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Editorial

It is with a great pleasure that we announce the launching of the first issue of Hawassa University Journal of Law (HUJL) which will contribute to fostering legal scholarship in Ethiopia. HUJL aims to encourage research and debate on different legal policies and issues by providing a platform for academia researchers, and practitioners to publish and share their research findings. HUJL focuses problem-solving research outputs on issues that directly or indirectly concern the country. Furthermore, the Journal has a vision to make Hawassa University School of Law at the forefront of legal research in Ethiopia.

In this regard, we are highly inspired by the energy displayed by the academia who have submitted scores of contributions for this very first issue. The motivation presents a great opportunity to keep the momentum and deserves our unreserved appreciation. On the other hand, we have seen some law journals struggling to keep going, some failed to continue after volume-1-number-1. Thus, the responsibility to ensure the continuity of HUJL should be shared by all of us — legal researchers, scholars, professionals and other stakeholders.

I also would like to take this opportunity to extend my heartfelt gratitude to all who have given us moral support and advice at this historic moment. We have received unwavering support from Dr. Tesfaye Abebe, Vice President for Research and Technology Transfer of Hawassa University, Mr. Edilu Shona, Dean of College of Law and Governance, Mr. Yidneckachew Ayele, Head of the School of Law and our academic staff to see our dream come true. Finally, I call upon everyone engaged in legal research to join our effort by submitting contributions for our future issues.

Tadesse Melaku, Assistant Prof.
Editor-in-Chief

The Developmental State and Ethnic Federalism in Ethiopia: Issues to Worry About

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Abstract

Ethiopia's "invention" of ethnic-based federalism had been the center for academic and political debates for the past two decades. In spite of all the criticism and skepticism, the Ethiopian government claims it is committed to fully realize the constitutional dictates to maintain fundamental values that any federal system should exhibit. Particularly, it has been expressing its dedication to preserve the pillars of the federal system including self-administration (self-rule) of the diverse ethnic groups and their representation at central decision-making (shared-rule). Nevertheless, shifts in the political economy narratives of the government posed serious challenges on the fate of the "ethnic federalism" in Ethiopia. Hence, the recent move to the developmental state (DS) has overlooked the federal principles as the extensive measures of "developmentalism" were taken at the cost of ethnonational interests of self-determination. The article is, therefore, aimed at scrutinizing the drawbacks of the developmental paradigm in accommodating the fundamental values of the federal system. Commenting on the existing challenges, this article further contends that it is possible to realize the utopian vision of building DS without eroding the constitutional guarantees of self-determination and subnational autonomy.

Key terms: Developmental State, Ethnic Federalism, Self-determination, Democracy, Ethiopia

Introduction

Though the history of ancient Ethiopia traces its roots back to the Axumite civilization, its modern history begins around the 1850s. Since then, the Ethiopian history has witnessed various ambitious attempts of building a 'civilized and

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unified Ethiopian Empire'. Particularly, the rise of a highly-centralized unitary state during the reign of Emperor Haile Selassie I (1930 – 74), by making an end to the relative autonomy of the kingdoms and revocation of the powers of regional rulers thereof, had contributed to the state crisis. Being the result of the incorporation and assimilation of various ethnic groups in the empire accompanied by the comprehensive measures of assimilation, the state crisis has been manifested in the continuing debates among academicians and politicians.

After a long lasting civil war, the Addis Ababa Conference was held among various groups of freedom fighters from July 1-5, 1991. Since the Transitional Charter was signed at the Conference, one could say it marked a new era in the Ethiopian history of state restructuring. The *de facto* federalism introduced during the Transitional Period[1] was later reaffirmed by the Federal Democratic Republic of Ethiopia Constitution that marked a federal system (*de jure* federalism) in 1995.[2]

The post-1991 extensive measures of state restructuring had brought the federal arrangement in Ethiopia, perhaps for the first time after the failed the Ethio-Eritrean federal arrangement of 1952-62. Ever since its conception, the Ethiopian ethnic-based federalism[3] , however, has been a center for academic and political debates. These debates have resulted in diametrically opposite perceptions about the system whereby some scholars and/or politicians romanticize it as the solution for the entire problems of the Country, while others blame the system for most, if not all, political problems. Many agree, however, federalism was rather the best, if

[1] Even though the word federalism was not explicitly mentioned, the Transitional Charter and Proclamation no. 7/1992 have encompassed the basic tenets of a federal arrangement including decentralization and subnational autonomy together with the right to self-determination of ethnonational groups. (See, Transitional Period Charter of Ethiopia, Proclamation No. 1/ 1991; *Proclamation to Provide for the Establishment of National/Regional Self-Governments*, Procla. No. 7/1992).

[2] Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995 (hereinafter, the FDRE Constitution).

[3] Some prefer to call it multinational federalism, ethno-national federalism or simply ethnic federalism.

not the only, option of the time that was implemented for the survival of Ethiopia through striking the balance between the forces of unity and that of diversity.[4]

Similarly, Ethiopia has witnessed various ambitious efforts that were taken towards restructuring the economy so as to develop the Country. Most, if not all, of these measures were taken in terms of finding some model in the already developed world as a benchmark, which can be considered as the "politics of emulation".[5] The recent move towards building the DS of Ethiopia is not an exception to this as the government has been publicly declaring it has transplanted the Asian model of developmentalism.

1. Salient Features of the Ethiopian Ethnic Federalism

1.1 Federalism: A Brief Note

Around the mid-20th century the world has witnessed the emergence of many federal systems in Europe, Asia, Africa and the Caribbean. Though most of these federal arrangements were dissolved between the 1960's to the1980's, there was another wave of adopting federal systems in the 1990s.[6]

A federal arrangement necessitates the existence of two (or more) tires of the government exercising shared-rule (at the central government) and self-rule (subnational autonomy).[7] Hence, the constituent units in a federal system should be represented at the federal government structure so that they can participate in and influence national policies and legislations. At the same time, subnational governments should enjoy genuine autonomy in administering themselves.

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[4] Assefa Fiseha, *Federalism and Accommodation of Diversity in Ethiopia: A Comparative Study*, (Revised Edition, Wolf Legal Publishers, Nijmegen 2007); Fasil Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect* (The Red Sea Press, New Jersey 1997).
[5] Christopher Clapham, 'Ethiopian Development: The Politics of Emulation' in *Commonwealth and Comparative Politics* (vol. 44, no. 1, 2006), p. 109.
[6] Ronald Watts, *Comparing Federal Systems* (3rded., McGill-Queen's University Press 2008), p.4.
[7] Ibid, p. 8.

Traditionally, federalism was perceived as one form of decentralization despite the significant differences between these two concepts. Most importantly, decentralization, irrespective of its form, principally entails decisions of central governments, which is different from constitutional stipulations that forms and regulates any federal system.

In spite of variations with respect to degree of decentralization, form of governments or systems of amendment, all of the federal systems have common characteristics. Hence, the primary common feature of federations is the existence of a supreme and rigid constitution, which establishes two or more layers of the government whereby bestowing the constituent relative autonomy in managing their affairs. This makes federalism different from decentralization, which implies the existence of direct or indirect supervisions and controls of the center. A constitutional allocation of legislative, executive and revenue powers for different tires of government accompanied by an umpire that is in charge of resolving disputes among these layers of governments is also another feature of a federal system. Finally, a federal arrangement urges for the existence of systems and institutional arrangements that enable subnational governments represented at the central government as well as facilitate intergovernmental relations.[8]

1.2 Ethnic-Based Federalism in Ethiopia

The conventional perception of ethnic-based (ethno-national) federalism is the establishment of at least some of the constituent units based on ethnic enclaves. The member states of the federation, thus, become the "homelands controlled by their respective ethno-nationalist groups".[9] In other words, the primary focus of ethnonational federations is to organize ethnic-based constituent units as

[8] Ibid, p. 9; George Anderson, *Federalism: An Introduction* (Oxford University Press, Toronto, 2008), pp. 3-4.

[9] Assefa Fiseha, 'Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet' in *Regional and Federal Studies* (vol. 22, no. 4, 2012), p. 442, <http://www.dx.doi.org/10.1080/13597566.2012.709502> accessed 11 October 2012.

manifestation of self-rule and local autonomy. Ethno-national groups are, thus, bestowed with the right to self-administration as well as the opportunities to influence central policies, together with a guarantee against policies of assimilation or exclusion.[10]

Considering the "ethnic factor" as a fundamental aspect of its organization, the Ethiopian federalism is treated as a pioneer in Africa, if not in the world.[11] As an ethno-national federalism (ethnic- federalism), majority of the regional states, i.e. six of the nine states,[12] were established as the "homelands" of the major ethno-nationalist groups. Besides, these regions are named after the dominant ethnic group/s in the region. The Tigray, Afar, Amhara, Oromo and Somali States are named after the ethnic group that has majority in the respective regional state, whereas the Benshangul-Gumuz regional state is numerically dominated by the Berta and Gumuz ethnic groups.

One of the communal features of ethnic federalism is ensuring access for ethno-nationalist groups to participate in the federation's politics at the demise of the traditional perception of 'nation-state ideology'.[13] This could be manifested in various ways including the recognition of their rights to manifest, practice and develop the group's language and culture. By doing so, ethno-national federations strive to strike the balance between unity and diversity. This could be equated with

[10] Ibid, pp. 443 - 444.
[11] David Turton states that it is a novel idea that existed almost nowhere in the world, which makes Ethiopia the first to experiment it before 'almost any state worldwide.' See, 'Introduction', in David Turton (ed.) *Ethnic Federalism, the Ethiopian Experience in Comparative Perspective*, (James Gurrey 2006), p. 1. However, there are others who claim that there were socialist federations, which had employed ethnic-based federalism in the past. See, Alem Habtu, 'Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution' in *Publius* (vol. 35, no. 2, 2005), pp. 313-335 <http://www.jstor.org/stable/4624714> accessed 20 April 2011.
[12] Some might not include Harari Regional State from this list taking into consideration the fact that the State is not the homeland of a "major" ethnic group since the region is named after Harari (who are numerically a minority in the state).
[13] Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity*, (Oxford University Press, Oxford 2007), pp. 65– 66; Assefa, *Ethiopia's Experiment*, fn 11, p. 444.

the classical theory of shared rule vs. self-rule, which is the basic tenet of federalism.

Recognizing and acknowledging the historical oppression and injustice, the FDRE Constitution has recognized and celebrated its "owners".[14] It is known that Nation, Nationalities and Peoples (NNPs) are the pillars and founding blocks of the Ethiopian federal system, on which the sovereignty resides.[15] The Constitution further acknowledged both internal and external forms of self-determinations including the recognition of their rights to organize, and to be proportionally represented at subnational or sub-regional entities, as well as the "unconditional" right of secession, the most extreme form of self-determination.[16]

The next feature of ethno-nationalist federations is the necessity of having procedures and institutional set-ups for shared rule, whereby the Second Chamber is the usual form of institution that enables constituent units to participate in processes of decision making at the center. The rationale behind this is to allow States to influence central policies (shared rule), which is a prerequisite for any working federal system apart from subnational autonomy.

The FDRE Constitution has established an upper house, i.e. the House of Federation, which has nominal role in decision making at the center. In principle, and exceptional to other federations, the House does not participate in the federal law-making process, nor has the power of veto.[17] The House is a political and

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[14] Unlike many other constitutions of the world, the preamble to the FDRE Constitution begins with "We, the Nations, Nationalities and Peoples..." whereby making ethnic communities the "makers" and "owners" of the Constitution.

[15] See, the preamble, together with Arts 8, 39, 47, 93, of the FDRE Constitution.

[16] FDRE Constitution, fn 2, Arts 39(2)(3), 46, 39(5).

[17] An exception to this exceptional feature of the House is its power of constitutional interpretation through which it can declare a law made by the lower house invalid, which can be understood as the *power of veto*. Besides, it has the power to "determine civil matters which require the enactment of laws by the House of Peoples' Representatives", which, together with its powers of determining revenue sharing from "joint Federal and State tax sources" and the preparation of federal grant formula, can be treated as part of its exceptional legislative powers. (See Arts 67(1) (7) (8), 83 and 84 of the FDRE Constitution as well as Proclamation No. 251/2001).

quasi-judicial organ that hardly ensures the representation and influence of the constituent units at the national decision-making process. Thus, the Ethiopian federal system lacks one of the basic features of ethno-national or other federal systems, i.e. institutional set up that guarantees the role of subnational governments in influencing the national policies and legislations.

2. The Developmental State of Ethiopia

2.1 The Developmental State: Meaning and Features

Since the Developmental State (DS) paradigm is an emerging scholarship, most researches attempt to come up with 'universal definition' of the concept from the East Asian experience. Because of this, it appears to be such a hard task to provide a clear-cut and universally agreed designation for the notion, as there are various points of disparities among the existing scholarly works.

Significant variation among the existing works on the area aside, most, if not all mentioned the ideological and structural components of the developmental state. In light of the ideology-structural nexus, a developmental state could be discerned as, '[a] state that *puts economic development as the top priority* of governmental policy and is *able to design effective instruments* to promote such a goal'[emphasis added].[18]

Generally, it is possible to say that a DS is a state that has both the ideological orientation and the capacity (state structure) to realize its visions through long-term plans. The ideological element is related with the government's firm stand on making economic development its prior mission and top agendum, whereas state structure is associated with the institutional and administrative capacities required to implement plans and policies.

[18]Amiya Bagchi, 'The Past and the Future of the Developmental State' in *Journal of World-Systems Research* (VI, 2, 2000), p. 398.

Therefore, developmental orientation is the primary distinguishing feature of developmental states so that economic development is prioritized above all other policies. Developmental ideology usually emanates from the consensus of the ruling elites for the sake of political survival or legitimacy since the ability to attain economic growth is conceived as the primary source of legitimacy of power.[19]Particularly economic growth is a top priority and to achieve this goal, the state should not be regulatory or welfare state, but a "developmental" state.[20]

In the developmental states, industrial policies take the first place or have the priority at the national level. Treating it as a vital means to achieve overall economic growth, industrial policy takes precedence over, if not at the cost of, other policy objectives such as foreign policy, income redistribution/welfare.[21]

A mere ideological orientation, nevertheless, could not make a state developmental unless it has the capacity to implement its policy objectives. Perhaps state-structure appears to be the crucial factor that determines the success or failure of developmental states as it is the ability to mobilize the nation which matters more than its economic policy.

State structure is synonymous with "state capacity", which comprises the ability of a state in prioritizing, policymaking and planning and as well as its capacity to mobilize resources towards national goals.[22] Thus, the concept is attached to the political, administrative and economic capacities of the state in effective implementation of developmental policies and priorities.

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[19] Charity Musamba, 'The Developmental State Concept and its Relevance for Africa' in Peter Meyns and Charity Musamba (eds.) *The Developmental State in Africa Problems and Prospects, Institute for Development and Peace,* (University of Duisburg-Essen INEF-Report, 101/2010), p. 12.

[20] Chalmers Johnson, *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975,* (Stanford University Press, Stanford 1982), p. 306.

[21] Ibid.

[22]Richard Doner, Bryan Ritchie and Dan Slater, 'Systemic Vulnerability and the Origins of Developmental States: Northeast and Southeast Asia in Comparative Perspective', International Organization, 59:2, 2005), pp. 337-338.

A strong state requires a strong and autonomous bureaucracy, which is one of the communal features of developmental states. Underscoring the nature and function of the bureaucracy in a DS, John Evans has come up with the notion of "embedded autonomy".[23] The idea of embedded autonomy is composed of twofold concepts; embedment and autonomy. Hence, it was sought to counter balance these two distinct interests in any developmental state: the need for establishing strong collaboration and cooperation with the private sector, i.e. embedment, in the one hand and the fear to be captured or manipulated by powerful interest groups, or bureaucratic autonomy.[24]

2.2 On Roads to the Developmental State of Ethiopia (Since 2001)

Some scholars believe the DS theory is a recent phenomenon in the Ethiopian politics and economy, which was one of the aftermaths of the 2005 popular election.[25] Contrary to this scholarly argument, documents prepared by the government and/or the ruling party invoke that the paradigm the state should follow as its developmental theory was one of the reasons for the TPLF's[26] split in 2001.[27] According to these documents, the conception of the DS paradigm dates back to the late 90s though the paradigm is fully articulated around 2000 and 2001.[28]

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[23] Peter Evans, 'Predatory, Developmental, and Other Apparatuses: A Comparative Political Economy Perspective on the Third World State' in *Sociological Forum*, (vol. 4, no. 4, 1989), pp. 561-587.

[24] Ibid, p. 568.

[25]Messay Kebede, 'Meles Zenawi's Political Dilemma and the Developmental State: Dead-Ends and Exit', in Geza Hayet (comp.), *Debate on the Developmental State by Ethiopian Scholars*, (2011), <http://www.hayet11.blogspot.com> accessed 11 May 2013

[26] TPLF (Tigray People's Liberation Front) is one of the members of the ruling coalition – EPRDF (Ethiopian People's Revolutionary Democratic Front)

[27] Speech by Meles Zenawi for the Africa Task Force, Brooks World Poverty Institute, Manchester University, UK 3rd to 4th August 2006.
<http://ethioembassy.org.uk/Archive/Prime%20Minister%20Meles%20Afica%20Task%20Force%20speech.htm> accessed 10 April 2015

[28]Ibid.

It is indisputable, however, that there were a number of policy documents that have direct implications on the developmental paradigm, earlier than it was declared publicly. These documents issued by the government or at party level had extensively covered the desired economic growth of the nation as well as the necessity of different forms of state activism and selective intervention including setting priorities, infrastructure development and through building cooperation with investors.[29]

These official documents of the government, published by the federal Ministry of Information, could be relevant in the study of both the developmental paradigm of the country as well as the federal-state relations since the year 2001. It could be easily witnessed that the lion's share was taken by policies covering a number of social and economic affairs, particularly those alleged to have direct impacts on realization of economic development, which is frequently mentioned as the priority of the Country.

Declaring economic growth is a top priority, most of these documents emphasized on the commitment of the government in the realization of national economic development (developmentalism).[30] Similarly, the vital role of the government in guiding industrial transformation and its leading role in overall development of the country is discussed in the policy documents. Particularly, the need for working in cooperation with the private sector while at the same time, preserving bureaucratic autonomy (embedded autonomy) is one of the concepts that is frequently mentioned.

Though the government has frequently argued the flawlessness of the developmental paradigm and praising it for the rapid economic growth of the country, the DS of Ethiopia is still an underlying theme in political and academic

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[29] Ethiopian People's Revolutionary Democratic Front (EPRDF) Program (Addis Ababa 2001).
[30] Amiya Bagchi, *The Developmental State in History and in the Twentieth Century* (Regency publications, New Delhi 2004), p. 3.

debates. Among other things, the issue of democracy and human rights took a special place among the criticisms launched against the developmental ideology. On the other hand, there are skepticisms around the feasibility of building an effective developmental state in the country. Particularly, the challenges posed by the ethnic federalism are frequently mentioned as the crucial problem.

3. Ethnic Federalism vis-à-vis Developmental State in Ethiopia

3.1 The Developmental State Paradigm in a Federal Arrangement

While studying the pitfalls of the DS paradigm in the Ethiopian federal structure, analyzing the theoretical foundations and historical evidences behind the policies of state-restructuring (with the view of introducing federal arrangement) vis-à-vis measures of economic restructuring (towards an effective developmental state) is essential.

In principle, the developmental state paradigm seldom goes along with a federal arrangement. This assertion is backed by the theoretical arguments of scholars and the empirical evidences from India, Brazil, Malaysia and South Africa. First of all, the very essence of the developmental state paradigm is antithesis to the notion of federalism. Particularly, centralized and long-term national plans in a DS defeat the need for subnational decision making in a federation.[31] That is why the constitutional allocation of powers was too centralized in the "federal and developmental" states that helped for the existence of little or no possibility of having diversified policies, plans on legislations. For instance, socio-economic planning was allocated under the concurrent list with the overriding powers of the

[31]Govinda Rao, 'Fiscal Federalism in Planned Economies', in Ehtisham Ahmad and Giorgio Brosio (eds.), *Handbook of Fiscal Federalism* (Edward Elgar Publishing, Northampton 2006), p. 224.

federal government in the Indian Constitution, which eased centralization by the Union.[32]

Moreover, it is hardly possible to preserve subnational financial autonomy in over-centralized revenue collection and spending arrangements in developmental states. Lessons from the East Asian experience tell us how governments were employing various fiscal and regulatory tools to promote exports and attract foreign investments, as well as, to mobilize resources and capital around national priorities. Apart from setting national priorities as well as formulating national policies and plans, the nation should be capable to influence investment flows since the success of any DS hinges on its institutional ability to mobilize investments around national priorities.[33] However, this refutes the basic tenet of federalism, which necessitates the relative autonomy of subnational governments in policymaking and execution as well as collection and spending of revenue.

Finally, the absence of democracy and the prevalence of authoritarianism in developmental states make federalism impracticable. Particularly, the existence of dictatorial or undemocratic governments in some of these States had been a reason for erosion of constitutional stipulations in their respective eras of developmentalism. For instance, the era of the Brazilian DS (from 1964-1988) was accompanied by extensive recentralization measures of the military dictatorship government.[34] Similarly, because of the dominant party system whereby the Union and most of the states were controlled by the Congress Party, it was easy for the Indian federal government to take centralization measures. For instance, in the Indian federation (of 1950s to 70s), centralized planning as well as taking

[32] List III, *Seventh Schedule of the Constitution of Republic of India (*as modified on 1 December, 2007)

[33] Meredith Woo-Cumings, 'Introduction: Chalmers Johnson and the Politics of Nationalism and Development' in Meredith Woo-cumings (ed.), *The Developmental State* (Cornell University Press, Ithaca 1999), p. 11.

[34]See, José Castanhar, 'Fiscal Federalism in Brazil: Historical Trends Present Controversies and Future Challenges', in CongresoInternacional del CLAD sobre la Reforma del Estado y de la AdministraciónPública, (VIII, Panamá, 2003), p.3.

education to concurrent list (which was originally exclusive power of states), were achieved without any trouble from states.[35]

As it can be discerned from the above discussion on the experiences of other federal systems that are still developmental, or that had once tested the paradigm, it is difficult say it is "always possible" to realize an effective DS while, at the same time, preserving genuine federalism, or vice versa. In other words, the "centralized" federal arrangement had been the vital reason for their success as developmental states. In addition, a move toward genuine federalism was a vital reason for the failure of many developmental states.[36]

It is indisputable that it is essential to look into the experiences of other "federal and developmental" states before delving into discussing the Ethiopian experiment. However, there is significant variation between the Ethiopian federal system and its counterparts with regard to nature of the challenges that the DS paradigm posed on the effective functioning of the federal systems. Unlike the Ethiopian federation, others did not, or do not, have ethnic-based federal structures, which is the main reason behind this disparity. Hence, the next section is devoted to deal with the pitfalls of the developmental state paradigm on the Ethiopian federalism, which are peculiar to its ethnic-based federal arrangement.

3.2 Ethnocracy v. Meritocracy

Meritocracy is one of the fundamental features of any developmental state that necessitates meritocratic and professional technocrats with long term carrier

[35]R. Srinivasan, 'Mission Accomplished: Centralization of State's Fiscal powers', pp. 7-11. <http://www.acadamia.edu/2432418/Centralization_in_Federal_India> accessed 2 November 2015

[36] For instance, the fact that the opposition started to control subnational governments since mid-1990s marked the birth of genuine federalism in India while the period was also the "beginning of the end" that dismantled the operating system of the Indian DS. (See, Bagchi, *The Developmental State*, fn 30, pp. 37-47.

plans.[37] Hence, the urge for highly skilled man power is not contested to build competent and autonomous bureaucracy so as to realize an effective developmental state. Ethnic-based bureaucracy *(ethnocracy),* on the other hand, exists when the way how the bureaucracy operates is influenced and shaped by ethnic affiliations. In such type of system, the recruitment or appointment as well as promotion of the members of the bureaucracy are solely dependent on ethnic belongingness.

In spite of the fact that Ethiopia needs to have meritocratic bureaucracy to build a working DS, the bureaucracy was highly *ethnocratic* by the time the developmental paradigm was adopted. While it was implemented, *ethnocracy* was intermingled with the principle of equitable representation of NNPs in the government machineries, which is a constitutional guarantee for the diverse groups in the federation. Hence, one of the debatable issues with regard to the challenges of building an effective developmental state in an ethnic federal arrangement of Ethiopia is the issue of striking the balance between meritocratic bureaucracy and proportional ethnic representation in the government institutions.

It is known that meritocratic bureaucracy is one of communal features of the developmental states of Asia. The bureaucracy should be meritocratic in such a way that it follows merit-based recruitment and selection as well as performance-based evaluations and promotions.[38] Johnson pointed out the contribution of merit-based recruitment and carrier paths for Japan's success where the civil service was built with the most talented graduates of top universities.[39] Meritocracy is not only the manifestation of a "strong state", which is a typical nature of any DS, but also it reassures bureaucratic autonomy from any kind of influence from interest groups.

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[37] Peter Evans, *Embedded Autonomy: States and Industrial Transformation*, (Princeton University Press, Princeton, 1995), p. 12.

[38] One of the factors for the collapse of the DS paradigm in Zaire during the time of Mobutu Sese Seko was the lack of meritocracy. It was "Predatory" or a failed developmental state since bureaucratic appointments were based on political affiliations and interpersonal connections. The same characterizes the post-WWII Brazilian developmentalism where the frequent source of jobs was political appointment that favors 'connection rather than competence.' See, Evans, *Predatory*, fn 23, p. 577.

[39] Ibid, p. 573.

On the other hand, ethnic federalism urges for the proportional representation of the ethnic groups at the federal or regional (as well as local) bureaucracy. For instance, article 39/3 of the FDRE Constitution has encompassed the guarantee for NNPs recognizing their right to proportional representations at the federal and regional administrations. Likewise, regional constitutions have provisions that are carbon-copies of that of the federal covenant. These guarantees are perceived as manifestations of "internal" self-determination or the right to self-administration, which is the cornerstone of the Ethiopian federal system.

Therefore, there is a need for accommodating these two interests of developmentalism and federalism whereby the bureaucracy shall be merit-based as well as representative. In other words, the bureaucracy should be meritocratic so that incumbents should be recruited and promoted through merit-based competitions. At the same time, it has to assure the equitable representation of the diverse ethnic groups in the federation.

When we look into the Ethiopian experiment, there was a tendency of *ethnocracy* at the early years of the federation, which was later ignored and replaced by *meritocracy* with the introduction of the DS paradigm. Hence, the criteria for selection and promotion of the members of the bureaucracy have been oscillating between ethnocracy and meritocracy during the pre-developmental era of Ethiopia (pre-2001) and after.

When we have a close look at these historical changes, the pre-developmental era of Ethiopia has witnessed extensive measures of self-determination, which was rather characterized by ethnocracy. Hence, there was a quota criterion of appointment, which is based on ethnic background and has been helping incompetent and inexperienced personnel occupy the offices at the cost of highly

qualified individuals.[40] Besides, the post 1995 Ethiopia regional governments were run by "indigenous" ethnic groups whereby individuals from the ethic group(s) were in charge of all the key political and administration posts. This was mainly because of the need for implementing the constitutional guarantees of the right of NNPs to self-rule. Sadly, these measures were not without problems since most of the officials lacked the necessary skill, knowledge and experience that the post need. Hence, in some of the States including Benshangul-Gumuz, Afar, and Gambella, there were many regional government officials who did not even attend a level of education above elementary school.[41] Putting aside the constitutional pledges, ethnic affiliation is allegedly the main, if not the only criterion in the actual practices of political and other key bureaucratic appointments.[42]

On its move to build an effective developmental state of Ethiopia, on the other hand, the government has issued a number of policy documents that have emphasized on the necessity of building a meritocratic bureaucracy.[43] In other words, these policy documents were manifestations of the government's commitment to build a DS in general, and its "obsession" on the idea of 'meritocracy' in particular. The Civil Service Reform document, for instance, argues that a claim for ethnic representation at regional civil services has nothing to do with the constitutional principle of self-determination (self-administration). It further stipulated that "as long as the community is able to elect the political

[40] Aklilu Abraham, 'Ethnicity and Dilemmas of State Making: Ethnic Federalism and Institutional Reforms in Ethiopia' in *The International Journal of Ethiopian Studies*, (vol. II, no.1&2, 2006), p. 109.

[41]Samuel Kenha Bonda, 'Impact of Ethnic Federalism in Building Developmental State of Ethiopia' (a master thesis presented at Institute of Social Studies, Netherlands 2011), p. 28.

[42]Berhanu Gutema Balcha, 'Restructuring State and Society: Ethnic Federalism in Ethiopia', (Aalborg University, Denmark 2007), p. 228.
<http://www.vbn.aau.dk/files/50021793/spirit_phd_series_8.pdf> accessed 17 May 2013

[43] See, *Rural and Agricultural Development Policies and Strategies*, (Ministry of Information, Addis Ababa 2001); *Capacity Building Strategies and Programs* (Ministry of Information, Addis Ababa 2002); *Issues of Building Democratic System in Ethiopia* (Ministry of Information, Addis Ababa 2002).

leadership, it is possible to say the right to self- determination is fully realized."[44] These kinds of perceptions by the government cast a dark cloud on the constitutional guarantee of Nations, Nationalities and Peoples to self-administration and equitable representation at the federal and regional civil services.

With the adoption of the DS paradigm, the government has started to put an emphasis on meritocracy, which is not a bad move by its own. However, the FDRE government can still be blamed for its moves towards meritocratic and strong bureaucracy while disregarding the constitutional dictates, and its commitments thereof. Hence, it has begun to build meritocratic bureaucracy while eroding the principle of "equitable representation" of NNPs.

Therefore, the Ethiopian experiment of federalism and developmentalism shows that the government has faced with difficulties in maintaining the balance between the urge for realizing the constitutional guarantee of self-determination (through equitable representation at the bureaucracy) and the need for establishing meritocratic and strong bureaucracy in a DS.

3.3 Recentralization and Subnational Autonomy

Changes in the global or domestic political economy have always affected the arrangements of financial decentralization in federations. The Great Depression of the early 20th C, for instance, had proved not only the collapse of laissez-fare State but also marked an end of an era of dual federalism.

It is known that a developmental state is "plan-rational", which makes centralized national economic planning a fundamental feature of developmental states.[45] The DS ideology also calls for centralized offices and institutional arrangements that

[44] Capacity Building Strategy and Programs (Ministry of Information, Addis Ababa 2002), (Amharic), pp. 212-13.
[45] Woo-Cumings, *Introduction*, fn 33, pp. 1-2.

are designed with the view of achieving nationwide uniformity of economic policies and priorities, together with coherences in their administration, as well. Strengthening this assertion, studies show developmental states in general are over-centralized.[46]

By the same token, Ethiopia is not new for formulation and implementation of middle and long-term plans.[47] However, the recent move of the government in establishing the national planning office at the federal executive was a manifestation of the contemporary developmental path, which formalized the existing practice.

Since the time when the DS paradigm was introduced, the prevalence of 'cohesive state' has existed in Ethiopia whereby the federal government has been aggressively centralizing expenditure and spending powers.[48] However, such measures of recentralization defeat the fundamental principles of federalism. Among which policy flexibility, which calls for diversified policies in a federation, could be mentioned here. In other words, the federal government's actions that are taken with the views of coherence and uniformity refute subnational governments' spending autonomy and policy flexibility.

For instance, the FDRE Constitution bestowed a considerable degree of autonomy for States to devise and implement development and socioeconomic policies and

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[46] Anwar Shah, 'Comparative Conclusions on Fiscal Federalism, Comparative Conclusions' in Anwar Shah (ed.), *The practice of Fiscal Federalism: Comparative Perspective* (McGill-Queen's University Press, Montreal 2007), pp. 371-74.

[47] It started with the *Sustainable Development and Poverty Reduction Program* (SDPRP) of 2002/03–2004/05, designed mainly for the realization of agricultural development and poverty reduction. Realizing the flaws of its predecessor, *A Plan for Accelerated and Sustained Development to End Poverty* (PASDEP) of 2005/06–2009/10, was designed with a broader scope. Upon the completion of the ambitious Growth and Transformation Plan (GTP) of 2010/11-2014/15, the Ethiopian government is now aggressively working on the Second Growth and Transformation Plan (GTP II) of 2015/16-2019/20.

[48] For a detailed discussion on the pitfalls of the developmental state paradigm on the revenue autonomy of regions of the Ethiopian federation see, Zemenu Yesigat, "Subnational Fiscal Autonomy in a Developmental State: The Case of Ethiopia." *Beijing Law Review* (7 42-50, 2016) <http://dx.doi.org/10.4236/blr.2016.71005> accessed 5 February 2017

plans.[49] Therefore, subnational governments have the power to formulate and execute regional socio-economic and developmental plans, policies and strategies. Nevertheless, a close look at the existing practice illustrates the tendency of recentralizing policy-related matters in the Ethiopian federal system. Rather, regional legislatives and executives had been simply adopting and implementing national socio-economic and developmental policies and strategies after being approved by the central committee of the ruling coalition.

Generally, the DS is characterized by a political economy of growth with the prevalence of "comprehensive economic development plans, long-term goals, and projections for the entire economy".[50] Thus, there will always be a danger of having too detailed national policy documents that might ultimately shrink the space for regional appreciation. This is what is currently happening in the Ethiopian federation where the Regional States are unable to be the workshops of local policies and programs. Contrary to Oates expectations in his theory of "laboratory federalism"[51], subnational governments of the Ethiopian federation are more like the laboratories of the federal government.

Conclusion: Towards Bridging the Gaps

Throughout its modern history, Ethiopia has witnessed different state and economic restructuring measures. The Ethiopian federal system, which was an offshoot of the post-1991 state restructuring, is best known for its special emphasis on the rights of ethnonational groups, also known as the Nations, Nationalities and Peoples (NNPs) of Ethiopia. Similarly, the recent move to the DS of Ethiopia can be considered as an extension to the continuous effort and ambitious quest for development by Ethiopian rulers.

[49] Art 52(2) (C) of FDRE Constitution.
[50]Eun Kim, 'Contradictions and Limits of a Developmental State: With Illustrations from the South Korean Case' in *Social Problems* (vol. 40, no. 2, 1993), p. 231.
[51] See Wallace Oates, 'An Essay on Fiscal Federalism: Federal Government Taxation' in *Journal of Economic Literature* (vol. 37 issue 3, 1999).

As it has been discussed above, Ethiopia has been experiencing the challenges of the developmental state paradigm on the effective functioning of the federal system. Some of these challenges, including authoritarian and cohesive state, are inherent to the developmental paradigm. The Ethiopian government has been declaring that it has envisioned a state that has significant variation with Asian developmental states, which is "democratic developmental state".[52] Albeit rhetoric, this assertion is directed towards addressing one of the crucial problems that emanate from adopting a DS paradigm in a federal system since federalism hardly survives in a State with authoritarian governments.

Nevertheless, there are still serious threats on the effective functioning of the federal system that are resulted from the "developmental" aspirations and extensive measures. Particularly, the Ethiopian government has been working for the realization of meritocratic bureaucracy while ignoring the constitutional dictates for the right of NNPs to have equitable representation in the bureaucracy. Besides, the contemporary recentralization measures of the government may help it succeed in realizing the DS of Ethiopia, but at the demise of subnational autonomy.

As it can be inferred from the measures taken by the government up on the adoption of the developmental state paradigm, there is a shift in its policy on the nature and features as well as the roles of the bureaucracy. While underlining its commitment for building a strong a merit-based bureaucracy, the Ethiopian government has, however, overlooked the necessity of realizing the equitable representation of NNPs. Recognizing historical marginalization and exclusion of many of the ethnic groups whereby they were denied of most of the public services including education, it is a paradox to ignore the necessity for proportional representation of diverse groups. Most importantly, this can be perceived as

[52] የተሃድሶው መስመርና የኢትዮጵያ ሕዳሴ (Amharic) (The Path of Renewal and the Ethiopian Renaissance) (Addis Ababa 2010).

'treating unequal groups equally', which is a typical form of inequality. How much meritocratic bureaucracy might be needed, it should not be pursued at the cost of the right to self-determination of NNPs.

It has to be noted that the idea of ethnic representation is not antagonistic to meritocratic bureaucracy. The government can build competent, strong and autonomous bureaucracy while at the same time ensuring the proportional representation of NNPs. In doing so, the government should aggressively engage on building the capacity of the disadvantaged groups and marginalized ethnic communities. If not, the idea of meritocracy might be devastative in a country where the previous systems were discriminatory that marginalized many ethnic groups, unless it is accompanied by education and capacity-building activities, as the Ethiopian Civil Service University has been doing.

The next issue to worry about is the new wave of recentralization in the Ethiopian federation. Wide-ranging recentralization measures were taken by the federal government with the view of building a strong and effective Developmental State of Ethiopia, However, these measures have downbeat impacts on the effective functioning of the Ethiopian federation in general and on subnational autonomy, in particular.

Particularly, the necessity of forming "plan-rational and cohesive state" and the need for mobilizing resources around national priorities has forced the Ethiopian government to take extensive financial and regulatory measures. Among these measures, recentralization of the revenue power and spending autonomy of regions as well as centralized policymaking and planning are undoubtedly essential for the success of the developmental paradigm. Nevertheless, these measures pose serious challenges on the federal system by eroding the constitutionally guaranteed autonomy of States.

There is still a possibility of executing the developmental agenda of the federal government without threatening regional autonomy. The federal government can realize this through devising systems and institutional setups for intergovernmental relations as well as by enabling States involve in the central decision-making process, including in the making of national plans, policies and strategies. Moreover, making sure that the national socio-economic and developmental plans are general frameworks that allow regions devise their respective plans and policies would be the best way to make States exercise their constitutionally guaranteed power of formulation and execution of socio-economic and developmental policies, strategies and plans.

Community-Based Rehabilitation of Offenders: An Overview of Probation and Parole in Ethiopia

Shewit Kahsay*

Abstract

States have nowadays realized that it is imperative to devise community based rehabilitation of offenders (probation and parole system) in dealing with offenders as most are now faced with the problem of recidivism and prison congestion. This article explores the gap between the theory and practice of probation and parole systems in Ethiopia based on primary sources, comparative insights and analysis of relevant laws. The article shows that while there are stipulated rules available in Ethiopia for release of offenders on probation and parole, these remain meaningless in the absence of organs meant to supervise parolees and probationers. It reveals the fact that the probation and parole systems have been a neglected area of criminal justice system in Ethiopia. It is noted that while the law allows for the use of probation, there is no adequate institutional facilities to implement it.

Key terms: *Community-Based Rehabilitation, Probation, Parole, Correctional treatment*

Introduction

In the past, all types of penalties were executed after they were imposed because execution is a natural step that comes after the imposition of criminal punishment.[1]But, nowadays, it is believed that at times the interest of justice may require resorting to different measures, that is, suspension instead of execution[2]. The principal justification behind suspension of penalties is the need to rehabilitate criminals. Different States have nowadays realized that it is imperative to devise

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[1]UN Office on Drugs and Crime, *Alternatives to Incarceration Criminal Custodial and Non-Custodial Measures* (Criminal Justice Assessment Toolkit, New York 2006), p.1.

[2]Penalties may be suspended after their execution has commenced and part thereof is served or before commencement of execution.

non-custodial measures in dealing with offenders as most legal systems are nowadays faced with the problem of recidivism and prison congestion.[3] Prison populations around the world are increasing, placing enormous financial burdens on governments. In the meantime, there is growing recognition that imprisonment does not achieve some of its most important stated objectives, as well as being harmful to offenders, to their families and in the long-term, to the community.[4]

The goal of rehabilitation is to address the underlying factors that led to criminal behavior and by so doing, reducing the likelihood of re-offending. However, it is precisely this objective that is generally not being met by imprisonment.[5] On the contrary, evidence shows that prisons are further pushing individuals to criminal behavior by leading to re-offending and a cycle of release and imprisonment. This does nothing to reduce overcrowding in prisons or to build safer communities.[6] Many states have now a recourse to one of non-custodial measures to community-based rehabilitation.[7]

Probation and parole play vital and unique roles in the criminal justice system. Through court advice, probation and parole programs engaged in community-based rehabilitation reduce both re-offending and the harm it causes. Research supports not only the overall effectiveness and value of community-based penalties but also how probation and parole officers can work more effectively to reduce crime in the

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[3]See, Doris Mackenzie, *Sentencing and Corrections in the 21st Century: Setting the Stage for the Future* (University of Maryland, 2001), p.19. < https://www.ncjrs.gov/pdffiles1/nij/189106-2.pdf > accessed on 16 June 2017

[4]UNDOC, Addressing the global prison crisis Strategy 2015-2017 <https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Strategy_on_Addressing_the_Global_Prison_Crisis.pdf> accessed on 16 June 2017

[5] Matt Loffmann and Faye Morten, *Investigating Alternatives to Imprisonment Within Council of Europe Member States*, (Quaker Council for European Affairs 2010), pp. 3-7.

[6]Matthew Demichele, *Probation and Parole's Growing Caseloads and Workload Allocation: Strategies for Managerial Decision Making* (The American Probation and Parole Association *2007*), pp.5-6.

[7]Penal Reform International, *The Probation and Parole System in Pakistan: Assessment and Recommendations for Reform* 2012, pp. 3-4.

community.[8] The fundamental roles of human relationships and social support remain central to their work.

Most Sub-Saharan Africa countries, including Ethiopia, have overcrowded prisons.[9] This is partly attributed to existing legislation and sentencing policies that overemphasize imprisonment as a major mode of punishment. In Ethiopia, community based rehabilitation of offenders has not yet received significant research. Existing research, is either limited in terms of perspective or scope. This has resulted in scarce literature, low practice and intervention on the area. Therefore, this article contributes as one of the baseline research and potentially serves as a guide to intervention. This amounts to the rationale for the researcher to study and contribute for the existing literature in the area of the research and this is conducted based on legislative analysis, particularly the Criminal Code of 2004 and analysis of relevant literature.

This article sets out to examine the community based rehabilitation of offenders and specifically gives an overview of probation and parole in Ethiopia. Accordingly, it is organized as follows. First, it provides preliminary notes on community based rehabilitation offenders. Next, it assesses the Ethiopian legal framework on probation and parole. It then deals with reflection on the legal and institutional frameworks relating to probation and parole in Ethiopia. Finally, it ends with concluding remarks.

[8]John Worrall and others, *Does Probation Work*? An Analysis of the Relationship between Caseloads and Crime Rates in California Counties (CICG Research Brief, California Institute for County Government 2001), p.1-4

[9]Andargachew Tesfaye, *The Crime Problem and its Correction* (vol. 2, Addis Ababa 2004), p. 321.

1. Philosophical and Theoretical Explanations of Community Based-Rehabilitation Offenders

1.1 Community-Based Rehabilitation of Offenders: The Concept

Community-based rehabilitation is a broad concept which includes different kinds of non-custodial or institutional programs for criminal offenders.[10] The objective of community based rehabilitation is to sanction and control criminals without confining them. This allows offenders to maintain existing contacts and establish new ones in the community.[11] Another objective of community-based corrections is community protection. Controlling offenders, while they remain in the community is an important objective aimed at protecting the society from further harm[12]. Community-based rehabilitation is a re-integrative philosophy of corrections. It is a court ordered period of correctional supervision in the community. There are various types of community based corrections. However, probation and parole are the concerns of this article.

1.2 Probation

The word 'probation' derives from the Latin *probare*, meaning to test or to prove.[13] Thus, a person on probation has his/her punishment suspended by the court on the understanding that he/she will try to reform; if not, further sanctions will be applied. The word has several definitions and all are closely related. Black's Law Dictionary defines it as: 'the sentence imposed for commission of crime whereby a convicted criminal offender is released into the community under the supervision

[10]Ibid, p. 295.
[11] This objective is also known as reintegration.
[12] Various control mechanisms may be applied to impose restriction on the offender's behavior condition like demands that offender to attend school, secure job and avoidance undesirable behaviors etc…
[13] Abubakri Yekini, *Probation as a Non-Custodial Measure in Nigeria: Making a Case for Adult Probation Service* (African Journal of Criminology and Justice Studies: AJCJS, vol.7, #s1 &2 2013), p.102. <https://papers.ssrn.com/sol3/Data_Integrity_Notice.cfm?abid=2370858> accessed 23 June 2017

of a probation officer in lieu of incarceration.'[14] The US Department of Correctional Services also defined it as: '…the procedure under which a defendant, against whom a judgment of conviction of a public offence has been or may be entered, is released by the court subject to supervision by a resident of this state or by the judicial district department of correctional services.'[15]

When we talk of sentencing, one thing that comes to our mind is the person found guilty of the violation of the criminal law. At this juncture, it is necessary to keep in mind that probation remains punishment. The whole idea of probation is to reabsorb the offender into the community for rehabilitation even while being punished for his crime. It is based on the belief that encouragement must be given to the criminal not only to be a law-abiding citizen but also to contribute to the development of the local community and society.[16] In this regard, they may be required to involve in different community service activities during this period.

It is safe to conclude, therefore, that probation means a sentencing option whereby the court pronounces judgment and imposes a sentence and then suspends execution of the sentence subject to the defendant's compliance with conditions set by the court as a requirement of the suspended sentence. The conceptual meanings of the combined definitions are similar. Probation is a way of dealing with offenders without imprisoning them; this means that the court releases a defendant found guilty of a crime without imprisonment subject to conditions imposed by the court. In terms of scope and content, probation is essentially a process or a procedural step taken in the course of administering criminal justice. Probation is not a right but a privilege. It is a status the judge may impose upon an offender who has been found guilty.

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[14] Henry Black (ed.), *Black's Law Dictionary* (6th edn., St. Paul, Minn, West Publishing Co. 1994), p. 1202.
[15] Andargachew, *The Crime Problem*, fn 9, p. 309.
[16] Malcolm Pearse, *The Effectiveness of Probation and Parole Supervision in New South Wales* (Judicial Officers Bulletin, v.24, no.7, 2012), pp.1-6.

In the U.S criminal justice system, after hearing the arguments of the prosecution and the defense, if the court feels the case is suited to probation, it then orders the probation officer to submit a Social Investigation Report (SIR) that includes information about the offender's character, antecedents, commission and nature of offence, home surroundings and other circumstances. The condition for release on probation is either issued as a special statute or incorporated in penal law. While giving the decision to release on probation, the court puts certain conditions to be complied by the convicted. However, whatever conditions are attached to probation must be reasonable.[17]

The first condition stipulated by the judge is not to commit crimes.[18] The judge may also set the conditions of probation under which convicted offenders must live. Probationers are subject to the conditions established by the court for the probation order, and any additional reasonable conditions, which the court, having regard to the circumstances of each case may impose to promote rehabilitation of the offenders or protection of the community. Conditions may include, but are not limited to, residence, abstention from drugs and alcohol, psychiatric therapy, counseling classes, non-possession of firearms, community services etc, and other matters the court, having regard to the peculiar circumstances of each case, considers necessary for preventing a repetition of the same offence or of the commission of other offences.[19] A court may direct an offender to attend a special program or to seek help for drug, alcohol or mental health problems as a condition of the probation order. Offenders may also be required to live at a probation hostel for part of the order if the sentencing judge feels they need a greater degree of supervision.[20]

[17]Andargachew, *The Crime Problem*, fn 9, p.311.
[18]Nathan James, *Offender Reentry: Correctional Statistics, Reintegration into the Community and Recidivism (*Congressional Research Service, 2015), pp.4-5.
[19] Ibid pp. 11-17.
[20] Ibid

Probation officers are assigned for this purpose to follow up on the conditions. On the other hand, the offender is also expected to see his or her probation officer regularly, aimed at making the offender take positive steps to avoid the folly of re-offending as to warrant revocation of probation. The probation officer or service may also refer offenders to other agencies for professional help with housing, employment, drug or alcohol problems or mental health needs. The probation officer has several mandates. They advise the offender, keep a record of their work and submit reports to the court when alleged violations occur. Furthermore, they coordinate their work with other social welfare agencies, which offer services of a corrective nature operating in the area to which they are assigned. In countries like the US, there is the wearing of a Global Positioning System (GPS)[21] apparatus as condition for probation so that it would be easy to keep track of the movement of probationers at any time.

However, probation may be revoked due to two main reasons.[22] A probationer can be removed from probation if she fails to observe the technical conditions of probation. This includes leaving the jurisdiction without permission and restricting from undesired behavior. If probation is revoked for a technical condition, the offender can be sent to prison for incarceration for the term for which he was initially sentenced. In case of the revocation for a new crime, the offender may have to serve for both the old and the new crime.

1.3 Parole

Probation and parole are used interchangeably. However, there exists a line of distinction between the two concepts. Parole is a conditional release and refers to the suspension of a penalty which is under execution subject to certain limitations

[21] —— *Probation and Parole: A Primer for Law Enforcement Officers* <http://www.theiacp.org/Portals/0/pdfs/Probation-and-Parole.pdf> pp. 4-6.
[22] Andargachew, *The Crime Problem*, fn 9, p. 312.

(conditions).[23] This implies that one's a person placed in a jail for the crime he has committed it does not mean that is the end of his/her everything. There is still a possibility to interrupt the enforcement of the penalty and release the prisoner on condition provided that certain requirements exist. The parolee is subject to future confinement for the unserved portion of the sentence in the event that he violates the provisions of parole.[24] Probation requires the offender to attend supervision programs instead of imprisonment. The distinguishing factor between probation and parole is that a probationer is not usually put in a correctional institution and does not serve any part of his sentence in such institution. On the other hand, parole is a release of an offender to serve the reminder of their sentence in the community. But, it is indisputable that probation and parole are two different non-custodial measures.

2. Probation and Parole Systems in Ethiopia

2.1 General Overview

Punishment is designed to meet one or more of the basic goals of the criminal justice system.[25] There is, however, disagreement on what these goals actually are. Generally speaking, retribution, deterrence, incapacitation, and rehabilitation are identified as some of them.[26] Regardless of the different justifications scholars offer to justify the use of punishment, reliance on any single principle is no more acceptable.[27] In Ethiopia, the Criminal Code of 2004 mentions deterrence,

[23]Penal Reform International, fn 7, p.12.
[24]Andargachew, *The Crime Problem*, fn 9, pp. 313-316.
[25]Dejene Girma, '*The Relevance of Hobbesian Principles of Punishment in Today's World in Light of the Ethiopian Criminal System'* in *Jimma University Journal of Law* (vol. 4 no. 1, 2012), pp. 35-62.
[26]Ibid
[27] Different kinds of argument logically require certain kinds of evidence: for example, arguments based on the effectiveness of rehabilitation require empirical evidence of the changes it produces in offending behavior whilst arguments based on the rights of offenders require demonstrations of consistency with generally accepted principles concerning human rights. Such demonstrations belong to a logically different category of evidence to which no amount of reconviction-counting could be relevant. This article, in identifying different kinds of justification advanced for rehabilitation, is also concerned with the kinds of evidence or argument logically required by each.

prevention, reformation and rehabilitation as the basic principles to justify punishment.[28] Those purposes are also available in provisions relating to different types of punishments.[29] The Code recognizes different forms of penalties. Thus, the court can use them, as may be appropriate, to serve the purposes the criminal law has in mind — the protection of society.[30] Probation and parole are recognized under the Ethiopian criminal justice system. Thus, the next part of the article attempts to assess the legal framework governing probation and parole in Ethiopia.

2.2 Appraisal of the Ethiopian Legal Framework on Probation and Parole

2.2.1 Probation

The Ethiopian Criminal Code recognizes the idea of probation whereby the court is given discretionary power to order probation having regard to all the circumstances of the case and if it believes that it will promote the reform and reinstatement of the criminal.[31] Though probation is not practiced[32], the 1957 penal code also provided

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(Peter Raynor and Gwen Robinson, *Why Help Offenders? Arguments for Rehabilitation as a Penal Strategy* (European Journal of Probation vol. 1, no. 1, 2009), P 3 – 20. These justifications are not primarily concerned with evidence (what *can* be done) but with the obligations and duties of individuals, societies or communities (what *ought* to be done). Understood in this way, probation services can be seen as not only central to the rehabilitation of offenders but also as playing a part in the development and maintenance of societies which prioritize human welfare and social inclusion. (Ibid.)

[28] See *Criminal Code of The Federal Democratic Republic of Ethiopia* (hereafter Criminal Code of Ethiopia), Proclamation No.414/2004, Art 1.

[29] Ibid, Arts 88,107,108 and 190.

[30] Of course, the legislator can establish this scale only in an abstract way; the law, because of its general application, cannot take into account all of the particular circumstance of individual offenders and giving the judiciary the discretion to decide which principle to use to fix the sentence of a particular criminal. For example, article 87 of the Criminal Code states, "[t]he penalties and measures provided by this Code must be applied in accordance with the spirit of this Code and so as to achieve the purpose it has in view (Art 1)." it is, is made by the judge. By individualization of the penalty , the judge, first, differentiates the particular offender from other offenders in personality, character, socio cultural background, the motivations of his crime, and his particular possibilities for reform or recidivism, and secondly ,determines which, among a range of punitive, corrective psychiatric and social measures, is best adapted to solve the special set of problems presented by that offender in such a way as materially to reduce the probability of his committing crime in the future.

[31] *Criminal Code of Ethiopia*, fn 28, Art 190.

[32] Andargachew, *The Crime Problem*, fn 9, pp.313-138.

the conditions under which offenders may be released on probation.[33] However the provision was not detailed enough to show all the necessary conditions that need to be imposed.[34]

The 2004 Criminal code has provided relatively detailed provisions regarding probation. This has provided conditions under which offenders may be released on probation. Probation is not extended to all types of offenders.[35] The personal profile, the needs of the offender and the type of offence are taken into consideration. Accordingly, the court may place a convicted criminal on probation if he\she has not been convicted previously, is not a danger to society, and when his\her crime is punishable with a fine, compulsory labor, or simple imprisonment for not more than three years.[36] Moreover, the convicted offender is required to enter into an undertaking to be of good conduct, to meet the conditions or rules of conduct attached to the probation, to repair the damage caused by the crime or to pay compensation to the injured person in order to be placed under probation.[37] Upon granting probation, the court shall place the offender under the supervision of a protector, guardian, or probation officer who shall keep in touch with the probationer and reports his situation.[38] When imposing a suspended sentence, the judge has considerable freedom in fixing the term of probation, usually, extending from 6 months to 5 years depending on the nature and seriousness of the crime committed. In determining the length of the probation, the court determines what period is most likely to provide maximum opportunity for the rehabilitation of the offender, to allow enough time to determine whether or not rehabilitation has been

[33] *Penal Code of the Empire of Ethiopia Proclamation 158/1957*, Art 202.
[34] *Ibid*, 207
[35]See, *Criminal Code of Ethiopia*, fn 28, Art 194 (1)(2) provided that the court may disallow probation where the offender has previously undergone a sentence of rigorous imprisonment or simple imprisonment exceeding three years and he\she is sentenced again to one of these penalties and where the criminal is sentenced to rigorous imprisonment exceeding five years for the crime he is now tried.
[36] Ibid. Art 191.
[37] Ibid. Art 197 and 198.
[38] Ibid. Art 199.

successful, and to protect the community from further crimes by the offender and others.

The offender is subject to different conditions.[39] Some of these conditions and the factors to be taken into consideration are stated in the Criminal Code: prohibiting the criminal from taking alcohol, consorting with certain people, not leaving a given place, and reporting to the appropriate authorities. Thus, if the criminal has to benefit from the suspension, he must observe these conditions if attached to his probation. Nonetheless, the court has a discretionary power to revoke the probation if the probationer infringes on one of the rules of conduct or conditions attached to it, or commits a new offense during the period of probation.[40] Revocation of the suspended sentence results in the execution of the sentence already pronounced. But, before the revocation is ordered, the court may warn him or impose fresh rules of conduct.[41] However, if the probationer persists with his misconduct or commits another offence, then the court shall suspend the sentence and impose the previous penalty or decide on another penalty if a new offence has been committed.[42] The Criminal Code provides that the court granting probation and parole,[43] if it is necessary, place the criminal under the supervision of a protector, guardian, probation officer or a charitable organization in general.[44] On the other hand, the protector or supervising officer is to keep in touch with the probationer; he may visit him at home or at his place of work, make arrangements for his leisure hours, give him guidance and facilitate to the best of his ability his readjustment in life and his reform.

[39] Ibid. 194(4).
[40] Ibid. Art 200.
[41] Ibid. Art 200 (1).
[42] Ibid. Para.1.
[43] Ibid. Art 199.
[44] See, Art 208.

2.2.2 Parole

The Ethiopian criminal law also recognizes parole whereby a prisoner is conditionally released before the completion of the term of imprisonment.[45] Parole may be granted by the court after receiving recommendations from prison administration and taking into consideration the behavioral reform of the criminal; this process helps the offender to early join and reintegrate with his\her families and the community. The Criminal Code in Art 202 states the requirements that must be fulfilled to allow parole which include: the prisoner has to serve two-thirds of a sentence of imprisonment or twenty years in case of life imprisonment; the prisoner or the management of the institution must submit a petition and recommendation respectively; the criminal must present tangible proof of behavioral reform during the period of imprisonment; the prisoner must repair or agree with the victim or his\her families to repair the harm caused; and that the character of the prisoner warrants the assumption that he\she will be of good conduct when released[46]and not be a recidivist.[47]

Similar to probation, parole is subject to certain conditions[48] the non-compliance of which may lead to the revocation of the parole. In that case, the prisoner is sent back to prison to serve the remainder of the sentence.[49] If a court permits the conditional release of the prisoner, it should fix the period for which the probation is to last. Normally, the period of probation should extend from two to five years. However, if the probationer is serving a sentence of life imprisonment, the period

[45] Ibid. Art 201.
[46] Ibid. Art 202.
[47] Ibid. Art 113 and 202.
[48] The rules of conduct expected from the parole are more or less the same as for probationer. According to Andargachew, the provision of rule of law was hardly used. No adult prisoners were released on supervised parole. However, on the basis of the prisons proclamation the granting of pardon and remissions to prisoners was widely practiced.
[49]See *Criminal Code of Ethiopia*, fn 28, Art 206.

shall extend from five to seven years.[50] Further, criteria are also provided in the Treatment of Federal Prisoners Council of Ministers Regulation.[51]

3.3 Some Reflections on Legal and Institutional Frameworks relating to probation and parole in Ethiopia

Theoretically, probation does exist under the Ethiopian law but only as far as the provisions of the Criminal Code relating to it apply. Though the Criminal Code provides the *organization* and the duties of the *probation commissions* and probation officers to be *regulated by law*,[52] there are no laws, procedures or operating guidelines developed to facilitate this. As it is clear from the article of the Criminal Code, the Ethiopian law clearly recognizes the need for separate organization which deals with probation. Even the status of the institution is indicated in the terminologies employed by this sub article: '*organization'* and the '*probation commissions'*. Nonetheless, despite these legal provisions, there is no organ established, to date, to supervise parolees and probationers.

As discussed above, the role of probation and parole officer is crucial. Probation officer has been assigned an important role in the whole process. For example, as discussed above in the US, probation officer prepares the SIR that includes information about an offender's character, the background, commission and nature of offence, home surroundings and other circumstances. SIRs are prepared to assist the courts to arrive at an appropriate decision. Likewise, in Ethiopia, if the court believed that previous enquiry is necessary for the purpose of deciding whether suspension should be granted, it then orders enquiry to be made by supervisor or a

[50] *Ibid.* Art 204.
[51] *Council of Ministers Regulations on Treatment of Federal Prisoners No*. 138/ 2007, Art 46 provides that Prisoners eligible for parole request must meet certain preconditions: behaving well during imprisonment, is believed to be commendable after release, has settled all payments required under a court decision, has already served two thirds of the term of his sentence or 20 years of his life sentence, and has positive inclination towards social life.
[52] *Criminal Code of Ethiopia*, fn 28, Art 199(2).

reliable welfare worker or an officer of a charitable organization.[53] However, this purpose could not be achieved in the absence of any specified rules and institutional set up.

Further, taking into consideration the criminogenic needs of offenders, the role of probation officers is substantial.[54] The probation officer has the prerogative to help, to follow up the conditions stipulated by the court and make reports to the court when alleged violations occur. Similar roles are given to probation officers in Ethiopia. However, it remains paper value as there is no organ established to play those roles and legislations are not available about the structure and organization. In other words, the rehabilitation objective of probation could not be achieved. Rules of conduct or conditions stipulated by the court are also for vain. Persons under probation are left unrecognized even if they violate those conditions. The role stipulated by the criminal law to Probation officers is given to neither of the criminal justice segments.[55] This is a grey area that needs to be further explored and taken up. Federal Attorney General Establishment Proclamation is also silent about this issue.[56]

As regarding to parole, in cases where a penalty or measure entails loss of liberty, the Criminal Code imposed anticipatory conditional release may be awarded by way of parole. Once released on parole, the concerned parole officer is to supervise, monitor and facilitate rehabilitation of the offender in the community. In practice, however, similar to probation, there is no organ established with this mandate. To this effect due to lack of parole supervision, we do not know what

[53] Ibid Art 195.
[54] See *Probation and Parole* fn 21. Probation and parole officers must perform a dual role, being a social worker and a law enforcement officer as they advise offenders, encourage behavior change, and take steps to ensure both short-term and long-term public safety. Probation and parole officers may also work closely with crime victims using the principles of restorative justice.
[55] The segment refers to the four components of criminal justice administration: Police, Public Prosecutor, Court and Correctional Administration.
[56] *Federal Attorney General Establishment Proclamation* No. 943/2016.

percent of those released on parole relapsed back into criminality and returned to prison recidivists.

Like probation, the Criminal Code provides that detailed conditions be regulated in law concerning the enforcement of penalties and orders dealing with this matter. In this regard, though the Regulation of Council of Ministers on Treatment of Federal Prisoners has covered some issues about parole, it is limited in its scope. This regulation mainly deals with how convicted offenders are selected for parole and duties and responsibilities of the board established for this purpose. Even though the law provides appropriate rules of conduct to be observed by the parolee and circumstances parole to be revoked, due to the absence institutional arrangements, it could not be practiced. Unless that person commits a crime and recognized by the police, there is no possibility to observe violation of those conditions.

The Criminal Code offers that supervision can be carried out by the association or groups of a public or private character, which devote their activity thereto, with the assistance and under the control of the State. However, the non-existence of clear procedures and guidelines make it impractical. Like the probation systems, neither of criminal justice components is entrusted with mandate. The Criminal Code clearly provides that this mandate must not be entrusted to police authorities, *unless otherwise necessary.*[57] Therefore, it is clear from this to understand that there is no organized body to deal with parole issues.

There are also arguments raised regarding the application of probation and parole. Though there is no comprehensive study, Ethiopian judges tend to adopt an apparently punitive and retributive approach despite existing legal provisions that encourage the use of probation and other noncustodial measures.[58] With respect to probation, it appears that Ethiopian judges are not disposed to the usage of

[57] *Criminal Code of Ethiopia*, fn 28, Art 210(1) Parag. 3.
[58]Kelali Kiros, *The Bail Justice in Ethiopia: Challenges of its Administration* (LLM Thesis, Addis Ababa University 2011), p. 87.

probation orders. More often than not, the courts usually close their eyes to alternative disposition methods. This is regardless of the fact that the courts are certain that the offenders deserve it. As it can be observed from the data of statistics, the use of probation was justifiable and prisoners convicted for short period of time were much larger in number than those for long period.[59] Out of these prisoners was a large majority believed to be the first offenders and could have been released on probation. Yet various studies have shown that short term imprisonment has little value in terms of its correctional effectiveness. One of the consequences of short-term imprisonment is that it reduces the chance for classification and segregation of hardened criminals with the limited facilities. Furthermore, short-term commitment does not allow for constructive training and rehabilitation since their duration is limited. Criminologists also argued that short term imprisonment is likely to increase recidivism because the exposures prisoners get form the contacts with more hardened criminals.[60] As the size of those short-term prisoners is substantial in number, this leads the country is to lose a huge amount of money to finance inmates who would have been on probation. The writer of this article contends that had there been a systematic probation and parole than indiscriminately putting offenders in prison, such kind of costs would not be.

Evidence shows probation and parole are cost effective by saving criminal justice administration costs of financing inmates. As Andargachew said, it is advantageous to use probation also for the government because, in addition to reducing costs and the over crowdedness of prisons, the offender will not be as much as burden as he would be if were committed to prison. According to him, if the necessary conditions were provided such as office facilities, fairly supportive community[61]

[59] See, FDRE, Statistical Abstract, Central Statistical Agency, 2012.
[60] Andargachew, *The Crime Problem,* fn 9, p. 293.
[61] In this regard, Andargachew expressed community support can be acquired through education and communication. If the values of probation and parole are properly explained through the media and in community meeting people are likely to cooperate. The success of probation and parole is highly dependent on the community support. Further, the writer believes that other are few attempts

and adequate transportation and the necessary legislative backup etc, a single probation officer can supervise up to 50 probationers.

It is also important to consider the possible adverse consequences of imprisonment on the accused personal and family life. Imprisonment has many adverse impacts on the offender as well as his families which the government of Ethiopia seems to underestimate or else miscalculate. Release on probation and parole is advantageous both to the offender and the community. The offender will remain within the community and continue to support his family. He will also be saved from the dehumanizing prison conditions. By the same token, the fact that a person is in prison may mean his job security is endangered. Though we do not have comprehensive statistical information on how many of the persons offenders were employed, it is not difficult to guess that at least such persons would have contributed something to sustain themselves. There are all rounded problems accruing on the family and children and this is an outcome of a wrong policy prevailing in Ethiopia. This is true in light of the fact that it is possible to have probation and parole system that have a very important role in ameliorating the costs of prison administration.

One of the serious challenges of prison administration in Ethiopia is prison overcrowding. The prison population rate of Ethiopia is reported to be one of the highest in Eastern Africa.[62] Prison conditions are very poor across Ethiopia.[63]Prison facilitates have not been expanding with increasing in

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by the government to introduce community policing in the country, it is possible this as possible resource for parole and probation.

[62] International Center for Prison Studies <http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=19> accessed on 30 April 2016.

[63] See, Addisu Gulilat, *The Human Rights of Detained Persons in Ethiopia: Case study in Addis Ababa* (LLM Thesis, Addis Ababa University 2012), p.1-4. Overpopulation, prolonged detention of under-trial prisoners, unhygienic living conditions are characteristics of Ethiopian prisons.

incarceration rates.[64] As a result, prisons are overcrowded.[65] Therefore, using probation and parole is vital in minimizing this problem.

The impact of weak probation and parole administration in Ethiopia is not limited to overcrowding challenges. It also extends to the problems as a result of overcrowdings. Recent research carried out in Ethiopian prisons revealed that the estimated prevalence of pulmonary tuberculosis was about eight times higher than that of the community.[66] This result confirms that probation would be better employed to rehabilitate these offenders than imprisonment as certain extenuating factors are responsible for their conduct. However, no one seems to be looking in that direction. In this regard, we are facing many problems while we can still have a probation and parole system which could minimize such risks by allowing the offenders to be released through an objective and systematic analysis. Thus, the Criminal Code which allows probation and parole does not have a solid basis in light of the current condition of the criminal justice system.

Concluding Remarks

To sum up, the article concludes that in Ethiopia there is law that permits for the application of probation and parole. Nonetheless, despite the legal provision, there is no organ established, to date, to supervise parolees and probationers and to report to the court as to the status of the offender; it is imperative that there is a need to close the gap between theory and practice. A probation and parole department should be established all over the country. This will realize the benefits that could be obtained from the services. There is also the need to have detailed

[64] See, the increasing in the number of criminals that were referred to various prisons could be seen from FDRE, Statistical Abstract, Central Statistical Agency

[65] Official statistics are not only scanty but also not up-to-date, the only a valuable information, therefore, are occasional reports, some national statistics and reports of some human right s organizations regarding the number of prisons and size of inmates.

[66]Zerihun Zerdo and others, *Prevalence of Pulmonary Tuberculosis and Associated Risk Factors in Prisons of Gamo Goffa Zone, South Ethiopia*: A Cross-Sectional Study (*American Journal of Health Research, v*ol. 2, no. 5, 2014), pp. 291-297.

laws on probation and parole that deal with structure and functions in order to address the situation and go with the modern trend in other jurisdictions as highlighted above. Further, judges should greatly use provisions for probationary sentences. In other words, the prisoners who qualify for probation or parole should be released on probation. This may be helpful in reducing the cost of prisons and other problems in relation to it.

Economic Analysis of Ethiopia's Vehicle Insurance against Third Party Risks

Alekaw Dargie Assefa*

Abstract

Road traffic casualties are a major public health challenge that needs sustainable prevention. In comparison with African countries, Ethiopia has the least vehicle ownership. However, motor vehicle accident is a cause for death, bodily injury and destruction to properties in Ethiopia. Ethiopia has a fatality rate of ninety-five traffic car accident deaths per ten thousand vehicles. To tackle this escalating social problem, recently Ethiopia has introduced vehicle insurance against third party risks proclamation. This article is a modest contribution to economic analysis of Ethiopia's Vehicle Insurance against Third Party Risk Proclamation. First party compulsory insurance is efficient in many respects; however, when first party insurance fails third party compulsory, though not efficient, it is introduced to serve as social insurance. The efficiency of the law is measured by whether it provides incentive to individuals to alter behavior. Economic analysis of law combines both positive and normative analysis. The positive analysis suggests that the actual structure of law tends to evolve in the direction of greater efficiency, whereas the normative analysis suggests how legal rules ought to be structured to be more efficient. Hence, the primary purpose is to examine the incentive effect of compulsory insurance law. It is argued that this proclamation tackles externality through accident risk and information asymmetry.

Key terms: *Compulsory insurance, externality, risk differentiation, adverse selection, moral hazard*

Introduction

Road traffic injuries are a major public health challenge that demands concerted efforts for effective and sustainable prevention. Both developed and developing

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countries are suffering from road traffic accidents regardless of the magnitude. Developing countries are prone to casualties, and eighty five percent of road deaths are estimated to occur in these countries. The economic burden of road traffic accident on developing countries is estimated to be absorbing 1-2% GNP. Ethiopia is one of the African countries with least vehicle-ownership. However, motor vehicle accident is the largest cause for death, bodily injury and destruction to properties in Ethiopia. United Nations Economic Commission for Africa in its 2009 report illustrated that Ethiopia has ninety-five traffic car accident deaths per ten thousand vehicles. The economic costs of road crashes are estimated approximately eighty million US dollars per annum according to Economic Commission for Africa 2011 report.

Taking this horrendous traffic accident statistical data, Ethiopia has devised various policies, plans and laws to minimize road accident social problems and ameliorate the situation of victims. Ethiopia has legislated extra contractual liability law to govern accidents occurred. From economic analysis of tort law, tort law is designed to internalize costs borne out of accidental harm (externality). Liability is not enough by itself, unless the injurer pays compensation. Tort law doesn't function independently to achieve its compensation goal when the incentive effect of tort liability is threatened by the judgment proof problem. This means tort law works well when the tortfeasor remains in solvent zone. Thus, tort law assigns tort liability to defendant and insurance shifts the liability to insurance company that pays compensation out of pool.

Reckoning this catastrophic social problem and the failure of tort law, Ethiopia enacted Vehicle Insurance against Third Party Risks Proclamation No. 799/2013. Legal challenges could be addressed using an economic approach or economically inspired approach (also dubbed law and economics) to organize the whole dogmatic legal system. Economics is a powerful tool for analyzing a vast range of legal questions. Thus, the efficiency of law is measured by whether or not it

provides incentive to individuals to alter behavior. Economic analysis of law combines both positive and normative analysis. The positive analysis suggests that the actual structure of law tends to evolve in the direction of greater efficiency whereas normative analysis suggests that how legal rules ought to be structured to be more efficient.

Economic analysis of law employs analytical tools of microeconomics. The application of it is based on the assumption that economic efficiency is advantageous to examine legal rules and institutions. Economic analysis of law has pervasive application and the purpose of this article is making a critical analysis of Vehicle Insurance against Third Party Risks proclamation by using the law and economics approach. The primary purpose is to examine the incentive effect of compulsory insurance law to handle information asymmetry and externality.

1. Introducing Empirical Data

Road traffic injuries are a major public health challenge that demands concerted efforts for effective and sustainable prevention.[1] WHO and WB bleak prediction reads as follow;

> *Worldwide, an estimated 1.2 million people are killed in road crashes each year and as many as 50 million are injured. Projections indicate that these figures will increase by about 65% over the next 20 years unless there is new commitment to prevention.*[2]

The death toll will rise hugely, and the situation will be so grim in rapidly motorized countries unless measures are taken. Developing countries are prone to

[1] World Health Organization, 'World Report on Road Traffic Injury Prevention: Summary' (Geneva 2004), p.1. <http://www.who.int/violence_injury_prevention/publications/road_traffic/world_report/summary_en_rev.pdf> accessed October 2016

[2] Ibid.

casualties, and eighty five percent of road deaths are estimated to occur in these countries.[3] The economic burden on developing countries is estimated to be absorbing their 1-2% GNP annually.[4]

Ethiopia is one of the African countries with the least vehicle-ownership.[5] However, motor vehicle accident is the largest cause for death, bodily injury and destruction to properties in Ethiopia.[6] United Nations Economic Commission for Africa in its 2009 report illustrated that Ethiopia has ninety five traffic car accident deaths per ten thousand vehicles (fatality rate).[7] The economic costs of road crashes are estimated at approximately eighty million US dollars per annum according to Economic Commission for Africa 2011 report.[8] The following empirical data depicted the situation of accidents in Ethiopia.

1.1 Trends of traffic accidents and vehicle fleet in Ethiopia

The following are reported accidents by Federal Police Commission in the entire country. The fatality rate which measures the traffic accident death rate per ten thousand motor vehicles and the fatality rate has shown a decreasing trend from 2003/4 which was 145 to 2007/8 became 95 G.C and the fatal, serious injury, light injury and property damages are decreasing but still needs measure should be taken.[9]

This report quantitatively identified causes of the accidents; viz. influence of alcohol (drug), failure to respect right handle rule, failure to give way for vehicles,

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[3] Aeron Thomas, *The Role of the Motor Insurance Industry in Preventing and Compensating Road Casualties* (2002), p.1. < https://assets.publishing.service.gov.uk/media/57a08d43e5274a27b2001739/R8012.pdf > accessed 20 June 2017

[4] United Nations Economic Commission for Africa, ECA/NRID/019, *Case Study: Road Safety in Ethiopia* (2009), p. 5. <http://repository.uneca.org/handle/10855/738> accessed Nov 2016

[5] Ibid p.15.

[6] Shimelis Tesfaye, *The Implementation of Compulsory Motor Insurance in Ethiopia* (Master's Thesis, Addis Ababa University 2015), p.3.

[7] Ibid.

[8] Ibid.

[9] United Nations Economic Commission for Africa, fn 4, pp.20-21.

failure to give way for pedestrians, following too closely, improper overtaking, improper turning, over speeding, failure to respect traffic signs, driving with fatigue, driving without attention, Improper parking/moving from parking, excess loading, failure in vehicle, defective road environment, pedestrian error, others and unidentified. According to the police report above, ninety percent of the traffic accidents are caused by human mistakes. Drivers contributed eighty nine percent of the total accident. Among the notable causes of accidents are failure to give way for pedestrians, speeding, failure to give way for other vehicles and failure to respect right hand rule respectively. The causes of driver error are attributed to inadequate training, driving under the influence of alcohol, drug and others.[10]

Taking these horrifying empirical data into account, Ethiopia has proposed to establish a ten-year successive plan for the period 2010-2020, under the Road Safety Vision 2020: "Making Ethiopian Roads Safer for Every One."[11] The proposed target of this Vision 2020 is to reduce the fatality rate to 25 fatalities per ten thousand vehicles by 2020 from the current base rate.[12] Ethiopia has also paid a great deal of attention to road accident and has incorporated in Growth and Transformation Plan (GTP I). This GTP I had set a target of reducing road traffic death numbers and achieved 60 deaths per 10,000 vehicles from 70 per 10,000. The Second Growth and Transformation Plan (GTP II) has a target of reducing road traffic accident from 60 to 27 per 10,000 vehicles by 2019/2020.[13]

Apart from this vision and plan, Ethiopia has legislated extra-contractual liability law to govern accidents occurred. From economic analysis of tort law, tort law is designed to internalize costs borne out of accidental harm (externality).[14] Economic

[10] Ibid pp.22-23.
[11] Ibid p.9.
[12] Ibid.
[13] National Planning Commission, *Growth and Transformation Plan II (GTPII) (2015/2016-2019/2020), Volume I: Main Text* (Addis Ababa 2016), p.172.
[14] Thomas Miceli, *Economics of the Law: Torts, Contracts, Property, Litigation* (Oxford University Press, New York 1997), p.15.

analysis of tort law is concerned with incentive for assignment of liability between injurer and injured to take optimal precaution against accident and injurer's failure to take due care ensues externality.[15] In addition, if the victim is fully compensated for the harm he suffered and he himself contributed to the accident by failing to take due care, this constitutes moral hazard.[16] The basic model of accident (the model of precaution) consists of a single risk neutral injurer and single risk neutral victim.[17] Therefore, the goal of tort law is to minimize the sum of accidents cost and the cost of accident avoidance the sum of which is called the social costs of accident which is mathematically represented as follows.[18] This is bilateral accident model which assumes both injurer and victim influence the accident risk.

$$C= p(x, y) L+A(x) + B(y)$$

Where: C= the sum of expected accident costs and costs of care; A= the victim; B= the injurer; x= level of care of the victim; y= level of care of the injurer; p= probability that an accident will occur and L= magnitude of the loss.[19]

Potential tortfeasor is under a duty to take out insurance against the risk of liability which is a combination of strict liability with a legal duty to insure. One of the objectives of tort law is compensation and wouldn't be achieved without liability insurance because the magnitude of the loss may go beyond the individual asset to cover compensating. Liability is not enough by itself unless the injurer pays compensation. Tort law doesn't function independently to achieve its compensation goal. The incentive effect of tort liability is threatened by the judgment proof problem (insolvency). This means tort law works well when the tortfeasor remains in solvent zone. Thus, tort law assigns tort liability to defendant and insurance shifts the liability to insurance company that pays compensation out of pool.

[15] Ibid
[16] Ibid
[17] Ibid p.16.
[18] Steven Shavell, 'Strict Liability versus Negligence' in *Journal of Legal Studies* (University of Chicago Press 1980), p.1-25.
[19] Ibid.

Reckoning this catastrophic social problem, Ethiopia enacted Vehicle Insurance against Third Party Risks Proclamation No.799/2013 (hereinafter referred to as compulsory insurance). The preamble stipulates the essence of the proclamation. It reaffirms the occurrence of accidents escalation from time to time and concomitantly loss of lives, bodily injuries and property damages caused by vehicle accidents are creating social problems.[20] Therefore, the preamble stresses the necessity to establish a system "for facilitating the provision of emergency medical treatments to victims of vehicle accidents, and to require owners of vehicles to have third party insurance coverage against third party risks". The proclamation as per Article 3(1) compels that all vehicle on the road must have valid third-party insurance.

The lofty goal of the proclamation is victim protection scheme. As motor vehicle risk involves high hazard risk, insurance companies employ different strategies to minimize motor insurance adverse effect and increase profitability. It is obvious from rationality perspective; private insurance companies do hesitate to insure motor vehicles when they don't gain profit. Some of the strategies include charging highest premium for motor vehicle, restricting share of motor vehicle class business and diversify their portfolio-mix.[21]

However, there is a challenge for the insurer because third party insurance against risk is compulsory (mandatory) insurance. Its premium tariff is regulated and risks are covered without insurer's selection. Hence compulsory insurance for third party risk results in unprofitability of the insurance company.[22] Even when having compulsory third party insurance against risks, the lion's share of vehicles is not insured. Research conducted in 2011 by Insurance Fund Administration Agency revealed that "out of the Total 309, 361 vehicles populated in Ethiopia only about

[20] *Vehicle Insurance against Third Party Risks Proclamation No.* 799/2013, Parag 1-2.
[21] Shimelis, *The Implementation,* fn 6. p.4.
[22] Ibid.

35% or 106,765 were insured voluntarily whereas the reaming 65% were dependent on their financial resources if liability arises."[23]

Compulsory insurance is a departure from consensual insurance which is incorporated in Commercial Code. Article 654(2) of the Commercial Code offers the legal definition of insurance policy is "a contract whereby a person a person called the insurer undertakes against payment of one or more premiums to pay a person called the beneficiary, a sum of money"[24] if the specified risk occurred. Insurance contract is an adhesive contract offered on a take-it-or-leave-it basis.[25]

As discussed, compulsory insurance premium tariff is imposed by law, and risks are covered without any differentiation. This breeds moral hazard and adverse selection problems. There are arguments as to which types of insurance are preferred from first party and third-party insurance. This legal issue could be tackled by using law and economics insights which will be analyzed as follow.

2. Economic Analysis of Compulsory Insurance Law

Legal challenges could be addressed using an economic approach or economically inspired approach (also dubbed law and economics) to organize the whole dogmatic legal system.[26] As Posner stated "economics is a powerful tool for analyzing a vast range of legal questions." Law and Economics is "double-barreled subject" that contributes interdisciplinarity and applies an economically inspired approach.[27] Economic analysis of law is "the greatest innovation in legal thinking"

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[23] Ibid.
[24] *Commercial Code of The Empire of Ethiopia, Proclamation No.166/1960*, Art 654(1).
[25] Susan Randall, 'Freedom of Contract in Insurance' in *Connecticut Insurance Law Journal* (vol. 14, no. 1, University of Connecticut, 2008), pp.107-148, p.107 <http://insurancejournal.org/wp-content/uploads/2011/07/44.pdf > accessed 20 June 2017
[26] Jürgen Backhaus (ed), *The Elgar Companion to Law and Economics* (2nd edn, Edward Elgar, Cheltenham, 2005), p.2.
[27] Klaus Mathis(ed), *Law and Economics in Europe: Foundations and Applications* (Springer, Dordrecht 2014), p. v.

and has made law a formal, scientific and quantifiable discipline.[28] Economic analysis of law tackles two fundamental questions about legal rules which are "what are the effects of legal rules on the behavior of relevant actors? And are these effects of legal rules socially desirable?"[29] Economic analysis of law utilizes the economic model to explain human behavior. It employs analytical tools of microeconomics. Thus, the application of economic analysis of law is based on the assumption that economic efficiency is advantageous to examine legal rules and institutions.

2.1 Increasing Expected Utility

Decision making under uncertainty or risk needs insurance. However, individuals have different approaches to risk. For example, risk neutral individuals have constant marginal utility of income, and they are indifferent between a certain prospect of income and uncertain prospect of equal expected monetary value.[30] On the other hand, a risk seeking (preferring) or risk loving person has an increasing marginal utility of income and prefers an uncertain prospect of income to a certain prospect of equal expected monetary value.[31]

Contrary to these types of persons, there is a risk averse person who wants to get insurance coverage. The behavioral implication of a risk averse person prefers to pay premium to avoid having to face uncertain result. Insurance is beneficial from a utilitarian perspective as it removes risk from the risk averse person and increases utility. Utilitarian approach to insurance dictates that risk creates disutility for risk

[28]Nicholas Georgakopoulos, *Principles and Methods of Law and Economics: Basic Tools for Normative Reasoning* (Cambridge University Press, New York 2005), p. 3.
[29] Louis Kaplow and Steven Shavell, 'Economic Analysis of Law Forthcoming' in A.J. Auerbach & M. Feldstein(eds.), *Handbook of Public Economics,* (Elsevier 1999), p.1.
[30] Robert Cooter and Thomas Ulen, *Law and Economics* (6thedn, Pearson Education, Boston 2012), p. 45.
[31] Ibid.

averse individual.[32] Risk averse individuals badly demand for insurance. Risk averse individuals prefer the certainty of small loss, which is the payment of insurance premium to shift larger probability of larger loss to insurance company in order to increase the utility of individuals.[33]A person who has diminishing marginal utility from money income is said to be risk averse. Decreasing marginal utility of wealth states that the marginal utility of one additional birr is higher in the post-accident stage than in the pre-accident stage. Risk aversion states that the marginal utility of wealth diminishes as wealth increases. This theoretical foundation applies to pecuniary damage and not for non-pecuniary loss.

Insurance shifts the risk and creates social welfare. According to utilitarian approach, liability insurance is a tool to increase the utility of a risk averse injurer not to protect victims. The degree of risk aversion is different from person to person. Wealthy individuals are relatively less risk averse or even risk neutral to accidents. Therefore, compulsory insurance compels wealthy individuals to pay premiums that do not lead to utility increasing because premiums exceed the expected losses.[34] In this case, compulsory third-party insurance creates social loss. However, empirical data is necessary to know how many people are actually harmed and how many people benefit from insurance in order to offset the duty to insure social loss.[35] It is rational to assume that a risk averse individual needs compulsory third party insurance when they themselves fail to pay premium for first party liability insurance.

The other problem of the potential injurer is that he has no incentive when his personal wealth is less than the compensation he will pay to the harm caused; hence, compulsory insurance is necessary to solve this problem. Adequate

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[32] Michael Faure, 'Environmental Damage Insurance in Theory and Practice. The Law and Economics of Environmental Policy: A Symposium' (2001), p.4. <http://www.cserge.ucl.ac.uk/Faure.pdf> accessed October 2016

[33] Ibid.

[34] Michael Faure and Roger Van den Bergh, 'Compulsory Insurance for Professional Liability' in *The Geneva Papers on Risk and Insurance* (vol. 14, no. 53, 1989), pp.308-330, p.313.

[35] Faure, *Environmental Damage*, fn 32, p. 41.

compensation to the victim is a distributional justification achieved by compulsory third party insurance. In such case the externality couldn't be internalized by potential injurer rather borne by the society.[36] This is called externality (third-party effect) and emanates both from judgment proof and disappearing (untraced) tortfeasor. Some argue that shift in distribution doesn't lessen total wealth and doesn't achieve efficiency.[37]

2.2 Externality through Insolvency

Compulsory insurance serves socially beneficial functions of gatekeeping beyond direct parties to the insurance contract which is a clear exception to privity of contract. This is positive externality aspect of insurance market. Externality is the activities of one party affecting the welfare of another in a way outside of the market mechanism.[38] Insurance also results in negative externality (spillover) which is one type of market failure. Negative externality effect of insurance occurs when the insured fails to take optimal precaution. Negative externality is defined below:

> *A "negative externality" is the cost that an action creates, but that the actor does not himself experience. Negative externalities cause people to do too much of the activity that yields the negative third- party effects. A classic example is pollution, as much of its cost falls not on the polluting factory but on society.*[39]

The potential injurer may cause damage resulting in losses exceeding personal wealth that leaves victims uncompensated.[40] It is argued that in fault-based liability

[36] Faure and Bergh, *Compulsory Insurance*, fn 34, p. 313.
[37] Robert Bork, *The Antitrust Paradox* (Basic Books, New York 1978), p.97.
[38] Harvey Rose, 'Public Finance' in Charles K. Rowley & Friedrich Schneider (eds), *The Encyclopedia of Public Choice* (Kluwer Academic Publishers, New York 2004), p.253.
[39] Alan Devlin, *Fundamental Principles of Law and Economics* (Rutledge Taylor & Francis Group, London 2015), p.13 at fn 3.
[40] Faure and Bergh, *Compulsory Insurance*, fn 34, p. 313.

rule, the potential injurer takes due care efficiently as long as costs of care is less than his assets; however, under strict liability rule potential injurer does have no incentive to take optimal care when loss exceeds asset.[41] Insolvent and uninsured owners have little incentive to avoid accidents and the problem of under-deterrence emerges. This means insolvent (judgment proof) individuals are not able to satisfy the victim in whole the amount they are legally bound to pay due to liability because their asset is less than their liability. In such case, liability rule alone is not preferred to provide adequate incentive to solve this externality because the potential injurer may engage in risky activities with great extent or take little care and purchasing of liability insurance is diminished.[42]

It is argued that insolvency brings under-deterrence which could be corrected by insurance.[43] Compulsory insurance protects problems that stem from insolvency of the injurer. Insolvency creates externality which cannot be internalized unless mandatory duty to insure is introduced.[44] A duty to insure is a guarantee to the victim that helps to receive compensation. This distributional argument guarantees compensation to the victim.

This discussion shows that compulsory insurance prevents externality from judgment proof injurers. However, there are arguments marshaled for first party compulsory insurance which serves most efficiently than third party compulsory insurance. First party compulsory insurance is a system whereby insurance coverage is offered and compensation is paid to the victim. The benefit of first party insurance is its risk differentiation. It must be noted that risk differentiation works efficiently when marginal benefit of risk differentiation outweighs the

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[41] Ibid p. 314.
[42] Steven Shavell, 'The Judgment Proof Problem' in *International Review of Law and Economics* (vol. 6, 1986), pp.45-58, p.45.
[43] Michael Faure, 'Economic Criteria for Compulsory Insurance' in *The Geneva Papers on Risk and Insurance Issues and Practice* (2006), pp.149-168, p.154.
<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.664.3618&rep=rep1&type=pdf> accessed November 2016
[44] Faure and Bergh, *Compulsory Insurance*, fn 34, p.313.

marginal cost of differentiation.[45] First party compulsory insurance helps to segregate risks to tackle adverse selection problem.[46] When there is risk-differentiation, premiums correspond with expected losses of insured.[47] Social responsibility is a euphemism for individual irresponsibility; unlike compulsory third party insurance it does not work in first party compulsory insurance. The other beauty of first party insurance is its upper hand in terms of lowering administrative costs by avoiding the waiting time to get compensation money immediately after the covered risk occurred.[48] Even with all merits of first party insurance, still compulsory third-party insurance prevails by functioning as social insurance. Furthermore, first party insurance may not be a feasible alternative in third world countries because individuals might not have premiums to pay ex ante.[49]

2.3 Externality through Disappearing Tortfeasor

Economists and lawyers approach liability allocation from different perspectives. For example, lawyers approach liability after the accident occurred, ex post, and deal with how liability is allocated whereas economists look liability from ex ante perspective and deal with how the law provides incentive to deter individual behavior.

The ex post view states that if a driver injures a victim and disappeared (untraced) by the time of accident, the victim is left without compensation.[50] The *ex ante* view approach looks into how the risk of potential injurer's disappearance has to be distributed in order to provide the optimal incentive to take due care to avoid or

[45] Faure, *Environmental Damage*, fn 32, p. 15.
[46] Faure and Bergh, *Compulsory Insurance*, fn 34, p.314.
[47] Ibid.
[48] Michael Faure and Veronique Bruggeman, *Catastrophic Risks and First-Party Insurance* (2008), p.13. <http://insurancejournal.org/wp-content/uploads/2011/07/12.pdf > accessed 19 October 2016
[49] Ibid, p.11.
[50] Summers, 'The Case of the Disappearing Defendant: An Economic Analysis', (1983), p.147. <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4634&context=penn_law_review> accessed Dec 2016

minimize accident.[51] Injurers are assumed to be rational utility maximizing. It is assumed that when potential injurers have expected the probability of disappearance, they will not take optimal level of care under any liability rule.[52] This disappearing injurer externalizes the cost, and compulsory insurance is called to internalize this externality. The hit and run (uninsured) vehicle accident externality is tackled by compulsory third party insurance when it combines fund tariff to solve.

There is an information asymmetry problem (adverse selection and moral hazard) associated with compulsory insurance law that affects efficient insurance contract, which is discussed below.

2.4 Information Impediments

Economic analysis of law dictates that rational parties having a perfectly competitive market in the absence of "transaction cost"[53], and possessing complete information voluntarily conclude a contract to maximize their joint surplus or welfare. The Coase Theorem encourages the enactment of laws that reduce transaction cost and promote efficient bargaining. In negligible transaction cost, contracts produce increased social welfare. Economic analysis approach to insurance adheres the efficient insurance contract. When there are informational problems (market failure), regulatory intervention is a necessary evil as market, which is the first best solution, does not perfectly functions. Individuals may not possess information that motivates them to need for insurance.[54] Without empirical data that depicts information deficiencies of individuals who do not know the problem of risk, its underestimation and the benefit of insurance, introduction of compulsory insurance (regulatory intervention of government) amounts to mere

[51] Ibid p.149.
[52] Ibid p.153.
[53] Transaction costs are cost of searching contracting parties, cost of negotiation, cost of monitoring and execution
[54] Faure and Bergh, *Compulsory Insurance*, fn 34, p. 315.

paternalism and results in inefficiency. The legislator's introduction of the duty to insure is based on mere paternalism. Those who oppose paternalism vehemently argue that information deficiency could be remedied through regulation with the objective of providing information to individuals who are poorly informed and claim that duty to insure (compulsory insurance) is disproportional remedy and it must be the last resort.[55]

Information impediments emanate from either imperfect information as to the probability of risk materializing (scope) or due to the existence of information asymmetry between insurer and insured about factors of probability of risk materializing and scope.[56]

Information Asymmetry happens when a party to the transaction has information that is not known or hidden to the other outsider party. It exists at pre-contractual stage when the insured possessed more information pertinent to insurance contract (adverse selection) and when the insurer armed with information relevant to insurance contract yields reverse adverse selection problem.[57] On the other hand, after the contract concluded but before or after the insured event occurred, informational gap about insured's behavior leads moral hazard problem whereas informational gap about insurer's behavior gives reverse moral hazard.[58]

Insurance contract is not properly functioning and very limited to reduce information asymmetry by forcing parties to reveal information to uninformed party (signaling theory).[59] This opportunity to signal risk could be done by choice of deductibles, which means higher deductible infers lower premium, i.e. low risk persons are likely to choose higher deductibles because the probability of accident

[55] Faure, *Economic Criteria*, fn 43, p.153.
[56] Ronen Avraham, 'The Economics of Insurance Law-A Primer' in *Connecticut Insurance Law Journal* (vol. 19, no. 1, 2012), p. 42.
[57] Ibid p.43.
[58] Ibid.
[59]Sara Arvidsson, *Essays on Asymmetric Information in the Automobile Insurance Market (*PhD Thesis, Orebro University 2010), p. 15.

is low.[60] However, empirical data shows that both high and low risk individuals badly demand lower deductibles, which means that low risk persons have little opportunities to signal their low risk when they purchase insurance policy.[61]

Adverse Selection – Asymmetry of information leads to adverse selection. Comparatively speaking, a person with high-risk badly seeks more insurance coverage than low-risk person. Adverse selection states that low risk individuals avoid voluntary insurance pools that lead to have disproportionate percentage of high risk individuals.[62] Adverse selection compels the propensity of high-risk persons to buy insurance coverage and thereby increase premiums and forces low-risk persons to be underinsured.[63] In case of motor vehicles, drivers and vehicles with heavy and repeated accident records will battle to find insurance on the voluntary insurance market; rather they will easily find coverage in compulsory insurance market (residual or shared market) whereby insurers are not free to select vehicles and drivers they insurance.[64] As corporate social responsibility of company demands insurance companies are mandated to provide insurance coverage for "hard to insure" risks of automobile insurance.[65] In compulsory insurance there is no risk differentiation and no different premium is set that makes insurance company lose their profit and they seize opportunity to carry out corporate social responsibility.

Premiums should reflect the risks of insured. However, an insurance company operating on average risk charges one premium rate to all insured having different

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[60] Ibid, p.15-16.
[61] Ibid.
[62]Tom Baker, 'Containing the Promise of Insurance: Adverse Selection and Risk Classification' in *Connecticut Insurance Law Journal* (vol. 6, no 2, 2003), p. 375.
[63] Michael Keane and Olena Stavrunova, *Adverse Selection, Moral Hazard and the Demand for Medigap Insurance* (2014), p.1.
<https://www.nuffield.ox.ac.uk/economics/papers/2014/PaperApril2014_3.pdf> accessed Oct 2016
[64] Michael Faure, '*Special Insurance Systems for Motor Vehicle Liability in Belgium and The Netherlands'*, (2013), p.1. <http://www.iuscommune.eu/html/activities/2013/2013-11-28/workshop9a_De_Mot_and_Faure.pdf> accessed October 2016. The term shared market indicates that profit and losses are shared by all insurers selling motor liability insurance at central pool.
[65] Ibid.

degrees of risk due to information asymmetry. This allows high-risk individuals to obtain insurance coverage at a lower premium than they should actually be willing to pay, whereas low-risk individuals are charged higher premium thereby cross subsidizing high-risk individuals.[66] The less risky insured cross subsidize the riskier insured when they are charged a higher premium than the risk they actually have. Asymmetry information leads to strategic behavior thereby high-risk individuals pretends to be low-risk. This creates inefficient insurance and drives low-risk individuals out of the insurance market.

To tackle information asymmetry, disclosure of information is a mandatory requirement. This mandatory disclosure demands high risk individuals possessing private information about their risk type to disclose to insurance company while concluding the insurance contract. Accurate information about the behavior and characteristics of insured parties helps to better assess and arrange premium. Risk difference brings differentiated premiums. This leads to reduced cross-subsidization and limits the insurance company liberty to spread risk among risk averse insured.[67] Thus, striking a balance between two tradeoffs which are increasing *ex post* coverage and eliminating *ex ante* incentives for strategic behavior of insured is necessary.

Adverse selection may not be detected, and even if it is detected there is a way to exclude high risk individuals. At times, compulsory motor vehicle insurance prevents adverse selection because low-risk individuals cannot opt out of the insurance pool.[68] Compulsory insurance encourages cross subsidy unless it comes along with risk-differentiation to charge different premiums. Risk classification implies the distributive nature of insurance.

[66] Avraham, *The Economics,* fn 56, p.44.
[67] Ibid p.45.
[68] Ibid p.59.

Reverse Adverse Selection – This exists when there is disparity in the quality of insurance policies provided by insurers and such information barrier bars insured to class policies into high and low quality.[69] Low quality policies up for grabs by lower premiums leads to a race-to-the-bottom attracting many insured and driving out higher quality coverage at more expensive price[70] and eventually emerges "market for lemons".[71] A low quality coverage insurance company costs much more than the benefit it offers because there is a challenge to stay solvent. Regulation of premiums could solve reverse adverse selection and prevent the race-to-the-bottom.

Moral Hazard – This happens when insured take less than optimal care in protecting themselves against an insured event; insured exert less effort to minimize their loss when risk occurs and exaggeration of losses by insured to get high compensation.[72] The policyholder could change his preventive behavior after securing insurance coverage which affects accident probability positively. Moral hazard arises when ex-post risk of insured persons is higher than the ex-ante risk.[73] The insurance company suffers from asymmetry of information that makes the insurance company to fail to know which insured behaves strategically. Compulsory insurance exacerbates the moral hazard problem unless measures are taken. To reduce the moral hazard problem, the insurer should increase monitoring, which is costly, or provide incentives to induce the insured to increase preventive effort to reduce accident risks, such as deductibles that are considered as a tool to reduce moral hazard. Under deductible, the insured is obliged to pay a fixed amount of the accidental losses.

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[69] Ibid p.61.
[70] Ibid p. 44.
[71] George Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' in *The Quarterly Journal of Economics* (vol. 84, no. 3, 1970), pp. 489-490. Akerlof who coined the term 'market for lemons' discussed four types of cars: new cars and used cars, good cars and bad cars (lemons) which are up for sale. The seller knows the quality of cars more than the potential buyer which is attributed to information asymmetry. This makes good cars less competitive compared to the lemons.
[72] Avraham, *The Economics*, fn 56, p. 66.
[73] Keane and Stavrunova, *Adverse Selection*, fn 63, p.1.

Reverse Moral Hazard – According to this, insurance companies behave strategically, and also are victims of opportunistic behavior. Moral hazard is locked in the parties once they concluded the contract.

3. Motor Vehicle Insurance against Third Party Risk: Law and Economics Approach

Compulsory motor insurance is not unique to Ethiopia; rather, many countries enacted compulsory third-party insurance and the essence of the institution is well articulated by Lord Denning as follows:

> *Parliament requires every driver to be insured against third party risks. The reason is so that a person injured by a motor car should not be left to bear the loss on his own, but should be compensated out of the insurance fund. The fund is better able to bear it than he can...*[74]

For example, EU Motor Insurance Directive No.2009/103 E.C demands all vehicles to be covered for motor third party liability up to a minimum amount for bodily damage. Ethiopia has enacted compulsory insurance proclamation; hence, this part is devoted to analyze this proclamation from a law and economics approach. Incentives, which are based on rationality assumption, "are the essence of economics".[75] Thus, the efficiency of the law is measured by whether or not it provides incentive to individuals to alter behavior. Economic analysis of law combines both positive and normative analysis. The positive analysis suggests that the actual structure of law tends to evolve in the direction of greater efficiency, whereas normative analysis suggests how legal rules ought to be structured to be more efficient.[76] Hence, the primary purpose is to examine the incentive effect of

[74] Richard Lewis, The Relationship between Tort Law and Insurance in England and Wales, p. 61. <https://link.springer.com/chapter/10.1007%2F3-211-30631-5_3#close > accessed 20 June 2017
[75] E.P. Lazaar, 'Incentive in Contracts' in J. Eatwell (eds), *The New Palgrave Dictionary of Economics* (vol. 2, Macmillan, London 1998), pp.744-748.
[76] Miceli, *Economics of the Law*, fn 14, p. 3.

compulsory insurance law to handle information asymmetry and how externality problem is tackled. First, an introduction is made about the proclamation.

Compulsory insurance proclamation stipulates the social insurance function as a grand objective of the law. Article 4 deals with mandatory insurance policy coverage which consists of compensation payable for death, bodily injury, damage to property and emergency medical expenses arising from the insured vehicle. Furthermore, insurance policy coverage that limits or excludes liability has no legal effect as per Article 6.

Part three deals with certificate of insurance. For example, Article 9 obliges any insurance company to issue a certificate of insurance to the insured simultaneously with the insurance policy. As per Article 10, this certificate of insurance shall be valid not less than one year from the date of issuance. Article 12 compels any insurance company to provide the insured insurance sticker along with certificate of insurance and failure to possess and absence of insurance leads the police to detain the vehicle until the appropriate documentation is presented as per Article 13.

Part four treats liability and extent of liability. Article 16 provides that the amount of compensation awarded ranges from 5000 to 40,000 birr in case of death; up to 40,000 birr in respect of bodily injury of one person; an amount not exceeding 100,000 birr in respect of damage to property and emergency medical treatment 2000 birr according to Article 27.

Part five governs the insurance fund that provides compensation for victims who are injured by uninsured or untraced vehicle. Article 20 stipulates that the objective of the fund is to provide emergency medical treatment to a person who has sustained injury, provide compensation to person who sustained bodily injury and provide compensation to the family of the deceased. The amount of compensation is based on Article 16.

Having discussed the content of compulsory insurance proclamation, the next discussion focuses entirely on how this proclamation fits to economic analysis of the law and how it tries to achieve efficiency and minimize problem we have discussed previously. In the previous section, it is discussed that insurance companies hesitate to insure vehicles, and claims vehicle accident as "difficult to insure" risk. From a rational point of view, insurance companies always want profit. However, insurance companies have corporal social responsibility to contribute to solve this escalating social problem and are obliged to insure vehicle accident risks.

The following is a separate discussion of how the proclamation solves, if it does, the moral hazard and adverse selection, and externalities.

Adverse Selection - Drivers and vehicles with heavy and repeated accident records find coverage in compulsory insurance. When the law compels an insurance company to charge identical premium rate to all insured having different degrees of risk, the adverse selection problem is exacerbated. Lack of risk differentiation results in inefficiency because all insured are obliged to pay identical premiums, yet it achieves social insurance.

The compulsory insurance proclamation obliges persons to have a valid vehicle insurance coverage against third party risks regardless of risk differentiation and premium tariff, which is determined by government, not by the market. Article 6(5) states that "with regard to insured persons and drivers with repetitive vehicle accidents the Ministry shall issue directive as to the applicable measure…" But it is not clear whether the word "measure" includes premium tariff increment or other administrative measure. Hence, if this measure includes premium tariff increment, to some extent it differentiates risk and ameliorates adverse selection problem.

The other related problem is enforcement challenges as to repetitive drivers' and vehicles' accident recording system. Adverse selection may not be detected due to

lack of record about repetitive accidents. Thus, to tackle adverse selection problem, disclosure of information is a mandatory requirement. This mandatory disclosure demands high risk individuals possessing private information about their accident risk type to disclose to the insurance company when concluding the insurance contract. Correct information about the behavior and characteristics of insured individuals and drivers' accident history helps to better assess and arrange premium. However, the proclamation does not expressly oblige repeated accident-prone vehicle owners and drivers to disclose information. If disclosure requirement is not met at the time of conclusion of compulsory insurance, the failing party could pay to offset what is paid as compensation by the insurance company. Incorporating this kind of provision mandating insured parties could tackle to some extent adverse selection as Article 688 of commercial code does not address adverse selection which happens in compulsory insurance.

Moral Hazard – This arises when ex-post risk of insured persons is higher than the ex-ante risk. Compulsory insurance proclamation devises mechanisms to reduce moral hazard problem. One of the mechanisms to tackle moral hazard is limiting compensation when risk has materialized. The compulsory insurance proclamation, according to Article 16, limits the extent of compensation. This induces the incentive to take optimal care after insurance coverage. The other means to tackle moral hazard is stipulated under Article 6(2) that stipulates that insurance policy allows recovery of compensation when the insured committed fault or drive a car without a license. In such case, the insurance company pays compensation for the third-party victim and covers the amount paid from the owner of the car because they committed fault.

Externality through Insolvency – Compulsory insurance serves socially beneficial functions of gatekeeping beyond direct parties to the insurance contract, which is termed as positive externality aspect of insurance market. As it is discussed above, ninety percent of the traffic accidents are caused by human

mistakes, of which drivers contributed eighty nine percent of the total accident. The potential injurer may cause damage resulting losses exceeding personal wealth that makes victims uncompensated. Insolvent and uninsured drivers have little incentive to avoid accident and the problem of under-deterrence emerges. Judgment proof individuals are not able to satisfy the victim in whole the amount they are legally bound to pay due to liability because their asset is less than their liability.

Compulsory insurance protects from problems that stem from insolvency of the injurer. It is obvious that insolvency creates externality which can't be internalized unless mandatory to insure is introduced. Compulsory insurance proclamation prevents externality from judgment proof injurers according to Article 16. The proclamation avoids the externality problem up to 40,000 and 100,000 Birr for death and property damage respectively. Even Article 16(5) empowers Council of Ministers to amend the extent of liability.

Externality through Uninsured or Untraced (Disappearing) Vehicle – If a driver injures the victim and disappears by the time of the accident (after the accident) the victim is left without compensation. It is assumed that potential injurers have expected the probability of disappearance; they will not take optimal level of care under liability rule. This disappearing injurer externalizes the cost, and insurance is called to internalize this externality. This hit and run (uninsured) vehicle accident which produces externality is tackled by compulsory third party insurance when it combines fund tariff to solve the problem.

Compulsory insurance establishes an insurance fund according to Article 19. Article 23 states that the source of funds shall be fund tariff and additional source to be determined by the Council of Minister. Article 2(15) defines "fund tariff" as "a contribution to the insurance fund collected by applying percentage or any alternative". The objectives of the insurance fund is to provide compensation to a person who has got bodily injury; providing compensation to family members of

the deceased person as well as provide emergency medical treatment to injured person and the magnitude of the compensation is according to Article 20(2) cumulatively Article 16(1(a-b)).

This disappearing hit and run (uninsured) car accident which produces externality is mitigated by compulsory insurance as it establishes fund tariff to be disbursed for compensation purpose. The extent of compensation and covered liability may not be enough to cover the total loss borne by victim. As a principle, the magnitude of compensation should be equal to the harm the victim suffered. However, the compulsory insurance still mitigates externality produced by vehicle.

Conclusion

This article analyzed the introduction of vehicle insurance against third party risks proclamation from a law and economics approach. Compulsory insurance is more justified by distribution effects than economic efficiency. Because compulsory insurance mandates high-risk individuals obtain insurance coverage at lower premium than they should actually be willing to pay whereas low-risk individuals are charged higher premium thereby they cross subsidize high-risk individuals. The proclamation demands all vehicles to be insured without taking risk differentiation as the goal of the law is victim protection. The proclamation presents the opportunity to insurance companies to carry out social corporate responsibility of duty to insure serving as social insurance achieving distribution role by sacrificing efficiency. However, the proclamation also tries to strike a balance to accommodate efficiency.

Accident is externality, and it emanates from insolvent owner or uninsured (untraced) vehicle accident. Furthermore, the potential injurer may cause damage resulting in losses exceeding personal wealth that makes victims uncompensated. Judgment proof individuals are not able to fully satisfy the victim because their asset is less than their liability. Insolvency borne externality can’t be internalized

unless mandatory insurance is introduced. Compulsory insurance avoids externality from judgment proof injurers to a certain extent. Disappearing (untraced) drivers externalize the cost, and compulsory insurance serves to internalize the externality through insurance fund. However, the extent of compensation and covered liability are not enough to cover the total loss borne by the victim when the harm is greater than the compensation caps stipulated in the proclamation.

Adverse selection stipulates that low risk individuals avoid voluntary insurance pools and the propensity of high-risk persons to buy insurance coverage is high. Compulsory insurance empowers the responsible government organ to issue measures applicable to vehicles and drivers with repetitive accidents history. If this measure includes premium tariff increment, it tackles adverse selection by making the premium correspond with risk magnitude. However, practical enforcement challenge pose threat to have repetitive insured and drivers' accident recording system is not central registry system. The behavior and characteristics of insured individuals and drivers' accident history help to better assess and arrange a premium to achieve efficiency.

Providing incentives induce the insured to take preventive effort to reduce moral hazard. Compulsory insurance proclamation devises mechanisms to reduce moral hazard. One of the mechanisms to tackle moral hazard is limiting compensation when risk materialized. The compulsory insurance limits the extent of compensation to induce the insured to take optimal care after insurance coverage.

An Insight on Ethiopia's reporting to the Committee on the Rights of the Child

Anteneh Geremew[*]

Abstract

Implementation of human rights treaties by state parties is subject to international monitoring. Evaluation of state reports and forwarding recommendations is the primary human rights monitoring tool employed by treaty bodies. All core human rights treaties adopted this procedure. This piece is aimed at appraising Ethiopia's performance in fulfilling its obligations with regard to the reporting procedure. Particularly, the article will examine participation of Ethiopia in reporting to the Committee on the Rights of the Child concerning the Convention on the Rights of the Child and its two Optional Protocols. With a place for improvement, Ethiopia has recorded impressive experience of complying with the periodicity requirement in reporting to the Committee. Compliance to the reporting obligations on child and women rights treaties is better than performance in other treaties. But, preparation of State reports to the Committee was not comprehensively participatory. Participation of Non-Governmental Organizations in submitting their shadow report to the Committee and commenting on State reports was nominal. Diversity in composition of Ethiopian government delegation to the dialogue with the Committee varied from one report to another. The practice of dissemination of recommendations of the Committee is also unorganized.

Key terms: treaty bodies, child rights, reporting, concluding observations, committee on the rights of the child

Introduction

To date, there are nine core human rights treaties under the auspices of the United Nations.[1] These treaties established treaty bodies that monitor compliance of States with their respective treaty obligations. The principal mechanism of monitoring

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[1] See for more, Office of United Nations Higher Commissioner for Human Rights' website: <http://www.ohchr.org>

human rights implementation is the reporting procedure. According to this procedure, states parties to the human rights treaties are required by the treaties to submit regular reports on the compliance of domestic standards and practices with treaties obligations. These reports are reviewed at various intervals by the treaty bodies, normally in the presence of states representatives. At the end of examining a member State, a treaty body adopts its findings and forwards its recommendations to that particular State. The main functions of State reporting procedures are: initial review, monitoring, policy formulation, public scrutiny, evaluation, acknowledging problems and information exchange.[2]

However, delay in reporting or sometimes failure to report, non-participatory and low quality State reports, and lack of appropriate mechanisms to implement treaty body recommendations remain critical problems affecting the effectiveness of the reporting procedure.[3] The proliferation of treaty bodies aggravated the resource problem of States to prepare and present reports.[4] Concomitantly, treaty bodies could not cope up with the increase in ratification of the treaties; hence, backlog of reports become a normal situation.[5]

Ethiopia is party to all the core human rights treaties.[6] It is submitting State report to UN treaty bodies since 1978 when an initial report was submitted to the Committee on Elimination of Racial Discrimination.[7] However, the area of human rights reporting was neglected in studies of Ethiopia's human rights status. There is a dearth of literature on Ethiopia's participation in human rights monitoring. The

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[2] Philip Alston, 'The Purposes of Reporting', in United Nations, *Manual on Human Rights Reporting*, (United Nations, Geneva 1997), p. 22.
[3] Christen Broecke, *The Reform of the United Nations' Human Rights Treaty Bodies*, vol. 18, Issue 1 <https://www.asil.org/insights/volume/18/issue/16/reform-united-nations%E2%80%99-human-rights-treaty-bodies#_ednref3> accessed 12 November 2016.
[4] United Nations High Commissioner for Human Rights, *Strengthening the United Nations Human Rights Treaty Body System*: Summary (2012).
[5] Ibid.
[6] <http://www.ohchr.org http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx> accessed 12 December 2016.
[7] Eva Brems, 'Ethiopia Before the United Nations Treaty Monitoring Bodies' in *Afrika Focus* (vol. 20, nr. 1-2, 2007), pp. 49-74), p. 53.

main relevant literature in this regard is Brems's "Ethiopia before the United Nations Treaty Monitoring Bodies". Brems introduced Ethiopia's ratification status of the core human rights treaties and the level of implementation. On the basis of observations of treaty bodies, Brems recommended most urgent concerns on implementation of human rights in Ethiopia.[8]

The aim of this paper is evaluating the performance of Ethiopian government in tandem with its obligation to report duly and participate in dialogue with treaty bodies. This paper particularly focuses on the participation of Ethiopia in reporting to the Committee on the Rights of the Child (here in after, the Committee) concerning measures of implementation taken as per the Convention on the Rights of the Child (the Convention).

From a perspective of domestic application of treaties, there are four stages of reporting: implementation of the treaty; preparation of the reports; constructive dialogue with treaty bodies; and finally, implementation and follow up of the recommendations. The objective of this paper is to identify gaps in each stage and to suggest the ways to fill the gaps. An analysis on interplay between Ethiopian government and external monitoring organ instigates comprehensive study on the government's policy on external human rights monitoring mechanisms.

1. The Reporting Procedure of the Committee on the Rights of the Child

1.1 Introducing the Committee on the Rights of the Child

At the center of monitoring State Parties' compliance with the Convention on the Rights of the Child is the Committee on the Rights of the Child.[9] Number of

[8] Ibid.

[9] The initial proposal which was made in 1980 by Poland designates the Economic and Social Council (ECOSOC) as a monitoring body over the proposed Convention. There was also a proposal, which was not considered, to enable the ECOSOC to establish a group of experts entrusted with the responsibility of examining State reports. Finally, a proposal which enjoyed an extensive support was forwarded by Sweden jointly with Canada. The proposal called for an

members of the Committee was fixed to be ten by the Convention.[10] However, an amendment to Article 43/2 of the Convention was made to increase the number of members eighteen.[11] The amendment was necessitated by the considerable workload of the Committee, which was triggered by the Convention's extensive ratification.

Another reform was split of the Committee in to two for the purpose of consideration of reports.[12] The backlog of pending reports from large number of State Parties compelled consideration of reports to be made through two chambers each consisting of nine members taking due account of equitable geographical distribution.[13] However, the Concluding observations are being adopted in plenary sessions.

High moral standing and expertise in the field relevant to the convention are being the main weights for membership to the experts' committee; the Convention additionally requires that consideration shall also be given to equitable geographical distribution, as well as to the principal legal systems.[14] Members of the Committee are elected for a period of four years. However, the members are

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establishment of a separate committee of experts. It was justified that neither the UN system nor any NGOs had an overall view of the rights of the child; a committee of specialists in child law, with expert knowledge of the problems that affect children and with moral and legal authority to approach any governmental or private international agency to draw attention to the plights of children could be of considerable benefit to children. Accordingly, the final text of the Convention settled that a committee which would examine the measures taken by State Parties was to be established.
See, Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, vol. II, 2007, p.820 and Jaap Doek, *The United Nations Convention on the Rights of the Child, a Guide to the 'Preparatore Trauvaxe'* (2006), pp. 535-539.

[10] Convention on the Rights of the Child, (adopted 20 November 1989 entered into force 2 September 1990), Art 43(2).

[11] UN General Assembly, *Conference of State Parties to the Convention on the Rights of the Child* (Res 50/155, A/50/L.61/Rev.1, 1996).

[12] The most recent authorization by the General Assembly was made in 2012. See General Assembly, *Committee on the Rights of the Child* (A/RES/67/167, 20 December 2012).

[13] Ibid.

[14] See *Convention on the Rights*, fn 10, Art 43 (2)(3)(5)(6); Currently, the chairperson of the Committee is an Ethiopian citizen.
< http://www.ohchr.org/EN/HRBodies/CRC/Pages/Membership.aspx> accessed 20 November 2016.

eligible for re-election if they are re-nominated at the expiry of their term. As of March 2015, each of Africa, Asia and Europe has five members while the remaining three are from South America and Pacific.[15] Though members of the Committee are to be nominated and elected by governments, members are expected to act only in a personal capacity[16] and accountable solely to the children of the world.[17] The Convention stipulated that the Committee shall meet annually though this can be changed by the Committee.[18] Starting from 1995, the Committee holds three sessions a year.[19] Each session comprises one week pre-sessional period and three weeks for reporting procedure.[20]

1.2 The Reporting Procedure

The central aim of the Committee is set to be "examining the progress made by States Parties in achieving the realization of obligations undertaken in the Convention".[21] The States Parties to the Convention undertake to respect and ensure the rights set forth in the Convention by taking all legislative, administrative and other measures appropriate for the realization of each right under the Convention.[22] The Committee monitors the State Parties' progress through investigating complaints; adopting general comments; review State reports and organizing meetings for thematic discussion on child rights issues.

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[15] Ibid.
[16] *Convention on the Rights*, fn 10, Art 43 (2).
[17] The Addis Ababa Guideline on Independency and Impartiality of members of the Human Rights Treaty Bodies also remarks that the election of a member should not be thought to result in more favorable treatment for the State of which the national is a member. See Committee on the Rights of the Child, *Rules of Procedure* (CRC/C/4/Rev.4, 18 March 2015), Annex: *Guidelines on the independence and impartiality of members of the Human Rights Treaty Bodies* (The Addis Ababa Guidelines), Sec 2, Parag 6 and Sec 3, Parag 1.
[18] *Convention on the Rights*, fn 10, Art 43 (10).
[19] See *Committee on the Rights of the Child*, fn 31, Report on the Fifth Session (CRC/C/24, 28 January 1994), and Sec I (1) (4). Apart from the regular sessions, the Committee may also convene special sessions according to the rules of procedure. See Committee on the Rights of the Child, fn 17, Rule 3.
[20] Ibid.
[21] *Convention on the Rights*, fn 10, Art 43 (1).
[22] Ibid. Art 2(1) and Art 4.

The Committee is utilizing the reporting procedure as the primary tool of supervision of implementation of the rights enshrined under the Convention. State Parties to the Convention undertake an obligation to report on measures they take to realize the rights of the child recognized under the Convention and progress made in this regard.[23] Peculiar to the Committee is that the reporting mechanism extends beyond the rights enshrined under the Convention to the two Optional Protocols.[24] Initial report is be submitted two years after the Convention enters into force for the State[25] while periodic reports are to be made every five years.[26] The same periodicity applies for the two substantive Optional Protocols of the Convention.[27] Being concerned with high rate of non-submission of reports and overlapping of reports, the Committee has adopted a rule which exceptionally allowed a State Party under dialogue to combine its next two periodic reports.[28]

State reports are required to meet structural and substantive specifications provided by the committee. Apart from guidelines common for all Treaty Bodies,[29] the Committee adopted guidelines for initial and periodic State reports.[30] These

[23] See Convention on the Rights of the Child, Art.44 (1) and Art.44 (2); In the negotiation of the text of Art 44, there has been a debate on what exactly the State Parties are required to report. An earlier proposal directed State Parties to report "on their compliance with obligations under the Convention". However, the approved text of Art 44 (1) is more flexible as State Parties are required to report "on the measures they have adopted to give effect to the rights recognized under the Convention and on the progress made on the enjoyment of those rights". See Office of the United Nations High Commissioner, fn 9, p. 840.

[24] See Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts (A/RES/54/263, 25 May 2000), Art 8 (1) and Optional protocols to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (A/RES/54/263, 16 March 2001), Art 12.

[25] *Convention on the Rights*, fn 10, Art 44 (1) (A).

[26] Ibid Art 44 (1) (B).

[27] See *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, Art 8 (1) and Art 8 (2) and Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Art.12 (1) and Art.12 (2).

[28] See Committee on the Rights of the Child, Recommendation adopted by the Committee on the Rights of the Child, CRC, CRC/C/124, Thirty-second session, 2003, p.1.

[29] Fifth Inter-Committee Meeting of the Human Rights Treaty Bodies, Harmonized guidelines on reporting under the international Human Rights treaties, including guidelines on a common core document and treaty-specific documents, HRI/MC/2006/3, 10 May 2006.

[30] Committee on the Rights of the Child, 'Reporting Guidelines for Initial Reports on the Convention on the Rights of the Child' in *Compilation of Guidelines on the Form and Content of*

guidelines outlined basic formality and content requirements of State reports. Both guidelines classified provisions of the Convention in to eight clusters for the purpose of preparing the State report. These clusters are: General implementation measures; Definition of the child; General Principles; Civil rights and freedoms; Family environment and alternative care; Basic health and welfare; Education, leisure and cultural activities; and Special protection measures.

The Committee's pre-sessional meetings are dedicated for a preliminary consideration of State reports.[31] A pre-sessional working group prepares of lists of issues.[32] The lists of issues are to be forwarded for a State Party to clarify facts mentioned in the State report or to provide supplementary information.[33] Though the Convention does not provide for the procedure of considering a State report in the presence of delegate of a State, the Committee adopted a practice of a formal meeting for an exchange of information with a State Party. A series of exchange of thoughts between members of the Committee and a State Party is widely known as constructive dialogue.[34] The period for a constructive dialogue takes two 3-hours periods. There are some features what make the dialogue a constructive one.[35] First, openness of the arguments; readiness to admit that the other Party may be right on some issues; readiness to provide all necessary information requested and positivity towards proposals aimed at improving Human Rights observance are essential behavior of the Parties to consideration of the report. Second, unlike the

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Reports to be Submitted by States Parties to the International Human Rights Treaties (HRI/GEN/2/Rev.6, 3 June 2009) and Committee on the Rights of the Child, CRC Treaty Specific Reporting Guidelines, Harmonized according to the Common Core Document (CRC/C/58/Rev.2, 1 October 2010).

[31] Committee on the Rights of the Child, Overview of working methods of the Committee, 2003, p.3.

[32] See Meeting of chairpersons of the Human Rights Treaty Bodies Twenty-fifth meeting, Overview of the Human Rights treaty body system and working methods related to the review of States Parties (HRI/MC/2013/2, 12 April 2013), Parag 28.

[33] Ibid

[34] Beata Faracik, *Constructive Dialogue as a Cornerstone of the Human Rights Treaty Bodies Supervision* (2007), p. 3. < https://papers.ssrn.com/sol3/Data_Integrity_Notice.cfm?abid=2557068> accessed 23 June 2017

[35] Ibid.

complaints procedure (individual, inter-State and inquiry), the process of consideration of reports has more non-judgmental atmosphere than a blame and shame nature.

In fact, no treaty body imposes an obligation on State Parties to send delegation.[36] If the State decides to send a delegation, the delegation is preferred to be constituted with individuals who have experience in the fields covered by the Convention and who can influence policy-making and enhance the promotion and protection of children's rights.[37]

The consideration of a State report is to be commenced with an introduction Statement from a delegation. Then, two of the Committee members who are appointed as country rapporteurs provide a brief overview of the State of child rights in the concerned State Party.[38] Thereafter, the Committee members raise questions on each cluster of rights and the State Party responds.[39] Based on their observations of the report and the dialogue, the country rapporteurs then prepare a summary which may include suggestions and recommendations. Finally, the State delegation makes a final Statement.[40] If the Committee understands that the State Party is in need of technical advice or assistance, it transmits the State report with relevant recommendations to UN specialized agencies and other bodies.[41] The

[36] See Meeting of Chairpersons, fn 32, p.14.
[37] Marta Pais, 'The Convention on the Rights of the Child' in *United Nations, Manual on Human Rights Reporting under Six Major International Human Rights Instruments* (1997), p. 494.
[38] Committee on the Rights of the Child, fn 31, p. 3 In addition to drafting the Committee's concluding observations, country rapporteurs play a prominent role with regard to the constructive dialogue through leading the dialogue and ensuring full coverage of the main areas of concern in the country. Meeting of chairpersons, fn 32, p. 13.
[39] Ibid. The delegation may defer an answer for any question to consult with relevant organ in the State country. If the Committee considers that a number of issues should be clarified further, it invites the State to submit additional information or an additional report, including a progress report, on the implementation of the Convention. Pais, *The Convention*, fn 37, p. 501.
[40] Meeting of Chairpersons, fn 32, p. 3.
[41] Convention on the Rights of the Child, Art 45 (B). The Committee serves as a bridge between child welfare organizations with the technical and financial resources and the State Party which is in need of those resources. Particularly to children's Economic and Social Rights, a system of international cooperation plays a crucial role in boosting the capacity of State Parties to realize these rights for children under their jurisdiction.

State Party under examination may make comments on the recommendations adopted by the Committee.[42]

Based on observations of the report and the dialogue, the Committee then prepares a summary which may include suggestions and recommendations. These documents are known as Concluding Observations. O'Flaherty defined concluding observations as a mechanism for committees of experts to forward an authoritative overview of the state of human rights in a country and forms of advice which can stimulate systemic improvements.[43] States parties are required to make their reports widely available to the public in their own countries.[44] The Committee reiterates in its General Comment 5 that unless reports are disseminated and constructively debated at the national level, the process is unlikely to have substantial impact on children's lives.[45] Therefore the Committee urged States to make all documentation of the examination of their reports widely available to promote constructive debate and inform the process of implementation at all levels.

2. Status of Child Rights Treaties in Ethiopia

Alongside Human Rights treaties which do not specifically set children as targeted beneficiaries, Ethiopia is a party to major Bills of Child Rights. Ethiopia accedes to the Convention in 1991, to the Optional Protocol on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography on March 2014 and to the Optional Protocol on the Rights of the Child on the Involvement of Children in Armed Conflict on May 2014. Ethiopia is also a party to the African Charter on the Rights and Welfare of the Child from October 2002 on-wards. In April 2012, Ethiopia has ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol). The Ethiopian

[42] See Committee on the Rights of the Child, fn 17, Rule 75/2.
[43] Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' in *Human Rights Law Review* (vol. 6, no. 1, Oxford University 2006), p. 27.
[44] *Convention on the Rights*, fn 10, Art 44 (6).
[45] *Committee on the Rights of the Child*, fn 31, Parag. 73.

Government has also ratified series of ILO Conventions including Convention on Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (No. 182) and Minimum Age Convention (No. 138).

In a course of assessing the status of the Child Rights treaties under the Ethiopian legal system, we may come to identify disparities on the level of measures taken to integrate the international child laws with the national system of child rights protection. The disparity begins from the earliest stage of adopting the treaties through an official instrument. While it is mandatory that all international agreements shall first be ratified by the Parliament to have the effect of law, it remains controversial among scholars whether publication in the *Negarit Gazetta* is a requirement. It is equally unclear whether the parliament shall proclaim all treaties through a ratification proclamation. The issue is well complicated by lack of consistency on the practices of the Parliament. While the Parliament has so far proclaimed many bilateral agreements, there are a number of multilateral and international agreements which do not book a place in the Negarit Gazette. Among the family of child related treaties, the Parliament has only proclaimed the ratification of Convention, the African Charter on the Rights and Welfare of the Child and the Palermo Protocol through the official *Federal Negarit Gazetta*.[46]

It is essential to note that Ethiopia is not subject to the one year old Optional Protocol of the Convention on Complaints Procedures. One of the recommendations of the Committee, which has just reviewed Ethiopia's combined fourth and Fifth periodic report, insinuate Ethiopia to consider the ratification of the Protocol.[47] But this is not expected to happen, at least in the near future. The

[46] The CRC was ratified by Proclamation No. 10/1992. The ACRWC was ratified by virtue of A Proclamation to Ratify the African Charter on the Rights and Welfare of the Child, 2002, Proc. no. 283/2002, and The Palermo Protocol was ratified by Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children Ratification Proclamation, 2012, Procla. No. 737/2012.

[47] Committee on the Rights of the Child, fn 31, *Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding Observations on the combined fourth and fifth periodic report: Ethiopia*, (CRC/C/ETH/CO/4-5, 2024th meeting, 5 June 2015), Parag 73.

hostile policy that the Ethiopian Government adheres against international agreements which grant individuals, Non-governmental Organizations (NGOs) and states to complaint to international organizations on human rights violations in Ethiopia stands firm. In fact, the African Commission on Human and People's Rights remains the only human rights monitoring institution, to which Ethiopia has submitted through the Banjul Charter, to litigate complaints alleged against Ethiopia.[48] The repercussion is that, the reporting procedure remains the main, if not the only, mechanism available for international and regional human rights monitoring bodies to oversee compliance with human rights norms and investigate human rights situations in Ethiopia.

3. Ethiopia's Experience in Reporting to the Committee on the Rights of the Child

3.1 The Power to Report

From the perspective of a state party to a treaty, we may identify four stages in the process of reporting: implementation of the treaty; preparation of the reports; constructive dialogue; and finally, implementation and follow up of the recommendations. There shall be a systematic coordination among institutions responsible in one or another stage of the process. Identification of organs which are responsible to report to human rights bodies is a big step forward in clarifying parties which bears the expectations arising from the outputs of the reporting procedure. By Proclamation No. 916/2015, the Ministry of Foreign Affairs (MFA) has the power to enforce rights and obligations arise from treaties that Ethiopia ratified unless specific power has legally been delegated to other organs.[49] Enforcement of treaties, *inter alia*, includes enforcement of the reporting obligation of the state. The MFA has taken the leading role in the coordination and

[48] African Charter on Human and Peoples' Rights (27 adopted 1981, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)), Arts 47 and 55.
[49] *A Proclamation to Provide for the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia*, Procla. No.916/2015, Art.15 (4),

presentation of reports that Ethiopia submitted to human rights bodies including the Human Rights Committee and International Covenant on Economic, Social and Cultural Rights (ICESCR).[50]

In fact, in 2009, a massive reporting project was conducted with an objective to close the file of long over-due reports to Committee Against Torture, International Committee on Economic, Social and Cultural Rights and the Human Rights Committee. The project, which was financed by the Office of the United Nations High Commissioner on Human Rights (OHCHR), involved wide spectrum of Government and non-Governmental stakeholders. The project has also prepared a "core document" common reference source for all treaty bodies in monitoring human right in Ethiopia.[51] The document which was submitted in 2008 is still in operation. Taking in to account this, the CoRC recommended Ethiopia to submit an updated core document.[52]

However, the project could not overcome the temporality endemic prevalent on the reporting procedure as the reports and the core document were prepared by ad-hoc inter-ministerial Committees. A look in to the core document indicates that there was a plan to establish a permanent committee entrusted to the reporting procedure.[53] The Ethiopian Human Rights Commission (EHRC) has also, on another occasion, recommended the House of People's Representative (HPR) to take steps to establish a permanent public organ that shall take ownership of the reporting obligation.[54]

The implication of this sort of permanent institutional structure is also highly positive from the perspective of effectiveness of Concluding Observation since the

[50] For instance, all Ethiopian delegates to the one and only review of Ethiopia's report to ICESCR in 2012 were staff of the MFA.
[51] United Nations, *Core Document Forming the Initial Part of the Reports of States Parties: Ethiopia*, (HRI/CORE/ETH/2008, 6 February 2009).
[52] *Concluding Observations on Combined Fourth and Fifth Report: Ethiopia*, Parag. 78.
[53] United Nations, *Core Document*, fn 51, Parag. 256.
[54] Ethiopian Human Rights Commission, *Inaugural Report* (Addis Ababa, 2011), p. 113

structure will essentially establish a procedure to disseminate Concluding Observations and organize structured post-reporting conferences on Concluding Observations. This in turn is an important leeway for the recommendations to affect domestic decision-making process. This forecast was validated by the core document itself which hinted that one of the responsibilities of the Committee was planned to be "to oversee the dissemination of the treaty bodies' recommendations."[55] A significance to have a central coordinating body with a responsibility of the reporting process is clearer when one takes in to account the fact that the reporting process of those generally applicable Conventions, like ICESCR and International Covenant on Civil and Political Rights (ICCPR), could not be left for one or some Ministries.

An approach to establish an ad-hoc Committee every time the need to report arises also defies a procedural nexus required to be maintained between two consecutive reports to a treaty body and more specifically between recommendations on current report and a future report. This is due to the fact that the provisional organ may, utmost, be operational as long as the time of receiving Concluding Observations.

To reiterate the power pertaining to enforcement of treaties, it is reserved that the power of the MFA is without prejudice to powers delegated to other organs. In this regard, treaties on rights of children and women have been for long entrusted to a special organ.[56] Child affairs under the Federal Democratic Republic of Ethiopia Government used to be the power of the Ministry of Labor and Social Affairs (MOLSA)[57] and the Ministry of Women (MOW).[58] Another legislation

[55] United Nations, *Core Document*, fn 51, Parag 257.
[56] A critique that the institutional framework for the implementation of the child rights treaties lack clear legal basis is, consequently, a skewed vision. See for the argument: Center for Human Rights Studies and College of Law and Governance Studies, *Baseline Study for a Comprehensive Child Law in Ethiopia* (Addis Ababa University 2013), p. 141.
[57] *A Proclamation to Provide for the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia*, Procla. No. 4/1995, Art 20 (9).
[58] *A Proclamation to Provide for the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia*, Procla. No. 471/2005, Art 29(8). This Proclamation has

restructured the executive organ has redefined the Ministry of Women, Youth and Child Affairs (MOWYCA). This Ministry has been recently restructured as the Ministry of Women and Child Affairs (MoWCA).[59] Therefore, MoWCA is the new duty holder to follow up the implementation of treaties relating to women and children and submit reports to the concerned bodies.[60] Hence, we can clearly understand that the obligation to report on child rights situation resides on an organ which takes responsibility to enforce treaties on child rights.

3.2 Ethiopia's Experience in the Reporting Process

So far, Ethiopia submitted four reports to the Committee. The initial and second periodic reports were prepared by the MOLSA. Whilst the third reporting process was led by the MOW, the recent report was managed by the MOWYCA. The initial report was submitted in 1995 while the second and third periodic reports were made in 1998 and 2005 respectively. The combined fourth and fifth periodic reports were submitted in 2012 while the dialogue was held in mid-2015.

3.2.1 Preparation of the Reports and Constructive Dialogue

Despite clear centralization in reporting, the reports assert that other concerned organs have not been foreclosed from partaking in the process. The reports were claimed to be prepared with active participation of the Ministries of Justice, Education, Health, and other key organs including NGOs working on child rights.[61]

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clearly stipulated that the Ministry shall follow up the implementation of treaties concerning women and children and submit periodical reports to the concerned organs.

[59] *A Proclamation to Provide for the Definition,* Procla. No. 916/2015, fn 49.

[60] Ibid, Art 36 (1) (j).

[61] Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Initial report: Ethiopia, CRC/C/8/Add.27, 12 September 1995, par. 2; Committee on the Rights of the Child, Consideration of Reports submitted by States Parties under Article 44 of the Convention, Second Periodic Report: Ethiopia, CRC/C/70/Add.7, 23 March 2000, par.1.

Besides, the EHRC has the power to forward its opinion on human rights reports to be submitted to international organs according to its establishment Proclamation.[62]

After submission of a report, the next stage is a constructive dialogue with the Committee. Well organized and comprehensive written submission cannot meet its informative objective without being accompanied by a quality delegation which can explain the facts and give supplementary information. Hence, the making of the delegation to a dialogue with the Committee shall serve two purposes; one, the group must be composed of individuals who are in the right position to make the merit based discussion with the Committee and two, the members of the delegation shall also be officials capable of influencing domestic policies and enforcement of child rights on the basis of the exchange of ideas with the Committee. Independent human rights institutions, courts and law makers have irreplaceable roles to play in shaping child relevant laws and ensuring the effective enforcement of child rights.

The form of composition of Ethiopia's delegations to the constructive dialogue with the Committee has no uniform picture. There was well considered diversity in the delegation to the third periodic report which included Chief Commissioner of the EHRC, the Vice-president of the Federal Supreme Court, Members of the Parliament and representatives from various Ministries.[63] Unfortunately, the delegation to the recent combined fourth and fifth periodic report did not include a representative from those organs while five staffs from a Ministry, MoWYCA, were sent for the dialogue.[64]

[62] *Ethiopian Human Rights Commission Establishment Proclamation,* Procla. No. 210/2000, Art.6 (7).
[63] *Letter of Transmission from Federal Democratic Republic of Ethiopia Permanent Mission to the United Nations,* (2006).
[64] *Letter of Transmission Federal Democratic Republic of Ethiopia Ministry of Foreign Affairs* (2015).

3.2.2 Compliance with Periodicity

Of course, it is hardly true that the reports were submitted with absolute compliance to due dates. The initial report and the third periodic reports were each two years overdue and the consolidated fourth and fifth periodic report was one year overdue. Despite this, the reporting history of Ethiopia to the Committee is commendable experience worthy to be taken as exemplary to the reporting process on other treaties by MFA. One may take note of the facts that initial reports on ICCPR and ICESCR were made after 17 years of delay and an initial report to CAT took 14 years.[65] Hence, it was rightly appreciated that Ethiopia has very mixed reporting record, with an excellent performance under the Convention on the Rights of the Child (CRC) and a fair one under the Convention on Elimination of all forms of Discriminations Against Women (CEDAW), but very poor under the other treaties.[66] Having in mind this path of failure of the Government to be abided by the obligation to timely and periodically report to Human Right Treaty Bodies, it is rather perceptible that the Government is more permissive to be challenged by the expert Committee on child rights and to subject its policies and laws to the scrutiny by the Committee. This excellent reporting history is also attributable to the availability of high technical and financial support from the UNICEF and other domestic and international NGOs which is not satisfactory in case of reporting to other treaties.

3.2.3 Participation of NGOs

Concerning participation of NGOs, there is a critique that preparation of the reports overlooked guidelines on the participation of stakeholders, especially NGOs.[67] The combined fourth and fifth report, on the other hand, claimed that national and

[65] There are also three periodic reports which are currently overdue, one each on ICCPR, CERD, CEDAW and CAT. http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/LateReporting.aspx last time accessed on December 12, 2016.
[66] Brems, *Ethiopia Before the United Nations*, fn 7, p. 53.
[67] Center for Human Rights, fn 56, p. 131.

international NGOs were consulted in the process of fact finding.[68] The report also remarked that NGOs participated in a consultative meeting to validate the country report in line with previous recommendations and country situation. It is also inappropriate to disregard the technical and financial support that NGOs, in particular the United Nations International Children's Emergency Fund (UNICEF) is offering for preparation of reports.[69] But, participation of NGOs in submission of alternative (shadow) reports to the Committee is invisible. The most recent report to the Committee recorded that four NGOs submitted alternative reports on Ethiopia's State report.[70] When one notices the fact that all these alternative reports were submitted by NGOs reside abroad, a suspicion on domestic environment for NGOs is understandable.

3.2.4 Delay in Examination of State Reports

Another concern shadowed the reporting procedure is the time gap between submission of state report and adoption of Concluding Observations. Typically, we can see that the Committee adopted Concluding Observations on the initial report of Ethiopia two years after the submission of the state report. Concluding Observations on the second report and combined fourth and fifth periodic reports were made three years past the submission of the reports. Though a possible gap with regard to new developments may be filled with information exchange in the constructive dialogue, the time gap between the submission of state report and adoption of the Concluding Observations entail a Concluding Observation which fails to depict the updated picture of child rights situation in a state party.

3.2.5 Publication and Dissemination of Concluding Observations

[68] Committee on the Rights of the Child, *Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations on the Combined Fourth and Fifth Report: Ethiopia* (CRC/C/ETH/CO/4-5, 2024th meeting, 5 June 2015), Parag. 8.
[69] Ibid. Parag. 10.
[70] <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx> accessed 12 December 2016

Concluding Observations are "a vehicle through which the preparation of reports is transformed into policy-making and implementation".[71] This possible impact on the policy and law-making process is highly determined by the procedural necessities subsequent to the adoption of the Concluding Observations. Translation, publication and dissemination of the Concluding Observations are the most important procedural frameworks to transform the Concluding Observations to domestically relevant instruments.

It is obvious that the government of Ethiopia is not legally bound to give effect to a recommendation of any external entity. But the Convention imposes a procedural obligation to publicize and disseminate reporting documents.[72] Contextual understanding of the instruments necessitates the publication and dissemination of Ethiopia's human rights reports and feedbacks to the reports. Art. 44 (6) of the Convention requires States Parties to make their reports widely available to the public. Of course, as it becomes clear from the Concluding Observations of the Committee, the obligation to publicize and disseminate Concluding Observations is regarded as an obligation rooted in this provision of the Convention. The Committee interprets Art. 44 (6) of the Convention as to include for dissemination of reports, replies, summary records, Concluding Observations.[73] According to the Committee's Concluding Observations, the direct purpose of the publication and dissemination of those documents is generating dialogue and awareness of the Convention within concerned organs. Being subject to the dialogues in parliament and other organs of the Government, recommendations of the Committee are intended to affect the decisions of those organs.

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[71] Niemi H., *National Implementation of Findings by United Nations Human Rights Treaty Bodies: A Comparative Study* (Institute for Human Rights, Abo Akademi University 2003), p. 22.
[72] Convention on the Rights of the Child, Art. 44 (6).
[73] Committee on the Rights of the Child, *Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations on Second Periodic Report: Ethiopia*, (CRC/C/15/Add.144, Twenty-sixth session, 21 February 2001), Parag. 79.

Having in mind this, we may conclude that though the Government of Ethiopia has no obligation to implement the recommendations of the Committee, it has a procedural obligation to publicize Concluding Observations and disseminate them to all concerned organs to consider the recommendations in decisions which affect children. However, it is argued that in view of what the Convention envisions under Art. 44 (6), it can be concluded that Ethiopia's effort is almost zero.[74]

In this regard, the Commission has a duty to translate international human rights instruments adopted by Ethiopia and disperse.[75] Contextual understanding of the instruments necessitates the publication and dissemination of Ethiopia's human rights reports and feedbacks to the reports. States adopt various strategies to make recommendations of treaty bodies widely accessible to the lay people. For example, Finland published Concluding Observations in the publication series of the Ministry for Foreign Affairs and in Sweden, the Observations are available online through the Ministry of Foreign Affairs Website.[76]

On the other hand, lack of follow up procedure from the side of the Committee, for midterm assessment of actions taken to publicize, disseminate and give effect to the recommendations of the Committee inhibited the possible persistency in exchange of information between the Committee and reporting state parties. The main follow up mechanisms under disposal for the Committee are the state reports and Concluding Observations themselves. The Committee has the practice to require a state party, as a recommendation, to report about implementation of recommendations in its next report. The Committee required Ethiopia information

[74] The African Child Policy Forum, *Harmonization of laws relating to children: Ethiopia*, p. 39. The EHRC, on the other hand, claims that it is has so far translated and disseminated a number of Concluding Observations to various concerned organs. But it's confessed that the practice of the commission is piecemeal and the documents are not accessible outside the institutional settings to the larger public. Interview with Mr. Adham Nuri, Human Right Protection and Monitoring Team Leader at EHRC, (Addis Ababa 17 February 2016).
[75] See *Ethiopian Human Rights Commission Establishment*, fn 62, Art 6 (8).
[76] See Niemi, *National Implementation,* fn 71, p. 26.

on the measures taken and progress achieved in the implementation of the suggestions and recommendations made by the Committee.[77]

A crucial step in this regard is the dissemination of the report and accompanying documents to create awareness as to the lacunae to policy and law makers and to apportion responsibility for all concerned organs. It could have been better to include the law makers in the reporting procedure; from commenting on the country reports to the extent of being part of the delegations to the dialogue with the Committee. A practice from South Africa is exemplary in this regard. All reports of South Africa to be submitted to human rights monitoring bodies are debated in parliament to evaluate whether the reports reflect the true picture of human rights situations in the country.[78] Members of parliament are also regularly included in national delegations to the treaty bodies, to ensure that they better understand the treaty bodies' recommendations.

The reporting procedure in the Ethiopian legal system lacks such all-stages coordination between the reporting bodies and the law makers. Besides, there is no formally established system to flow the recommendations from the reporting body to the law makers. As a relief to these irregularities, post-reporting workshops can be taken as important venue to reach all stakeholders which may have a role in the review of national policies and laws as per the suggestions of an international monitoring body. For instance, in Germany, the National Human Rights Institute prepares regular meetings to create awareness about reports of German to treaty bodies.[79] In these meetings, representatives from ministries, law makers, NGOs, academia and even members of the treaty bodies were participated. In fact, this

[77] Committee on the Rights of the Child, *Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations on Initial Report: Ethiopia* (CRC/C/15/Add.67, Fourteenth Session, 24 January 1997), Parag. 37.

[78] The Human Rights Law Centre and the International Service for Human Rights, *Domestic implementation of UN Human Rights recommendations: A Guide for Human Rights Defenders and Advocates* (2013), p.13.

[79] Frauke Seidensticker, *Examination of State Reporting by Human Rights Treaty Bodies: An Example of Follow-Up at the National Level by National Human Rights Institutions* (German Institute for Human Rights, April 2005), p.4.

kind of post-reporting conference was once prepared by Addis Ababa University and UPRInfo on recommendations given to Ethiopia under two rounds of Universal Periodic Review (UPR) which is a peer review human rights monitoring unlike the expert monitoring.[80] This kind of conferences should also be conducted with the purpose of creating consciousness as to observations of international and regional treaty bodies on Ethiopia's Human Rights situation.

Conclusion

Ethiopia's compliance with its obligation to report and cooperate with the Committee on the Rights of the Child is satisfactory. This is due to the fact that the obligation to report on child rights situation separately assigned to an organ which takes responsibility to enforce rights on child rights. This is in contrast with reports of MFA on treaties of which implementation is the responsibility of a plethora of Ministries; i.e., the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights. Experience of organs which, at one or another time, took the responsibility to report on child rights shall be taken as exemplary to the reporting process on other treaties by MFA.

Preparation of reports to the Committee was also inclusive of concerned government offices working on child rights. However, NGOs are not amply participating, apart from financial supports, in preparation of State reports and submitting their own alternative reports. Concerning a dialogue with the Committee, the recent Ethiopia's report to the Committee was not accompanied by a delegation composed of individuals who are capable of influencing domestic policies and enforcement of child rights. For instance, members of the parliament were not part of the delegation. This gap between the external monitoring organ

[80]Addis Ababa University and UPRInfo, *Post-UPR Conference on Ethiopian Accepted Recommendations* (2015).

and domestic law-making organ affects the affects the integration of the Committee's recommendations into domestic law-making process. Though Ethiopia has no conventional obligation to implement the recommendations, the State reports with Committee's feedback shall be made accessible all stakeholders. The initiative on UPR post-reporting workshop shall also be adapted to the treaty body reporting procedure.

The ICC and the Crime of Aggression: Justiciability of an Act of Aggression

Legesse Tigabu Mengie*

Abstract

Though agreement was reached on the inclusion of the crime of aggression in the ICC Statute, the controversy over the jurisdictional issues of this crime has continued. One of the important points of the disagreement is whether the ICC is an appropriate body to determine an alleged act of aggression committed by a state which is a basis for prosecution of the crime of aggression. This reflection investigates the act of aggression, as set under the ICC statute, from the perspective of its justiciability.

Introduction

The incorporation of aggression as an international crime under the ICC statute has brought about diverging views. The explanations to the diverging views on the crime of aggression, as it stands today under ICC Statute, rely mainly either on political perceptions of states towards the ICC or the Westphalian proposals. Some explanations also rely on the effectiveness of the Court to handle the crime of aggression. The most important and overlooked issue which could help us in explaining the divergence, however, is the question of whether the act of aggression that is an essential *actus reus* element of the crime of aggression inherently justiciable. This work will, therefore, investigate the act of aggression, as set under the ICC statute, from the perspective of its justiciability and aims at contributing a modest enlightenment to the broader debate on whether the Court's judicial function could be complicated through exercise of jurisdiction over the crime of aggression.

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The scope is thus limited to the act of aggression and does not address the justiciability of the crime of aggression in its general sense. An investigation on the justiciability of an act of aggression is both relevant and timely given the current controversy surrounding the jurisdiction of the ICC over the crime of aggression and due to the fact that a decision on activation of such jurisdiction can be made any time once we are in 2017. Such an investigation would also be a relevant addition to the attempts to clear the doubt on which international body is appropriate to determine an act of aggression.

As exploring justiciability of an act of aggression would require considering both legal and extra-legal contexts of this act, this work will employ both legal and political perspectives. Relevant case law and contemporary literature on both legal and political aspects of an act of aggression will, thus, be used to analyze the relevant provisions of the ICC Statute with a view to appraise the justiciability of an act of aggression, which is an essential *actus reus* element of the crime of aggression as defined under the ICC statute. Accordingly, the next section will discuss aggression as an *actus reus* element of the crime of aggression. Section three will explore the justiciability of aggression. Finally, section four will provide concluding remarks.

1. Aggression as an *actus reus* Element of the Crime of Aggression

Despite the lack of a universally recognized definition, aggression is generally viewed as a crime violating customary international law (CIL).[1] The crime of aggression was tried at the international level by the Nuremberg Tribunal (NT) for the first time as 'crime against peace'.[2] In response to the challenge to its jurisdiction based on the *'nullum crimen sine lege'* principle, the Tribunal

[1] Malcolm Shaw, *International Law* (Cambridge University Press, 2014), p. 316.
[2] Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014), p. 307.

employed several sources to construct aggression as a crime under CIL.[3] As stated under the Charter of the NT, the judgment of the Tribunal and later in the ICC Statute, the crime of aggression requires an act of aggression as a prerequisite.[4] This element of the crime of aggression has made it difficult to attain consensus on the content and application of this crime.

Cognizant of the lack of consensus on the act of aggression, the International Law Commission (ILC) left the determination of this act out of the jurisdiction of the ICC in the draft it prepared for the negotiation on the establishment of the Court.[5] To be precise, the ILC suggested the ICC jurisdiction on crime of aggression to be dependent on determination of the alleged act of state by the United Nations Security Council (UNSC).[6] The diverging views then resulted in Art 15 *bis* of the Rome Statute which made the ICC jurisdiction on crime of aggression subject to ratifications and a decision to be made after 1 January 2017.[7]

Though a consensus was reached on the inclusion of the crime of aggression in the ICC Statute, the controversies about the jurisdictional issues of this crime continued.[8] One of the important points of the disagreement, as Erin Creegan put it correctly, is 'whether there should be a jurisdictional triggering mechanism, such as the approval of the UNSC, the General Assembly (GA) or the ICJ, before a case of alleged aggression is referred to the ICC.'[9] This controversy has directly to do with the nature of aggression. The 'planning, perpetration, initiation or execution of an act of aggression'[10] by a person having the position stated under Art 8 *bis* constitutes a crime only if such act of aggression, 'by its character, gravity and

[3] Ibid, p.118.
[4] Art 6(a) of the Charter of the Nuremberg Tribunal and Art 8 *bis* of the ICC Statute.
[5] Cryer, *An Introduction*, fn 2, p. 310.
[6] Ibid.
[7] Art 15 *bis* (2 and 3) of the ICC Statute.
[8] Erin Creegan, 'Justified Uses of Force and the Crime of Aggression' in *Journal of International Criminal Justice* (Oxford University Press, Oxford 2012), pp. 59-82.
[9] Ibid
[10] Art 8 *bis* (1).

scale, constitutes a manifest violation of the UN Charter.'[11] This would require a two levels test: firstly, determining if the act is aggression under Art 8 *bis* (2) and secondly, if so, whether its 'character, gravity and scale' depicts a manifest violation of *jus ad bellum* under 8 *bis* (1). Both levels would require a close investigation of a state's act and such an investigation is prone to the controversies surrounding the act of aggression.

The two fundamentally opposed views raised on crime of aggression at the ICC Review Conference in 2010 were evidences of the intricate issues associated with the determination of the act of aggression. The US delegate insisted that it is quite difficult to prosecute aggression as it involves political issues.[12] Other delegates rejected this position and held that denying the ICC such a jurisdiction would make little sense given the fact that the crime of aggression is long considered as one of the four international crimes and it remains the 'supreme international crime' as declared by the NT.[13] The two positions beg for the question whether an act of aggression is inherently justiciable.

2. Justiciability of Aggression

Before evaluating the justiciability of aggression, it is appropriate to indicate the essentials of the doctrine of justiciability. Justiciability does not have a fixed content and its application is dictated by the delicate and conflicting forces revolving around the appropriateness of an issue for adjudication.[14] As Thomas Barton rightly stated it, 'justiciability is a tool to assess what sorts of problems are, and are not, suitable for adjudication.'[15] In international law, justiciability

[11] Ibid
[12] Mary Ellen O'Connell and Mirakmal Niyazmatov, 'What is aggression?': Comparing the Jus and Bellum and the ICC Statute in *Journal of International Criminal Justice* (vol. 10, 2012), pp. 189-207.
[13] Ibid
[14]Thomas Barton, 'Justiciability: A Theory of Judicial Problem Solving' in *Boston College Law Review* (vol. 24, 1983), pp. 505-634.
[15] Ibid

principally refers to the determinacy of an issue through the 'application of legal principles and techniques.'[16]

At the core of this work is whether an act of aggression, by its nature, is suitable for adjudication. In other words, how easily could an act of aggression be handled by the ICC through application of law and legal techniques? Though it was not directly framed and debated, justiciability of an act of aggression was and continues to be the source of the major controversies in the discussions over the content of the crime of aggression. The supporters of the Kampala amendments applaud such amendments and see them as instruments of maintaining the Nuremberg legacy.[17] The details provided by the amendments regarding the content of the crime of aggression are seen as adequate responses to the challenges related to legal certainty which were experienced during NT. If we endorse the views of these supporters, an act of aggression is a justiciable subject matter which can be effectively held by the ICC and thus there will be no need to separately deal with the ICC's jurisdiction over an act of aggression as a discussion on its jurisdiction over the crime of aggression would suffice.

For the opponents of the Kampala amendments, although the details about the crime of aggression are positive developments, determination of an act of aggression is not a subject that can be automatically exercised by the ICC. The US is the prominent protestor and has rejected the ICC's jurisdiction over the crime of aggression let alone the Court's jurisdiction to determine an act of aggression which is the very reason for all the controversies.[18] In the 2015 American Society of International Law annual meeting, Sarah Sewall raised three points in defense of the US position. The third point has to do with justiciability of aggression (i.e. the political issues associated with aggression) while the remaining two are related to

[16] P. Ingram, 'Justiciability' in *American Journal of Jurisprudence*, (vol. 39, 1994), 353-372.
[17] ____ *The ICC Crime of Aggression and the Changing International Security* (American Society of International Law) <https://www.asil.org/blogs/icc-crime-aggression-and-changing-international-security-landscape> accessed 18 March 2016
[18] O'Connell, *What is Aggression*, fn 12, p. 190.

practical problems that the Court will face in exercising jurisdiction over the crime of aggression.[19]

There are also objections to the Court's jurisdiction over the crime of aggression based on the Westphalian system and the effectiveness and impartiality of the Court.[20] The objections which rely on the Westphalian system are less important so long as the ICC assumes jurisdiction based on a treaty to which states have given their consent.[21] The arguments which are raised based on effectiveness and impartiality seem temporary and do not basically address structural problems related to the crime of aggression in general and the act of aggression in particular. They do not explain if an act of aggression is justiciable and can be determined by the ICC.

Determination of an act of aggression involves intricate issues as such act has to do with state responsibility. In determining an act of aggression, the ICC will have to consider the political motives of a state, the nature of an attack and the level of use of armed force as it has to assess whether an act of a state, 'by its character, gravity and scale, constitutes a manifest violation of the UN Charter.'[22] Such an assessment cannot escape the political essentials inherent in the act of aggression. As over 40 civil society organizations stated it in their joint letter addressed to foreign ministers ahead of the Kampala conference, 'aggression raises fundamentally political considerations about a state's initial decision to resort to the use of force.'[23] The ICC, for example, will have to determine politically sensitive issues like which state is responsible for an inter-state conflict and who

[19] *The ICC Crime*, fn 17.
[20] Ayla Prentice-Cuntz and Katie Flannery, 'The crime of aggression and the ICC in a quasi-Westphalian system', <http://www.internationaljusticeproject.com/on-the-crime-of-aggression-and-the-icc-in-a-quasi-westphalian-system/> accessed 19 March 2016
[21] Ibid.
[22] Art 8 *bis* (1 and 2).
[23] <http://www.iccnow.org/documents/Foreign_Minister_Letter_-_May_10.pdf> accessed 21 March 2016

has used armed force in self-defense.[24] By doing so, it will engage itself in political issues which are normally handled by international political bodies. The act of aggression is, therefore, non-justiciable by its nature. The content of aggression also suffers from indeterminacy. The disagreements on un(lawfulness) of use of force for humanitarian reasons following NATO's intervention in Yugoslavia and Russia in Georgia are among the noticeable examples depicting the indeterminacy of aggression.[25] Such uncertainty would make any argument in favor of justiciability of an act of aggression feeble.

It follows that the ICC is not an appropriate body to determine an act of aggression if not the crime of aggression. Despite the contrary formulation under its statute[26], the ICC should, therefore, seek determination of such an act by the appropriate political bodies before it starts to prosecute a crime of aggression. Some may say this would undermine the Court's independence. Nonetheless, this is an apt compromise as, unlike the other three crimes under the ICC jurisdiction, the crime of aggression constitutes not only the acts of an individual but also a state. The UNSC reluctance or blockage may, at times, be a real threat in this regard. Yet, the ICC can work on the ways of using the more democratic and impartial UN bodies (GA and ICJ) to get green light to prosecute the crime of aggression.

Conclusion

To sum up, given the fact that the determination of an alleged act of aggression involves an investigation into state responsibility and thus intricate political issues, such an act is non-justiciable by its nature. While exercising jurisdiction over the crime of aggression, the ICC should, therefore, rely on determination of an alleged act of aggression by the appropriate international political bodies. Such dependence

[24] <http://www.state.gov/j/remarks/240579.htm> accessed 24 March 2016
[25] Andreas Paulus, 'Second Thoughts on the Crime of Aggression' in *The European Journal of International Law* (vol. 20, 2010), pp. 1117-1128.
[26] Art 15 *bis* (8).

is a necessary evil in exercising jurisdiction over a crime which is closely linked to a political choice of a state and saves the Court from practical setbacks. As determination of an alleged act of aggression by the UNSC may be rare, the ICC has to develop mechanisms to utilize alternative ways of determination.

Book Review

Tadesse Melaku, *Ethiopian Constitutional Law: Past and Present*, Vol. II (Alpha Printers, Addis Ababa 2017; number of pages: xv + 268, Price: 100 ETB)

Gosaye Ayele*

Ethiopian Constitutional law, Volume II is one of the new publications on law published in 2017. It is a follow up of similar work by the same author five years ago under the title "Introduction to constitutional law", volume I. The book is a good contribution, given the acute shortage of reading materials, on constitutional law. It is perhaps the third textbook written on Ethiopian constitutional law[1] and the second textbook dealing principally on the current FDRE Constitution. Hence, the significance of the book under consideration cannot be overstated.

The author has done a commendable job in continuing with the second volume. It is hoped that the book would be valuable not only to students but to general readers/audience interested to have greater understanding of the FDRE Constitution.

A notable significant strength and development in this volume is the use of as many Ethiopian constitutional cases as possible and as available. Despite the inaccessibility problem, the author has attempted to include Ethiopian constitutional cases and present them in the pertinent sections. The other strength of the book is its attempt to include cases from jurisdictions which are more or less similar to the Ethiopian context. With the increasing constitutional cases disposed by the House of Federation (HF) and their accessibility, there is a chance in the

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[1] The first constitutional textbook was authored fifty years ago by Paul and Clapham in two volumes, under the title "Ethiopian constitutional development". There has not been any other publication since then until 2012. In 2012 the second textbook on Ethiopian constitutional law and the first on the current constitution was published by Getachew Assefa entitled "Ethiopian Constitutional Law with Comparative Notes and Materials".

future that the book can be truly a textbook on Ethiopian constitutional cases with its further refinement and thorough review.

A general major drawback of the book, in my view, is that the author did not continue with some of the valuable features of the previous volume that would make the book truly a textbook. Unlike the previous volume, this volume does not contain learning objectives. Nor does the book provide conclusion/summary and review questions, and further reading references in each chapter. This can give the book more of an attribute of a reference book than a textbook. The ambivalence is obvious from the introduction of the book, where in a sentence the author also seems not to be sure how to refer to the book. It simply states, not assertively, that "the book may be taken as a textbook". Another slight inconvenience is that the book makes greater sense if read in tandem with the previous one.

The notable absence of reference to, at least in the bibliography, the two previous works on constitutional law, Paul's and Clapham's books in two volumes on Ethiopian constitutional development and the recently published Getachew Assefa's book on Ethiopian constitutional law, is unbecoming of a writer on Ethiopian constitutional law and would be a surprise for constitutional lawyers.

Having these observations on the books general strengths and drawbacks, in what follows, I present my specific comment, observations and some of the limitations that result from oversight or misrepresentation in each chapter.

Organized into six chapters, the book attempts to exhaustively deal with almost every aspect of the Federal Democratic Republic of Ethiopia (FDRE) Constitution. It begins, in chapter one, by introducing the past constitutional system until the 1991 Transitional charter. The Ethiopian constitutional development may roughly be divided into two, taking the year 1931 as a watershed in which the first codified constitution was introduced. The first is the pre-1931 era. The second is the post-1931 period.

The pre-1931 period, the era of the 'unwritten' constitution, is the longest, extending, at least, as far back as 2000 years ago. It is very hard to give a detailed account of that era, not least because there is little or no written material, because the book's principal purpose is expounding the current constitution. It only gives a snapshot of the traditional constitution in Ethiopia.

While the author's attempt to give a background is appreciable, there are noticeable limitations. For one thing, apart from a general claim that the present cannot be understood without understanding the past, the book does not make a strong case on why and how the past constitutional experiment is relevant to the present. What one witnesses in the Ethiopian constitutional history is discontinuity and lack of a deep constitutional culture. In setting the scene for the readers, this was an important opportunity to bring to the fore one of the biggest problems of the country — the vicious circle of changing one constitution after another. In other words, the failure to establish and sustain constitutionalism in Ethiopia.

Second, it cites the traditional sources of legitimacy during the monarchal period. One of these is that one had to belong to the Solomonic dynasty to be a ruler. The second was that one had to belong to and profess the Ethiopian Orthodox teaching. The third, the book says, was "the underrepresentation of women in leadership positions". This is more of an evaluation of the system in hindsight than a description of the third feature of the traditional sources of legitimacy.

Third, the chapter is very sketchy on other relevant traditional constitutional issues such as the nature and scope of the powers and rights of the kings and of other officials of the kingdom, their titles, their hierarchy etc.

Fourth, there is a mismatch between the title and the content of Section 1.3 of the first chapter. The title is modern constitution in Ethiopia. But the paragraphs discuss on the difficulty, if not the impossibility of comparing quality of one

constitution with a replaced one with particular instance of the institution of parliament.

Moreover, the section fails to discuss which the modern ones are. Why are they modern? What is the standard? It seems to have an implicit judgment that the unwritten constitutional era is traditional and the written era is modern. But it is very difficult to take the state of *writtenness* as a criterion to determine modernity.

Fifth, section 1.4.1 of the same chapter seems to reduce the reason why the 1931 constitution was adopted due to the elites' pressure to adopt the constitution. Nevertheless, critiques have a variety of views what could have motivated the emperor to adopt the first written constitution including the desire to confine the line of succession to his blood line. There is also consensus that the turning down of Ethiopia's application to the League of Nations was part of the reason for its adoption. It is equally important to include the emperor's reason why he wanted to adopt the constitution, which he made explicit in his speech and the preamble of the constitution.

Sixth, there is no discussion on the debate and controversy with regard to the fate of the regional landlords and various traditional officers (*mesafint* and *mekuannint*) with regard to their positions and privileges. Now there are increasingly available materials on this issue with the publication of, for instance, Ambassador Zewde Reta's book[2], which extensively provides on the surrounding debate and controversy.

Seventh, the author claims that "……while the constitution succeeded in concentrating power, it failed to prevent foreign aggression". This seems to assume that was the purpose, at least one of the purposes of the constitution.[3] But it is

[2] አምባሳደር ዘውዴ ረታ የቀዳማዊ ኃይለስላሴ መንግስት ሻማ ቡክስ፣ አዲስ አበባ፤ 2005፡፡

[3] Tadesse Melaku, *Ethiopian Constitutional Law: Past and Present* (2017), p. 13.

questionable if that was its purpose. Even if the reason for its adoption is to secure independence, can the success /failure be attributed to the constitution?

Eighth, strange enough one of the discussions overlooked is the manner of the revision of the 1931 constitution. There is no discussion of the process of revision, the organs in charge and its composition.

Ninth, there is a disconnect under section 1.5.1, Human Rights under the 1955 Constitution, between the first paragraph and the remaining ones. The first, consistent with the title, discusses on human rights. The second however deals features and problems of constitution in a hierarchical society. Still the third paragraph talks about the growing discontent and the variety of measures undertaken by the emperor. The fourth talks about the downfall of the emperor. The fifth deals with the last efforts to draft a new constitution.

Tenth, little is said on the causes or the variety of views on the causes of the revolution, which have had huge political consequence reverberating still today.

Eleventh, no mention or any discussion is made about proclamation No. 1/1975 which established and defined the powers of Provisional Military Administrative Council (PMAC). It was based on this proclamation that the Dergue declared the deposition of Haile Selassie from power, the dissolution of the parliaments and the suspension of the 1955 Revised Constitution. The proclamation was one of the most important legal instruments which almost amounted to being the constitution for the regime until it adopted a formal constitution in 1987.

Chapter 2 and 3 discuss at length the features of the FDRE Constitution and bill of rights respectively. Both chapters provide a fair discussion of all the relevant issues. Chapter three particularly is valuable in making a robust discussion on human rights meaning, classification, and the propriety of the classification in the constitution. The author's efforts to ground exposition of some of the rights by

bringing judicial decisions form other jurisdictions is laudable as it enables readers to understand judicial application of similar rights in other jurisdictions.

Nonetheless, the author should have made an in-depth discussion and make the connection of the issues raised in chapter two on the idea of republicanism. Though there are efforts to explain the idea, there is little attempt to make a connection with the current constitution and expound which of its parts exhibit its republican feature. Despite a fair treatment of the fundamental principles of the constitution — secularism, sovereignty and constitutional supremacy — there is no discussion on the other fundamental principles of the constitution — transparency and accountability.

Chapters 4 and 5 deal with the allocation of powers both vertically and horizontally. Chapter four is devoted for a discussion of federal structure and division of power. Chapter 5 focuses on horizontal allocation of power. Both chapters address every conceivable issue that needs to be expounded in the context of the FDRE Constitution. It attempts to introduce and explain a variety of concepts associated with division of powers such as exclusive, shared, concurrent, framework, parallel etc. powers. There is an appreciable effort to contextualize these concepts with the FDRE Constitution as well.

There is also an in-depth treatment of the nature, scope of separation of the powers of the various federal principal organs of government — the legislatures, the executive and the judiciary — and the variety of checks and balances put in place in the constitution.

One of the difficulties, which currently is not a serious problem largely because now the same party controls the center and the periphery, is to exactly define the powers of each respective government, the federal government and the regional states. There are provisions in the constitution which even a literal reading does not

make clear what power belongs to which level of government.[4] Like other researches on the division of powers in the FDRE constitution, this book attempts to put in context the discussion of the division of power from other jurisdictions. But it seems to invite more trouble in understanding and defining exactly the powers of the federal government and the regional states in Ethiopia.

First, it introduces general concepts such as shared, parallel, framework etc. on which there does not seem to exist a universal consensus on their meaning. Second, nor is their difference clearly articulated. Third attempts to bring these concepts and contextualize them in the constitution are creating more confusion than clarity. The constitution does not use the term framework and parallel powers, for example. It is entirely unclear whether this is appropriate and relevant to expound the division of power under Ethiopian constitution. Such broad concepts compound the problem and care has to be taken in bringing and contextualizing concepts used in other jurisdictions not provided in the constitution.

The author claims that the constitution is silent on whether executive power is coextensive with legislative power.[5] But a reading of article 50(2) makes abundantly clear that it is. It provides that on matters assigned to the federal government under the constitution, the federal government has legislative, executive and judicial power. This means executive power is coextensive with legislative power.

On the question of supremacy of federal laws over regional laws, the author argues that this is provided in proclamation No. 25/96. But it is questionable on the propriety of citing the proclamation to state the positions of the constitution. This is a fundamental matter in a federal constitution that has to be gleaned from the constitution via interpretation. It is illogical to cite the proclamation to fill in a gap

[4] See Arts 51(2)(3) and 52 of the Constitution.
[5] See, note 4, p. 156

in the constitution. That piece of legislation, in the first place, is made by the federal government. Second, it is it is lower in hierarchy to the constitution. Third, its purpose is to define the structure and jurisdiction of federal courts. Fourth, that provision of the proclamation which declares the paramountcy of federal laws is itself unconstitutional.

In order to make easier for readers to understand the division of the power under the constitution, the author comes up with his own classification of the powers of the federal government.[6] The propriety and relevance of the classification of the powers of the federal government is questionable. It lists, for instance, constitution, patent and copyright etc. within the category of law enforcement. It seems to send the message that on those matters federal government power is law enforcement. But, what about law and policy making on these subjects? What about adjudication? It is in the first place not entirely clear what law enforcement is and how it is to be distinguished from the other categories.

On the composition of the House of Peoples Representatives (HPR), it mentions, but does not discuss, who the minorities the 20 seats are reserved for. There is little discussion on parliamentary immunity and the issue of quorum and decision-making procedure.

In one place, the author mentions that the House of Federation (HF) "assigns new tax base"[7]. This seems to send the wrong message implying it is its exclusive authority. It has to be qualified that it jointly exercises this power with the HPR.

The author also states that "to be a Prime Minster (PM) one must win a seat in the lower house… and be the leader of the party…. that control a majority in the HPR."[8] But there is no constitutional requirement that he/she should be also the

[6] See note 4, Table 4.1 pp. 162-163.
[7] See note 4, p. 184.
[8] See note 4, p. 196.

leader of the political party that has majority seat. What the constitution says is that he/she is elected from the party that has a majority seat.

Regarding the judiciary, there is no discussion on the nature and scope of delegation of federal courts jurisdiction to state courts. There has to be a discussion also on what exactly is the role of the PM on the appointment of the judges, other than the president and vice-president of the supreme court. The constitution provides that the PM submits a list to the HPR provided to it by the Federal Judicial Administration Commission. What submission of a list entails needs to be explored — does the PM act as a go-between the judiciary and the HPR or does s/he have a say on who gets appointed.

The last chapter is on constitutional interpretation. Well-written and exhaustive, the chapter provides readers the core current issues on constitutional interpretation in Ethiopia. But the example it provides to explain when and under what circumstance judges may invoke the constitution and therefore engage in constitutional interpretation is likely to generate misunderstanding. The book gives example of a certain broadcaster being warned of revocation of license because of an alleged content deemed to be defamatory and inciting violence. It seems to mislead that the Ethiopian Broadcasting Authority has this power. But the example rather has the unintended consequence of presenting an ultra-virus act, therefore, an administrative adjudication issue, which is not controversial that the courts have jurisdiction, than really a freedom of speech constitutional challenge. It would have been better to cite the other proper authority in charge of licensing. Or alternatively, it would have been good if the example is given in the context of broadcast media.

Despite these limitations and oversight, the author should be applauded for not stopping just in volume I, in the face of several adverse environments which discourage publication of this sort. The effort to exhaustively deal with the current

constitution is very good and the second and consequent edition of the book need to include the issues overlooked or deliberately left out. The attempt to include Ethiopian constitutional cases, both foreign and Ethiopian, is commendable and should continue. But when the next editions are contemplated, it is good to provide an excerpt translation of constitutional decisions whenever available. Rather than reporting the cases, the book should be able to create opportunity for readers/students to be able to see the variety of arguments and stand points in the disposition of constitutional cases.

A Reply to the Book Review on Ethiopian Constitutional Law: Past and Present

Tadesse Melaku (Assistant Prof.)

On 14 June 2017, we held a very productive book review and launching program, mainly thanks to Gosaye's contribution as a reviewer. He provided a comprehensive and fascinating comments at the event and the above piece is an offshoot of that program. His insights, no doubt, are valuable inputs to future editions of the book for which I am very grateful. However, I feel I should react *not* for the sake of defending myself but out of a desire to share my perspectives and for three reasons. First, my silence might be interpreted as an agreement with the comments raised by the reviewer. Second, I should have a chance to clarify my position on some of the issues he has raised. Third, the exchange of views can help improve our understanding of the issues in question, thus, its educational value.

The reviewer is certainly right when he says the current book does not contain learning objectives, review questions and a list of references. My reason is, compared to the first volume, the second is more advanced and I thought such features would compromise its quality. It should be noted, however, there are still, although small in number, tables, diagrams and examples, the characteristics of a textbook.

I also admit the book does not clearly reveal the absence of continuity and constitutionalism in Ethiopia. Also, his observation on the concept of federal supremacy clause and Proclamation 25/96 is a valid point. Furthermore, he rightly pointed out that issue of parliamentary immunity including the practice of removing judges over the years should have been considered. However, he

overlooked the discussion on the quorum and decision-making procedure in both houses of parliament.[1]

For example, concerning the House of Federation, the book reads:

> *Unlike the HPR, the presence of a simple majority at HF does not constitute a quorum, only the presence of a two-third supermajority does. That means that out of 120 members, at least, eighty must attend a meeting to take decision and this reduces substantially the capacity of the larger ethnic groups to outvote smaller groups.*[2]

I am also criticized for not addressing "traditional constitutional issues such as the nature and scope of the powers and rights of the kings and of other officials of the kingdom, their titles, their hierarchy, etc." This is only partly true, however. The power of the emperor under the 1931 and 1955 constitutions is fully but concisely dealt with, at least having regard to the stipulations of those instruments.

As for the goals of the 1931 constitution, the reviewer casts serious doubt whether the constitution was designed to preserve the sovereignty of the state. For this, I just make reference to Fasil Nahum's book, *Constitution for a Nation of Nations: The Ethiopian Prospect* (1997). In the book, Fasil mentions modernization, centralization and the preservation of the independence of the state as the principal objectives of the 1931 constitution. The prevailing situation at that time also affirms this view. True, the constitution is an inanimate object which by itself cannot achieve what it is intended to. But every law is an instrument through which social goals are set, explicitly or implicitly, and society tries to accomplish the goals with the help of the law. To be more specific, the Europeans came to Africa in the 19th and early 20th centuries under the pretext of 'civilizing' the continent, as protectorates. Surrounded by European colonies, the then government of Ethiopia,

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[1]Tadesse, *Ethiopian Constitutional Law*: *Past and Present* (2017). The quorum regarding House of Peoples' Representatives is dealt with on pages 177-78 of the book

[2] Footnotes omitted. Ibid. p. 186.

by adopting the constitution of 1931, tried to send a message to the colonialists — we are a 'civilized' nation and do not need protectorates. The document had, therefore, an instrumental function. For that matter, all laws have instrumental function, not an end by themselves.

According to the reviewer "little is said on the causes or the variety of views on the causes of the [1974] revolution..." I have mentioned both the deep-rooted popular discontent and the immediate cause of the revolution — the mutiny of solders.

On page 26 of the book I wrote:

> *A number of factors were at play against the regime. It is thus described as, "The government's failure to effect significant economic and political reforms over the previous fourteen years combined with rising inflation, corruption, a famine that affected several provinces...and the growing discontent of urban interest groups| provided the backdrop against which the Ethiopian revolution began to unfold in early 1974".*

The reviewer notes, "There are provisions in the constitution which even a literal reading does not make clear what power belongs to which level of government… Like other researches on the division of powers in the FDRE constitution, this book attempts to put in context the discussion of the division of power from other jurisdictions. But it seems to invite more trouble in understanding and defining exactly the powers of the federal government and the regional states in Ethiopia."

Learning from foreign academic literature and other sources of knowledge, or comparative study, is one of the prominent research methods. It helps to (better) understand a concept, its origin, history and justification. (For example, as students, we read treatises written on French law to make sense out of the otherwise less clear provisions of the Ethiopian civil code). In fact, if the constitution were clear, it would be unnecessary to do a comparative study. It is the absence of clarity which dictates researchers to look elsewhere. What is more, the

reviewer mentions no specific example to refute my analysis on shared, parallel and framework powers. He further argues "the constitution does not use the term framework and parallel powers". The constitution does not use the term separation of powers and this does not mean there is no separation of powers under it. The notions of shared powers, framework and parallel powers are implicitly stated in the Ethiopian constitution.

According to the reviewer, Art 50(2) makes it "abundantly clear" that federal executive power is coextensive with federal legislative power. The relevant provision does not prove this. Art 50(2) states, "The Federal Government and the States shall have legislative, executive and judicial powers." But this is no proof that each tier of government is responsible for its legislative, executive and judicial functions. The German constitution created three branches for both governments but it has entrusted lawmaking power primarily to the center and administration primarily to the states. The former stipulates, "The House of Peoples' Representatives shall have the power of legislation in all matters assigned by this Constitution to Federal jurisdiction." While Art 55(1) is clear in defining HPR's lawmaking power, it singles out only the legislative body. Nowhere is to be found a similar provision on the other institutions of government. The reviewer is, therefore, mistaken in reading Art 55(1) into Art 50(2). To mention just one example. Criminal law is a federal matter and, by virtue of the delegation of federal judicial power, state courts try criminal cases only to be administered by state police, state prosecutors and state prisons.

As for the comment on the supremacy clause, true, on a theoretical level, a federal constitution cannot be unilaterally changed by either level of government. But as my book attempts to make it clear, the division of powers is not fixed for all time. It changes because of different factors including extraconstitutional factors, apart from the formal amendment procedure. The distribution of powers is defined and re-defined and, if the states do not challenge the constitutionality of proclamation

25/96 (which makes federal legislation superior to state legislation) and succeed in getting it invalidated, well, it means federal law overrides inconsistent state law with regard to state cases before federal courts. Sometimes constitutional theory and constitutional practice do diverge and the constitution should be seen in its broader sense, not just the text.

The reviewer opined that "there is no constitutional requirement that he/she [the prime minister] should be also the leader of the political party that has majority seat". As the Ethiopia's experience shows, the former and the present prime ministers are leaders of the party controlling majority seats (now the entire seats) in parliament although the sample might be too small to conclusively prove what I said. At any rate, one thing should be clear; not everything can be written down in a constitutional document, and I insist, constitutional practice should be taken into account in explaining how things work.

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Author, *Title in Italics* (series title, edition, publisher, place, date) page.

John Baker, *An Introduction to English Legal History* (4th ed., Butterworths, London, 2002) pp. 419–21.

Names of Ethiopian authors should appear as follows: author's given (first) name and his/her father's name without changing the order. Subsequent, references should be limited to given names.

> Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study,* (2nd ed., Wolf Legal Publishers, Nijmegen, 2007), p. 235.

> • ***Contributions in edited books***

Cite essays and chapters in edited books as in the example below:

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Give the title in roman, within inverted commas. The style for authors of articles is the same as for authors of books. The journal title is in roman.

> Ibrahim Idris, 'The Place of International Human Rights Conventions in the 1994 FDRE Constitution, Journal of Ethiopian Laws', Vol.20, No.1, Aug. 2002, P.114.

For journals that are only published electronically, give publication details as for print journals, but also provide the website address and most recent date of access within angled brackets:

> Carolyn Penfold, 'Nazis, Porn and Politics: Asserting Control over Internet Content' [2001] 2 JILT

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Labour Proclamation No. 377/2003, Art. 3.

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Cited coded legislations in the following form.

Civil Code of Ethiopia, 1960, Art. 1678 (1), Proc. No. 165/1960, *Fed. Neg. Gaz*. (Extraordinary issue), Year 19, No. 2.

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• ***Treaties***

Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Art. 5.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Art. 10.

- ***Resolutions***

Security Council Resolution 1368 (2001), at WWW http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?Open Eleme nt > (accessed on 10 August 2008).

- ***Cases***

Corfu Channel Case (UK v Albania) 1949 ICJ rep 14 at 35, Nicaragua case (US v Nicaragua) (1986) ICJ rep 14 at 106

የኢትዮጵያ መድን ድርጅት vs. ጊታሁን ሀይሉ፤ጠቅላይ ፍርድ ቢት ሰበር ሰሚ ችሎት፤ መ.ቁ. 14057፤ 1998 ዓ.ም.

- ***Theses***

Give the author, title, type of thesis, university and date of completion and pinpoint:

> Helen Toner, 'Modernising Partnership Rights in EC Family Reunification Law' (PhD thesis, University of Oxford, 2003).

- ***Periodicals***

Mehari Taddele, 'Brain Drain and its Adverse Impact on the Achievement of MDGs and Poverty Reduction', The Reporter, (Feb. 16, 2008), p.5.

- ***Interview***

Interview with Ato Abraham Dagne, President of Dorebafano *Woreda*, Sidama Zone, on 22 January 2014.

- ***Internet Source***

Derartu Abeba, *Higher Education in Ethiopia*, <http://www.ethiopar.net/type/English.htm> accessed on April 1, 2009

- ***Productions***

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