriation in Ethiopia is an increasing trend for redefining the notion of property rights in land. The country is retaking land that was expropriated from landlords and redistributed to peasants after the 1974 revolution. In 1975, it took the issuance of a single legislation to wipe out the system of exploitative absentee landlordism and to transfer land to poor tenants and farm workers in the Ethiopian countryside. Now it might take a series of

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[101] Jill Zimmerman (2005), "Property on the Line: Is An Expropriation Centered Land Reform Constitutionally Permissible", *S. African L. J.*, vol., 122, pp. 416ff. The Ethiopian state`s articulation of expropriation appears to be similar to what Zimmerman calls transformative expropriation arguing in the South African context that "the state should invoke expropriation to obtain land for redistribution purposes but compensation with significantly below market value, which course of action has support in the constitution; market value should not be the central or even predominant factor in this kind of expropriation." See also A J Van Der Walt (2006), "In Reconciling the State's Duties to Promote Land Reform and to Pay 'Just and Equitable' Compensation for Expropriation", *S. African L. J.,* vol. 123, pp. 23ff for the critique of this position of Zimmerman.

[102] The field researches also reveal that investors, with limited capital and experience acquire land, which lead to leaving the land so taken idle for many years while some investors with financial capabilities and as well as the requisite experience are finding it difficult to obtain agricultural investment land, in particular in the southern state. For this, see Dereje Seyoum, Access to Rural Land and Compensation Payment Schemes for Agricultural Investment in Amhara Regional State in the Proceedings *infra* note 138, pp. 33-35 & 45. And also see Letta Abebe and Dejene Chaka, Access to Rural Land and Compensation Payment Schemes for Agricultural Investment in Oromia Regional State in the Proceedings *supra* note 138, pp. 42 & 93-94. Nigusse Abebe, Perspectives on Access to Rural Land and Compensation Payment Schemes for Agricultural Investment in the Proceedings *supra* note 138, pp. 21-22.

[103] See the Proceedings of the Workshop on Land Policies & Legal Empowerment of the Poor, November 2-3, 2006, World Bank Washington D.C. *supra* note 62.

acts of expropriation to undermine the effects of such redistributive action. The state that sided with poor peasants is now tending to ally with capital on the assumption that such an alliance would advance the interests of the general public.

Finally, at the heart of the beneficial expropriation thinking is an economic notion of land rights, i.e., "an ethic that regards economic development and monetary return as evidence of the land's highest and best use".[104] In other words, the scheme of beneficial expropriation of land upheld by the Ethiopian state is conceived as simply one of the factors of production that changes hands through the intermediary of the state from peasants to investors in order to advance economic development.

3. Reforming Expropriation in Ethiopia

The preceding sections reveal a lax expropriation regime. Based on this finding, the sections imply reform concerning compensable interests, basis of calculating compensation, substitute land, normative contradiction and uniformity, notion of a landholder and significant implementation problems including lack of rehabilitation scheme. The current section considers the potential of rethinking the country`s expropriation law through enhanced judicial security, recasting land use rights as a human right and ensuring quality of post-taking projects.

3.1 Judicial scrutiny

Scholars have sought to rectify the imbalance attributable to the present expropriation laws of Ethiopia by allowing the judiciary to entertain major disputes relating to expropriation including public purpose.[105] Unfortunately, the law regarding the role of courts is vague because the law neither allows nor prohibits court litigation on the question of public purpose. Moreover, the legal framework on the possibility of reviewing final decisions of lower courts in relation to compensation through cassation is silent. In this regard, it is opined that "The law does not explicitly permit cassation. It is not proscribed either. Hence, parties have the right to seek review by way of cassation".[106] The dictum 'what is not prohibited is assumed to be allowed' can also be invoked in connection with public purpose. The access to justice clause enshrined in Article 37 of the Constitution might be construed to this end. This is a mere argument with the possibility of a counter-argument.

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[104] Lynton Kieth Caldwell (1986), ''Land and the Law: Problems in Legal Philosophy'', *U. Ill. L. Rev., vol.* 19, p. 329.

[105] Daniel Behailu (2015), *Transfer of Land Rights in Ethiopia: Towards a Sustainable Policy Framework, (*The Hague: Eleven Publishing) and Daniel W/Gebriel *infra* note 138.

[106] Summary of Focus Group Discussion *supra* note 13.

In the Ethiopian case, allowing people affected by expropriation to resort to regular courts might not necessarily work in favor of the poor because of deficit in the independence of the judiciary in relation to cases that are deemed or perceived to matter to the authorities. Currently, the country`s judicial system has moved away from its earlier formal dependence towards its legal and constitutional independence. This is so because the judiciary`s formal independence is unambiguously stated in the Constitution, which declares that: "An independent judiciary is established… Courts of any level shall be free from any interference of … any governmental body, government official or from any other source … judges shall be directed solely by the law."[107]

There are misgivings about the judiciary`s detachment, as a matter of fact, from the legacy of dependence. History is one factor. In Ethiopia, historically, there had been a formal union between the judiciary and the executive adversely affecting the former`s present independence. Assefa observes:[108]

> In historic Ethiopia, adjudication of cases formed part and parcel of public administration. One finds a merger of functions within the executive, the administration of justice and the executive function proper…This blend of judicial and executive functions in the latter is not without implications. First and foremost, the judiciary never had a separate existence of its own as an institution. It was subject to all kinds of pressures from the other branches.

Perception is another reason. It is stated that "There is a perception that the autonomy of the judiciary in Ethiopia is weak…"[109] Assefa says "…external

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[107] The Constitution, Article 78 (1) and Article 79 (2& 3).

[108] Assefa Fiseha (2005/2006), *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, (Netherlands, Wolf Legal Publishers) p. 390; see also Chi Mgbako *et al (2008)*, "Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights", *Fordham International Law Journal*, 32:1, pp. 289-290 & 296, where it is asserted that "The executive branch has the power to do as it wishes with no judicial checks on its activities…" See also Tigist Assefa (2010), "Judicial Review of Administrative Actions: A Comparative Analysis" (LL.M Thesis, School of Law, Addis Ababa University) <http://etd.aau.edu.et/dspace/bitstream/123456789/2154/1/Tigist%20Asefa.pdf> (viewed December, 22, 2011). Discussions in this sub-section (Sub-section 3.1) are based on a Comment the present writer co-authored with Hailu Burayu and Elias N. Stebek under the title "Judicial Protection of Private Property Rights in Ethiopia: Selected Themes" (2013), *Mizan Law Review*, vol. 7:2, pp. 360-363.

[109] African Development Bank (2009), "Country Governance Profile: Ethiopia" (hereinafter Country Governance Profile) <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Ethiopia%20%E2%80%93%20Country%20Governance%20Profile%20EN.pdf> (accessed January 11, 2012) p. 11; see also The Canadian International Development

pressure on the judiciary has deep roots and is not without some hangovers on the new federal judiciary. Administrators at state level, even today, think that it is natural to order the judge…"[110] Past legacy contributes to this perception: "A long history of centralized governmental authority and a judiciary subjugated to the executive branch has fostered a weak judicial branch with reduced capacity to exercise genuine independence, as well as a reticence of other branches to treat the judiciary as either truly independent or co-equal."[111] In particular, "…where government interests are at stake, direct interference has been noted…"[112]

The issue goes far beyond *de facto* executive intervention. The legislature appears to have played a role in the process by passing successive legislation having the impact of stripping regular courts of jurisdictions.[113] Further, as the Global Competitiveness Report has it, measured in terms of juridical independence, Ethiopia ranks 89 out of 139 countries, which has shown an improvement from its previous ranking, but Ethiopia`s standing is still low in the ranking index.[114] The underperformance is in spite of the fact that the country endeavoured to reform the judiciary whose central aim was "the promotion of professional and autonomous judiciary".[115] This is notwithstanding other factors which impede the assertiveness,[116] accessibility, effectiveness and efficiency of the judiciary.[117]

Agency (2008), "Independence, Transparency and Accountability in the Judiciary of Ethiopia" (Unpublished, on file with the author), pp. 99-101 & 135-138.

[110] Assefa Fiseha, *supra* note 108, p. 390.

[111] The World Bank, Judicial and Legal Assessment Judicial and Legal Assessment (2004), <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EthiopiaSA.pdf> (accessed January 11, 2012) pp. 19 & 21-23.

[112] *Id*., p. 21.

[113] Yared Legesse (2014), "Court Stripping: A Threat to Judicial Independence" in The FDRE Constitution: Some Perspectives on the Institutional Dimension" Ethiopian Human Right Series, vol. vi (Addis Ababa University, School of Law).

[114] World Economic Forum, The Global Competitiveness Report 2010-2011 <http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf>, (last viewed December 21, 2011) at 155.

[115] Country Governance Profile *supra* p. 109.

[116] There is a tendency to restrict the turfs of its power even in cases which are deemed ordinary. This is particularly true when it comes to reviewing the actions of executive organs. For instance, in *Ethiopian Privatization and Public Enterprises Supervising Authority vs Heirs of Nour Beza*, (Fed. Sup. Ct. Cassation File No. 23608, 2000E.C.) in the Decisions of the Federal Supreme Court Cassation Division Vol. 5 (Addis Ababa: Federal Supreme Court, 2001 E.C.) pp. 304-305, where the court has reasoned that "in the Ethiopian context, judicial power of the regular courts is not inherent but it emanates from the positive law and that where bodies other than regular courts are given by the law

The deference of the judiciary to executive measures is another factor. This is manifested, for example, in the decision of the Federal Supreme Court which has prohibited courts from reviewing decisions regarding nullifications of title deeds by administrative bodies.[118]

Therefore, given the above accounts of the judiciary`s present standing and historical inertia behind it, it is unclear to expect this branch of the government would scrutinize expropriation issues such as determination of public purpose and rehabilitation should they be challenged before it.

3.2 Redefining land use rights as human rights

Some rightly classify expropriation into two categories on the basis of the link between property (subjected to expropriation) and one`s livelihood.[119] The contrast between the categories represents expropriation of a mere economic asset *versus* that of a subsistence asset. When land is taken from investors, the government is depriving them of a mere asset, but not the foundation of their livelihood; when property such as land is taken from small landholders the government is depriving them of a livelihood asset.[120] Subscribing to this dichotomy calls for more stringent protection when expropriation is invoked with regard to livelihood asset than when it is used to expropriate an economic asset. However, what is reflected in the expropriation law of Ethiopia is the opposite; in the country`s eagerness to attract investment, it seems, it is making it legally easier for the state to deprive a livelihood asset than is the case with a mere economic asset. There is thus the need to depart from this *status quo* by creating a nexus between livelihood resources such as land and the *right to life* (as land rights of smallholder farmers are indispensable for the right to life).

Section 1.2(g) has already implied this linkage when it proposed the mandatory rehabilitation strategy, i.e., tying land use rights to loss of land, a critical livelihood asset, which in effect means linking such right to the wider concerns of livelihood. Within the scheme of the Constitution, land rights and

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the power to render final and binding decisions then regular courts cannot size upon such matters even by way of review."

[117] Federal Democratic Republic of Ethiopia (2005), "Comprehensive Justice Reform Program: Base Line Study Report" (Amsterdam, Centre for International Legal Cooperation), pp. 77-89 & 213-227.

[118] Yemane Kassa, (2011), "The Judiciary and Its Interpretive Power in Ethiopia: A Case Study Of The Ethiopian Revenues And Customs Authority" ((LL.M Thesis, School of Law, Addis Ababa University); Hailu Butayu *et al* (2013) "Judicial Protection of Private Property Rights in Ethiopia: Selected Themes" *Mizan Law Review*, 7:2. Elias N. Stebek (2013) "Role Conflict between Land Allocation and Municipal Functions in Addis Ababa", *Mizan Law Review*, 7:2.

[119] Antonio Azuela and Carlos Herrera-Martin, *supra* note 1, p. 339.

[120] *Ibid*.

more generally the right to property are, however, labeled as democratic rights as opposed to a human right. Though argued to be "a classification without significant impact",[121] the categorization of land rights as democratic rights formally means, in essence[122] the state can more easily restrict or trump the land rights of citizens. If the democratic rights path is followed, the state can issue lax expropriation laws, as it has done at present, that mandate it to take land from the people in the name of development.

One can nevertheless plausibly interpret other provisions of the Constitution to take land rights out of the democratic rights box. Following the foot path of the Indian courts,[123] though rendered in connection with public employment, it is plausible to link the land rights of peasants to the right to life clause of the Constitution, which is seen as "emanating from the nature of mankind" and "inviolable".[124] Land rights in Ethiopia are (more often than not) the sole source of livelihood for smallholder farmers. They constitute an indispensable factor for the rural population and are thus part and parcel of their constitutional right

[121] Gedion Timothewos (2010), "Freedom of Expression in Ethiopia: The Jurisprudential Dearth", *Mizan Law Review*, 4:2, p. 211; see also Tsegaye Regassa (2009), "Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia", *Mizan Law Review*, 3:2 p. 303.

[122] See the text of the two sub-articles of Article 10 of the Constitution. See also Abadir Mohamed (2008), "The Human Rights Provisions of the FDRE Constitution in Light of the Theoretical Foundations of Human Rights", (Addis Ababa: Addis Ababa University Faculty of Law) p. 85. The reading preparatory documents show that the dichotomy of rights under the constitution as human and democratic was a deliberate one. For this see Gedion Timothewos, *supra* note 121p. 209.

[123] See where a court in India has decided in Delhi Transport Corporation vs D.T.C. Mazdoor Congress on 4 September, 1990 <http://www.indiankanoon.org/doc/268805/> last viewed December 22, 2011) that the right to public employment is part and parcel of the right to life enshrined in the Indian Constitution. The Court has reasoned: "The right to life, a basic human right, assured by Article 21 of the Constitution comprehends something more than mere animal existence; it does not only mean physical existence, but includes basic human dignity. The right to public employment and its concomitant right to livelihood receive their succour and nourishment under the canopy of the protective umbrella…of the Constitution. The right to life includes right to livelihood. The right to livelihood, therefore, cannot hang on to the fan- cies of individuals in authority. The employment is not a bounty from them nor can its survival be at their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limb of undefined premises and uncertain applications. That will be a mockery of them."

[124] The Constitution, Article 10 (1) and Article 15.

to life; this would accord such rights sanctity by removing them away from easy reach of state authorities.[125]

Characterization of land rights as a dimension of the right to life suggested here is not the same as the human rights approach advanced by the UN agencies with regard to evictions. This discourse of the UN agencies articulates evictions within the rubric of social, economic and cultural rights of affected people in particular their housing right –primarily in urban settings. The human rights approach as advanced by the UN agencies rejects any eviction projects, and hence housing rights as human rights trumps all other societal concerns. Here property right as a type of human right underlies the housing rights campaigners.[126] This way of presenting human rights has been rightly critiqued as failing "…to acknowledge the economic implications of policy options."[127]

Land as an aspect of the constitutional right of peasants proposed here is also in a sharp contrast with the economic development perspective, an approach formulated by international economic agencies such as the World Bank, the International Monetary Fund and USAID that would, if applied in the context of present Ethiopian land tenure, over privilege the objective of economic development. At the heart of this latter position is economic utilitarianism grounded in private property rights ideas of Boserup and North.[128] A concrete application of this economic development discourse is encapsulated in free trade agreements where the paramount issue is the protection of the property rights of investors underpinned by the belief that opportunities created by the investors would trickle down to the poor.[129]

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[125] Such interpretation however cannot come from Ethiopian regular courts for they are not mandated to interpret the Constitution; it might come from the House of Federation, a political organ vested with sole and ultimate authority to interpret the constitution. See Article 62 of the Constitution which authorizes the House of Federation, the upper house, to entertain constitutional interpretation.

[126] Antonio Azuela and Carlos Herrera-Martin, *supra* note 1p. 346.

[127] *Id.*, pp. 358-359.

[128] Ilya Somint (2007-2008), "The Politics of Economic Development Takings" *Case W. Res. L. Rev.*, vol. 58, where, among others, the author argues for the importance of the accountability of those who decide on economic development takings. Somint says that the question that must be answered in the affirmative is: are those who decide on economic development takings accountable to the electorate (political power of the land holders) given the lack of knowledge on the part of the electoral about the effects of economic takings, given the long time it takes before one reaps, if any, the benefits of economic takings?

[129] Martha Belete (2014), ''Standard of Compensation for Expropriation and Nationalization of Foreign Investment in Ethiopia", *Journal of Ethiopian Law*, 26:2; and Alec R. Johnson (2010), "Rethinking Bilateral Investment Treaties in Sub-Saharan Africa", *Emory Law Journal,* vol. 59

The economic development discourse seems to incline toward efficiency for it welcomes transfer of land from `less efficient` users, peasants, to more efficient users, investors, as long as the former get 'just compensation'. But it is argued that: "Economic development theories that inspire land tenure reforms in many countries ignore the human rights dimension; free trade agreements focus on the interests of investors. If land policies are to be based on solid foundations, all these dimensions must be considered".[130] On the other hand, the argument that treats land rights of peasants in Ethiopia as an aspect of their constitutional right to life seeks to combine the merits of the human rights and the economic development approaches while removing their deficiencies. To this end, it corrects the imbalance in land takings that at present tilts toward the authorities without at the same time making it impossible for the authorities to use their eminent domain power.

In sum, the presentation of land rights of peasants as an integral part of their constitutional right to life is not sufficient in itself. It requires concrete expression in legal rules, as has been recommended in the context of Indian draft land acquisition bill discussed above. The draft is meant to restrict the state in the course of land expropriation. It tightens up the definition of public purpose, puts in place mandatory and effective public hearing and consultation mechanisms, allows interested persons to object to land acquisition, thereby "limiting the type and amount of agricultural land that can be expropriated at any given point in time,"[131] making the amount of compensation adequate, and revising the expropriation laws so that loss of land of the poor occurs only upon the fulfilment stringent conditions. In effect, payment of compensation does not merely consider loss of property on the land such as standing corps. These and other specific legal remedies have also been suggested to revamp expropriation laws of other countries.[132]

3.3 Post-expropriation development

The fact that farmland is expropriated for economic development from people who use it for subsistence purpose may not always mean that judicious development will occur. As the authorities in Ethiopia readily and frequently

[130] Antonio Azuela and Carlos Herrera-Martin, *supra* note 1 pp. 358-359.

[131] This is suggested by Saptak Sanyal and Aditya Shankar, *supra* note 77 p. 244.

[132] *Ibid.* Such measures include: the largest amount of the compensation for loss of land shall go to land losing farmers, not to village collectives and local governments, and the process of land taking shall be made democratized and complementary measures should be taken to list down matters that constitute public interest, unlisted ones shall be subject to approval by state council).

admit, expropriated lands lay idle for lack of the requisite capital and/or for want of proper follow up.[133] As Girma notes:

> The authorities expropriate land from farmers under the guise of advancing more important purposes… Many `investors` take the land not to invest but to sell it underground with high price… Others change the original purpose for which land was expropriated. And most rural land… stays idle…. Public authorities are not ready to take any measure against those who fail to develop the land within the agreed time. ...[134]

In other situations, the land expropriated might be put to inimical development activities such as the ones that ruin the environment. Or, development might take place to the sole benefit of investors without addressing the felt need of society such as secure employment.[135]

In the context where land is acquired for speculative purposes or put to inimical use, it is necessary to give special attention to the quality of development during pre-expropriation public hearings and consultations. Quality post-expropriation development means ascertaining at the time of expropriation the probability of the occurrence of development which contributes to the reduction of "concentrated poverty." Dana argues:

> If we want eminent domain … for good development, we should consider eminent domain reform that ties the availability of eminent domain to the characteristics of the development that will replace current land uses. One such reform would be an eminent domain test that would make eminent domain available when the anticipated new development would have features that are likely to contribute to reductions in the concentration of poverty. Such reductions arguably are a social good in themselves. [136]

Broadly speaking, each project requiring land expropriation has to raise and prudently answer the question: "…what kinds of development and what kinds of communities, we as a society, state and national polities, believe will best advance the public welfare."?[137] This requires giving as much attention to the nature of development to take place after expropriation as we do pay attention to the amount of compensation due and the judicial processes at the disposal of affected people.

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[133] One frequently reads news that some regional states cancel land lease contracts leading to land restitutions.

[134] Girma Kassa, *supra* note 20, pp. 80-82.

[135] David A. Dana (2007-2008), "Reframing Eminent Domain: Unsupported Advocacy, Ambiguous Economics and the Case for a New Public Test", *Vt. L. Rev.*, vol. 32.

[136] *Id.*, p. 168.

[137] *Id*., p. 169.

Conclusion

Review of the law and the available field research shows that Ethiopia`s expropriation regime exhibits many limitations.[138] Deficits are reflected in a broader definition of public purpose, lack of legally required public hearings and consultations, requirement of production of a landholding certificate to be eligible to receive compensation (implying the exclusion of some affected people especially informal landholders and property owners from payment of compensation), compensation scheme that is widely regarded as insufficient, limited judicial scrutiny of issues of expropriation and lack of institutional rehabilitation scheme to help those who have lost their livelihood to secure alternative means.[139]

Decades ago, Harrison Dunning argued for the abolition of the public purpose limitation stating that even a steadily widening notion of public purpose was:

> unsuited to a modern, development oriented African state. Such a state is expected to engage in all fronts of development-planning, initiating, and often producing. In these circumstances, every development project, even one managed by private persons for their own profit directly serves the

[138] Daniel Woldegbriel (2013c), "Land Rights and Expropriation in Ethiopia", PhD thesis, School of Architecture and the Built Environment, Sweden, Royal Institute of Technology); Imeru Tamrat, *supra* note 20, pp. 11-14; Ethiopian Land Tenure and Administration Program: Study on the Assessment of Rural Land Valuation and Compensation Practices in Ethiopia, Final Main Report (unpublished, on file with the author, 2007); Dustin Miller & Eyob Tekalign, *supra* note 20, pp. 362-363. See also the Proceedings of a Consultative Meeting on Rural Land Transactions and Agricultural Investment, (hereafter the Proceedings) (Gizachew Abegaz and Solomon Bekure (eds.), (Addis Ababa: Ethiopia-Strengthening Land Administration Program, 2009). Also see Irit Equavoen and Weyni Tesafi (2011), ''Rebuilding Livelihoods after Dam-Induced Relocation in Koga, Blue Nile Basin in Ethiopia'', Working Paper Series No. 83 (Bon: Center for Development Research, University of Bon) pp. 7-9 & 13-15, that documents irregularities in compensation payment including low amount of compensation in relation to people displaced as a result of irrigation project.

[139] The researches further indicate that people affected by expropriation proceedings lack knowledge of their rights to judicially challenge the decisions of the authorities even regarding compensation or even when they know about their rights they think it is either impossible or futile to bring the authorities to justice or when people are right conscious and daring enough to challenge those decisions in regular courts, the regular court judges lack knowledge of the relevant expropriation laws. An affected farmer said, "The government has all the powers, i.e., the court, the police, the prosecutor all belong to the government. We fear that there might be revenge from the authorities. We have no recourse to appeal against the decision of the authorities. Even if we are able to do it there is no probability of winning the case. It is like struggling with a mountain to demolish it." As cited in Girma Kassa, *supra* note 20, p. 115.

> public inertest … The power of eminent domain must be viewed positively and even the most broadly worded public purpose limitation encourages a negative, restrictive approach. Moreover, if the definition is expanded to include any conceivable project, the limitation is being simply retained for ornamental or sentimental reasons and is misleading. [140]

Dunning characterized the concept of public purpose as 'alien or obsolete legal doctrines inhibiting development' in African countries.[141] He argued that the requirement of payment of compensation should however be retained but linked directly to development, for example, by "denying compensation for undeveloped property…"[142] He further suggested simplified procedures in order to expedite the taking of property by the state at an early stage in the process.[143]

Under Dunning`s schema the state would be allowed to exercise its eminent domain power unshackled by conditions. In his scheme, the costs of economic development projects would be cheaper and the implementation of the projects in poor African countries swifter; the land so taken would be put to economic development conceived in its broader sense; people would benefit from the jobs created by the developmental state by raising their level of income; and perhaps, the state would exercise its power of eminent domain judiciously in spite of lack of legal constraints.

However, the idea of unhindered expropriation was advanced at the time when development was equated with economic growth through a robust state, which assumes that if the nation grows, then there is development. Experience has taught mankind to the contrary. Eminent domain has been exercised in the name of development to dis-empower the poor. The view which would like to see lax expropriation requirements appears to interpret land rights merely in economic terms to be compensated directly with the payment of lower amount of compensation and indirectly through the creation of jobs and availability of infrastructure. Yet, it has been amply settled in land tenure literature that to the poor, land is worth more than an economic asset; land gives them a place in a community. It is a means through which they voice their concerns in a given locality. Expropriation, when invoked inappropriately, detaches the poor from that locality.

One can easily subscribe to Dunning`s suggestion that speed, simplicity and fairness ought to mark a system of good eminent domain.[144] Yet, his argument

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[140] Harrison Dunning (1968), 'Law and Economic Development in Africa: The Law of Eminent Domain', *Colum. L. Rev.*, vol., 68, p. 1313.
[141] *Id*., p. 1315.
[142] *Id*., p. 1314.
[143] *Id.,* pp. 1311-1312.
[144] *Id*., pp. 1313-1314.

for the removal of key restraints against the state`s expropriation power unjustifiably favors the efficiency side of the matter at the expense of justice and fairness. One could not agree more with Sue Farran`s observation that:

> … often economic development is taking place so rapidly that the victims of it are left behind and long-term consequences are conveniently ignored in favor of short-term gain. Moreover, inequalities of wealth combined with inequalities of political power can result in a self-perpetuating system of human rights denial, especially where those who most benefit seek to preserve the unequal *status quo.* [145]

To argue for controlling the power of the executive by subjecting it to political and legal processes in its exercise of the power of expropriation is not to argue for paralyzing the state. It is rather to argue for subjecting the state to the rule of law.[146] It is about a quest for *balance* between private and public stakes in the exercise of the power of expropriation. At stake in expropriation proceedings that do not maintain this *balance* are the loss of livelihoods, erosion of the rule of law and adversities in the stability of the country. ■

[145] Sue Farran (2009), ''Land as A Fundamental Right: A Cautionary Tale'', *Victoria U. Wellington L. Rev.*, vol., 40, p. 402.

[146] For an account of the development of the rule of law in Ethiopia, see Assefa Fiseha (2013), ''Customary Dispute Resolution Mechanisms and the Rule of Law: Areas of Convergence, Divergence and Implications'', *in Law and Development, and Legal Pluralism* (Elias N. Stebek and Muradu Abdo, eds.), *Law and Development Series* No. 1, (Addis Ababa: Justice and Legal Systems Research Institute).

The Federal-state Intergovernmental Relationship in Ethiopia:

Institutional Framework and its Implication on State Autonomy

Nigussie Afesha ♣

Abstract

Intergovernmental forums facilitate negotiation, non-hierarchical exchange of information and cooperation between the institutions of the two levels of government. This article explores the experience of the House of Federation, the Ministry of Federal Affairs and sector by sector harmonization in two federal Ministries and their respective regional bureaus. There is lack of an independent institution in charge of consolidating inter-governmental relation (IGR) and this in turn has led to gaps in the regularity, continuity and effectiveness of the interactions. Save for some provisions of the Constitution dictating non-hierarchal relationship between the federal and regional states, the Ethiopian federation is generally characterized by a top-down relationship which can erode the spirit of partnership. Establishing an appropriate legal framework is thus essential to optimize the role of IGR in the Ethiopian federal system. The House of Federation seems the appropriate institution to organize IGR, and if the current dependence on the executive line remains unchanged, the focal point for IGR should be the Prime Minister's Office owing to its enhanced opportunity to give binding decisions and its ability to control the execution of decisions. Excessive reliance on political party lines evokes the question as to what will happen if opposing parties manage to win elections at federal and regional levels, and whether under such settings the collapse of the Soviet Union could be a prophesy to the Ethiopian federalism as well. Such risks call for stable and formal legal and institutional frameworks of IGR toward harnessing centrifugal forces and nurturing unity within diversity.

Key terms

Intergovernmental relations, IGR, federalism, state autonomy, Ethiopia.

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Introduction

IGR focuses on how different orders of government in federal political systems communicate and collaborate with each other. It encompasses the entire

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complex and interdependent relations among various spheres of government in legal, financial and administrative matters and policy coordination. There are various types of political arrangements or structural political organizations with varying degrees of relevance and utility.[1] An effective structure in a political organization is conceived as the bedrock on which the state is erected.[2] It is also described as an indispensable determinant of administrative efficiency in any state. One of such structural political organizations which have weathered the test of time is federalism.[3] The idea of federalism presupposes the existence of tiers of government with defined competence and dominion of jurisdiction on the same land.[4] Powers and functions of each government are outlined as part of the division of power and their sovereignty is also maintained. However, it does not necessarily mean that the division of powers and functions between the central government and constituent units remains fixed on permanent basis. It rather involves a continuous process of political bargaining between the centre and the federation units.[5] To this end, the synergy among the different levels of government needs to be backed by well-designed and institutionalized intergovernmental relations.[6] IGR is a vital norm and continues as a widely shared and one of the most common characteristic of any federation.[7] It regulates and enhances communication between the institutions of the two levels of government that have defined jurisdictions and are supreme within their respective powers.

IGR focuses on how different orders of government in federal political systems communicate and collaborate with each other. It encompasses the entire complex and interdependent relations among various spheres of government with respect to co-ordination of public policies.[8] IGR as a concept is commonly

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[1] S.T. Akindele & O. R. Opaopa (2003). 'The Theory and Practice of Federalism as a Structural Mechanism of Governance: How Adequate for Gender Struggle and Representation in Nigeria?', Kamla-Raj, *Anthropologist Journal,* Volume 5, No. 3: 169-178, p 170.

[2] Ibid.

[3] Ibid.

[4] Solomon Negussie (2008). *Fiscal Federalism in the Ethiopian Ethnic-based Federal System*, Revised Edition, Wolf Legal Publishers, Oisterwijk, p.32.

[5] Berhanu Gutema (2007). Restructuring State and Society: Ethnic Federalism in Ethiopia, SPIRIT PhD Series, Thesis no. 8 published by SPIRIT & Department of Culture and Global Studies p.29.

[6] Mitullah Winnie V. (2012). 'Intergovernmental Relations Act 2012: Reflection and Proposals on Principles, Opportunities and Gaps', *FES Kenya Occasional Paper*, No. 6, p. 4.

[7] Meekison J. Peter (2000). Introduction, in the Meekison J. Peter, ed., on "Intergovernmental relations in Federal countries: A series of Essays on the practice of Federal Governance", p1.

[8] Mitullah Winnie V., *supra* note 6, p 5.

used to refer to relations between and within levels of government that facilitate the attainment of common goals through cooperation and interactions.[9] These relations and interactions occur through policy alignment, reporting requirements, fiscal grants and transfers, the planning and budget as well as informal knowledge sharing and communication among officials.[10] With this in mind, establishment of permanent forums of intergovernmental bond has crucial roles in negotiation, non-hierarchical exchange of information as well as facilitation of cooperation between the institutions of the two levels of governments.[11] This eventually will bring mutual respect and confidence between the various levels of government.[12]

It may be argued that intergovernmental cooperation is both an inevitable and desirable feature of federal political systems. Given the importance of IGR in a federal system in enhancing negotiation, maintaining non-hierarchical exchange of information as well as facilitation of cooperation, an important question facing many federations is the extent to which modern constitutions should recognize and regulate intergovernmental interaction.[13] In many federations, there are intergovernmental councils, commissions, and committees,[14] and their interaction depends on the type of federation and subject matter.

In Ethiopia, the Constitution provides for a dual governmental structure along with separate jurisdiction to each level of government.[15] Although the jurisdictions of the federal government and the member states are distinctly delineated, there are important constitutional provisions that underline the need for consultation, coordination and collaboration. It is possible to argue that the federal government and the constituent units are interdependent in a wide range of matters. The preamble of the FDRE Constitution emphasizes the need to form, "one economic community…with sustainable and mutually supportive conditions …"[16] In the *first* dimension of the functional interface between the two levels of government, the federal government is authorized to formulate and implement the overall social, economic and development policies and strategies of the Country, while the jurisdiction of the regional governments is limited to

[9] Ibid
[10] Ibid
[11] Assefa Fiseha (2009). 'The system of Intergovernmental relationship (IGR) in Ethiopia: in search of institution and Guidelines', *Journal of Ethiopia law*, vol. 23 No.1 PP 96-131 pp. 107-108.
[12] Ibid, p 108.
[13] Patz, Tom (2005). 'Ethiopia', in Ann Griffith (ed.), Handbook of federal countries. Montreal and Kingston: McGill-Queens University Press.
[14] Watts, R. (2001). *Comparing Federal Systems*. 2nd ed. Montreal and Kingston: School of Policy Studies - Queen's University.
[15] See article 50(2) of the FDRE Constitution.
[16] See the preamble of the FDRE Constitution.

preparing social, economic and development policies and strategies that are going to be implemented in their specific regions.[17]

The *second* dimension relates to matters of education, health, science, technology, protection of cultural and historical legacies. In these matters, the federal government sets the national standards and basic policies, while the regional states are the conduits for the protection and promotion of the language, culture and history of their respective constituent ethnic communities.[18] *Third,* while the federal government is responsible to enact laws for the utilization and conservation of land and other natural resources,[19] the administration of such laws is left for the regional states.[20] *Fourth*, the judicial authority of the federal High Court and First-Instance Court is delegated to state Supreme Court and High Court respectively.[21] *Fifth*, although each level of government is, in principle, assigned executive authority for which it has exclusive legislative power, federal laws are, in practice, largely executed through the regional states. Perhaps more importantly, extensive interaction is envisaged in the fiscal domain which involves sharing of revenue, provisions of grants and loans, and the auditing and proper utilization of grants allocated to the regions.[22]

In spite of the wide range of affairs which require continuous synergy among the federal and regional state governments, there are hardly enough provisions in the Constitution to regulate IGR.[23] The Constitution seems to have loopholes in terms of offering sufficient provisions for intergovernmental cooperation. Even the existing rudimentary provisions remain largely unimplemented.[24] Other laws and political parties have also failed to create sufficient permanent institutional mechanisms to deal with intergovernmental issues. Hence, IGR is a notion which is given relatively little attention. This study, therefore, explores the current IGR framework in Ethiopia, including policies and structural mechanisms with a view to determine the extent to which these have been anchored.

There are two sets of intergovernmental relation –vertical and horizontal.[25] The vertical relation focuses on the relation between the federal government and

[17] See article 51(2) cum 52(2)(c) of the FDRE Constitution.
[18] See article 51(3) of the FDRE Constitution.
[19] See article 55(2) (a) of the FDRE Constitution.
[20] See article 52(2)(d) of the FDRE Constitution.
[21] See article 78(2) of the FDRE Constitution.
[22] Solomon Negussie, *supra* note 4, p 98.
[23] Ibid, p 108.
[24] Ibid.
[25] David Cameron (1999). Structure of Intergovernmental Relationship a paper presented at the International conference on Federalism, Mont-Tremblant, October 1999, Background paper, p. 1.

constituent units or between constituent units and local governments, whereas the horizontal relation involves inter-state or inter-local relations.[26] This article examines the practices of federal-state intergovernmental relationship in Ethiopia. The institutions which are presented in this article were purposely selected for investigation on the basis of their relative importance and accessibility and their experience in serving as a focal point for the intergovernmental relation. Institutions that have relatively wider common matters in relation to other institutions were preferred. In this regard, four federal level institutions and two institutions from regional governments are selected for investigation. Their experience with regard to organizing intergovernmental relation has been examined.

The first section of this article offers a conceptual overview of IGR and highlights the theoretical foundations of intergovernmental relationships. Section two, discusses the necessity of intergovernmental collaboration within a federal system. The third section deals with models of intergovernmental relationships and briefly addresses the nature and features of dual and executive models of intergovernmental relations. Section 4 highlights the mechanism of organizing and institutionalizing intergovernmental relationship in a given federal political system. The fifth section briefly explores IGR in Ethiopia and its development following the enactment of the FDRE Constitution. It also presents the institutional framework of IGR and its implication on the autonomy of the states.

1. Conceptual Overview of IGR

Intergovernmental relations are of growing concern among governments and political scientists[27] as they are ubiquitous and pervasive in all federal systems. This emanates from the inevitable facts of interdependence among levels of governments; complexities of the contemporary policy agenda; and the impossibility of drawing clear and separate lines of responsibility among tiers of government.[28] It may be argued that intergovernmental relations are not about neatly defining and defending areas of competency but rather about co-operation between organs of the state in different spheres of government.[29]

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[26] Deil S. Wright (1974). 'Intergovernmental Relations: An Analytical Overview', *Annals of the American Academy of Political and Social Science*, Vol. 416, Intergovernmental Relations in America Today (Nov., 1974), pp. 1-16 p. 2.

[27] Pattison Mark (1980). 'Intergovernmental Relations and the Limitations of Central Control: Reconstructing the Politics of Comprehensive Education', *Oxford Review of Education*, Vol. 6, No. 1, pp. 63-89, p. 64.

[28] George Anderson (2008). *Federalism: An Introduction*, Oxford University Press. p. 59.

[29] Department of Provincial and Local Government (the dplg) *Practitioner's Guide to Intergovernmental Relations in South Africa*, Website: www.dplg.gov.za

According to Watts, "Intergovernmental relations are conventionally defined as interaction between governmental units of all types and levels within a political system".[30] The wording "all types" signifies the existence of formal and informal IGR. The informal aspect of IGR results from the exchange of information either by letter, telephone or other similar means.[31] On the other hand, formal IGR is established by the Constitution, subsequent laws or by intergovernmental convention.[32] While informal processes involve direct communication between functionaries of different levels of governments, the formal institutions and processes are in the form of meetings, conventions, or conferences involving legislators, ministers, officials, and departments of different ministries of federal functionaries.

The words "all levels" imply "top down or bottom up relationship", or they may refer to collateral relationship among the constituent units. This involves two sets of relationships –vertical and horizontal [33] The *vertical* relation can be the relation between the federal government and constituent units or between constituent units and local governments. The horizontal relation, as stated above, involves inter-state or inter-local relations.[34] It is important to note that such relationship becomes inevitable in areas which involve concurrent power or policy framework on shared programs between the federal government and the regions.[35] Coordination of polices on shared programs is thus one of the factors which necessitate intergovernmental cooperation within a given federal system.

2. The Rationale for Intergovernmental Relations

The establishment of permanent forums of intergovernmental bond plays a crucial role in negotiation, non-hierarchical exchange of information as well as facilitation of cooperation between the institutions of the two levels of government.[36] This will bring mutual respect and confidence between the levels of government. There could be various factors that render cooperation as well as coordination between or among the tiers of government[37] indispensable.

First, the difficulty of giving clear-cut jurisdiction for each level of government renders IGR necessary because "it is impossible to have a

[30] Watts, R., *supra* note 14, p. 22.
[31] Id., p. 29.
[32] Id., p. 30
[33] David Cameron., *supra* note 25, p. 1.
[34] Deil S. Wright (1974), *supra* note 26, pp. 1-16 p. 2.
[35] Assefa Fiseha (2006). *Federalism and the accommodation of diversity in Ethiopia: A Comparative Study*. (Netherlands: Wolf Legal Publisher) p. 333.
[36] Watts, R, *supra* note 14, p. 22.
[37] Ibid.

watertight distribution of administrative or legislative jurisdiction among governments or to avoid overlaps of function".[38] Shared programs are inevitable, and intergovernmental cooperation is one of the mechanisms of mitigating conflict in the course of such programs. In this respect, Steytler argues that "conflict between tiers of states may be inevitable because they would often compete for the same powers and resources. Where such conflict occurs, they should be settled in the spirit of [cooperation]".[39] In this sense, IGR mechanisms are viewed as instruments that facilitate negotiation on matters that involve disagreement. Such interaction creates mutual understanding between the federal and regional governments.

Second, intergovernmental relation can serve as "a means to adapt changing circumstances without having to resort to formal constitutional amendments".[40] There is principle of co-operation implied from the concept of federalism that could overcome gaps in power distributions. The aim of intergovernmental relation is to make adjustment in the existing constitutional distribution of power rather than going through a rigorous constitutional amendment process, especially where the formal constitutional amendment procedures are rigid and unworkable.[41]

Third, having effective and efficient intergovernmental relation will help to achieve, *inter alia*, policy coordination, consultation, sharing of experience between the tiers of governments and among states/units/regions.[42] In a nutshell, most federal systems have developed some kind of informal and formal structural processes to coordinate and facilitate inter-governmental relations.[43] Although these are the potential explanations that demand intergovernmental relation to be rooted within the federal system, their type is influenced by the models of IGR.

3. Models of Intergovernmental Relation

A federal system usually requires a combination of two orders of government that are competent and autonomous in their respective spheres and have concurrent powers which can be exercised jointly. Here, what is important is

[38] Ibid

[39] Steytler Nico (2005). 'Republic of South Africa', in John Kincaid and G. Alan, eds., *Institutional Organs, Structure and Change in Federal Democracies*. Montreal and Kingston: McGill-Queens university press, p. 176.

[40] Watts, R, *supra* note 14, p. 26.

[41] Ibid.

[42] Carolyn M. Johns, Patricia L. O'Reilly, Gregory J. lnwood (2007). 'Formal and informal dimensions of intergovernmental administrative relations in Canada', *Canadian Public Administration Journal*, Vol. 50, No. 1, pp. 21-41, p. 33.

[43] Ibid.

how these tiers of government, which are coequal and autonomous, cooperate in order to improve the federal practice of the country, especially in the area of shared functions. In this respect, there are two models that deal with intergovernmental relations in a federal structure.

3.1 Dual/Competitive Model

The older federations were born in an era of limited government; hence their founders saw little need for formal mechanisms to manage interdependence.[44] For that matter, they did not anticipate the overlapping of power and interdependence between the central government and member units of the federation. In effect, they did not build formal intergovernmental arrangements into their constitutional systems.[45] This model focused on separate or divided model of federalism, in which, each government would be responsible for both lawmaking and the implementation of a defined list of responsibilities.[46] The foundation of this model is the accountability of each executive to its own legislature.

This model mainly focuses on the existence of inherent competition between the levels of government. According to Richard, "the characteristic of the competitive model is that it assumes the existence of inherent competition for power between the federal and state governments and one can give power only at the expense of the other."[47]

The emphasis of this model rests on the competition of the levels of government leaving no room for a pattern of political integration between them. According to this line of argument, state power should be divided between the two tiers of government so that each of them operates independently; this denotes a spirit of competition and rivalry between the center and the region.[48] Consequently, intergovernmental relations among the levels of government are likely to be minimal.

This does not however mean that the constitutions of the adherents of this model are utterly silent on some critical issues of intergovernmental relationship. In an era of complex, all pervasive governance, interdependence and overlapping functions grow exponentially, with the attendant risks of contradiction and duplication, requiring the development of extensive

[44] Simeon Richard. (2000). 'Conclusion' in the Meekison J peter, ed., on "Intergovernmental relations in Federal countries: A series of Essays on the practice of Federal Governance" p. 92.
[45] Ibid
[46] Solomon Negussie, *supra* note 4, p. 38.
[47] Assefa Fiseha (2006), *supra* note 35, p. 369.
[48] Solomon Negussie, *supra* note 4, p.38.

mechanisms of intergovernmental relations.[49] Even if there are such types of constitutional framework, in practice, the various levels of government in a federation have frequent interactions in legal, financial and administrative matters.[50] This shows that interaction between the levels of government is unavoidable.

3.2 Executive/ Cooperative Model

This model is in sharp contrast to the dual federalism. It can be described as a "shared" or "integrated" federalism, and emphasizes not only on distinct status and roles of the different orders of government, but it also gives due attention to their collective responsibility in legislation, implementation[51] and other avenues. The experience of federations throughout the world indicate that it is neither possible nor –in some cases– desirable for member governments in a federal polity to exercise their powers entirely in isolation from each other.[52] It is understandable that the distribution of power in a federal system is not based on the assumption that the subject of government activity is isolated from each other. However, if there are matters that are specifically given to different levels of government and where they need to be regulated by different and competing orders of government, each tier of government carries out its functions independently. Conversely, if a given function needs joint arms of both levels of government, they can work together.

This cooperative model suggests that federal and state governments do not operate in isolation as portrayed by the competitive model but rather they interact frequently. In this regard, it is pointed out that:

> … [T]he interdependence/overlapping model gives emphasis to the existence of shared power and responsibilities among the different levels of government. In a nutshell, it states that many areas of policy require federal, state and local involvement; that in modern federal system, the areas of autonomy and discretion for any single jurisdiction are limited; that several levels of government require more bargaining and negotiation than competition to obtain adequate power influence to carry out programs.[53]

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[49] Simeon Richard, *supra* note 44, p. 92.
[50] Solomon Negussie, *supra* note 4, p. 38.
[51] Simeon Richard: *supra* note 44, p. 92.
[52] Saunders Cheryl. (2003). *Formal and Informal Institutions and Mechanisms of Intergovernmental Relations in Australia*, a paper presented on Mechanisms of Intergovernmental Relations: International Experiences and Challenges for Brazil from 17 and 18 September 2003, Brazil , p. 1.
[53] Assefa Fiseha (2006), *supra* note 35, p. 369.

In this context, federal-state relationship has been considered as the important aspect of the federal system. Intergovernmental relation, in effect, is regarded as a basic pillar of cooperation that permeates the federal arrangement and that is used as an instrument to facilitate compromise if conflict arises out of various interests. This model requires the constitution or legislation to spell out for the establishment of IGR institutions and set rules that govern how these institutions will operate in order to manage intergovernmental collaboration. The structural arrangement of this model may vary from federation to federation.

4. Structure of Intergovernmental Relation

Co-operation in a federation is not an unqualified good, irrespective of the subject and form. In any federation, therefore, there are questions about when co-operation is appropriate and in what form.[54] There are many ways by which one can describe, organize, and institutionalize intergovernmental relations. The following dimensions are intended to capture the major aspects of such variations.[55]

4.1 Arrangements of intergovernmental relation

The mechanism of intergovernmental relationship varies from one political system to another across federations.[56] This variation may be attributable to various factors. One may find a formal institution which is established either by the constitution itself or by a subsequent proclamation. Such law is expected to contain detailed rules on how this institution works, including the character and major coordination area in which the institution focuses.

The formal rules of intergovernmental relations are imperative to constrain clientelism and destructive behaviour during the IGR dialogue.[57] Moreover, these laws encompass the role of both the federal and constituent states in IGR. The laws indicate the area of competence at both levels of government to negotiate and define how IGR institutions function. One of the cardinal reasons for formalizing IGR lies on the benefit that "Institutionalisation brings

[54] Saunders Cheryl, *supra* note 52, p. 2.
[55] Simeon Richard, *supra* note 44, p. 91.
[56] Peter Söderlund. (2005). *The Dynamics of Federalism in Russia*: A Study of Formal and Informal Power Resources of the Regional Chief Executives in Russian center-region Relations, Åbo Akademi University Press, Finland, p. 14.
[57] Kincaid John (2000). *Intergovernmental relations in the United States of America*, in the Meekison J. Peter, Ed. on "Intergovernmental relations in Federal countries: A series of Essays on the practice of Federal Governance" p. 33.

continuity, stability and predictability. Formal functioning mechanisms allow for clear cut action enabling smoother functioning."[58]

Notwithstanding these benefits of formal IGR, there are informal intergovernmental relation mechanisms, especially, in those federations whose constitutions do not provide ample provision that regulates intergovernmental matters. Informal IGR, in most cases, may not have "constitutional base", but it emerges through practice or evolves over time. The practice shapes the overall structure and character of IGR. Of course, constitutions may incidentally indicate the areas where the federal and the regional governments can work together in general or the sector by sector cooperation in particular. However, in the absence of an institution which is dedicated to IGR, it is clearly felt that intergovernmental interaction between different levels is not a regular affair. The informal ways of IGR are fluid and *ad hoc* that may develop in line with changing circumstances and existing political turmoil; and in effect, due attention should be given to formal IGR.

4.2 Balance of power among governments in the IGR forums

The concept of federalism is based on the idea of partnership which presupposes the political actors of the federal and state governments to act and discuss their issues on coequal terms. By logical extension we may conclude that IGR circumvents hierarchical relation between the center and regional governments. In this regard, Assefa considers "the idea of negotiation as an inherent aspect of the IGR process and structure" and he notes that "the process should not be based on the dictates of one level of government over the other, but should have some elements of bargaining and negotiation".[59] In principle, the predominant impression is one of relative equality between the two orders of government.

Unless federal and state governments interact on coequal terms and spirit of partnership, the federal political union which has been developed through series of negotiation would be defeated. Hierarchy and inequality are likely to lead to very different dynamics. The idea of non-hierarchal relationship and the spirit of partnership would make clear in advance number of issues such as the mechanism of bringing the political acts of the federal and regional states to the round table discussion and the manner in which the agenda is set. Whether regional states can request the federal government for negotiation would also be clearly stipulated including issues such as who would chair such a negotiation and, how the institutions should be composed of.

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[58] Ofilia Saavedra & K. K. Kailash (2002). *What are Effective Approaches to Intergovernmental Relations?* A paper presented at 4th International Conference on Federalism: Unity in Diversity Young Professionals, April 22, 2002. p 8.

[59] Assefa Fiseha (2009), *supra* note 11, p. 115.

4.3 Intergovernmental institutions as decision-making bodies

The formal approach of intergovernmental relations presupposes the establishment of one or more institutions in charge of regulating the matter. The establishment of these institutions requires defining their mandates and decision making competences.[60] Intergovernmental deliberations primarily involve exchanging information and ideas; and they provide a forum for discussion.[61] On the one hand, intergovernmental institutions are mandated to process bargaining, negotiation, and persuasion between levels of government, while both levels of government remain responsible to their own legislatures and electorates for the actions they take.[62] At the other extreme, there are intergovernmental institutions that can make formal decisions, binding on all the partners.[63]

There is strong resistance against the assignment of binding powers to non-elected intergovernmental bodies. This is because accountability of governments to each other would potentially undermine the accountability of each levels of government to its legislature. In integrated federations, on the other hand, where homogeneity and consistency are highly valued, binding intergovernmental agreements are the norm.[64]

4.4 Focal point for institutional design

The institutional design of IGR lies in the broader institutional structure or framework, within which federalism and IGR are embedded. Be it formal or informal, it must indicate the place where this institution should be attached.[65] The institutional design should answer the following queries. Should intergovernmental relationships be based on the executive line or other non-governmental institutions? Where should the focal point be? Does it need to be an independent institution or should it be attached to another federal institution?

Indicating the place where the institution is situated is vital. This perhaps guarantees easy enforceability of the decisions. Normally, intergovernmental relations take the form of relationship between the executives of the two orders of government.[66] This implies that intergovernmental relation can be facilitated through different channels, structure and processes.[67] Party channel is one of them. For such a situation to exist there must be one effectively organized and

[60] Ibid, p.107,
[61] Simeon Richard, *supra* note 44, 99,
[62] Ibid,
[63] Ibid,
[64] Ibid,
[65] Assefa Fiseha, (2009), *supra* note 11, p 111
[66] Ibid , p 108
[67] Watts, R. (2001), *supra* note 14, p. 23

highly disciplined party that controls all levels of government: both at federal and regional levels.[68] With an integrated party system in which national parties are able to win support across all or most regions, and in which national and provincial/state parties are closely linked, with considerable mobility of leadership from one level to another, much of the accommodation between the center and regions will take place in the course of party politics and in the national political arena.[69]

5. Party System *versus* Intergovernmental Relations

In full-fledged democracies, political parties compete to assume state power. The structure of political parties, and their internal practices, policies and pattern of interaction can affect the workings of federations.[70] These factors can have a profound impact upon the functioning of federations. For instance, centralized parties tend to centralize political power and decision-making and may create trends against the division of power in federations.[71] By the same token, if splintered parties rule the regional states or if region-based parties are very strong, it poses a challenge in the management of a federation.[72]

As William Riker notes, "the structure of the system of political parties is what encourages or discourages the maintenance of the federal bargaining".[73] The implication of this argument is that different forms of intergovernmental interactions may be desirable depending on the political structure of the country. This is not without reason; the experience of intergovernmental relations in various federal systems points to the existence of a great variety of arrangements. Thus the argument is that, intergovernmental relations can be facilitated through different channels, structure and processes.[74] Party system and party channel among other things, are among the various mechanisms. For such a situation to exist there must be one effectively organized and highly disciplined party that controls all levels of government: both at federal and the regions.[75]

The nature of political parties and their internal working procedures has an impact on the working of a federation. If one homogeneous party controls both

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[68] Assefa Fiseha (2006), *supra* note 35, p. 369.
[69] Simeon Richard, *supra* note 44, 99.
[70] Ibid.
[71] Lucy R. (1985). The Australian form of government, Melborne: Macmillan Company. p. 56.
[72] Anderson, *supra* note 28, p. 51.
[73] Riker, William H. (1964). Federalism: Origin, Operation, Significance. Boston: Little Brown & Co p. 51.
[74] Watts, R., *supra* note 14, p.24.
[75] Assefa Fiseha (2006), *supra* note 35, p 369.

levels of government, there would be no occasion for intergovernmental conflicts.[76] But, in majority of the federations, it is usually unlikely that there would be one party dominating both levels of government for a long period of time. On the other hand, if diverse parties are in control of the different levels, we can expect high level of intergovernmental conflicts and competition.

6. Intergovernmental Relationship in Ethiopia: Institutional Framework and its Implication on State Autonomy

The FDRE Constitution requires both tiers of government to preserve and maintain constitutional order throughout the federation.[77] Despite this major concurrent constitutional responsibility of the federal and regional states, the Constitution contains no explicit reference to intergovernmental cooperation and it does not expressly state the obligations of the respective levels of government in maintaining the constitutional order. There was thus the statutory gap in intergovernmental relations and statutory institutions were not established with an explicit aim of facilitating the cooperation.

In practice, however, various informal intergovernmental forums were established in the Ethiopian federation after the enactment of the Constitution. These forums are principally aimed at paving the way for cooperation and integration between the levels of government. Although meetings were taking place between the federal ministerial offices and regional bureaus, between director generals and technical experts; between regional governments and local governments with their respective offices or sectors, they were largely *ad hoc*, spontaneous, irregular and often without clear constitutional base.[78]

In federations with parliamentary systems where the predominant role of governmental executives in intergovernmental relations are visible, the institutions and processes for intergovernmental relations usually develop pragmatically rather than by constitutional requirement.[79] In Ethiopia too, the institutions and processes for intergovernmental relations have been more or less similar to federations with parliamentary systems.[80] They involve direct communications (via letters or telephone conversations) between the concerned functionaries of federal and regional governments. The various ministries of the federal government have direct and close contact with their corresponding bureaus in regional governments. This close link and interdependence is imperative to carry out their respective responsibilities effectively and in a

[76] Id., p. 392.
[77] See article 51(1) cum 52(2)(a) of the FDRE Constitution.
[78] Solomon Negussie, *supra* note 4, p. 104.
[79] Assefa Fiseha (2009), *supra* note 11, p 111.
[80] Ibid.

coordinated manner. It also enhances the capacity of the regional governmental institutions, which compared to the federal government institutions, suffer from lack of adequate human and material resources. For instance, the Federal Ministry of Health and the regional health bureaus work together in a mutually complementary manner in the effort to implement the federal health policies and standards in regional states.[81] The Ministry also provides technical assistance to the regional health bureaus.

We can also identify other *ad hoc* mechanisms of intergovernmental relations in Ethiopia. These include conferences, advisory *ad hoc* bodies, exchange of personal and technical experts, or personal exchange of information between authorities of the levels of governments.[82] These interactions reveal the inevitability of intergovernmental relations between the federal and regional governments so as to ensure smooth and efficient application of powers and responsibilities. Yet there is the need to look into the institutional framework that has been practiced in Ethiopia along with its implications on the autonomy of regional states.

6.1 Institutional framework of intergovernmental relationship in Ethiopia

Usually the mechanisms and structures to carry out IGR functions are the result of both formal and informal arrangements. However, structures may be determined, at least in part, by constitutions, legislation and other more formal agreements. National constitutions often specify revenue and expenditure assignments, but they do not institutionalize elements of intergovernmental machinery, though some countries have extensive constitutional inter-governmental provisions.[83] Usually, federations manage their intergovernmental relations with less explicit guidance rather than express stipulations in the constitution.[84] It is through legislation that IGR mechanisms are established and regulated. This means, the legislator passes bills to formalize inter-governmental institutions. Such bills commonly include rules of procedure or the establishment of committees to manage intergovernmental matters or provide advice about them.

[81] Interview with Ato Mebeiratu Belay, policy analysis and plan officer, Addis Ababa, Feb. 18/2014.

[82] Solomon Negussie, *supra* note 4, p 104

[83] Ronald H. Neumann and T. Russell Robinson (2006). *The Structures and Conduct of Intergovernmental Relations*, in the Richard M. Bird and François Vaillancourt, on "The International Bank for Reconstruction and Development Perspectives on Fiscal Federalism" pp. 66-67, p. 66.

[84] Ibid.

In the absence of legislation, intergovernmental agreements, which typically are used to implement policy decisions, may also be used to establish inter-governmental arrangements for the performance of a variety of functions. These include consultation on identifying issues; preparation of common policy option; coordination, administration, and monitoring of issues; and the establishment of rules of procedure. This agreement may also establish forums which enable an intergovernmental political body or a group of officials to carry out IGR on either a one-time, regular and continuing basis.[85]

In light of the discussion above, institutions that are authorized to organize intergovernmental relationship seem imprecise in Ethiopia. However, there are formal and informal intergovernmental relationships which have been developed through time. There is an institution, the House of Federation, which invokes constitutional inference to organize IGR.[86] At the same time there is also an institution –the Ministry of Federal Affairs– that makes reference to legislation to organize IGR and establish intergovernmental department within its internal structure.[87] The third category of institutions that have organized intergovernmental relations have made the intergovernmental convention as a legal base to organize IGR.[88] This is usually described as a *sector by sector* interaction which is backed by memorandum of understanding duly signed by both levels of government representatives. This document serves as a legal basis to make their interaction formal.

6.1.1 House of Federation

The House of Federation is responsible to find solutions to disputes or misunderstandings that may arise between regional states.[89] For instance, if a border dispute arises between two or more states; it is the mandate of the House to organize a forum for disputant-states to negotiate and settle the issue amicably.[90] The House facilitates such forums and umpires both sides to get the issues resolved. If this attempt fails, the House can render decision to resolve such disputes on the basis of settlement patterns and the wishes of the peoples concerned[91] within the time frame laid down under the Constitution.[92]

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[85] Ibid.

[86] Interview with Ato Yakob, Acting Director of Intergovernmental Relations Directorate at House of Federation, Addis Ababa, Feb. 17/2014.

[87] Interview with Ato Tsegabrihan Tadesse, Intergovernmental Relations Directorate General at Ministry of Federal affairs, Addis Ababa, Feb. 19/2014.

[88] Interview with Ato Mebeiratu Belay, policy analysis and plan officer, Addis Ababa, Feb. 18/2014.

[89] See article 62 (6) of the FDRE Constitution.

[90] Interview with Ato Yakob Bekele, Acting Director of Intergovernmental Relations Directorate at the House of Federation, Addis Ababa, Feb. 17/2014.

[91] See article 48(1) of the FDRE Constitution.

The House is also empowered to decide on issues pertaining to the rights of nations, nationalities and peoples to self-determination, including the right to secession in accordance with provisions of the Constitution.[93] This mandate demands that regional states which have a problem of misunderstanding with one another in dealing with their matter before the House, decide their issues in accordance with the Constitution. The House may organize a forum for disputant-states to negotiate and resolve the issue amiably. This negotiation may include efforts of persuading the parties to renounce their intention of secession.

The other power of the House which involves intergovernmental relation relates to revenue sharing and grant allocations. The House is empowered to decide the division of revenues derived from joint Federal and State tax sources and the subsidies that the Federal Government may provide to the States.[94] It decides the share of each level of government from joint tax source, and allocates the share of the regional states among individual regional states. The House also determines the allocation of federal subsidy among regional states. These matters can be source of conflict, and should be decided by consensus to maintain the social cohesion among the member states of the federation.

The House has organized both formal and informal IGR systems. The formal forums are essentially of two kinds: 'Forum of Speakers' and a joint forum of 'federation and regional states'.[95] In the former case, as the name indicates, the participants are the speakers of both the federal houses and regional state councils.[96] On the latter forum, the participants of the meeting are not limited to representatives of the regional states and the federal governments.[97] It includes other stakeholders such as different staff, intellectuals and other invited guests. The most unique feature of their participation is that the invited guests are not passive participants of the meeting. They can forward their views during the meeting like any 'legitimate' participant or permanent member of the forum.

The federation units are expected to attend the IGR forum whether the agenda concerns a given state or not. This seems to have the rationale that units of the federation can draw lessons from states which have encountered problems. Most of these conferences are chaired by federal government officials. The regional states participate on the agenda set up by the House. The

[92] See article 48(2) of the FDRE Constitution.
[93] See article 62 (3) of the FDRE Constitution.
[94] See article 62(7) of the FDRE Constitution.
[95] Interview with Ato Yakob Bekele, Acting Director of Intergovernmental Relations Directorate at the House of Federation, Addis Ababa, Feb. 17/2014.
[96] Ibid.
[97] Ibid.

role of the states is limited to forwarding their reflections on each agendum designed by experts.[98]

However, the IGR forums organized by the House, seem 'general meetings' rather than an IGR forums. Theses forums set broad agenda. The chairperson attempts to narrow down the diverse points raised by the participants. And then, the chairperson identifies an agendum that is agreed by all and makes the floor open for further discussion on those issues in which the participants did not reach agreement.[99] These meetings allow differences to be discussed and provide a platform for reaching consensus.

However, dissenting opinion is not encouraged in the forums.[100] If there is a participant who has dissenting opinion, an effort will be made to convince him/her. The party line adds its own impact for this. The opinion of the majority prevails over any dissenting opinion. This is known as "consensus dialogue". The other issue is the effect of the decision. The decision is binding on both sides: the participating state and the absent state/s. The minutes of the forum is sent to all regions the next day. After setting out a strategy and action plan, the issue may be returned to all regional states for implementation. Failure to attend the IGR forum will not entail any consequence, and the decision is binding even in the absence of a given state.[101]

6.1.2 Ministry of Federal Affairs

The Ministry of Federal Affairs is the other federal body which has engaged in organizing IGR. It has established a section in charge of formalizing IGR. It has also organized IGR forums. The ministry is working toward the establishment of IGR sections within each federal ministry and its respective counterpart at regional bureaus.[102] This is part of the pursuits of institutionalizing sector by sector intergovernmental interactions. The Ministry's power of organizing IGR forums stems from its mandate and duties embodied in Proclamation No. 691/2010. Pursuant to this legislation, the Ministry of Federal Affairs has the powers and duties to cooperate with concerned federal and regional state organs in maintaining public order.[103]

Based on this mandate, the Ministry has organized a forum on peace and security. Participants of the forum are representatives of the federal and peace and security office heads of the regional states. Each region is represented by

[98] Ibid.
[99] Ibid.
[100] Ibid.
[101] Ibid .
[102] Interview with Ato Tsegabrihan Tadesse, Intergovernmental Relations Directorate General at the Ministry of Federal Affairs, Addis Ababa, Feb. 19/2014.
[103] See article 14(1)(a), Proclamation 691/2010.

three representatives.[104] This forum is active in exchanging information and is backed by a memorandum of understanding which clearly defines the role of each level of government. Usually, they meet every three months to evaluate their performance, identify problems encountered and determine directions for future action.[105] The forum is chaired by the federal government, and the states have the right to raise issues they think important to be discussed at the forum.[106]

The second forum organized by the Ministry is the logical extension of the constitutional entitlement that requires government to provide special assistance to Nations, Nationalities, and Peoples of the least advantaged in economic and social development.[107] On behalf of the Federal government, the Ministry is authorized to provide assistance to regional states particularly to those regional states which deserve special support.[108] Furthermore, the Ministry coordinates, integrates and follows up supports given by other federal organs to the regional states.[109] There are also formal IGR forums which are organized by the federal special support board sector. Normally, this seems to involve a holistic form of support to enhance their capacity. They meet every three months at the head level and there are monthly meetings at the level of technical staff. The support of these technical experts ranges from capacity building to issues of how to plan, implement and report the same. [110]

The Ministry is also empowered to facilitate the resolution of disputes arising between regional states.[111] In this regard, it is obliged to make sure that its acts are not prejudicial to the power of the House of Federation as stated in Articles 48 and 62(6) of the Constitution.[112] By virtue of Proclamation No. 610/2010, "the Ministry of Federal Affairs shall have the powers and duties to serve as a focal point in creating good federal-regional relationship and cooperation based on mutual understanding and partnership and thereby strengthening the federal system".[113] The Proclamation indicates the institution that serves as a focal point

[104] Interview with Ato Sisay Melese, Culture of Peace Building Directorate Director at Ministry of Federal Affairs, Addis Ababa, Feb. 19/2014.
[105] Ibid.
[106] Interview with Ato Tsegabrihan Tadesse, Intergovernmental relations Directorate General at Ministry of Federal Affairs, Addis Ababa, Feb. 19/2014.
[107] See article 89(4) of the FDRE Constitution.
[108] See article 14(1)(f), Proclamation 691/2010.
[109] See article 14(1)(g), Proclamation 691/2010.
[110] Interview with Ato Tsegabrihan Tadesse, Intergovernmental relations Directorate General at Ministry of Federal Affairs, Addis Ababa, Feb. 19/2014.
[111] See article 14(1)(b), Proclamation 691/2010.
[112] See article 14(1)(b), Proclamation 691/2010.
[113] See article 14(1)(e), Proclamation 691/2010.

to organize IGR.[114] It also demands that the federal-state relationship should not be on the basis of hierarchy; rather, it should be on the basis of spirit of partnership and mutual understanding.[115] As stated in the Proclamation, the overall objective of such relationship is to ensure "cooperation based on mutual understanding" and strengthen of the federal system.

6.1.3 Sector by sector relationship

In Ethiopia, virtually all ministries have their own family of intergovernmental mechanisms, and they have developed their own practice of cooperation and collaboration between the federal and regional governments. The structures, processes, and practices have been developed between different federal Ministries and their regional counterpart bureau in which all levels of government have a role. Thus, the Ministries of health, agriculture, education, trade and industry as well as regional sector bureaus have developed mechanisms and patterns to conduct intergovernmental relations that cover a wide range of functions. Although many of the concepts and functions are common across ministries, their roles and structures vary for a variety of reasons. The functions of the Ministry of Health and Ministry of Agriculture highlighted below provide examples of intergovernmental processes in the context of a sector by sector coordination and harmonization.

a) Ministry of Heath with Regional Health Bureaus

The Ministry of Health has the power and duty to formulate the country's health sector development programmes and to follow up and evaluate the implementation of the same.[116] It supports the expansion of health services coverage and follows up and coordinates the implementation of health programs financed by foreign assistance and loans.[117] The Ministry is also responsible to direct, coordinate and follow up the implementation of the country's health information system.[118]

Consistent with this mandate, the Ministry of Health is working with regional bureaus on prevention and control of diseases as well as availing health services for the public.[119] The Ministry and the concerned regional bureaus have signed a

[114] Ibid.
[115] Ibid.
[116] Ibid. See article 29(1).
[117] See article 29(2).
[118] See article 29(3).
[119] Interview with Ato Mebeiratu Belay, policy analysis and plan officer, Addis Ababa, on Feb. 18/2014; and Interview with senior Expert (who wants anonymity) at Southern Nations, Nationalities and Peoples Regional state Health Bureau, Hawassa , March 14/2014.

memorandum of understanding which strengthens their collaboration.[120] This document is expected to serve as a legal base for their interaction and cooperation.[121] There is a regular meeting which is held every two months at the level of high officials. The participants in this forum are top management (council) of the Ministry and regional bureau heads under the chairmanship of Ministry of Health.[122] In this case too, there are states who fail to attend the meeting even though they are bound by the decision of the forum, irrespective of their non-appearance.[123] This forum is supported by a technical committee which is called Federal Ministry of Health and Regional Health Bureaus Joint Steering Committee (shortly abbreviated as FMOH-RHB).[124]

The committee collects information from each regional health bureau and identifies areas of priority. Based on the information gathered from each region, the committee identifies the common concerns of all the regions that should be discussed on the forum.[125] The committee also identifies regions which need capacity building, financial support and experience sharing.[126]

Experts move to these regions to supervise their overall performance and provide appropriate technical support with a view to scaling up the performance of the regional states. These experts examine the overall performance the regional states and offer recommendations. Each region is expected to undertake its activities in accordance with the recommendations of the experts. Pursuant to this, each region prepares and submits its report both to its respective regional council and to the Ministry every month.

However, there are some states that delay their reports to the Ministry. In such cases, the state in default of reporting is notified to submit its report as soon as possible. If it fails to do so, this will be communicated to the Minister and the latter will write a letter, to which the regional states will instantly respond. The issue worth inquiring at this juncture is whether the regional states are obliged to submit a report to the Ministry? Failure of regional states to submit their report timely will be a ground to be evaluated by the federal government[127] as if they are accountable to the federal government. This approach seriously erodes the spirit of partnership and mutual confidence that would be created otherwise between the tiers of governments.

[120] Ibid.
[121] Cited as a legal basis to institutional IGR forums.
[122] Interview with Ato Mebeiratu Belay, policy analysis and plan officer, Addis Ababa, Feb. 18/2014
[123] Ibid.
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Ibid.

b) Ministry of Agriculture with regional agriculture Bureaus

Like the other ministerial offices, the federal Ministry of Agriculture has both formal and informal relationships with regional agriculture bureaus. The informal mechanisms include communication through letters, telephone and also video conferences. The formal mechanism involves the forums that are frequently held.

Activities that jointly engage the Ministry of Agriculture and regional agriculture bureaus include agricultural extension, natural resource and livestock development programs.[128] The strategic oversight committee which follows up such joint engagements is composed of representatives from the Ministry of Agriculture, regional Agriculture Bureau and donors.[129] These stakeholders together identify areas of priority and jointly prepare an annual plan derived from the Growth and Transformation Plan (GTP). The project has its own manual. The plan contains the respective roles of both levels of government.[130] This joint plan and program is evaluated every three months'.[131] After six months, each region is expected to submit its report to the Ministry.

There could also be other meetings (held twice a year) comprised of higher officials, experts and donors.[132] The agenda is set by federal government experts. Here also, the role of the regional governments is limited to taking part in the meeting. Each meeting is chaired by the federal government officials, and head of agriculture bureau of the regional state –which serves as the venue of the meeting– becomes deputy chairperson.[133] The federal government might take the forum as an opportunity to influence the agenda in favour of the federal government's areas of priority.

According to an opinion communicated to this author, it is the federal ministry that prepares the project and looks for funds, and that is why the federal government wants to have a tight control and hence chair the project.[134] Even

[128] Interview with Ato Getachew H/Mariam, senor information expert at Ministry of Agriculture, Addis Ababa, Feb. 18/2014.

[129] Interview with Ato Zena H/wold, planning and program directorate Director at Ministry of Agriculture, Addis Ababa , Feb. 18/2014.

[130] Interview with Ato Zena H/wold, planning and program directorate Director at Ministry of Agriculture held Addis Ababa , on Feb. 18/2014, and Interview with Ato Aylew Zenebe, Public Relation Expert at Southern Natation, nationality and People Regional state Agriculture Bureau, Hawassa , March 12/2014.

[131] Ibid.

[132] Interview with Ato Zena H/wold, planning and program directorate Director at Ministry of Agriculture, Addis Ababa , Feb. 18/2014.

[133] Interview with Ato Aylew Zenebe, Public Relation Expert at Southern Nations, Nationalities and Peoples Regional state Agriculture Bureau, Hawassa , March 14/2014.

[134] Interview with Ato Zena H/wold, Director of Planning and Program Directorate at the Ministry of Agriculture, Addis Ababa, Feb. 18/2014.

though the federal government prepares the plan and organizes the platform for discussion, the regional governments have a significant role in developing the project proposal.[135] The program is implemented in their respective regions and they are the actual actors in implementing the program. This gives them the opportunity to execute projects in their own context subject to submitting periodic reports regarding their performance. In case there are representatives of the regional governments who fail to attend the conference, they will be bound by the decision of the summit.[136]

6.1.4 Political parties as a channel of intergovernmental relations in Ethiopia

The dominant arrangement which has been employed by the federal government to ensure federal influence on states and guarantee uniform application of policies is the political party channel. It can be argued that a disciplined party that dominates both levels of government is an asset for a divided country like Ethiopia. However, many writers consider this as an obstacle to a genuine federal structure.[137] In practice, the hegemonic control of the party throughout Ethiopia is a problem.

The interaction between the central ruling party and regional member and affiliate parties is characterized by what Paulos calls "patron-clientism".[138] Regional parties are implementers of the policies adopted by the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF). The ruling party has its own representatives in regional states. By directly communicating with these representatives, the federal government can monitor the implementation of federal policies, programs and plans in regional states, and to render assistance in the capacity building pursuits of the latter. This has led some to conclude that there is currently a *de facto* one party state. [139]

Although we can argue that EPRDF is a coalition of ethnic parties, and not a monolithic party, the total dominance of EPRDF at both levels of government in Ethiopia is obvious. This evokes the question as to what will happen if an opposition party manages to win elections at regional or federal level? In other

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[135] Interview with Ato Aylew Zenebe, Public Relation Expert at Southern Nations, Nationalities and Peoples Regional state Agriculture Bureau, Hawassa , March 14/2014.

[136] Interview with Ato Zena H/wold, Director of Planning and Program Directorate at Ministry of Agriculture, Addis Ababa , Feb. 18/2014.

[137] Assefa Fiseha, (2006) *supra* note 35, p 116 ; *see* also Paulos Chanie (2007), *What One Hand Giveth, the Other Hand Taketh Away*: *Ethiopia's Post-1991 Decentralization reform under neo-patrimonialism*, Netherlands, Shaker publishing, p. 283.

[138] Paulos, Id., p. 284

[139] Merera Gudina (2007). 'Party politics and election in Ethiopia: 1991-2005' In Kassahun Berhanu and et al (eds.), *Electoral politics, decentralized governance, and constitutionalism in Ethiopia*. (Addis Ababa: Addis Ababa University Press.

words, if an opposition party manages to win elections at regional a level and EPRDF wins at the federal level, some fear that the reasons for the collapse of the Soviet Union could be a prophesy to the Ethiopian federalism as well.[140]

Hence, what are the mechanisms of dealing with centrifugal forces if they dominate the political space? As Bekele quoted in Alem argues, if EPRDF falls from power, the federation will wither away with it. Indeed, such fears are grounded, since each ethnic group has the weapon of secession. In fact, such threat is something confirmed by EPRDF itself in its series of party meetings.[141]

One can anticipate a number of worst case scenarios. The collapse of the federation might be followed by civil war, military rule, or disintegration of the Ethiopian state. The potential for such negative scenarios calls for proactive strategic thinking and measures that can enhance cooperation, trust and harmony. After a certain level of fragility, failed statehood may not stop at the level of a regional state or a zone but can go further down to the smallest demarcation point of 'identity' because at that stage denominations such as shared language and religion do not guarantee unity and peace as is the case in Somalia and other countries. While the Soviet Union scenario was fragmentation of the states, fragility and failed statehood can bring about scenarios that are even worse.

One of the areas that show potential danger of deadlock is the arrangement of intergovernmental fiscal transfer. By African standards, regional officials in Ethiopia are less confident to challenge the federal government on constitutional grounds.[142] Despite a single party dominance, however, we have witnessed serious debates in the House of Federation (HoF) in matters of fiscal transfer. In this case, Solomon's analysis of the potential tension of revenue secession in light of the experiences of other countries is worth mentioning.[143] In settings of different parties controlling regional states, there could be serious inter-ethnic party conflict on these issues.

The 2001 Tigray People's Liberation Front (TPLF) crisis, as many writers observed, is illustrative of the fragile nature of the federation in general and the status of intergovernmental relations in particular.[144] EPRDF itself, as stated in its series of party meetings, appeared to have been shocked and took subsequent

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[140] Ibid

[141] Alem Habtu (2003). *Ethnic Federalism in Ethiopia: Background, Present Conditions and Future Prospects*. Paper Submitted to the Second EAF International Symposium on Contemporary Development Issues in Ethiopia, July 11-12, The Ghion Hotel Addis Ababa.

[142] Merera Gudina, *supra* note 139.

[143] Solomon Negussie *supra* note 4, p. 266

[144] Young and Medhane (2003) 'TPLF: Reform or Decline', in *Review of African Political Economy,30:97*

measures, which were seen by some as implementing the constitutional provisions to fill the existing gaps and by some as extra-constitutional centralization of power. Some of the notable steps taken were the creation of federal police force in the regions, replacement of delegated court structure with dual court structure, the creation of Ministry of Federal affairs, and passage of a proclamation for federal intervention into the regions; at one point EPRDF had announced its intentions to transform the ethnic based parties into nationwide parties.[145]

In the midst of such challenges, Tom Patz saw phenomena which emerged from the 2001 party crisis, such as the rise in the self-confidence and self-assurance of regional states as well as the formation of several committees, work groups and coordination mechanisms.[146] He advises states to understand the inherent complexities of a federal system and to learn how to manage and solve conflicts by developing the culture of dialogue and consensus building. Thus, institutionalized intergovernmental relations will enable participation and consensus building on matters of shared functions. This may avoid blackmail and conspiracy by some regional parties to manipulate ethnic identity for particular purposes.

6.2 IGR and its implication on state autonomy in Ethiopia

Hundreds of meetings each year, uncountable informal contacts, a varied and complex intergovernmental cooperation are the nature of intergovernmental relations in Ethiopia today.[147] The increasing number of multilateral and bilateral intergovernmental agreements and partnerships indicate the inter-governmental activities in all policy areas. With the shift to the signing of several intergovernmental agreements and pressure for policy and administrative collaboration, one might expect significant changes both in the formal intergovernmental machinery and informal interactions. However, there has been little examination of the implications of such changes of formal intergovernmental machinery or of informal intergovernmental networks on the autonomy of the states. This implication can be viewed form the following perspectives.

[145] Assefa Fiseha (2006), *supra* note 35, p. 273

[146] Patz, Tom (2005). 'Ethiopia's return to federalism' in *federations,* Vol.5 No.A-1, p144

[147] Interview with Ato Yakob, Acting Director of intergovernmental relations Directorate at House of Federation and Ato Tsegabrihan Tadesse, Intergovernmental relations Directorate General at Ministry of Federal Affairs, Addis Ababa, Feb 17/2014 and 19/2014 respectively.

6.2.1 Institutionalization Process

The absence of an independent institution that is in charge of consolidating IGR leads to lack of regularity and continuity of interactions. For instance, some institutions make intergovernmental relation twice a year and others make it three times a year. Unless the regional government requests the assistance of the federal government, the forums are organized based on the schedule of the federal government and when the federal government deems it necessary to disseminate some lesson/information for the federation units. Or, it may take place when there is some urgent matter that the federal government desires to implement throughout the country or if there are national issues of sufficient substance to warrant a meeting.

The other point that needs consideration is requesting all regional states to participate in the meeting. Even more, representatives of all regional states are expected to participate on the IGR forums without inquiring whether the agenda only concerns a particular state or not.[148] Had it not been for the absence of formal institutions in charge of IGR, all federation-units would not have been called for IGR dialogues on every issue/matter. A federal ministry writes a letter to its counterpart as if the latter is subordinate to the former. This results in the development of unwanted hierarchical relationship between the two. Unconstructive cultures of superior-subordinate interaction freezes a spirit of partnership and erodes the autonomy of the states.

Moreover, the existence of a dominant political party system and the overriding mode of interaction between federal and state relations through the party channel undermine the establishment of formal institutional frameworks. As a result, formal intergovernmental relations are ultimately placed within the domains of party channel interactions thereby influencing the operation of the same. This continues to pose a challenge to the stability and integrity of formal intergovernmental relationships in the Ethiopian federation.[149] Furthermore, the level of horizontal intergovernmental relations is even much underdeveloped, with the exception of informal cooperation of few regional states.[150]

6.2.2 The role and power balance of the two tiers of government

Despite some sections of the Constitution that suggests non-hierarchal relationship between the federal and regional states, in Ethiopia, what exists is a top-down federal system. The federal government has wide range of powers to

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[148] It can also be argued that the participation of all states may have the advantage of creating the chance for experience sharing, they may contribute in generating innovative solutions, and learning from the forum they may also take necessary preventive measures to make sure that the same problem would not occur in their territory.

[149] Assefa Fiseha (2009), *supra* note 11.

[150] Assefa Fiseha (2006), *supra* note 35, p. 274.

undermine regional plans, and to intervene in regional administrations. Regional governments have not developed a strong sense in considering themselves as independent political actors. It appears that many inter-governmental meetings are dominated by federal government priorities.

One drawback of the current structures of IGR at the level of federal-state relations is that it is defined and practiced in 'hierarchical terms'. There is a clear top-down approach while the federal government is dealing with regional states in several matters. The state governments, both in terms of personnel and in the nature of responsibility, are less equipped compared to that of the federal government. Most of the time, it is the federal government which takes the lion's share in agenda-setting and organizing IGR forums.[151] Besides, it is the federal government which chairs most of the conferences. All these verify that it is a hierarchical relation rather than equality that has been a key feature of IGR in Ethiopia.

6.2.3 The invisible obligation to submit periodic reports

Regional government officials are required to submit periodic reports on their performance. Their achievements are evaluated under the chairmanship of the federal government officials. These officials give feedback and direction about things that can/should be done and on the way forward. This may extend to the reporting of the inefficiency of the regional representatives to the regional government president's office which may result in the removal of the person in charge of the office. This undoubtedly amounts to eroding the autonomy of the regions and systematic reshuffling of the regional state officials. This is against the constitutional integrity of the regional states.

Concluding Remarks

Intergovernmental relation is important in installing the culture of negotiation, checking the centralization of government power, and enhancing the bargaining power of the regional states. Establishment of permanent forums for intergovernmental bond has a crucial role in negotiation, non-hierarchical exchange of information as well as facilitation of cooperation between the institutions of the two levels of government.

Regarding institutional framework of IGR in Ethiopia, the House of Federation invokes a constitutional basis to organize IGR. At the same time the Ministry of Federal Affairs invokes certain legislation as its legal basis to organize IGR. The third category of interaction which has been practiced uses intergovernmental agreement as a legal basis for organizing IGR. This is usually described as *sector by sector* interaction which is backed by the signing of

[151] Id., p. 391.

memorandum of understanding. This document serves as a legal base to make their interaction formal.

Therefore, establishing an appropriate legal framework is essential to optimize the benefits of intergovernmental relationship. This legal framework must contain detail principles of cooperation in the course of concurrent or overlapping responsibilities. An independent institution should be established whose mandate is mainly to organize IGR on shared programs. Federations are expected to respond both to central priorities and to regional and local priorities; and each negotiation should be done on the spirit of partnership and equality rather than hierarchy.

Neutrality of the institution facilitates the coequality of the two tiers of government. The House of federation seems the appropriate institution to organize IGR in light of the participation of the regional governments in the House. Second, the House has constitutional mandate to organize IGR. If the existing dependence on the executive line remains unchanged, the focal point for IGR should be the prime-minister's office owing to its enhanced opportunity to give binding decisions and its ability to control the execution of decisions.

A federal government interacts and collaborates with a regional government either individually or jointly. Therefore, a given state should be expected to attend IGR forums only if the matter concerns it. Otherwise, it is unnecessary to demand and oblige every regional state to partake on the issue that does not add substantial value to its interests and concerns. The role of invited guests in IGR forums should also be sufficiently defined. The IGR forums are basically meant to coordinate the policies of the federal and the regional states on the shared programs. The federal government and the state governments identify their role on the program and reach a consensus. The role of invited guests should thus be limited to giving opinion rather having a say same as the stakeholders, i.e. federal and regional government representatives. ■

The Grand Ethiopian Renaissance Dam and Ethiopia's Succession in Hydro-legal Prominence:

A Script in Legal History of Diplomatic Confront (1957-2013)

Tadesse Kassa Woldetsadik ♣

Abstract

This article argues that within the system of international law, while Ethiopia's equitable right of access to resources of the Nile is recognized as a matter of settled principle, the law's actual working is a coefficient of prior hydraulic measures adopted on the ground rather than mere articulation of legal norms, diplomatic civility or altercations. I also submit that the system of international law still remains vital in resolving transboundary water issues, and yet, the mechanics of law could not function optimally outside of power politic, diplomatic dexterity and sincere commitment to the fundamental values it upholds. In this light, and against a backdrop of Ethiopia's relegated position in the second half of the twentieth century, the paper concludes that today the country's relative renaissance in the Nile legal politics - which for the first time captured serious downstream interest in riparian negotiations - is attributed not to a change in the pertinence of the norms of international law nor to any altruistic revision of positions in the lower reaches of the river, but rather to its belated awakening in pursuing the Grand Ethiopian Renaissance Dam (GERD) as a national project of multifarious impact.

Key terms

The Grand Ethiopian Renaissance Dam, Nile water resources development, Nile, legal diplomacy, Ethiopia, Egypt, Sudan.

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Introduction

In an article published in Mizan 8(2) focusing on the legal history and diplomatic minutiae of the first half of the twentieth century (1902-1956), it was argued that the Anglo-Ethiopian Treaty of 1902 on the Blue Nile and the stream of negotiations conducted in the immediate aftermath in relation to the Lake Tana

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Dam concessions engendered detrimental impacts on Ethiopia's riparian rights in the subsequent decades.[1] Paradoxically, the same period also witnessed a relative highpoint in Ethiopia's hydro-legal eminence which, although never pursued, presented the country a rare opportunity for propelling its own canoe with regard to utilization of the Nile within its jurisdiction. Carrying-over the legal and diplomatic account on Ethiopia's multifaceted glitches on the Nile, this article covers important episodes of the post-1950 period (1957-2013) – particularly featuring the fall and gradual rise of the country's hydro-legal posture in transboundary river discourses.

Unlike the pre-independence period in the Nile Basin where Ethiopia had to deal with the imposing maneuvers of Great Britain in defending its riverine interests, by the mid-1950's and the subsequent decades, the country was confronted with two more pressing threats. The first emanated from reinvigorated proprietary perception over the Nile which downriver states 'inherited' from their colonial past and the second originated from the unilateral moves they embarked upon in the immediate aftermath –carrying out grand Nile control works on the Aswan High and the Roseires dams.

Disturbed by the exclusionary negotiations processes and detrimental resource development patterns downstream, Ethiopia was forced to put in place a national strategy that strove to counter, or at least undermine, Egypt's hegemonic control that would inevitably ensue from construction of the Dam and consequent expansion of irrigational uses. A two-track approach was adopted: first, to diplomatically stake Ethiopia's claims of 'water quotas' with the Egyptian and Sudanese governments, and secondly, to work expeditiously on complete survey of the Blue Nile River within its jurisdiction so as to create opportunities for a pre-emptive use of the resource upstream –before Egypt and Sudan could claim prior use rights. In the second half of the twentieth century, neither approach was wholly implemented; Ethiopia's actions proved ineffective in safeguarding its equitable rights in the Nile waters.

Analytically reconstructing geographical, historical, diplomatic and developmental minutiae in a context relevant to legal discussions, the first section in this article highlights how decades of 'British water imperialism' in the basin eventually humbled Ethiopia's standing in basin-wide discourses and further entrenched nationalist beliefs along the downstream Nile. The second section investigates the evolution and chief causes of Ethiopia's waning influence in the hydro-legal dialogues of the post-1956 period –mainly concentrating on negotiations on the Aswan High Dam and re-division of the

[1] *See*: Tadesse Kassa Woldetsadik (2014), 'The Anglo-Ethiopian Treaty on the Nile and the Tana Dam Concessions: A Script in Legal History of Ethiopia's Diplomatic Confront (1900-1956)', *8.2Mizan Law Review*, pp.271-298.

Nile waters– pursued without any reference to it. With the collapse of British colonialism in the region at about the same period and the loss of its protective role of downstream interests, the second section also presents on how the new geo-political development prompted Egypt and Sudan to work on plans that offset the inevitable setback.

Section 3 discusses the clause under the 1959 Nile Waters Agreement which included the accommodation of 'future requests of share' by upstream Nile, and how, over time, the allocations regime constituted the 'absolute floor' below which neither country was willing to go. Section 4 narrates the unilateral water control schemes carried out in Egypt/Sudan in the post-High Dam period. The analyses in Section 4 centers on the effects of Egyptian long-standing strategy that the ultimate security of its claimed entitlements lay in the volume of waters preemptively withdrawn, and discusses how, from upstream perspective, such a growth trajectory trumped the bargaining vigor of Ethiopia for many decades to come. The fifth section discusses Ethiopia's countering actions during the 1951-1972 period, aiming on key institutional processes of the past century with regard to the gathering of basic hydraulic information on the Blue Nile and the plans for its harnessing. This theme is linked to the examination of how domestic factors –relating to fiscal and technical limitations, governmental procrastination and want of visionary insight– led Ethiopia pay the ultimate price in defending its interests and in raising its hydro-legal prominence.

Section 6 covers the 1972-1990 period –featuring further stagnation in Ethiopia's hydro-political eminence; it recites the studies and declarations which, inopportunely, were attended by very limited government actions during an era that saw the state's continuous preoccupation with the proliferation, structuring and redefinition of the powers of institutions accountable for the development of water resources in Ethiopia. The analysis in section 7 twirls on the changed facets of Ethiopia's water resources development and national security policies which, following the advent to power of a new regime, were fundamentally reformed; it scrutinizes futile enterprises of the Ethiopian state in 1991-1993 in its bid to restructure relationships with the Sudan and Egypt, and presents the earliest marks of regression in the extreme water uses policy of Sudan. As Ethiopia came to grasp that diplomatic and legal tools alone could not assure its equitable entitlements nor strengthen its prominence, the last section depicts the fundamental makeover in Ethiopia's river use policy in the post-1996 period –which increasingly reflects legitimate unilateralism as means of triggering genuine cooperation. The last section discusses four sweeping developments that furthered Ethiopia's sovereign interests and long term hydro-political standing in the basin's legal discourse.

1. The Demise of British 'River Imperialism' in the Nile Basin: Ends and Upshots

In 1908, Lord Cromer, the long-time British viceroy in Cairo and one of the pioneers of Great Britain's basin-wide policies in the Nile, declared that the Englishman had taken the entire Nile in hand; for the first and only time in the Nile's history, one might talk of a 'King of the Nile Waters –Lord Cromer'. This rhetoric was voiced at a time when 'his and the government's plans for taming the entire river were very ambitious in water systems –with projected dams and water infrastructure installations designed to serve the overall interests of one imperial authority', i.e., Great Britain.[2] In the subsequent years, W. Garstin and Wilcocks (1904) wrote one of the first 'comprehensive volumes' of Nile development schemes, followed by Sir M. McDonald and later by J. Hurst (1919, 1921, 1946), each working in agency of the Egyptian Ministry of Public Works. Since then, British engagements in relation to Ethiopia had been framed *solely* on the basis of its imperial objectives and strategies in the basin.

The Anglo-Ethiopian treaty of May 1902 on the Nile was conceived in this context.[3] Attended by a stream of negotiations on Lake Tana conducted in the succeeding decades, the accord left behind profound marks on user-right perceptions along the downstream Nile and heralded the struggling position in which Ethiopia found itself in the twentieth century. Between 1882-1951, decades of British imperial river politics –espoused in the greater good of its political, economic and strategic interests in Egypt, the Suez Canal, Sudan and the Near East– did not only humble Ethiopia's standing in basin-wide discourses, it also entrenched extreme nationalist beliefs in the states of Egypt and Sudan that brandished the river as exclusive resource domain. With changing facets in the pre and post-Egyptian revolution of 1919, British water imperialism endeavored to *solely* increase supplies downstream –by retaining the excess inflows of wet years to make good for short years by storing water in the lakes where the White and Blue Nile have their sources.[4]

Since the 1950's, the independence movement surged in many African countries, including in Egypt who had already gained greater autonomy since 1922, in Sudan and the British East African Territories. The demise of colonialism, and with it, the closure of grand imperial designs such as those

[2] Terje Tvedt (2015), 'Water systems, Water Agreements and State Sovereignty: The Case of the Nile Waters Agreement of 1929', *eds. Sovereignty and International Water Law,* Series III, vol.2, I.B. Tauris, New York/London, p.604

[3] For thorough discussions, *see:* Tadesse Kassa Woldetsadik (2014), *supra* note 1.

[4] Memorandum of International Aspects of the Waters of the Nile for Presentation to the Emperor of Ethiopia, E.B. Boothby, Foreign Office to D.L. Busk (Addis Ababa), 5 February 1954, JA 1421/3, London.

proposed under the 'Century Storage Scheme' (1920) and 'Future Conservation of the Nile' (1946) projects for the control, use and management of the Nile waters was only inevitable. Yet, the injurious effects of British river imperialism and with that the works of monopolistic mind-set which its colonial administration in Cairo nurtured, lingered. In the post-independence period, while it is evident that no single state could garner basin-wide political leverage as the British had, Great Britain's imperial schemes which failed to present the Nile as a truly shared amenity of all riparian communities, were acceded to in the lower reaches of the river with sheer zeal and political resolve.

On the other hand, the collapse of colonialism in the region also occasioned that British protective roles, scheming on non-interference regimes of the Nile waters upstream, could no longer be availed. Whereas it is true that following its formal exit from the region, Great Britain had still endeavored not to be 'reduced to a policy of inaction while matters of importance were being settled' in the basin,[5] in practice there were clear indications that it was unable to 'regain through diplomacy the massive influence it had formerly exercised' in safeguarding downstream interests –by overlooking the sovereign stakes of Ethiopia and other upriver states.

For Egypt and Sudan, the new geo-political development was, in a way, a wakeup call –that they had to work on plans that offset this setback and rewrite previous British and (in part Egyptian) plans for the supply of Nile waters from hydraulic works situated elsewhere in the basin.

Alarmed by Great Britain's political manipulations on the Nile, Egypt had already revealed its inclination to embark on water control works within its own jurisdiction –trusting that this undermines British hydro-political leverages in the region. Hence, pushing forward the Aswan High Dam project –to which the Egyptian national administration had been committed since 1952– was perceived as the most inevitable course.[6] The dam's construction as over-year storage started in 1960 and was completed in 1966, effectively replacing earlier proposals such as the 1946 plans by Hurst, Black and Simaika for a system-wide Century Storage Scheme –with facilities spread in Ethiopia, Uganda and Sudan.

The new political realty in the basin presented Ethiopia with grave challenges, prompting the adoption of measures in defense of national riverine interests. Unlike the pre-independence epoch during which Ethiopia had to deal with the imposing maneuvers of Great Britain *only*, the country was confronted with more concerning threats since the 1950s and 1960s –one emanating from

[5] Ralph S., British Embassy to Honorable Harold Macmillan, M.P., 16 May 1955, JE 1428/13/55, Cairo.

[6] For details, *see*: United Arab Republic and Sudan Agreement for the Full Utilization of the Nile Waters, 8 November 1959, Cairo.

deeper proprietary perception over the Nile which downstream states 'inherited' from colonial past, and a second originating from unilateral moves which they embarked upon in the immediate aftermath– on the High Aswan and Roseires dams.

The High Dam project had occupied a central element in Egyptian nationalists' thinking for some time; the project was retailed as a means for transforming Egypt's serious economic predicament –affected by inadequate water-flow regimes, destructive floods and inefficient models applied in basin irrigation. The scheme sought to ensure Egypt's two strategic pillars of all time –water and food security– through the protection of water quotas and continued expansion of irrigational uses of the resource.[7]

Disturbed by the new exclusionary processes, Ethiopia's strategy strove to counter, or at least undermine Egypt's hegemonic status that would unavoidably result from construction of the Dam. A two-track approach was adopted: first, to diplomatically stake claims of water quotas with the Egyptian and Sudanese governments –given both had resolved to embark on construction of the Dams withholding the entire river flow within their territory,[8] and second, to work on complete survey of the Blue Nile River within its jurisdiction so as to create opportunities for a pre-emptive use of the resource upstream– before Egypt and Sudan could claim to have acquired prior use rights.[9] In the following decades, neither approach was wholly implemented. Outflanked by realist approaches of the downstream states who over-stressed 'self-interest' in the development of shared resources, Ethiopia's strategy was not effective in safeguarding its equitable rights in the Nile waters.

2. Ethiopia's Waning Influence in Hydro-legal Discourses: the Post-1956 period

By the mid-1950s, the diplomatic language and legal postures of the states of Egypt, Sudan and Ethiopia, hitherto articulated from positions of comparable strength, started to falter. In 1954 and through 1959, the relationship between Egypt and Sudan was itself extremely strained over Egypt's initial reluctance to

[7] Incidentally, it is worth noting that not a few authors had concluded previously that 'optimum national water security' is unattainable and in any case incompatible with policies of 'food security' or the 'principles of international law'.

Adelphi Series (1992), 'Conclusions: The agenda for the 1990s -Water and Instability in the Middle East', vol.32:273, p.65.

[8] Tadesse Kassa Woldetsadik (2013), *International Watercourses Law in the Nile Basin: Three States at a Crossroads*, New York/Abingdon, Routledge, Taylor and Francis, pp.152-156.

[9] Ibid.

involve Sudan as a bilateral cooperative partner, and subsequently, over issues of revision of the 1929 Treaty on the division of the Nile waters. Yet, from Ethiopia's perspective, Egypt's nationalist resolve to eventually proceed with construction of the dam preordained that the downriver states no longer needed to stick to the decades-long unyielding negotiations on the Lake Tana dam concessions. Against such background, the Eritrean question over which Egyptian support had been solicited, and the proven fear that Ethiopia might 'not (even) take a firm and satisfactory line with the Egyptians or anybody else',[10] prompted Egypt to stop its participation in the talks on Lake Tana projects.

On the other hand, Sudan's resolution to initiate the Roseires dam plan in 1956, while still engaged in the Lake Tana Dam negotiations with Ethiopia, signified a radical policy shift, reducing its reliance on an Ethiopian scheme. The same year, the Sudanese government announced it would give first priority to the Roseires dam, gradually replacing its need for hydraulic works on the Ethiopian Blue Nile.[11] Following a meeting with the Ethiopian Emperor and his Minister of Foreign Affairs in Addis Ababa in April 1956, Sudanese officials concluded their government had neither the money nor the need for works on the Ethiopian Blue Nile for many years to come –unless Ethiopia, mainly interested in Lake Tana and the Blue Nile from the point of view of power generation, went ahead with its own plans which would force the former to counter-advance alternatives and seek to influence the schemes in a direction that benefits the irrigational needs of Sudan.[12] The construction of the Roseires dam which started in 1960 and was completed in 1966 with a storage capacity of 3 BCM, fulfilled this objective. It was part of a chain of projects designed for the full utilization of the Nile waters which both Sudan and Egypt worked on within the framework of the negotiations for a revised Nile waters agreement. These projects involved the Aswan High Dam and re-division of the Nile waters without the courtesy of informing Ethiopia –a major upstream source of the river's flows.

The specific circumstances that led to Ethiopia's relegation in the Nile legal discourse, and in particular, the historic deliberations on the Aswan High Dam could not be understood properly without resorting to the rudiments that molded contemporaneous perceptions in Egypt, Sudan and in some degree, Great Britain. In addition to Ethiopia's imperial vacillation of the time on key

[10] British Embassy to African Department (Foreign Office - London), 5 June 1950, 1421/54/50, Addis Ababa.

[11] Sudan Government to British Embassy (Addis Ababa), 23 April 1952, FO 371/96805, Khartoum.

[12] C.O.I Ramsden, British Embassy to J.H.A. Watson, Esq., African Department (Foreign Office), 14 April 1956, 1421/1, Addis Ababa.

development initiatives, the country lacked the financial and technical means required for embarking on major water resource projects. Yet, the country's legal and political resolve to *reserve* its shares and take part in the High Dam negotiations had been fairly robust.

Ethiopia had recognized that its failure to attend in such processes would certainly entail heavy toll on its long-term stature. In reality, however, apart from the 'desperate' and 'politically inspired' letters of formal reservation of rights issued in 1956 and 1957, Ethiopia did little to force downstream states for talks in serious diplomatic settings or to conduct comprehensive surveys of the Nile waters within its jurisdiction.[13] Despite his extra-ordinarily long and stable reign, the Emperor, who relentlessly promoted the 'centralization of the Ethiopian state', reconstructed 'a new and answerable bureaucracy', saw to the 'modernization of the Ethiopian army' and resumed 'the educational revolution'[14] –failed to get it right when it comes to the Nile legal politics. With growing feelings of indignation, Ethiopia continued to bewail facts that, through time, kept it out of the picture of the convoluted Nile *politic* in the late 1950's.

The first main reason accounting for Ethiopia's troubled stature in the basin could be traced to the knotty British approaches adopted at the time. Of course, in the post-independence period, Great Britain had tried to shift-away its traditional spotlight from Sudanese and Egyptian interests. At least in theory, its colonial officials in London as well as at the Embassy in Cairo and the Governor General's Office in Khartoum concurred that the East African Governments' claims to a share in the Nile waters should not go by default, and that the bilateral negotiations (between Egypt and Sudan) had to be pursued 'without prejudice to their (certain but not quantified) claims.'[15] At one point, the East African colonies were even pressured to put forward rights for specific volumes which shall be utilized in the future and it was declared that Great Britain should 'be prepared at the right moment to bring in the Governments of Ethiopia and the Belgian Congo' to similarly stake their claims.

What is more, in relation to shares of the upriver states, Great Britain suggested that 'the division of the Nile waters between Egypt and Sudan should be made on a *proportionate* basis, not in terms of absolute quantities, i.e., each

[13] Nile waters and economic aid to Ethiopia: reports conversation with the United States Ambassador, D.L. Busk, British Embassy to J.H.A. Watson, African Department (Foreign Office), 17 February 1956, 1423/28, Addis Ababa.

[14] Haggai Erlich (2000), 'Identity and Church: Ethiopian Egyptian Dialogue 1924-59', *32.1International Journal of Middle East Studies*, p.33

[15] W.H. Luce to Tom, Governor General's Office, 5 May 1955, FO 371/113733, Khartoum; Ralph Stevenson to Harold Macmillan, British Embassy, 16 May 1955, FO 371/113733, Cairo.

country would be given a stated proportion of the natural flow at Aswan'.[16] A few months after Sudan's independence, British representatives held discussions with Ethiopia's Minister of Foreign Affairs, emphasizing how important it was that an agreement should be reached between Sudan and Egypt on the division of the Nile waters - with Great Britain (on behalf of Kenya, Uganda and Tanzania), and the Ethiopian governments registering their respective claims once this had been achieved'.[17] Clearly, in light of the changed political circumstances and its fading powers along the downstream Nile, Great Britain was trying to 'lean more heavily towards Ethiopia than ... (it had) done in the past, with a view to increasing the bargaining power of the up-river states in any negotiations with the down-river users.'[18]

While the British continued to recommend such a seemingly practical basis for durable settlement of the issues through multilateral division of the Nile waters,[19] this objective was never pursued seriously in the subsequent years, and if any, it was promoted only in a context that served British vested interests in the basin. Actually, Great Britain never took Ethiopia's interests earnestly. In the words of its own legate at the British Embassy in Addis Ababa, 'there is without doubt some justice in criticisms of us voiced in certain Ethiopian quarters that we have dealt *unfairly* with her in the past by imposing servitudes such as that in Article III of the 1902 Treaty, by insisting on certain conditions for Ethiopian negotiations with the J. White Corporation, and by offering money to help build the High Aswan Dam without reference to them'; indeed, 'at no time have we (i.e., the British) ever seriously taken into account the necessity of protecting Ethiopia's rights equally with those of down-river countries' although our wrong deeds are 'pardonable in that Ethiopia has never been in a position to express her need for a share in the Nile waters –backed up by any real plans for using that share.'[20] This penitent statement by the British government was partly correct; Ethiopia's 'real plans' that rushed Egypt and Sudan to forthwith plead for negotiations on equal footing came only six decades after the 1950s, i.e., following the commissioning of the Grand Ethiopian Renaissance Dam, as highlighted in Section 8.2 of this article.

Great Britain assumed that Ethiopia's involvement in the talks between Sudan and Egypt would needlessly strain the promises of a deal being struck. Its

[16] W.H. Luce, Governor General Office to T.E. Bromley, African Department (Foreign Office-London), 5 May 1955, FO 371/113763, Khartoum.
[17] J.E. Killick, British Embassy to J.H.A. Watson, African Department (Foreign Office - London) 29 September 1956, FO 371/119063, Addis Ababa.
[18] J.E. Killick, British Embassy to Adam, 29 September 1956, FO 371/119063, Addis Ababa.
[19] Ralph Stevenson, British Embassy to Harold Macmillan, *supra* note 15.
[20] J.E. Kellick, British Embassy to J.H.A. Watson, *supra* note 17.

authorities corresponded their country's main objective should rather be 'to reach an early and sufficiently comprehensive agreement to enable work start on developments –including the Aswan High Dam and others in Sudan (from which British entrepreneurs had hoped to benefit) and in East Africa– unhampered by lack of certainty as to the share of Nile waters to which each country is entitled'. Hence, talks of 'getting bogged by claims from the Belgian Congo and Ethiopia', they submitted, should be avoided –hoping to satisfy them 'by some such arrangement as inviting at some stage to send observers'.[21] In this light, a strategic visit proposed by Ethiopia in June of 1956 to send its representative and discuss Nile waters with the East African Territories was shrugged-off by Kenya's British colonial administration who believed that Kenya 'derives little benefit from such visit' and by Uganda who 'chose not to be involved in the melee of Middle East politics'.[22]

Overwhelmed by the complex British diplomatic machinations, Ethiopia had no choice but watch helplessly as negotiations on the High Dam as well as the re-division of the whole Nile waters were pursued, and in such context, its misfortune was clearly sealed. In contrast to the pre-1954 order where it commanded a fairly strong position and ran the talks on equal grip, this time Ethiopia had to yearn and tacitly implore for participation in the processes. Even Emperor Haileselassie's high profile visit to Egypt in June 1959 - shortly before the treaty was concluded –a visit which he accepted 'after three years of embarrassing courtship by Nasser'[23] could not turn the tides back. Egypt and Sudan 'calmly sat down to negotiate a comprehensive agreement for division of the whole water without any reference to [Ethiopia]'.[24]

On the other hand, Ethiopia's stressed position in the basin during this period could as well be narrated by reference to the hard-line attitude which Sudan and Egypt espoused in rebuking its stakes. Both states –geographically vulnerable as recipients of the river's flow from Ethiopia and Uganda– were barely impressed by British and Ethiopian diplomatic maneuvers for a *prior settlement* of water rights between all riparian communities in the basin. The 1956 publication of Sudan's *Government pamphlet on The Nile waters Question* referred to the division of the whole waters *solely* between Egypt and Sudan –without any mention of the rights of Ethiopia. In reality, in the post-1956 period, the values that informed Sudanese and Egyptian *legal politic* on the Nile remained hugely fixated with their past, and in official dealings both states replicated the old

[21] Cairo to African Department, Foreign Office, FO Telegram No.2027.
[22] Ministry of Natural Resources to W.A. Mathieson, Colonial Office (London), 24 July 1956, JE1423/89, Uganda.
[23] Haggai Erlich (2000), *supra* note 14, p.39.
[24] J.E. Killick, British Embassy to J.H.A Watson, *supra* note 17.

tricks adopted by their mentor, Great Britain, since the advent of the latter's colonial empire in the basin in the last legs of the nineteenth century.[25]

The quintessence of the Egyptian narrow nationalistic philosophy, which, later, the British Embassy in Cairo branded a 'chauvinistic rubbish' - was movingly compiled by Dr. Abdul Aziz Ahmed, a technical advisor at the Egyptian Ministry of Public Works, and published with official sanction in *The Egyptian Gazette* –only after *The Times* declined to print it in its editorials.[26] In broad unfamiliarity with the notion of state sovereignty over natural resources, the article submitted the problem associated with the Nile waters is 'not an international one –for Egypt and Sudan are the *only* states which utilize the … waters for irrigation at the present and for many years to come'; secondly, the paper argued, the 'Nile flow regime –which is the decisive factor in the matter of water distribution, limits its use to the two countries *only*'.[27] Hence, it was held in a forewarning tone: the institution of any basin-wide organization not only 'jeopardizes Egypt's vital interest in the Nile waters (as ostensibly political move), it also touches the national ego on a sore spot'. From this followed that 'no others states could possibly partake' in the negotiations of the division of the Nile waters; whereas it may be argued Ethiopia, which supplies all the flood water, might participate in the discussions, the fact that the river flows through 'mountainous regions of almost uninhabitable wilderness and far from where it could be put to any use' serves no useful purpose 'for Ethiopia to be present at that discussion *merely* to witness how Egypt and Sudan would share the flood water.'[28]

Naturally, this perspective should not be perceived as a sporadic manifestation of an officer in charge of Egyptian *politic*. It is the outcome of centuries of interwoven naiveté that derived from the very early conjectures of Greco-Roman writers on the Nile, the major cartographic presentations of the Arabs and the Portuguese (14th c.), and the great explorations of John Speke, Samuel Baker, Richard Burton, Henry Stanley and David Livingstone (19th c.) on the sources of the Nile and its extraordinary impact on Egyptian civilization.

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[25] British position of the time held that Congo's interests were confined to the 'amount of compensation' that ensue from realization of Nile control works flooding parts of its territory, and Uganda's stakes limited to 'the development of hydro-electric power without affecting the flow of the Nile.' Ethiopia's only profit was assessed as the 'development of hydro-power for which there is no market in the near future', and its key water diplomacy directed to focus on 'the amount of money it can secure from Egypt and Sudan in return for permission to construct the Lake Tana Dam.'

[26] British Embassy to African Department, Foreign Office, 25 August 1956, JE 1428/108/56, Cairo.

[27] British Embassy to African Department, Foreign Office, 25 August 1956, JE 1428/108/56, *Enclosure:* 'Sharing Waters of the Nile'; Cairo.

[28] Ibid.

The Nile River and its profound intertwine with Egypt had been addressed in various geographical, historical, developmental, social and cultural writings. These conjectures had prompted its lower-reach societies to crave for and construct a unique identity around the resource which tended to regard the watercourse as 'Egyptian River'.

Today, such thoughts prevail as critical constituents of the national consciousness in Egypt, affecting perspectives and actions at all levels of the cultural and political establishment. Hence, it would not be surprising to note that in the 1950s the construction of the High Dam 'within and controlled by Egypt, and not by Ethiopia' was pursued under a clear impression of proprietary ownership that 'Lake Nasser would become the *main source* of the Nile',[29] not Ethiopia.

Third, Ethiopia's beleaguered position could also be explained in relation to another closely related fact: the claims of 'natural' and 'vested' rights. The legal implication of the assertions notwithstanding, Egypt had consistently projected the natural and historical rights theories as providing indisputable grounds for exclusive use rights so much so that no new legal arrangement could work against such thinking. As early as in 1920, a Report of the Nile Projects Commission had already recommended that Egypt and Sudan be considered as each having a vested right to *all the natural flow* (of 40 and 18 BCM/annum of waters respectively);[30] in the same year, the growing economic import of the Sudanese territory prompted Great Britain to issue the Milner Mission Report which, among others, recognized that Egypt has an indefeasible right to an ample and assured supply of water for the land at present under cultivation and to a fair share of any increased supply which engineering skill may be able to provide.[31] This over-sentimentality of exclusive proprietorship was formally acknowledged by Great Britain on numerous occasions and expressly incorporated under the 1929/1959 Nile waters agreements, rejecting, in effect, any meaningful stake of upstream states in the resource, and hence in the negotiations.

Such was the fabric of the national predisposition in both Egypt and Sudan, stuffed with greater scales of bigotry. Therefore, it would not come as surprise that the 1959 Treaty on the division of the Nile waters was recast not on a proportionate basis of shares owed to each state in the basin –as would have been imagined following international law, but only in a context that created riparian uncertainty. Upstream states were not afforded the opportunity for

[29] Haggai Erlich (2000), *supra* note 14, p.39.
[30] Report of the Nile Projects Commission (1920), Printed with the authority of the Egyptian Government, 25 August London.
[31] R. K. Batstone (1959), 'Utilization of the Nile Waters', 8 *Int'l & Comp LQ*, p.527.

staking their shares through negotiations. In the subsequent decades, the perception of exclusive title remained entrenched; it was attended by new developmental trajectory which expanded user rights to the additional waters made available under the 1959 treaty –through the construction of the Roseires and the High dam facilities. Against such odds and besieged by its own inaction, Ethiopia was reduced to mourning its situation, with far-reaching implications on its stature in the basin.

3. A Positive Treaty Clause: Accommodating 'Future Requests of Share' by Upstream Nile

Unlike the 1929 agreement between Great Britain and Egypt, the 1959 treaty for full utilization of the Nile waters introduced a paragraph that intended to deal with future requests of water share from upstream Nile. Given the national ego that informed the bilateral negotiations, it was surprising that a provision lukewarmly admitting the stakes of upstream states was included in the treaty regime. True, Sudan and Egypt were always convinced that Ethiopia did have neither a firm plan nor the means for pursuing significant development projects on the Blue Nile. Yet, the fact that both states (under the treaty) expressed intent to 'jointly consider' claims of other riparian states in the future and deduct their respective shares –'if any such consideration results in acceptance'– was in itself exceedingly progressive.

Most probably, this approach was adopted in reaction to the concerted diplomatic charges pursued at the time by Great Britain (representing the East African Territories) and Ethiopia –forewarning that their shares in the Nile waters should not be established by simple default. If anything else, the intense political setting and preconception under which the treaty was drafted and the subsequent practices of both Sudan and Egypt attests to the fact that neither was ready to acknowledge the 'equal sovereign right' of all riparian states in the Nile basin. This is particularly evident from the framing of the pertinent provision in the treaty which bestowed the power of deciding on whether or not to accommodate upstream requests of shares *wholly* on the good will of the two countries –as though the other states were vested with reduced sovereignty under international law.

In practice, profound details accounted in political history confirm that Sudan and Egypt harbored firm reservations and endeavored to forestall threats that potentially originate from prospective uses of the Nile waters upriver. Of course, with the passage of time, Waterbury wrote, the original spirit of the 1959 Agreement had been mostly lost ..., the shares in absolute terms had now

become sacrosanct, absolute floors below which neither country will go.[32] A vigorous pattern denunciating upper riparian rights emerged –rebuffing Ethiopia's right of pursuing *even* the measured 'local irrigational rights of inhabitants dwelling on both sides of the Blue Nile' which Great Britain had acknowledged in the past –when it was in charge of Egyptian and Sudanese hydraulic developments,[33] and the similar rights admitted by Sudan and Egypt within the framework of the draft Tana dam agreements exchanged in 1933, 1935, 1946 and 1951.[34]

Buoyed by longer periods of inaction and donors' disinclination to devote capital in contested rivers, the post-1957 epoch in Ethiopia was attended by increased orientation of downstream policies along the contours of the now defunct conception –the absolute territorial integrity principle. Through time, not only did Ethiopia's position in the basin deteriorate, the import of the 'positive clause' in the Nile waters agreement also paled in the thin air; this created a perfect setting for unabated development of water resource programs downriver –creating new facts that made Ethiopia's legitimate quest for utilization of the resource harder to accomplish.

4. The Downstream Nile: Subsequent Water Resource Developments

Between 1954-1980, Sudan commissioned nine large and medium-scale irrigational projects, developing approximately one million ha of land,[35] including the projects executed at New Halfa (on the Atbara) and under the Rahad I project in the vicinity of the Gezira. In addition, the old Gezira Scheme, established in 1925, was doubled in the first decade of independence from 404,685 ha to 809,371 ha through the Managil extension completed in 1963,[36] heightening Sudan's overall irrigation areas to 3.9 million ha. Today the Gezira schemes stretch over 882,000 ha and withdraw about 13 BCM of waters pledged

[32] John Waterbury (2002), *The Nile Basin, National Determinants of Collective Action*, Yale University Press, New Haven, London, p.75.

[33] Draft Telegram to Cromer, 16 February 1907, FO 371/14591, Addis Ababa; Draft Agreement, Huge Dodds to Viscount Allenby, 26 December 1922, FO 371/8403, Addis Ababa.

[34] *Seefor e.g.,* Lake Tana Dam Project: Draft Agreement or Treaty, Sir Miles Lampson to Mr. Becket, 22 June 1935, J2606/318/1, Cairo.

[35] Government of the Democratic Republic of Sudan, Ministry of Irrigation (1979), *Nile Waters Study*, vol.III, Supporting Reports, p.3.

[36] Bret Wallach (1984), 'Irrigation in Sudan Since Independence', *74.2 The Geographical Review*, pp.127-144.

under the 1959 Nile Waters Agreement with Egypt.[37] Constructions on the Roseires and the Khashim El Girba dams –impounding the Blue Nile and Atbara Rivers respectively and designed to facilitate Sudan's full consumption of its water quota– were concluded in 1966. On the other hand, construction on the Jonglei Canal in the Sudd swampy region –now located in the South Sudan Republic– started in 1970 jointly by Sudan and Egypt 'with the object of increasing the Nile yield to meet their future water requirements needed for the expansion of irrigated agriculture'. The Canal, with a length of 360 km, will run from Bor or Baher El Jebel to the confluence of the Sobat and the White Nile, with expected yield of 5 BCM per year at Malakal which will be shared equally between both countries.[38] However, work on the Sudd project –an area accounting for the loss of about 42 BCM waters every year through evaporation, overspreading and evapotranspiration[39] had to be interrupted in 1983 following the civil war in the region. Attempts to revive it did not succeed. Sudan's last major venture on the Nile River was the Merowe multipurpose dam –built near the fourth cataract downstream of Khartoum in 2009– with installed producing capacity of 1250 MW of hydro-electric power.

In retrospect, such a dynamic development by a state that gained formal independence only in January 1956 and was plagued by ravaging civil wars is simply outstanding. From upstream perspective, the growth trajectory of Sudanese water resources trumped the bargaining vigor of Ethiopia for many years to come.

Egypt had already acquired alternative supplies from the Gebel Aulia Dam on the White Nile in Sudan as early as in 1932, and had been engaged in the successive heightening of the old Aswan dam over the decades. It embarked on the construction of the High Dam that heralded a concluding stage in its time-honored petition for dispensation of concessions on the Lake Tana. In 1951, Egypt formally shelved negotiations on the project.[40]

In the post-1960 period, Egypt read the new geo-political reality sufficiently in time and with clearer foresight; it realized that thoughts of 'grand imperial

[37] Nile Basin Country Paper (1996), 'Comprehensive Water Resources Development of the Nile Basin: Action Plan', IVth Nile 2002 Conference, Kampala, Uganda, Proceedings, p. 2-3, C-26.

In 1996, Sudan reported it had virtually consumed its water-share of 20.55 BCM and projected to utilize 32 BCM by 2025 after the planned construction of dams on the Atbara and Merowe and the heightening of the Roseires were completed.

[38] A.M. Ibrahim (n.a.), 'The Environmental Impact of the Jonglei Canal in the Sudan', Projects Implementation Division AAAID, Sudan, p.1.

[39] Ibid.

[40] Sudan Government to British Embassy (Addis Ababa), 23 April 1952, FO 371/96805, Khartoum.

schemes' analogous to the Owen Falls Dam, the Lake Tana Dam or the Equatorial Nile Projects that contemplated to institute water control works upstream with a view to advancing the economic welfare of Egypt or Sudan represented antiquated approaches in Nile waters management. In this light, it was only imperative for both Egypt and Sudan to work on plans that lessen their dependence for the supply of Nile waters on hydraulic works situated across the Great Lakes region and in Ethiopia.

In a long-term strategic perspective, Egypt also foresaw that the ultimate security of its claimed entitlements lay on the volume of waters it preemptively withdraws. In this spirit, streams of water control works were commissioned over the decades on a unilateral basis. Protected by the huge reserves of the High Dam, large-scale agricultural expansions were initiated since 1982 by reclaiming tracts of desert lands beyond the fertile Nile valley. Similar plans were also instituted in 1997 which aimed at the development of about 1.4 million ha of land until 2017 –including the two grand projects in the Sinai region and along the Toshka depression.[41]

Under the El Salam/Northern Sinai Agricultural Development Project, the Al-Salam Canal whose construction began in 1976 to bring water from the Damietta branch of the Nile –crossing under the Suez Canal south of Port Seid by means a siphon– was inaugurated in 1997; it diverted water from the Nile basin to reclaim desolate lands by irrigation in the western parts of the Sinai desert.[42] In 1994, as an eastward extension, excavation of the second phase of the Peace Canal commenced to irrigate 1700 sq. kms of the Sinai from El Arish, near the Israeli border, to accommodate 3 million Egyptian settlers through the Northern Sinai Agricultural Development Program.[43] On the other hand, the reclamation and development program in southern Egypt basically depended on the South Valley Development Project, commissioned in 1997 within the framework of the 25-years national plan; the scheme featured three important components along the Toshka (226,800 ha), East Oweinat (187,740 ha) and the New Valley Oases west of the Lake Nasser.[44]

Implementation of the plans on the Roseires, the High Dam and the subsequent agricultural expansions were attended by little countering reactions in upriver Nile, whether legal or institutional. The effect was that with the

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[41] Arab Republic of Egypt (2005), *National Water Resources Plan for Egypt 2017*, Cairo, Ministry of Water Resources and Irrigation, Planning Sector, pp.2-6.

[42] Ibid, pp.4-7, 8; Kristin Wiebe (2001), 'The Nile River: Potential for Conflict and Cooperation in the Face of Water Degradation', *41 Natural Resources Journal*, p.731.

[43] Robert O. Collins (1997), 'The Inscrutable Nile at the Beginning of the New Millennium', Working Paper, University of California, Santa Barbara, Dep't of History.

[44] Tadesse Kassa Woldetsadik (2013), *supra* note 8, p.44; Arab Republic of Egypt (2005), *supra* note 41, pp.3, 4-7, 8.

intensified uses of the Nile, the new projects periled future utilization of the waters in upstream countries by creating *de facto* regimes of *prior use* in respect of all the water conserved in the High Dam. The massive reclamations, Caponera submitted, made it difficult for Egypt to reduce its water allocation in order to adjust to new upstream uses;[45] as a whole, the non-participatory process epitomized a highpoint in Ethiopia's fading influence over the Nile affairs – which continued unabated until the preceding decade.

5. Ethiopia's Countering Actions: Meager Surveys and Water Control Works (1951-1972)

In the 1950s and through the 1960s, as Egypt sketched a cogent river development roadmap and solicited finance from the West and East for its picturesque dam project and as Sudan stretched its hydraulic infrastructures on an inconceivable tempo, Ethiopia loitered as a spectator. Time and again, it failed to engage in the pursuit of a single course that could have enthused material impact under the circumstances: a comprehensive survey, design and development of the Blue Nile River basin. Obviously, Ethiopia's diplomatic proclamations alone –issued in the mid 1950s– had not prompted Egypt or Sudan to embrace it in the negotiations on the Nile legal regime or to acknowledge its rights of utilization *per se*.

Indeed, decades of its ardent participation in the Nile politics notwithstanding, Ethiopia failed to take matching actions on the ground. This may appear very ironic considering that the systemic synthesizing of hydraulic information on the Blue Nile River and firm plans for its harnessing crossed the threshold of its hydro-political landscape so early –with the ascent to power of Ras Teferi as Crown Prince and Regent. By 1902/3, C.E. Dupuis had already undertaken an expedition around Lake Tana based on the instructions of Sir William Garstin, then Advisor to the Egyptian Ministry of Public Works.[46] Between 1921-24, a team led by G. W. Graham from Sudan and R. P. Black from the Physical Department of the Egyptian Government spent considerable time around Lake Tana, and the result of their studies –*Report on the Mission to Lake Tana 1920-21*– was published by the Egyptian Government in 1925.[47] Hence, by the mid-1920s, basic hydrological knowledge on the Nile in Ethiopia had already metamorphosed; not only had the Blue Nile and Lake Tana represented central mainstays in the government's actions for development, the resources also

[45] Dante A. Caponera (1993), 'Legal Aspects of Transboundary River Basins in the Middle East, the Al Asi (Orentes), the Jordan and the Nile', *33 Natural Resources Journal*, p.656.
[46] D. E. Dupuis (1936), 'Lake Tana and the Nile', *35.138 Journal of the Royal African Society*, pp.18-25.
[47] Ibid, pp.19-20.

became vital tools of maneuver in foreign policy. The organizational and fiscal competence of state institutions charged with the use of the water sector also expanded slowly, but considerably.

In this light, the Ras started setting the stage very early by employing in '1924-25…a Swiss hydrologist to survey the Lake Tana'[48] for national developmental purposes. By 1925, report of studies produced by Graham and Black (two years earlier) was received.[49] In 1931, a fairly elaborate plan was conducted by J. G. White Engineering Co. in the context of the Lake Tana dam project,[50] and in 1952, the first reconnaissance report on the whole Blue Nile River was compiled as part of the 'Point Four General Agreement for Technical Cooperation' signed in Addis Ababa in June 1951.[51] During the latter period, US policy on Ethiopia was informed by multifaceted issues which included 'fears of communist inroads in the region', 'hostile Egyptian activities', 'the Somali problem' and 'US interests to counteract forces menacing its influence in Ethiopia'. From 1952-1956, several agreements were concluded and long-term military and economic assistance programs designed. In this context, Point Four was followed by 'Agreement for Mutual Defence Assistance' (1952, 1953), 'Technical Cooperation Program for Water Resources Development' (1953), and the 'Agreement Relating to Economic Assistance' (1957).

The 1952 reconnaissance mission's report identified several areas feasible for irrigation - through direct diversions - particularly focusing on the flat plains immediately surrounding Lake Tana; areas along the Little Abai, Rib and Gumara tributaries; the fertile plains of the Andassa River; the valley between Little Abay River and Lake Tana; the valley along the meandering low-banked tributary of the Didessa River along the Ethio-Sudanese border; and the Mugher and Guder river regions.[52] The study concluded that major storage reservoirs would be required before any large-scale developments –mostly undertaken by reclaiming desert lands – could be pursued.[53]

Still, the investigations were regarded 'inadequate' –not to mention that the Emperor also procrastinated against further studying of the Blue Nile basin against the learned advises of his ministers– except for the US Bureau of

[48] Harold Marcus (1987), *Haileselassie I The Formative Years 1892-1936*, The Red Sea P., Lawrenceville, p.72.
[49] From Sudan Government Secretariat to British Embassy (Addis Ababa), JA.1422/4, 23 April 1952, Khartoum.
[50] Ibid.
[51] US Department of Interior, Oscar L. Chapman, Secretary, Michael W. Straus, Commissioner, Bureau of Reclamation, *Reconnaisance Report, Blue Nile River Basin, Ethiopia,* August 1952, Washington D.C.
[52] Ibid, pp.17-18.
[53] Ibid.

Reclamation's (USBR) elaborate surveys conducted by *Sewell and Hough* in 1964.[54] In this light perhaps, British officials were correct in observing in 1956 that although 'it was over three years ago that Huntings first became interested in this question (Point IV) and began to make proposals to the Ethiopian Government' and that 'the Bureau of Reclamation and Point IV have also been working on it for a couple of years', the Ethiopian Government had 'always received the proposals amicably and usually implied that [it was] interested' where *in actual fact* 'nothing was ever done'.[55]

In 1956, the 'Third Operational Agreement for the Extension of the Program for the Study of the Water Resources of Ethiopia for the Multi-purpose Blue Nile River Basin Investigation' was signed –proposing to 'assist the Ministry of Works to initiate multi-purpose Blue Nile River basin investigations designed to facilitate the determination of the economic potential of the land, water and other resources of that area to the end that the data thus gained may be used in the future for planning specific projects.'[56] From this followed the USBR's final report published in 1964. The report recommended thirty-three irrigational, hydro-power and multipurpose projects in the Blue Nile basin –most of which were later identified in the reconnaissance stages; this included the construction of four dams –Karodobi, Mabil, Mendela and Border Projects, the latter now pursued as the GERD with greater modification.

The irrigational potential across the Blue Nile was re-assessed as extending over an area of 433,754 ha, with a total annual water requirement of 6.36 BCM and the total installed potential of generating hydro-power at 6,965,165 kilowatts.[57] Only two hydro-power plants, the Tis Abay I and the Fincha I hydro-power projects, with installed capacities of 11.4 and 100 MW were commissioned in 1964 and 1974 respectively.

The full implementation of the USBR's schemes could have heralded a wholly distinct legal, hydro-political and developmental configuration in the Nile River basin today, investing in the Ethiopian state a differential riparian status. Not least, it would have offered Ethiopia the opportunity to counterpoise downstream unilateralism in some measures. Ethiopia would have positioned to surprise Egypt and Sudan in own plans for Nile developments well before they could assume to have acquired extended 'prior use' rights –a pattern of physical

[54] Limited studies were also conducted on the Gilgel Abbai basin by Lahmeyer Consulting Engineers in 1962. Dessalegn Rahmato (1999), Discussion Papers, Forum for Social Studies, Addis Ababa.

[55] British Embassy to African Department, (Foreign Office - London), 31 July 1956, JE1423/104, Addis Ababa.

[56] British Embassy to Foreign Office (African Department - London), 4 July 1956, JE 1423/95, *enclosures*, Addis Ababa.

[57] Tadesse Kassa Woldetsadik (2013), *supra* note 8, p.241.

facts which, even when inequitable, becomes difficult to overturn at a later stage.

Pressed by exigencies of this period, Ethiopia concluded the legal security of its water rights as *partly* laying in the formal declaration of its shares in the Nile waters,[58] and *half-heartedly*, in the accelerated surveying and development of the Blue Nile basin. In 1956, Pierre Petridis, a Counselor at the Ethiopian Embassy in Cairo –and a Greek citizen with extended services at the Foreign Affairs office– was seconded to work on Ethiopian plans for the development of the Blue Nile. Petridis was aware of the urgency of the situation from Ethiopia's perspective; and he strongly advised the government to adopt a simplified plan – surveying the whole river basin (as opposed to the elaborate plans of Point IV).[59] His final policy brief for the Imperial Government, which was to be followed by 'a more specific letter to the Nile Valley States', advocated the 'clear and immediate reservation of Ethiopian rights' for irrigational and hydro-power projects.[60] More importantly, his proposal, presumably based on old technical investigations of the past, put forward six alternatives of developing the Tana dam for power and irrigation, including Sudan's likely involvement in joint development schemes.[61]All components of the proposed project, intended to be implemented either jointly or as alternatives, involved the utilization of Lake Tana as a natural reservoir with a regulator, barrage and hydro-electric power stations in different parts of the river basin.[62]

It is unsettling, though, to note that whereas limitations relating to fiscal and technical facilities had been imposing at the time, at least at the start, Emperor Hailesselasie's reaction to the Bureau's surveys had been cold. Although the Emperor's utter indifference was apparent, the degree of criticism he was subjected to was attributable to a wrong reading of the state of facts.

The Emperor, whose heart was then set on the development of Port Assab, the civil aviation industry and an eastwards expansion of modern farming, labelled the study report as 'unduly concentrating on big water control works in

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[58] In this line, the Ministry of Foreign Affairs issued a communiqué outlining the need for calling international tenders with a view to 'opening up new agricultural regions and sources of power' necessitated by 'the impressive growth of the Ethiopian economy ... increased population and enormous expansion of internal and external trade.'

Communiqué Released by the Ministry of Foreign Affairs of Ethiopia, Addis Ababa, Tuesday, February 7, 1956.

[59] P.R.A Mansfield, British Embassy to J. F. S. Philips, Foreign Office (London), 27 April 1956, FO 371/119061, Addis Ababa.

[60] Ibid.

[61] Ibid.

[62] 'Translation of a brief prepared by Mr. P. Petridis on the Blue Nile Basin for the Ministries of Foreign Affairs and Public Works', Annexed in Busk to Foreign Office (London), 5 May 1956, FO 371/119061, Addis Ababa.

areas where no population settles, with limited indications of beneficial works for Ethiopia'.[63] The technical findings that Ethiopia's paybacks largely derive from hydropower schemes and that dams in Ethiopia hoarding waters for dry season irrigation downstream would alleviate alluvial concentration in Egypt and Sudan –were not earnestly welcome.[64]

Political stunt in commissioning the survey was also to account for Ethiopia's subsequent inaction on the USBR's recommendations. As Zewdie Gebreselassie, Minister of Works during the Imperial era recounted, the primary objective of the investigation was rather 'to use the information obtained from the study to negotiate with the lower riparian states, so that they can revise their estimates of how much water each riparian state should be allotted.' The actual development agenda, which was never pursued anyway, resurfaced only when this strategy failed, in the context of avenging 'downstream unilateralism'.[65] The truth remained that since the proposition on the Century Storage Scheme was put forward at the turn of the century to use Lake Tana as an over-year reservoir, Ethiopia's interest was never more than lukewarm.[66] This partly explains why none of the major projects identified by the USBR study were carried out in the following decades.

Separately from these exertions of the period, the early years of the twentieth century also saw less systemic reports composed by explorers that served as vital sources of hydrologic information. During the early periods, attempts by explorers and travelers to trail the Blue Nile's whole course using boats and other means had proffered unprecedented measures of geographical minutiae.[67]

In 1972, Ethiopia presented a quantified claim on the Nile waters, the first of its kind. The National Water Development Commission estimated that for three decades the country would require 18,789 BCM of Nile waters per annum for irrigations, domestic uses, and out-of-basin diversions.[68] The Commission also

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[63] National Water Development Commission (1972), *Note on the Blue Nile*, Addis Ababa, (unpublished), p.21.

[64] Ibid.

[65] Zewdie Gebreselassie (2000), 'The Nile River Question in a New Era of Cooperation among Riparian States', VIIth Nile 2002 Conference, Proceedings, Addis Ababa, Ethiopia, p.524.

[66] John Waterburry (1982), *Riverine and Lacustrine: Toward International Cooperation in the Nile*, Discussion Paper No.107, Princeton University, p.86.

[67] Notable explorers of the time that cleared the way for later development of the resource included Oscar Crosby (1901), Lewis (1903), H. Weld Blundell (1906), the W. N. Macmillan Expedition of B. H. Jensen (1902 and1906), R.E. Cheesman (1926), and later, Herbert Rittingler (1962) and Arne Rubin (1965) on the main river course, and Samuel Baker (1861) on the Atbara-Tekeze-Anegereb Rivers and effluents draining to Tekeze River.

[68] National Water Development Commission (1972), *supra* note 63.

advised the Ethiopian Government to frame a 'clear policy guideline' in respect of the use of its international rivers, and design a three-thronged stratagem: to preemptively use the river with or without foreign aid, work in concert with upper stream states to weaken the legitimacy of the 1959 agreement, and unequivocally state Ethiopia's position in regard to the resource.[69] It would be noted, in the subsequent sections, that since the last decade of the twentieth century, Ethiopia's key involvement within the framework of the Nile Basin Initiative had been informed by these strategic considerations.

6. Stagnation in Ethiopia's Hydro-political Standing (1973-1990)

Between1972-1996, Ethiopia's national enterprise in relation to the Nile River concentrated on establishing, restructuring and redefining the powers of state institutions responsible for the development of water resources. Rahmeto accounted that no less than eight public agencies were superfluously involved in the water sector –each specializing in irrigation, planning, feasibility, design, construction, or operation of water control works– creating duplication, confusion and resource wastage.[70]

In September 1974, a violent popular revolution deposed the Emperor and his antiquated imperial establishment –the institution that in the past had lacked the visionary acumen and proactiveness required in complex transboundary water control works and diplomacy. But, all the same, the Dergue's assent to power was attended by decades-long civil wars which devoured national resources and a Marxist ideology which drifted the country away from global financial institutions and technical assistance programs offered by the West. During the Cold War, Ethiopia's faithful alignment with the Soviet bloc also entailed increased confrontation with Egypt and Sudan over a range of geo-political and strategic interests, with down-beating effects on the implementation of hydraulic projects within its jurisdiction.

Despite such unfavorable setting, the second half of the 1970's and 1980's saw modestly extensive 'studies' and 'declarations' and 'very limited' actions proposing irrigational and related developments in the Blue Nile River basin.

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[69] Ibid.

[70] These included the National Water Resources Commission (NWRC), Water Resource Development Agency (WRDA), Ethiopian Water Works Construction Agency (EWWCA), Ethiopian Valleys Development Studies Authority (EVDSA), Development Projects Studies Authority (DEPSA), Water Supply and Sewerage Authority (WSSA), Water Well Drilling Agency (WWDA), and Irrigation Development Department (IDD) within the Ministry of Agriculture.
Dessalegn Rahmato (1999), *supra* note 54.

These were limited to the Ribb, Gumara, Anger, Koga and the Gilgel Abai watersheds, and included the commissioning of Fincha I hydro-power plant. Since the 1970's, Ethiopia also pursued its largest project on the Alwero dam in the Gambella region, a tributary of the Baro River, with irrigation potential of over 10,000 hectares; however the project remained unutilized for several years even after its completion.[71] Most of the other investigations were undertaken at a reconnaissance, prefeasibility or feasibility levels. For instance, of the fifty irrigational and drainage projects identified by ten studies over a span of five decades (between the same period and the 1990's), many were pursued at a master-plan and reconnaissance levels; only a few passed the pre-feasibility and feasibility stages.[72]

At the 1977 UN Water Conference in Mar De Plata too, Ethiopia rolled a plan for the development of 91,000 ha in the Blue Nile basin and 28,000 in the Baro, extracting about 4 BCM of waters.[73] Similarly, at the 1981 UN Conference on the Least Developed Countries, Ethiopia presented a ten-year investment plan which listed fifty irrigation projects totaling 704,000 ha in the Blue Nile and Baro Akobo basins.[74] Yet, as the country suffered from destructive civil wars and economic misfortunes, and furthermore lacked sustainably organized water resources management programs, it became predestined to a condition where it became virtually unable to utilize its resources with a view to raising the welfare of its population.

On the diplomatic front, Ethiopia's participation in less-inclusive basin discourses of the time, which for the most part had been engineered by Egypt, deteriorated. In defending its riparian rights, the country appealed either from positions of indifference or submission, and as in the past, the mainstream policy only endeavored to formulate reactive prescriptive rights to unspecified shares in the Nile River flows. During the UN Water Conference at Mar Del Plata in 1977, for example, Ethiopia's delegation called for 'good neighborliness in the basin' but underscored the country's 'right to proceed unilaterally with water development projects', a position which was erroneously construed by many writers as a threat to camouflage under the absolute territorial sovereignty principle.[75]

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[71] Ibid.

[72] Federal Democratic Republic of Ethiopia Ministry of Water Resources (May 2006), *Ethiopian Nile Irrigation and Drainage Project, Consultancy Service for Identification of Irrigation and Drainage Projects in the Nile Basin in Ethiopia*, Final Report, p.ii.

[73] John Waterburry (1982), *supra* note 66, pp.90-92.

[74] Ibid.

[75] *See,* for example, Bonaya A. Godana (1985), *Africa's Shared Water Resources, Legal and Institutional Aspects of the Nile, Niger, and the Senegal River Systems*, p.46, 71; John

During the same period, Ethiopia also protested against Egypt's expansion of out-of-basin projects. Egypt's right of executing plans that call for the diversion of Nile waters outside the natural course was disputed by Ethiopia, but more importantly, it was feared that such schemes would produce prior use facts on the ground –making future agreement on equitable uses of the Nile a far-flung prospect.

7. Restructuring Relationships with Downstream Nile: a Futile Enterprise? (1991-1993)

In 1991, Ethiopia's political superstructure went through a transformation. With the overthrow of the Derg and the advent to power of a new regime, Ethiopia's water resources development and national security policies were tweaked afresh, in balanced but most critical tone, candidly reproaching the legal and developmental *status quo* in the basin. Financial, technical and legal hurdles notwithstanding, a speedy utilization of the Nile was settled high on the government's agenda, attended by diplomatic efforts to restructure relationships with Sudan and Egypt.

In 1991 and 1993, Ethiopia ventured in futility to radically reorganize relationships and improve its long-standing riparian antipathy with the states of Sudan and Egypt –by knotting two general agreements on the Nile. The Ethio-Sudanese Accord on Peace and Friendship was signed in Khartoum on 23 December 1991. Through the accord, both states endeavored to revive the deep and cooperative spirit that dominated their relationships in the pre-1950 period. With regard to Ethiopia, it should be noted, Sudanese policy had always contrasted with Egypt; Sudan had been conscious of the multifaceted impacts of upstream dams on its riparian interests.

Under the accord, Sudan conditionally embraced the principle of equitable utilization –along with another canon of international water law which highlights the obligation not to cause appreciable harm to one another. A series of meetings were held between the national delegates of the two riparian countries. Joint communiqués of the Ethio-Sudanese Technical Advisory Committee were issued between 1992 and 1994 wherein Sudan timidly came out of its comfort crate offered under the 1959 Nile Waters Agreement – explicitly acknowledging Ethiopia's rights in the shared resource. Both affirmed that 'existing arrangements in the Nile basin could not be peremptory to the rights of other states in the basin to equitably utilize the Nile waters'.[76] The

Waterbury (2002), *The Nile Basin, National Determinants of Collective Action*, Yale University Press, p.46, 71.

[76] Minutes of Ethio-Sudanese Joint Meeting on Nile Waters Resources Cooperation, 5-18 May 1992, Addis Ababa, Ethiopia, (unpublished), p.3.

Committee pledged to examine facts that impede equitable allocations and agreed to work on such setbacks that protract beneficial uses of the river in both jurisdictions.

Yet, Sudan refused to discuss the specific fate of the prior rights of use shielded under the 1959 treaty, a course which is incompatible with its recognition of Ethiopia's sovereignty in relation to the resource. Instead, Sudan chose to concentrate on the exchange of hydrological and meteorological data and watershed management –steadfastly warning that all water developments shall be carried 'without causing any appreciable harm to the interests of other co-basin states';[77] the two basin states also disagreed over the list of 'facts and circumstances' considered in evaluating the equitability of any use of Nile waters.[78] Ethiopia, on the other hand, maintained a clear position: any figure that represents the pattern of existing uses would not be afforded absolute protection and in fact would be looked upon merely as *one* of the several factors considered in the process of equitable determination.[79]

The ever-changing approaches which Sudan took-on during the conventions posed serious challenge in fulfilling Ethiopia's crave for anew water-sharing regime, which, it sought, was the chief object of the bilateral undertaking. Still, Sudan's cautious endorsement of the equitable uses doctrine as the operational guide and its agreement, at least in principle, that existing legal regimes shall not impede the equitable entitlement of both states was in itself a great leap forward. In fact, this relative acquiescence in riparian positions represented one of the earliest marks of regression in extreme water use policy which Sudan had espoused in the past. It heralded a serious 'reconfiguration' in the stances of the two states. While it is admitted that this new development failed the test during the last legs of the negotiations on the Cooperative Framework Agreement in 2010 –with Sudan storming out of the NBI's diplomatic pursuits at a crucial stage, it nonetheless created a very strong parallel in user right perceptions of the two countries in the aftermath of Ethiopia's decision to construct the GERD.

Unfortunately, the spirited collaboration between the two states, initiated in the early 1990's, had to be curbed –not on account of grounded differentials which both countries presented in shielding riparian rights *per se*, but because of the ill-timed incidence of other geo-political twists which ruined all aspects of their relationships for years to come. It occurred after an Islamic organization

[77] Ministry of Natural Resources Development and Environmental Protection, Minutes of the Fourth Regular Meeting of the Ethio-Sudan Technical Advisory Committee on Nile Water Resources Cooperation, 5-17 October 1994, Addis Ababa, (unpublished), p.9.

[78] Ethiopia's Technical Advisory Committee Proposal, Application of the Principle of Equitable Utilization and the Duty not to Cause Appreciable Harm in the Context of the Nile, ANNEX 10, Addis Ababa, (unpublished), pp.3-5.

[79] Ibid.

attempted to assassin Egypt's President Hosni Mubarak in Addis Ababa on 26 June 1995 –as he was arriving for the OAU Summit; Egypt suspected the Islamist Government of Sudan under its spiritual mentor –Hassan al Turabi– was behind the terrorist plot. Ethiopia formally demanded Sudan to take immediate actions and ensure the extradition of three suspects who were believed to have sought refuge in its territory. Sudan's failure to comply with Ethiopia's demands and the instructions issued by the UN Security Council led to the slumping of its diplomatic relationships with Ethiopia to a historic low.[80]

Sudanese and Ethiopian Nile policy started to show robust realignment only after Ethiopia initiated the GERD national project on a unilateral basis. An array of hydrologic and geo-political considerations lured Omar Hassan al-Bashir's Sudan to drift away steadily from its traditional ally on the Nile –Egypt, and continued to play pivotal roles in reconciling Ethiopian and Egyptian positions in relation to the GERD. While, in the end, Sudan aspires to preserve its 'co-hegemonic status' along with Egypt in line with the spirit of the 1959 accord, it also realizes that in the long-term its best interest depends on future water control and conservation works pursued on the Blue Nile watersheds in Ethiopia.

Upriver schemes reduce evaporation, deliver waters through controlled gravity, mitigate the effects of seasonal and intra-year variations, provide flood protection, decrease sedimentation, improve navigability, abate the impacts of successive draught seasons, and increase water yields and the expansion of irrigation downstream. Needless also to account is also the upsetting implications of the declining reservoirs at the Sennar and Roseires dams –both in terms of finance and agricultural productivity. By 1985, the storage capacities of the dams had already decreased by 34% and 25% respectively.[81] Sudan needed to look upstream. As early as in 1904, detailed insights offered by the studies of C.E. Dupius held that as reservoir on the Blue Nile 'feeding the canals irrigating the Gezira … the suitability of Lake Tana is so great and obvious that it seems almost inevitable that sooner or later in the world's history some solution of the political difficulties must be found, and advantage taken of it.'[82] Subject to political exigencies, the overall strategy of the modern Sudanese state is influenced by such discernments –eying upstream and working with Ethiopia.

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[80] UN Security Council Press Release SC/6214, Security Council Demands Sudan Act to Extradite Suspects in Assassination Attempt of Egyptian President by 10 May or Face Limited Sanctions; adopted Resolution 1054 (1996) by 13-0-2 Vote, Demands Sudan Desist From Terrorist Support, Other Measures Possible for Non-Compliance in 60 Days.

[81] A.M. Eldaw (2004), 'The Gezira Scheme: Perspectives for Sustainable Development', University of Gezira, Reports and Working Papers 2/2004, Bonn, p.42.

[82] C.E. Dupuis (1904), 'Report on Lake Tana and the Rivers of the Eastern Sudan', Parliamentary Papers, p.23.

With or without Egypt, therefore, Sudan continued to take greater interest in the GERD and the potential impacts of the Dam on its lifeline passing through the Gezira fields. Of course,only time will tell if the states would pursue cooperation beyond current levels.

During this particular period, Ethiopia's other diplomatic enterprise that in time proved to be less-rewarding relates to its attempt to restructure relations with Egypt. Even though geographical bond between Ethiopia and Egypt has interlocked their destiny, their relations have been overwhelmed by complex challenges. Egypt's foreign policy had been fundamentally informed by Khedive Ismael's pledge in the nineteenth century that his country holds no hostile intentions against Ethiopia for 'nature was already sending (Egypt) the best part of Ethiopia with each flood of the Nile (and hence) he had no desire for the residue'.[83] In reality, however, both countries were engrossed in two fairly major wars of aggression (1875 and 1876) and in the post-Medieval Modern Period their relationship featured recurring policies of hostility.[84] An embedded cultural tension and political ill-fate for each other's sovereign interests made up a discernible order of the day –the chief causes of which could be traced to the sole river both share and to Egypt's extremism in promoting the idea of 'Unity of the Nile Valley' under one hegemon.

In 1993, Ethiopia and Egypt commenced a rare initiative to transmute the entrenched perceptions of resentment that in the past had defined their political and diplomatic relations. The Ethio-Egyptian Framework for General Cooperation signed in Cairo in July 1993 was the first step in this direction.[85] The agreement discussed several issues of concern to both states; its key provision on the Nile, Article 4 stipulated the agreement of the two countries' to 'work out in detail', through discussions by experts from both sides, their respective interests 'on the basis of the rules and principles of international law'. It was evident from the outset that the future of the framework hinged on the degree and details of continued collaboration both states choose to carry out.

Article 5 of the Framework, an unnecessary inclusion from Ethiopia's perspective, required both parties 'to refrain from engaging in any activity

[83] Czeslaw Jesman (1959), 'Egyptian Invasion of Ethiopia', *58.230 African Affairs*, p.76.

[84] Ethiopia's statement of Foreign Policy (*see below*) explicitly underlined that its problem in the use of the Nile is principally one caused by Egyptian extremism; it accused Egypt of promoting instability in the Horn of Africa and Ethiopia, blocking and negatively influencing the grant of foreign aid/loans for Nile related development schemes. But the Foreign Policy also acknowledged that the interests of the two countries are not necessarily irreconcilable.

[85] Framework for General Cooperation between the Arab Republic of Egypt and Ethiopia, 1 July 1993.

related to the Nile waters that may cause appreciable harm to the interest of the other party.' The accord made no reference to the old treaties concluded on the Nile –the chief subject of Ethiopia's diplomatic scorn in the past six decades. In inadvertence, the agreement also failed to 'co-accommodate' one fundamental principle of international watercourses law alongside the no harm rule: the right to equitable utilization. Against such backdrop, the arrangement was subsequently read as imposing a limitation on Ethiopia's sovereign rights of undertaking projects that significantly affect the Nile River's flow regime.

Yet, from the overall organization of the framework itself and the practical anticipations of the parties under articles 4 and 7, 'rules and principles of international law' –providing both states with equivalent arms– constituted the basis on which future cooperative actions are predicated, the idea being a joint technical commission would be instituted to work on details of the framework. The framework and its legal ramifications on Ethiopia are better understood in this context. The framework agreement has not been transposed onto a treaty through parliamentary ratification.

Discussions were never pursued within the commission, nor had experts been convened to hammer down details of the framework. For different reasons, the future of the framework agreement was doomed *before* it kicked off. As the new government in Ethiopia came to grips with the sheer scale of Egyptian intransigence on the Nile, the enthusiasm faded; tossing contempt on the framework agreement, Egypt spared no moment implementing huge irrigational projects without the courtesy of consulting its new treaty partner-Ethiopia. The latter protested against Egypt's continued efforts 'to create facts on the ground which makes matters very difficult to deal with in the future'. Ethiopia also questioned Egypt's good faith in adhering to the spirit of the agreement and ridiculed the role of a joint technical commission –asserting that 'the facts created by Egyptians on the ground are not technical, but political and strategic' that could not be addressed by such a team.[86]

Ethiopia grasped that diplomatic and legal tools alone could hardly assure its equitable entitlements in the river basin. A clear consensus emerged in the ranks; the key drive for Ethiopia's absolution laid in embracing unilateralism in resource development initiatives both as a means of poverty reduction and as a tool for triggering genuine cooperation. Within the system of international law, while Ethiopia's equitable right over the Nile is recognized as a matter of settled principle, it had become evident that the law's actual working is a coefficient of prior hydraulic measures adopted on the ground rather than mere articulation of legal norms, diplomatic civility or altercations. The system of international law still remains vital in resolving transboundary water issues, and yet, the

[86] Mideast Mirror, *Ethiopia Challenges Egypt* (1998).

mechanics of law could not function optimally outside of power politic, diplomatic dexterity and sincere commitment to the fundamental values it upholds.

Hence, in the context of downstream Nile, Ethiopia's juridical fervor tended to advocate that no rule of international law as such exists to proscribe a late-coming riparian state's recourse to unilateral utilization of the Nile River. Ethiopia's former Prime Minister submitted 'if we had the resources, we could store the water, irrigate our lands and provide for our livelihoods; ... the issue is whether we can use *some* of the this water (stored at Aswan) for irrigation purposes'; he stoutly concluded no treaty would bar Ethiopia, warning 'if and when we get the resources, we will use it'[87] even if such action distresses previously established patterns of use in certain measures.

8. Fundamental Makeover in the Post-1996 Period: a Changing Diplomatic Equilibrium?

This vital episode in Ethiopia's diplomatic and legal history on the Nile saw four sweeping developments which furthered Ethiopia's sovereign interests and long-term hydro-political standing in the basin's discourse. These are –the reorganization of institutional, policy and legal frameworks governing the water sector with a clearer direction; the intensification of new water control schemes implemented on the Nile River system; the inception and part-realization of key objectives of the Nile Basin Initiative (including the Agreement on the Nile River Basin Cooperative Framework); and the start of construction on the Grand Ethiopian Renaissance Dam (GERD). Two of these developments deserve some discussion.

8.1 The reorganization of policy, program and legal frameworks

The Ethiopian Water Resources Management Policy was adopted in 1998/1999. The document admitted that in the water sector works implemented so far revealed a very low level of performance. The poor achievement, mainly attributed to the absence of well defined and coherent policy and lack of adequate investment, resulted in failure of the country's water resources to contribute to the overall socio-economic development of its population. To alleviate the problems, the Policy advocated that a sustainable and reliable development and use of the water resources of Ethiopia would be imperative, and, in particular, it stated detailed directions that should be followed in the irrigational and hydropower sectors.[88]

[87] TV 2 Documentary, 'Reise til vannets fremtid', Sunday 28 October 2007, Norway, Oslo.

[88] FDRE Ministry of Water Resources (1999), *Ethiopian Water Resources Management Policy*, Addis Ababa, p.1.

On the complex issues of transboundary waters, the Policy set out –as its primary goal– to study, promote and ascertain Ethiopia's stakes in the allocation of shared watercourses, to establish integrated frameworks for joint and equitable cooperation on such resources, and to utilize transboundary waters on the basis of accepted international norms.[89] Two vital executive tools of the Policy, the Ethiopian Water Sector Strategy and a 15-year Water Sector Development Programme (WSDP) were put in place in 2001 and 2002 respectively.[90] The Strategy identified priorities for a 15-year time horizon – including the establishment of short, medium and long-term action goals of water resources development in Ethiopia. It advocated the construction of a series of small, medium and large-scale dams to generate hydropower and sustain irrigated-agriculture economy. On the other hand, the WSDP listed in substantial detail the small, medium and large-scale irrigation schemes scheduled for implementation throughout the country during the planned period –including the Omo Ratti, the Koga, Alwero/Abobo, Gode West/South, Megech, Nagi Beach and Azena/Ayo.[91] In total, 274,612 ha of farmland would be developed under new irrigation schemes –raising the countrywide total area of irrigated farmland to 471,862 ha by the end of WSDP period.[92]

In the hydro-power sector, the program included the construction of six medium-scale plants with an aggregate installed capacity of about 950 MW, and fifteen small-scale plants (<10 MW each), as well as the feasibility study of thirty-seven sites, the prefeasibility study of forty-eight medium-scale hydropower sites, and reconnaissance studies of thirty medium-scale hydropower sites.[93] Obviously, this figure did not account for the intervening schemes pursued on the basis of GTP-I and the implementation of the GERD project itself. The Nile basin in Ethiopia already hosts the Fincha-Amarti (100 MW), Fincha 4th Unit (33), Tis Abay I/II (11.5 and 75 MW), Tekeze I (300 MW) and the Tana Beles (460 MW) hydro-power facilities. The latter two were commissioned in 2010. In addition to existing power installations, several single and multi-purpose projects, including the Mendaia-Border-Mabil (5375 MW), Dedessa, Tekeze II, Fettam, Upper Guder, Aleltu East, ChemogaYada, Aleltu

[89] FDRE Ministry of Water Resources (Oct.2002), *Water Sector Development Program*, Main Report, Executive Summary, vol.I, Addis Ababa, p.9.

[90] Three additional legislations, the Ethiopian Water Resources Management Proclamation No.197/2000, the Ethiopian Water Resources Management Regulation No.115/2005 and the River Basin Councils and Authorities Proclamation No.534/2007 were also issued - providing details of the powers, responsibilities and jurisdiction of state organs in the management, utilization and administration of water resources in Ethiopia.

[91] FDRE Ministry of Water Resources (2002), *Irrigation Development Programme Report,*Volume I, Executive Summary, Addis Ababa, p.9.

[92] Ibid.

[93] Ibid.

West and Neshe had also been proposed on the main stream and the Nile tributaries.

In raising Ethiopia's hydro-political eminence in accelerated phases, a convenient stage was also set in place through the commissioning of studies for Integrated Master Plan Projects of the twelve national river basins, including river systems that form part of the Nile in Ethiopia (i.e., the Blue Nile, Baro-Akobo and Tekeze sub-basins), and the identification of irrigational and drainage projects. Several pre-feasibility and feasibility studies were undertaken on the principal course, tributaries and sub-tributaries of all rivers.[94] More pertinently to the Nile in Ethiopia, the Ministry of Water Resources published in 1999 a comprehensive technical report –the 'Abay (Blue Nile) River Basin Integrated Development Master Plan Project'. Under the Master Plan, two irrigation development scenarios, extending over a 50-year period (1999/2000-2048/49), projected to develop a total area of 235,000-350,000 hectares,[95] withdrawing about 6% (3.1-3.3 BCM/yr) of the mean annual discharge of the Blue Nile River.[96] The study also identified that the potential large and medium-scale irrigation in the sub-basin extends over a total net area of 526,000 hectares.[97]

On the other hand, the same period also witnessed the adoption of Ethiopia's Foreign Affairs and National Security Policy and Strategy. From international relations' point of view, the document laid the overall direction that informs Ethiopia's initiatives in developing water resources and in nurturing its relationships with Egypt. It highlighted the country's predisposition to develop the resources particularly in the field of hydro-power and irrigation, 'without affecting Egypt's fundamental interests' and through 'the balancing of interests'.[98] The policy document presumed the impact of projects pursued under the WSDP, and later the GERD, on the quality and quantity of flows of the Nile

[94] Ibid.

[95] FDRE Ministry of Water Resources (Apr.1999), *Abay River Integrated Development Master Plan Project*, Phase 3, vol. I, p.197.

[96] Ibid, p.200.

[97] Ibid, p.245; note that in contrast, a 2005 assessment by the FAO estimated the eventual irrigation potential in the Blue Nile sub-basin at 1,001,500 ha; the irrigation potential in Baro-Akobo and Tekeze-Atbara sub-basins of the Ethiopian Nile system was assessed at 905,500 and 312,700 ha respectively.

FAO Water Report 29 (2005), *FAO's information system on water and agriculture, Ethiopia* <http://www.fao.org/nr/water/aquastat/countries/ethiopia/index.stm>

[98] The Federal Democratic Republic of Ethiopia (2000), *Foreign Affairs and National Security Policy and Strategy*, Ministry of Information, Press & Audio-visual Department, Addis Ababa, p.124.

downstream would be accommodated within the broader entitlements of each country under the principle of equitable utilization.[99]

It could be submitted that the utilization scenarios identified under the master plans and sector-specific programs are still *too low* to pose serious prejudice on downstream Nile. Yet, the concentrated programs have raised apprehension in Egypt and Sudan, and the new facts have set Ethiopia in the right developmental trajectory in the basin, commanding, as a result, a measure of influence in the contemporary trilateral discourses.

8.2 The Grand Ethiopian Renaissance Dam: no more playing chicken on the Nile?

The launch of the Nile Basin Initiative (NBI), the first truly comprehensive cooperative enterprise on the river, was attended by a radical transformation of Ethiopia's water sector –focusing on institutional re-organization, the re-definition of mandates and policy frames, and the implementation of numerous projects. In fulfilling its strategic interests, Ethiopia adopted a two-tracked approach. The *fir*st track focused on influencing the direction of riparian discourse within the NBI so that the upstream states' engrained perception of injustice is brought to the open and rectified. The *second* track involved the development of new water control schemes that counter the hegemonic status and flout the legitimacy of non-interference regimes espoused in Egyptian and Sudanese water diplomacy.

8.2.1 Developments within the Nile Basin Initiative

From Ethiopia's perspective, the accomplishments are fairly mixed. While the political ramification of the developments within the NBI leading to the conclusion of the Cooperative Framework Agreement could be read as an unprecedented diplomatic feat, the basin-wide legal framework was preordained to fail from the outset. In upper Nile and lower reaches of the river, the values, nationalist expectations and strategic designs that informed the decade-long negotiations process were incompatible, to say the least. The incentives for collaboration between the riparian states anticipated a wholly different set of economic and political payoffs.

True, during the first decade of the twenty-first century, the riparian position of downstream states ended to exhibit some measures of moderation. Sudan and Egypt participated in negotiations of the Transitional Institutional Mechanism of the Nile Basin Initiative (TIM-NBI) –launched in Tanzania on February 22, 1999 through a Council of Ministers' meeting of the Nile Basin States. The transitional process is mandated to set up the Nile River Basin Commission (NBC) and adopt the Agreement on Nile River Basin Cooperative Framework

[99] Ibid.

(CFA) –based on a vision 'to achieve sustainable socio-economic development through equitable utilization of, and benefit from, the common Nile Basin water resources'.

By June 2007, the Nile Council of Ministers (Nile-COM) concluded in Uganda negotiations on the substantive and procedural aspects of the CFA –on the basis of technical works undertaken by the Panel of Experts, the Transitional Committee and the Negotiations Committee in the course of 1997-2005. However, serious divergences lingered with respect to a few provisions of the proposed legal instrument. Negotiations were re-launched hosting various rounds of political and technical congregations of the Nile-Com as well as the Joint Nile-Technical Advisory and Negotiators Committee in Kinshasa (May-2009), Nairobi (July-2009), Alexandria (July-2009), Entebbe (September-2009), Dar es Salam (December-2009) and Sharm El Sheikh (April-2010). However, the parties could not resolve their differences. On April 13, 2010 seven countries participating in the Extra-Ordinary Meeting of the Nile-Com in Sharm El Sheikh voted on a landmark resolution to proceed, at a later date, with a formal signature of the proposed CFA document based on decisions adopted in Kinshasa in May 2009. The resolution was passed in spite of outstanding discrepancies in national positions of the partaking states. Egypt and Sudan rejected the proposed move and expressed strong reservation.[100]

The CFA instrument was opened in Entebbe, Uganda for signature from May 14, 2010 for a period of not more than one year.[101] Against Egypt's declared anticipation that 'the upstream countries (would) reverse their decision to sign a unilateral framework agreement so that negotiations continue',[102] the agreement has since been signed by six states: Uganda, Tanzania, Kenya, Ethiopia, Rwanda and Burundi. To date, three countries have ratified the instrument following domestic constitutional processes: Ethiopia (June-2013), Rwanda (August-2013) and Tanzania (March-2015). By virtue of Article 42, the CFA enters into force on the sixtieth day following the date of deposit of the sixth instrument of ratification or accession with the African Union.

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[100] Nile Basin Initiative, 'Ministers of Water Affairs End Extraordinary Meeting over the Cooperative Framework Agreement', Press Release, 14 April 2010. <http://www.nilebasin.org/index.php?option=com_content&task=view&id=161&Itemid=102>, last accessed 15 December 2015; note that there had been discrepancy from first draft of the Framework which contemplated the signature to take place between 1August 2009 - 1 August 2011.

[101] Nile Basin Initiative, 'Agreement on the Nile River Basin Cooperative Framework opened for signature', Press Release, 14 May 2010. <http://www.nilebasin.org/index.php?option=com_content&task=view&id=165&Itemid=102>, last accessed 15 December 2015.

[102] Mohamed El-Sayed(2010) 'Dangers on the Nile', *Al-Ahram Weekly Online,* April Issue 995 <http://weekly.ahram.org.eg/2010/995/eg3.htm>, last accessed 16 December 2015.

While this landmark ratifications process marked the beginning of formal transformation of the NBI into a permanent river basin commission, the treaty remained restrained by serious problems related to two concepts which detract its chances of ever becoming a truly comprehensive legal instrument: 'water security' and 'the fate of pre-existing agreements'. Seven states in the upper reaches of the Nile, including Ethiopia, held a similar position on a version of the CFA which entailed the complete abrogation of all pre-existing treaty arrangements. Egypt and Sudan insisted on inserting a clause that requires each riparian state 'not to adversely affect the *water security* and *current uses and rights* of any other Nile Basin State',[103] and furthermore reiterated that any position adopted at the Extra-Ordinary Meeting of the Nile-Com 'reflects the views only of the states.'[104] An alternative proposal for direct launching of the NBC 'within the framework of which further negotiations on the remaining pieces of the CFA would be undertaken' failed to garner an upstream favor.[105]

The result was that while efforts continued today to get Sudan and Egypt fully onboard, diplomatically, both states were sidelined as the 'unruly horses' who reigned on a realm of inequity. More concerning, however, is the fact that as institutional mechanism, it now appears that the CFA concluded its running course, potentially creating a 'rights regime' which would be applicable only as between the upriver states –with little chances of Egypt (or Sudan) accepting the treaty in its present form.

8.2.2 The Grand Ethiopian Renaissance Dam

The blow to any hopes of the CFA as a comprehensive pact comprising Egypt also came about in June 2013, following tense diplomatic altercations between two main players in the basin: Ethiopia and Egypt. Prompted by rapid economic development in the first decade of the twenty-first century, Ethiopia undertook concrete measures –drawing a specific outline of national policies and laying down arrangements for the development of projects on the Blue Nile. Unlike in the past, Ethiopia's relative stability and fiscal command evinced that the absence of cooperative arrangements in the basin or international financial provisioning could no longer deter its water resources development enterprises. The Grand Ethiopian Renaissance Dam project was conceived in such context. Mobilizing domestic resources, the Dam's construction began in May 2011 – generally coinciding with the outbreak of the Arab Spring revolution that rocked Egypt and the rest of the Middle East.

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[103] This was not accepted at the Nile-COM's Kinshasa Meeting of 22 May 2009 where seven countries instead agreed to 'annex' Article 14b for subsequent resolution by the NRBC.

[104] Nile Basin Initiative (2010), *supra* note 100.

[105] Tadesse Kassa Woldetsadik (2013), *supra* note 8, p.165.

The Dam, the greatest engineering feat in Africa and one of the biggest hydropower infrastructures in the world, is situated at Guba in the Benishangul Gumuz region, close to the Ethio-Sudanese border. It comprises a dam about 1,780m long and 145 m high and will host a power plant with installed generating capacity of 6,000 MW. The Dam will create Ethiopia's largest artificial lake, impounding about 74 BMC of the Blue Nile flows -i.e., more than twice the volumetric size of Lake Tana and nearly half of the absolute volume of waters stored at the Lake Nasser Reservoir. It has a total surface area of 1,680 sq. km.

By design, the project has been sketched as a non-consumptive utilization of Nile waters for the generation of hydro-electric power, and even more so, in diplomatic communications, it is presented as a scheme that could potentially help in fulfilling the social and economic goods of the peoples of Ethiopia, Sudan and Egypt. On the other hand, Egypt viewed the dam and a better part of its technical specifications as unsound and politically inspired, and consistently held that the project may constitute a means for inflicting harm on the security of its 'shares' recognized under the 1959 Nile waters agreement.

Ethiopia's initiation of the GERD scheme fundamentally changed its image. The widely accepted negative narrative and the old intuitive prophesy by Waterburry that 'it is in the *longer haul* that the great Ethiopian unknown will become relevant'[106] –seemed now to have dashed its course. A centerpiece in all Nile-related negotiations today, Ethiopia turned out to be more than 'relevant', and in fact indispensable. The lingering differences in riparian perspectives notwithstanding, its determination 'not to any more play chicken on the Nile' prompted changes in the political and legal landscape of the basin, and consequently in the relative influence each state commands in contemporary riparian discourses. It was noted above that in the past despite its 'implorations' to participate, Ethiopia was wantonly excluded as a partner during negotiations on the 1959 Nile water treaty, leaving in the national ego an eternal hallmark of detest for downstream intransigence.

Faced with the unyielding enterprises of the NBI in terms of water-sharing and equitable benefits, Ethiopia's resort to unilateralism as the ultimate means of ensuring its rights under international law seemed only natural. Within the framework of the NBI, the pursuit of collective action values still continues – albeit without Egypt's full participation. But such process has little chance of enhancing the welfare of all riparian communities on equal footing or in altering the prior power relationships; in this context, Ethiopia's measure is but a logical outcome of decades of its yearn for a stake in a resource it co-owns. In typical upstream settings, Whittington noted, such a course of action seemed inevitable

[106] John Waterburry (1982), *supra* note 66, p.94.

where political leaderships (as in Ethiopia wait for a perfect moment to) make intuitive judgments on the basis of the assessment of socio-economic payoffs, political, diplomatic and military strengths, the character and intentions of leadership in downstream states, as well as financial and technical ability of the upriver state (itself) to launch a unilateral development.[107]

Since May 2011, the pace of construction on the GERD proceeded unabated but the events that unfolded in the aftermath depicted an extremely strained relationship between Egypt and Ethiopia. All the same, this historical episode also exposed that during this period it was Egypt and Sudan –the unequal traditional hegemons in the basin– who 'rushed to plead' with Ethiopia to sit for negotiations on the Nile. Of course, even the staunchest optimist would not contend that decisions to engage in serious dialogues about basin-wide cooperation (as in the NBI or the trilateral talks) represent irreversible commitments to forego unilateral development.[108] Indeed, in bringing forward the GERD scheme onto the implementations board, Ethiopia was only fulfilling its prior declaration that the country's participation in any regional or trilateral platform would not in any way detract its rights of unilateral action.

The pinnacle in Ethiopia's transition to a relative hydro-political eminence will yet have to be witnessed through the conclusion of the GERD; yet, in its present state, the developmental minutiae has already presented a reverse historical trend in the diplomatic and legal discourse of the basin. Ethiopia's voice had not only become sturdier; the traditional approach that accorded undisputed supremacy to Egypt's position also seemed shacked –spurring downstream states to re-tune the language of diplomatic engagements in the immediate aftermath. Ethiopia's influence in the bargaining processes was evident in its refusal to suspend construction on the GERD while the tripartite negotiations continue today, in the composition and effects of studies pursued by the International Panel of Experts, and in the powers, constitution and effects of specific studies pursued by the International Technical Experts Committee and the Tripartite National Technical Committee. Ironically, Ethiopia's moves on the GERD also confirmed that genuine cooperation among appropriating riparian states with the intention to settle occurs *only* when certain conditions are in place –as restated in many writings on 'game theory' and 'collective actions'.

Today, uncertainties with regard to impacts of the dam on Egyptian interests linger, and the true scale will not be fully known until such time when the impact assessment studies are undertaken by the International Technical Experts Committee. Whereas each state is entitled to interpret the project's possible

[107] Dale Whittington (2004), 'Visions of Nile Basin Development', *6 Water Policy*, p.12.
[108] Ibid, p.15.

effects quite differently, it is evident, from the diplomatic dealings exchanged on the subject that Ethiopia did not seek to maximize its welfare at the expense of downstream states. Sudan was first in picking this line, adhering to Caponera's guidance that reservoirs upstream in Ethiopia 'would offer greater advantages in the long-term for the integrated management of the Nile'; Egypt, too, has started making concessions (at least diplomatically) as it would otherwise 'remain vulnerable to unilateral water withdrawals' upstream –outside of a negotiated allocations regime– which in turn forces it to 'begin negotiations without placing preconditions … such as those contained in the philosophy of the 1959 Nile Agreement.'[109]

On May 28, 2013 Ethiopia celebrated the second anniversary of the launch of dam construction by its late Premier with a national fanfare; the occasion was attended by 'diversion' of the Blue Nile River's course along a different route, an engineering procedure required to provide way for physical construction of the GERD. Already overawed by domestic political problems and disconcerted by Ethiopia's unparalleled defiance against downstream hegemony, Egypt reacted strongly, reintroducing the debate on water security and prior use rights in the most extreme style.

Under pressure from the Egyptian society, President Mohamed Morsi convened a meeting with opposition leaders just a few days before his ouster; in a televised address, he declared 'his country is ready to confront any threat that would endanger the country's water security', and that 'Egypt's water security cannot be violated at all'; should Egypt 'lose one drop, our blood is the alternative', the President confirmed to his people, further promising that 'all options are open' to forestall the predicament'.[110] Apparently, the final scientific report of the International Panel of Experts on the GERD –already submitted on June 1, 2013 to the governments of Ethiopia, Sudan and Egypt after months of deliberation– played little role in swaying the hydro-political outlook in Egypt.

Outraged by the open declaration, Ethiopia summoned the Egyptian ambassador in Addis Ababa, expressed its displeasure and demanded official explanation. More significantly, Ethiopia's Foreign Ministry reaffirmed that the project would not be *stopped* for a second despite the stir caused in Egypt. The diplomatic confrontation subsided on June 18, 2013 –after Egypt's new government represented by Foreign Minister Mohamed Kamel Amr visited Addis Ababa and both countries pledged to engage in further consultations to resolve outstanding issues. Yet, the blotch of this brief incident lingered as a

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[109] Dante A. Caponera (1993), *supra*note 45, p.660.

[110] 'Egypt's Live TV Coverage of Nile Crisis Meeting Draws Fire', Al-Ahram Weekly, Tuesday 4 June 2013, Available at: <http://english.ahram.org.eg/NewsContent/1/ 0/73174/Egypt/0/Egypts-live-TV-coverage-of-Nile-crisis-meeting-dra.aspx>.

somber reminder of how Egypt, not accustomed to detractions on its hegemonic status in the Nile basin, reacts with serious apprehension to the rise of a new hydraulic power in the region: Ethiopia.

Conclusions

It could be submitted that in relation to Ethiopia's equitable interests, the scale of moderation observed today with regard to downstream riparian positions is chiefly accounted to Ethiopia's resolve to unilaterally embark on the construction of the GERD. Whether the Nile continues to be a source of tension, rivalry and even conflict –or otherwise serves as a tool for maximizing the interdependent benefits of its communities– remains to be seen in future trilateral dialogues, and could not be analyzed in the abstract. However, given the entrenched and yet competitive stakes of each riparian state, there is little doubt that Egypt, Ethiopia and Sudan will eventually work on the outstanding issues and engage to tender certain compromises. If anything else, the more than two hundred water-related treaties now in force all over the world testify the fact that it is possible to settle, or at least confine, water disputes to manageable proportions.[111]

Yet, it also needs to be emphasized that genuine collaboration and equitable allocation are hard-won enterprises and function within the limits of domestic political workings and perceptions. Therefore, Ethiopia's 'long overdue' ambitions on the Blue Nile could not be expected to be fulfilled effortlessly. In such context, it suffices to reminisce of a perfectly fitting historical parallel – that it took six full-years of concentrated diplomacy and tempered negotiations – including a military confrontation in 1958 and a defiant unilateral heightening of the Sennar Dam,[112] before Sudan clutched a higher share of the Nile waters under the revised 1959 agreement (with Egypt).[113] Over the decades, the absolute interdependence which Egypt and Sudan had installed through the 1959 Nile treaty paved the way for greater cooperation in the sector –even when it operated against the background of tense geo-political relationships and conflicting socio-political orientations of both states.

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[111] A Dan Tarlock (2008), 'Water Security, Fear Mitigation and International Water Law', *31.3 Hamline Law Review*, p.712.

[112] Aron T. Wolf (1996), 'Middle East Water Conflicts and Directions for Conflict Resolution', Food, Agriculture and the Environment Discussion Paper, IFPRI, Washington D.C., p.4.

[113] In fact, the planning and some of the construction of the dam began before the two countries were able to reach an agreement over the division of the stored water in the High Dam. Only after a friendly government headed by Lt. General Ibrahim Abboud came to power were the two countries able to conclude a deal. Nurit Kliot (1994), *Water Resources and Conflicts in the Middle East*, Routledge, New York p.41.

Ethiopia's fate would not be any different. The hydro-political relationship between Egypt, Sudan and Ethiopia may escalate or deescalate depending on several factors that affect the contents and direction of domestic water use policies. But there is no doubt that the new facts on the ground have forced the states into a new form of collaboration which functions within the confines of restructured conceptions of entitlement and the realities of power relations.

The developments in the cooperative initiatives and the negotiations on the GERD, now pursued between 'fairly equal partners', are not attributed to *changes* in the pertinence of international law *per se* nor to any *altruistic revision* in downstream positions. The moves are strategic choices and are better accounted by reference to Ethiopia's relative rise in its bargaining position-which itself is a coefficient of economic and political powers one wields.

It is evident that a mere hegemonic approach to political processes on shared waters is counter-productive, and affects the sincerity and sustainability of cooperation in a basin. While the long-term cooperative development of international water resources often presents the greatest challenge to policy-makers,[114] at this stage in the dialogues, Egypt, Ethiopia and Sudan have no other option than partnership. Or else, the ill-effects of unilateralism and competition will ensue in full force. Through concerted diplomacy and institutional mechanisms, the states must labour on assuring each other that the GERD, and even more so, the Nile would not become causes of tension, mistrust and even conflict. Indeed, Ethiopia's equitable actions in relation to the Nile should not be viewed as a conflicting strategic course of a zero-sum game in reference to its downstream neighbors in which one's gain represents absolute loss to the other party. ■

[114] Adelphi Series (1992), *supra* note 7, p.7.

COMMENT

Brief Comment on the Draft Land Administration, Use, Registration and Plan Proclamation, 2007 (EC)

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The draft 'Land Administration, Use, Registration and Plan Proclamation (2007 EC)' has been in circulation for a while now. One of the prime objectives of the draft law is to address various counterproductive restrictions in the current federal land proclamation. According to its preamble, the draft aspires to expand the rights of land users. The notion of 'expanding rights' presupposes the existence of restrictions and prohibitions in the existing law attributable to narrow conception of rights.

The objective of lifting restrictions is a rights approach. This evokes the question whether the draft law alleviates (or lifts) all restrictions. The draft proclamation has many strong points. It lifts various restrictions of the existing law, especially on the transfer of land rights. However, the restrictions and prohibitions of the federal land proclamation are still embodied in various regional laws thereby necessitating further improvements which are highlighted below.

The title of the proclamation 'Land Administration, Use, Registration and Plan Proclamation, 2007 (EC)' is cumbersome and very long. The current proclamation's title, i.e., 'Land Administration and Use Proclamation' is rather more befitting, and can be used for the draft as well. The supplementary words, i.e., 'registration' and 'plan', are tasks that can be subsumed under the heading 'rural land administration and use'.

With regard to the content of the draft, the issues that need attention include the expansion of land use rights, land registration, pastoral land, land use plan, conflict resolution, sharecropping, and scope of application.

1. Expansion of Land Use Rights

The central idea of the draft proclamation can be observed from the preamble. It states that the new law is meant to expand the land use rights of peasants and

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pastoralists. In this regard, the commendable moves of the draft and its shortcomings are the following:

The draft attempts to increase transferability of the land rights by, among others, lifting some limitations of the law on transfer of land rights.[1] The rights include the right to rent, mortgage, inherit, and donate. But, these rights are still burdened with restrictions: including, the limitation on minimum size to be rented and duration of rent. These rules will be substantiated by future regional laws that will provide the particulars.[2] The framework legislation suggests for the insertion of limitations in terms of size and duration through regional laws. The challenge lies on how the regions would understand these limitations. Unless these restrictions of the law are *entirely lifted,* the whole idea of creating land rental market (or increasing transfer of land rights within the constraints of the FDRE constitution) would be futile.

The right to rent one's landholding should not be limited by size and time because the enhancement of credit access and modernizing agriculture and productivity should be encouraged. Such measures are appropriate because they allow and even encourage land consolidation.[3] The state must rather *provide subsidies or other incentives* to encourage the consolidation of farms plots *toward larger plots* – a minimum of one hectare and more. Although the word 'incentives' is mentioned in the draft law, it requires definitions and elaborations, perhaps along with the concept of subsidy.

It is commendable that the draft allows mortgage of use rights[4]. This envisages financial institutions (with due attention to land based loans). However, the draft embodies limitations on rental markets, which should have been encouraged to ensure the development of land markets and credit access. The unlimited rights to rent granted to minors and the elderly is appreciable.

It is to be noted that *high value lands* (irrigable land, pre-urban land and cash crops' land) have already entered into *informal land markets*. Legalizing the land market (perhaps rental markets) for these lands is beneficial to the state and the public at large. The modalities of transfer can, for example, be under a lease system or unlimited rental rights.

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[1] Article 9-16 of the draft- mentions these improvements (amendments) of the current law;these provisions talks about the rights of rural land holders, especially in terms of use rights, transferring use rights and the right to jointly develop the land with investors.

[2] Article 10 of the draft proclamation gives power to regions to limit such rights in terms of size and duration.

[3] Article 17 and 18 of the draft proclamation states the right to exchange plots and consolidate farms, and the possibility of getting incentives to do so with purpose to forge better shaped and larger farms.

[4] Article 16 of the draft proclamation mentions about the right to mortgage use rights yet with hosts of limitations as well.

2. Land registration

Registration of land is currently underway. Yet updating land registration[5] is a major concern in the event of death, transfer, etc. Moreover there is lack of a clear legal regime and institutional framework for the registration of community land and government land. Parcel based 2nd level registration is meant to avoid many problems related to first level registration, among others problems related to concealed holdings and it facilitates updating land information. Even though it is way expensive, Ethiopia can benefit from a selective approach. The first priority can be given to land which is already identified by 'informal land markets' because these lands could be immediately moved to rental markets or lease systems. High value lands such as irrigable land, pre-urban areas, and cash crop areas fall under this category. The following deserve due attention in the draft law:

a) The draft has clearly provided for institutions which could do the updating and registration of community land and government land. However, duplication of offices must be avoided.
b) The draft is still silent on the registration of home and garden of the farmers and how these holdings can be transferred, compensated and valued where necessary.
c) The registration and thereby the certification of land use rights is meaningless unless it promotes rental rights and land markets. This can be done without the need for constitutional amendment, if the limitations in the law are lifted.[6] Thus, second level registration must be accompanied by free transfer of land rights.
d) In view of the land shortage which is a chronic problem already, rental markets and substantial enhancement of productivity are indispensable. Moreover, there is the need to encourage other economic activities such as agro-based manufacturing. Rental markets can, for example, transfer community lands (especially in the pastoral areas) to youth associations who want to venture to agriculture, while the revenue from rent can be used by the community. This requires detailed directives from the relevant organs.
e) It is also encouraging that community land is kept out of the ambit of distribution and redistribution by the draft law which is one of the weakness (Achilles- heel) in the current land legislations and polices.

[5] Chapter 3 of the draft proclamation regulates registration of rural land, article 1 and 2 of this chapter.

[6] Refer to a book written by the commenter entitled, 'transfer of land rights in Ethiopia: towards a sustainable policy framework', Published in 2015 by Eleven international Publishing- interested person can email the author for the e-copy of the book.

3. Pastoral land

The draft provisions concerning pastoral land [7] are encouraging and the pastoral society is independently mentioned. Pastoralists deserve to be treated having regard to their custom and way of life. To this end, land registration in pastoral society must aid their way of life. Indigenous knowledge must be protected and any intervention should be preceded by careful scientific study. The certification must also ensure various positive aspects of customary pastoral land use and it should encourage its further use.

The certification must ensure compensation for any encroachment. The compensation payments can be used by the pastoral community which is directly affected based on benefit sharing schemes which must be worked out. Regions can be encouraged to enact separate legislation for postural communities under their jurisdictions. Private holdings under pastoral communities should also be treated as private holdings in non-pastoral communities.

4. Land use plan

The draft aspires to promote land use plan which reduces farmlands, especially in the highlands with a concentrated population and wrong agricultural practices. Hence, (i) hill-side farming is expected to discontinue when the land use plan is implemented; (ii) the prohibition of hill-side farming creates more land shortage, and it must be accompanied by vibrant land rental markets which can counterbalance the land shortages through enhanced transferability, consolidation and productivity of prime agricultural land; (iii) other incentives need to be explored and implemented towards creating hill and mountain based businesses, such as tourism, timber (i.e. private and community forests along with regulated harvesting) and forage production.

5. Conflict Resolution and disputes on land [8]

Nearly half of the court litigations in Ethiopia involve land related disputes. The draft duly encourages amicable land dispute resolution outside the Rural Land Administration Committee (RLAC) which operates in a court-alike fashion. RLAC and its role need to be carefully spelt out in a manner that would avoid corruption and right violations if it is to be included in the new legal framework. The *Woreda* court is first instance court, and it is advisable to have land benches at *this* level, and continuous training should be provided to judges involved in land dispute matters.

[7] Chapter 7 of the draft proclamation is dedicated to the rights of pastoral society with respect to land.

[8] Chapter 8 of the draft proclamation regulates the nature of dispute resolution with respect to land.

It is commendable that *locus standi* is widened in the protection of land rights with regard to women and children. It is also helpful to include free legal aid in the draft law that can be provided by anyone interested (including NGOs and Universities).

6. Sharecropping [9]

The draft law ventures to regulate sharecropping. The challenge in this regard can be whether a formal legal regime (that goes beyond providing general principles and standards) can be as effective as traditional systems. Matters of sharecropping can thus be left to the traditional systems and the law can merely afford recognition to the culture as far as it does not conflict with basic tents of the law. Sharecropping is an ancient custom which functions well without even state interventions.

7. Scope of application

According to Article 6 of the Draft Proclamation, reference is made to persons '…mainly engaged in agriculture for livelihood'. The word 'mainly' is employed to make reference to those who have rural land use rights. The ambiguity lies in whether it includes low income government employees, petty traders and laborers, etc. who are somehow directly or indirectly involved in agricultural activities. Thus there is the need for clarity and specific reference to the persons without using ambiguous words such as 'mainly.' In other words, there should be specific standards which clearly identify the persons who come under the Draft Proclamation. Otherwise, vague provisions create problems in lieu of the solutions they purport to bring about.

Conclusion

The draft law is still in circulation (i.e., it is constantly changing) and it is being debated on. It is advisable to invite further discussions on the law and include views from different stakeholders. It is also essential to harmonize the law with other Ethiopian laws and pursuits, particularly in the realms of human rights (economic rights among others), environmental protection, indigenous knowledge protection and sustainable development.

However, such discourse should not prolong the timeline for the enactment of the draft law because it is long overdue. Ethiopia's pursuits of sustainable development and its aspirations to enhance the livelihoods of the rural population call for the enactment of the draft law as soon as possible with all sensible comments addressed, especially comments that expand the scope and transferability of land users rights. ■

[9] See chapter 2, article 14 of the draft which requires registration of such contracts and more.