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CONTENTS

ARTICLES (PEER REVIEWED)

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Ethiopia's Criminal Law Evolution from the Perspectives of Major Legal Theories: An Overview

Simeneh Kiros Assefa ♣

Abstract

This article reviews the various theories of law applied throughout the modern development of the Ethiopian system of rules from a criminal law perspective. As is elsewhere, the initial influences mainly relate to the natural law theory. Later, positivisation evolved as part of the modernisation of law. Further, as part of the modernisation of society, the social theory of law evolved. With the PMAC coming to power, the Marxist theory of law crept in. The excessive connection between law and politics glamoured the instrumentality of the law. This got prominence in the post-2005 election in Ethiopia. The theories of law are abstracted from the manner the laws were designed, or the way they are implemented. The discussion looks into the difference between the statutes and the application of criminal law. Further, it shows that legal theory has a method aspect. I finally argue for the pragmatic instrumentality of the law.

Key terms:

Jurisprudence · Legal theory · Natural law · Legal positivism · Social theories of law · Pragmatic instrumentalism

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Contents

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1. Introduction

A theory of a particular subject is a generalisation regarding properties, causation, nature or otherwise of the subject under consideration. Accordingly, the theory of law (legal theory) is meant to explain the nature and/or function of law. Several legal theories appear to have developed around criminal law, either to justify or critique existing law, because they focus on the legitimacy of the coercive power of the state. This article dwells on legal theories from the criminal law perspective. Theories of law evolved along with the level of legal and political power consciousness of society. Thus, no legal system has a singular legal theory because legal systems, often, do not subscribe to a particular theory of law.

The transition from natural law to positivism, in as much as it is a legal transformation, is the transition of political power from the church to the monarch. The positive nature of the law is evident from the statute itself. However, legal theories are also used to define the scope and purpose of a particular statute. This is seen in the methods of interpretation and application of the law. In this regard, legal theory is, therefore, a part of the legal method. Further, the instrumental nature of law is abstracted from the ends the particular statute is intended to achieve. Thus, a holistic approach is necessary to understand the applicable theory in a particular context.

An effective legal theory attempts to explain the essential elements of law and to comprehensively address them. However, no theory does that; nor are many of those legal theories mutually exclusive. Each of them explains an aspect of the law, and the use of a combination of theories appears to be justified. Thus, different theories of law may be applied (in tandem) in a single case. Based on the methods of analysis, the theories –to use Brian Tamanaha's

classification– employ three perspectives: normative, analytical and empirical.[1] These theories of law are discussed in that order.

This article attempts to identify applicable theories to Ethiopian criminal law in light of the traditional and modern schools of legal thought. Although the theories developed elsewhere in different legal traditions, historical developments of Ethiopian law have significant parallels in those systems wherein the theories are said to have evolved.

Law operates in a society; and it is highly influenced by non-legal factors and disciplines, such as economics, sociology and political theory. These developments are shared by Ethiopian society too. There are also global developments that influenced the Ethiopian politico-legal realities, such as the religious influence in the Middle Ages, the positivisation of law in the Renaissance, and rationalisation and codification of law in the Enlightenment, constitutionalism in governance in the early 20th century, the legal transplantation after WWII and the socialist legal movement in the 1970s.

These realities have all influenced the Ethiopian legal system. It is, therefore, appropriate to evaluate the historical development of the Ethiopian system of rules in light of these theories. The system of rules is examined in chronological order. The theories are abstracted from provisions of the law, purposes they are meant to address, the general theoretical and philosophical background of those laws, the manner of application of the law and the nature of institutions applying such law. This article focuses on the evolution of legal theories in relation with Ethiopian criminal law embodied in codified criminal laws in Ethiopia (including some introductory reference to the Fetha Negest). Thus, various customary laws, traditional systems, the Sharia and other normative systems that have been an integral part of the Ethiopian legal tradition over many centuries are beyond the scope of this article.

Frequently used acronyms

E.C	Ethiopian Calendar
FDRE	Federal Democratic Republic of Ethiopia
PDRE	People's Democratic Republic of Ethiopia
PMAC	Provisional Military Administration Council
UDHR	Universal Declaration of Human Rights
WPE	Workers' Party of Ethiopia

[1] Brian Z Tamanaha (2017), *A Realistic Theory of Law* (Cambridge University Press), at 30 ff.

Based on the sequence in the influence of the legal theories, Section 2 deals with natural law theory, and Section 3 deals with the modernisation of the legal system in Ethiopia and legal positivism. As a continuation of the discussion, Section 4 deals with the social theory of law. Under this section, sociological jurisprudence, historical school and Marxist theory of law are discussed as different variants of social theories of law. Sections 5 and 6 deal with the positivisation of natural law and an argument for pragmatic instrumentalism.

2. Natural Law Theory

The natural law theory has a moral conception of law. It evaluates the correctness of human law against 'higher' moral principles to determine what a "good law" is. It holds that a legal rule should comply with certain moral principles short of which it is not binding. The medieval theory of natural law - had a religious – 'premise' that both the ruler and the ruled must pursue "a good life" on earth that should be "fitting[] to the happiness of heaven."[2]

Thomas Aquinas classified natural law into four - eternal law, divine law, natural law and human law. Human law is binding insofar as it is not in conflict with natural law. However, the positive law is not abstracted from natural law; he rather argues that natural law must be abstracted from, among others, the scriptures, by reason, through a rational process.[3] In modern natural law theory, this is done through practical reasoning as expounded by John Finnis.[4] Both Aquinas and Finnis thus pursue that every act of human beings must conform to nature, which is guided by the "natural inclination of man" to do "human good".[5]

The natural inclination of a human being is the foundation of Zara'a Ya'Eqob (Worqe)'s views. He argues that once God has given me the natural appetite, it is a contradiction that he prohibits me from engaging in certain activities, such as the prohibition of eating at a particular time, and a particular type of meal because of the church's order of fasting.[6] It is based on such

[2] Shirley Robin Letwin (2005), *On the History of the Idea of Law* (Cambridge UP) at 72.
[3] Id., 73-80. There are certain qualifications to this general statement. Ibid.
[4] John Finnis (2011), *Natural Law and Natural Rights, Second Edn* (Oxford UP) at 100 ff.; Letwin, *supra* note 2, at 72-79.
[5] Finnis, *supra* note 4, at 401-403; Letwin, *supra* note 2, at 73-76.
[6] Getachew Haile (2017), *Ethiopian Studies in Honor of Amha Asfaw* (Birana Books) "The Discourse of Warqe: Commonly known as *Hateta ze-Zara'a Ya'Eqob*" at 51-71; _____ (2006 E.C), *Autobiography of Worqe which is known as Hateta Ze'Zer'a Ya'Eqob* (Trans. Getachew Haile, Amharic) at 24-29. The translator argues that Zara'a

understanding of natural law that Zara'a Ya'Eqob also argues for the equality of human beings, including racial and gender equality.[7]

Although Christian scholarship in Ethiopia regarding law dates back to a millennium ago, records show that it was at its peak during the reign of Emperor Zara'a Ya'Eqob (1434-1468). To make Ethiopia a Christian nation, he had exercised what we might today call "excessive power". He helped the church to own extensive property, to control each family through a father confessor, creating a strong bondage between the church and the citizen.[8] He also wrote several books, treated as law, to guide citizens on how to live a life by God's command.[9] The ordinary citizen during the period, therefore, felt both the power of the church and the power of the Emperor. He presided over hearings of cases along with monks and priests and his judgments were exclusively based on ecclesiastic scriptures. Such codes of conduct were later on absorbed into and manifested through the *Fiteha Negest*.

The *Fiteha Negest*

The Ethiopian political history of the Middle Ages, as is elsewhere in Europe, is religious history. The state was engaged in the dissemination of Christian teachings, and the establishment of churches and monasteries until the formal separation of the government and religion were proclaimed since the Mid-1970s. The diplomatic, economic, and political power relations were all manifested through religion.[10] The essential interests revolved around religious values and thus the law was used to promote those values.

Ya'Eqob must have been exposed to Thomas Aquinas's theory. Ibid, 10. It should be noted that the philosopher Zar'a Ya'Eqob (1600 -1693) and the Emperor Zar'a Ya'Eqob (1426 -1460) are different individuals who lived in different eras.

[7] *Autobiography of Worqe*, *supra* note 6, at 21-24. Zar'a Ya'Eqob in fact objects to the biblical statements that Israel is the chosen people, and man is head of woman. God created every human being, whether Israelite or otherwise, men or women.

[8] Taddesse Tamrat (1972), *Church and State in Ethiopia: 1270 – 1527* (Clarendon Press) at 206-247.

[9] Emperor Zar'a Ya'Eqob wrote a book that defines what a "good life" is and how to be righteous before the eyes of God. Atse Zar'a Ya'Eqob (2012 E.C), '*Tomare Tesebe'et: Se'w Yemhon Debbdabe* (Trans. Simachew Negatu, Amharic). He also authored the following books: *MeThihafe Birhan*, *MeThihafe Selassie*, *MeThihafe Bahriy*, *Te'Aqibo MesTir*, *Sibhat Fiqur* and *Egziabiher Negis*. Getachew Haile (2013 E.C), *Bahire Hassab: YeZemene A'QoTaTer Qersachin Ke'tarik Masetawosha Gar, Third Edn* (Birana Books, Amharic) at 236.

[10] *See*, for instance, Sergew Hable Sellassie (1972), *Ancient and Medieval History of Ethiopia* (United Printers); Job Ludolphus (1684), *A New History of Ethiopia, Second Edn* (Samuel Smith Booksellers).

The beginning of the Solomonic dynasty marks the height of the Ethiopian liturgy. There were extensive writings (and translated works into *Ge'ez*) of the church and the monarch that governed accession to the throne and the lives of citizens.[11] That includes *Kibere Negest*, *Metsehafe Berhan*, *Metsehafe Milad*, and *Fiteha Negest*, which is the last and one of the most important documents of this period.[12]

The *Fiteha Negest* was translated into Ge'ez in the 15th century to be applied both by the church and by the monarch.[13] It was originally written by Ibn al-'Assal in Egypt "as a guide for the Christian Copts living among the Muslim people of Egypt."[14] *Fiteha Negest* was meant to regulate two aspects of life – the first part governs the spiritual (heavenly) life and the second part (which is influenced by Roman-Byzantine sources) was meant to govern worldly (temporal) life.[15] Although the criminal law is found in the second part, its content is very much influenced by the contents of the first part.

Before the *Fiteha Negest*, Coptic Christianity governed all aspects of the Christian life.[16] Before the adoption of the *Fiteha Negest*, the ecclesiastic

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[11] Philip F. Esler (2019), *Ethiopian Christianity: History, Theology, Practice* (Baylor UP) at 109 – 22; Taddesse, *supra* note 8, at 1-5, 19-20, 34-38, 107-18, 248-50. Getachew, *Ethiopian Studies…, supra* note 6, at 9-12.

[12] Esler, *supra* note 11. Emperor Zaz'a Ya'Eqob makes frequent reference to the Pentateuch, *Synodos*, *Didascalia* and *Metsihafe Kelementos. Supra* note 9.

[13] Because the *Fiteha Negest* makes reference to Constantine, the translators doubted its content assuming this is a reference to King Constantine because the contents of the *Fiteha Negest* include events and laws that were adopted after the passing of King Constantine. However, Emperor Zar'a Ya'Eqob would call himself CosTenTinos and he is said to have committed what King Constantine did. Zar'a Ya'Eqob, supra note 9, at 79; Getachew Haile (2012 E.C), *Ke'Ge'ez SeneTsihouf Gar Bizu Afta Qoyita* (Birana Books, Amharic) 47; Getachew, "*Bahire Hassab*…", *supra* note 9, at 236; Getachew, *Ethiopian Studies*…, *supra* note 6, at 370.

[14] *The Fetha Nagast* (1968), Translated from Ge'ez by Abba Paulos Tzadua, Edited by Peter Strauss (Second printing, Carolina Academic Press, 2009), Foreword (p. xvi) *See* also Dibekulu Zewde (1986 E.C), *Fiteha Negest: Nomocanon* (Addis Ababa, Amharic) at 52, 53. _____(1968) *Fitha Negest: The Law of the Kings* (Trans. Abba Paulos Tsadwa, Law Faculty, HSIU) Foreword at xvi, xvii; Getachew, *Ethiopian Studies…*, *supra* note 6, at 123-137.

[15] _____ (1962 EC), "*Fiteha Negest*" in *MeTsehafe Higgigat Abbeyit* (Addis Ababa, Amharic) Preface, 12.

[16] *MeTsehafe Higgigat, supra* note 15, Preface. There has already been established "covenant between Debre Asebo [later Debre Libanos monastery] and the Palace [of Yekuno Amlak] of an everlasting mutual help and cooperation in administration Christian Ethiopian in prayer and sharing national revenue." Getachew, *Ethiopian Studies* …, *supra* note 6, at 322.

laws, such as the Pentateuch, *Synodos*, *Didascalia* and *Metsihafe Kelementos*, *Kibre Negest*, *Fewse Menfesawi* were governing rules many of which were cited in the preface of the *Fiteha Negest* as sources of the law.[17] Customary laws were also governing interpersonal relations;[18] and in later days, the monarchs adopted edicts either as a proclamation pronouncement or as a judgement.[19]

The *Fiteha Negest* applied during a period whereby there was yet a significant overlap between the church and the state's power.[20] As it governed both spiritual and worldly matters, criminal punishment had both spiritual and temporal aspects. In as much there was no distinction between the state and the church, there was no distinction between crime and sin, and punishment was expiation of sin, in as much it is social censuring of the offender.[21] Criminal punishments normally involved corporal punishment including the death penalty[22] and were carried out upon the judgement of the temporal judge.[23] Where judgment is not rendered or executed, a spiritual judgement

[17] Preface, *Fiteha Negest*, *supra* note 15, at 12-17; _____(1834), *The Ethiopic Didascalia; or, The Ethiopic Version of The Apostolical Constitutions, Received in The Church of Abyssinia with an English Translation* (Edited and Trans. By Thomas Pelle Platt). *Kibre Negest* is not cited in the *Fiteha Negest*; it was rather written in the 12th Century to legitimise the king's power by linking it with the House of David and Solomon in Israel. Daniel Kibret (2011 EC), *Etiopiawiw Surafe: Ye'Abbune TekleHaimanot Ye'hiwot Tarikena Astwatse'o* (Addis Ababa) at 23-31. Getachew is very critical on the *Kibre Negest* and takes it as the only fiction in the literature. Getachew, "*Ke'Ge'ez SeneTsihouf Gar…"*, *supra* note 13, at 39, 182 -222.

[18] Aberra Jembere (2000), *An Introduction to the Legal History of Ethiopia, 1434 - 1874* (Lit Verlag) at 42 ff.

[19] Ibid, 83-99.

[20] Taddesse, *supra* note 8; *MeTsehafe Higgigat, supra* note 15, Preface.

[21] In the *Fiteha Negest*, homicide is described to "belong to the category of great sin". "The Law of the Kings", *supra* note 14, Rule XLVII, at 289. Letwin, *supra* note 2, at 70 – 71. Simeneh Kiros Assefa and Cherinet Hordofa Wetere (2017), "Over-Criminalization': A Review of Special Penal Legislation and Administrative Penal Provision in Ethiopia" 29 J Eth L 49, at 51, 52.

[22] For instance, those involving corporal punishment in the *Fiteha Negest* include, Apostasy - Chapter XLVI, Murder – Chapter XLVII, Fornication – Chapter XLVIII and Theft – Chapter XLIX. 'The Law of the Kings', *supra* note 14. Reference is made both to the Amharic and English version of the *Fiteha Negest*. The Amharic version is cited as "*Fiteha Negest*" while the English version is referred to as "The Law of the Kings".

[23] The death penalty may be imposed for taking the life of another person. If a judge passes a death penalty in such circumstance, the convict would be given to the avenger. It is up to the avenger either to kill the murderer, to take blood money, or to forgive

may be made by the High Priest, i.e., ex-communication, the spiritual judgement, "a punishment in the world without end".[24]

The *Fiteha Negest* enforced religious morality in as much as it was about maintaining order; and it granted full power to the monarch including the power to punish.[25] However, there are two other matters that augment the argument for the natural law theory. The preface of the *Fiteha Negest* admits that the content of the *Fiteha Negest* might not be complete. In the event of such a gap, as every one of us is endowed with a rational mental faculty, those who administer the law may apply the law as would be revealed to them, as was revealed to those who wrote the *Fiteha Negest*.[26] Further, a priest may be appointed as a judge if, among others, he has good knowledge of the scripture, is conversant with interpretation by analogy or in the dual interpretation of the law and should know the customs of the forefathers.[27]

It appears for these reasons that before the adoption of the 1930 Penal Code, criminal responsibility was not properly systematized. Thus, once the judge finds the defendant guilty of the crime charged, the judge sends him to the Governor for a sentence because it is the Government that "knows the punishment".[28] According the medieval natural law theory, criminal punishment is the expiation of sin and for a conduct to be a crime, it must first

him. "The Law of the Kings", *supra* note 14, at 294. A certain Dejazmach Wodaje of Gojam who had killed his wife was sentenced to death. He was handed over to his avengers and on 24 August 1905 he was killed by them. MerseHazen WoldeQirqos (2008 EC), *Ye'Hayagnawe KifleZemen Me'Bacha: Ye'Zemen Tarik Tizitaye Kayehutena Kesemahut 1896 – 1922 Third Edn* (Addis Ababa UP, Amharic) at 29.

[24] "The Law of the Kings", *supra* note 14, at 289.

[25] Ibid, at 272.

[26] "*Fiteha Negest*", preface, *supra* note 15, at 10, 17.

[27] Ibid, Paragraph 43, Rule No 1424 – 27. "The Law of the Kings", *supra* note 14, Chapter XLIII, Section I, 9th Rule, 251. It should be noted that the Orthodox Church teaching is the School of Reading (ንባብ), School of Liturgical Music (ዜማ), School of Poetry (ቅኔ), and School of Interpretation (ትርጓሜ). Interpretation is the highest level of study. See, in general, Habte Maryam Worqneh (2013 E.C), *Tintawi Ye'Ethiopia Timihirt Second Edn* (Birana Books, Amharic); *Autobiography of Worqe supra* note 6, at 14; Esler, *supra* note 11, at 127-132. Even Zara'a Ya'eqob took 10 years to complete the school of interpretation.

[28] The 1930 Penal Code, Preamble para 3; Jean Graven (1964) "The Penal Code of the Empire of Ethiopia" *1 J Eth L* 267, 273; Tsegaye Beru (2013), "Brief History of Ethiopian Legal Systems – Past and Present" *41 International Journal of Legal Information* 335, at 350. Such is how a case against negligent soldiers of Dejazmach Beyene Wondgimagegnehu of Wolayita was disposed of. The judges had established guilt and Dej. Beyene determined the punishment. MerseHazen, *supra* note 23, at 248-249.

constitute a sin.[29] Law was not seen as a protection against tyranny; it was rather seen as "God's dispensation for the punishment of man's transgression".[30] The Monarch was regarded as a representative of God on earth and there was no limit to his power.[31]

The monarch or his "representative" would preside on important cases, along with important personalities such as high priests, monks, and judges based on the *Fiteha Negest*.[32] Likewise, until the appointment of the first eight ministers by Emperor Menelik II (in 1907), the Emperor performed almost every judicial, administrative and legislative function in running his government.[33] There was a strict schedule set to be implemented by the Imperial timekeeper who had several assistants under him. The Monarch reviewed cases at the Crown Court.[34]

To maintain the legitimacy of the state law, the 1930 Penal Code was presented as a continuation of the *Fiteha Negest* in two ways – first, the Penal Code states that it is a revision of the *Fiteha Negest*;[35] second, the

[29] Graven, *supra* note 28, at 281-284; Letwin, *supra* note 2, at 60.

[30] Letwin, *supra* note 2, at 63. In the *Fiteha Negest* the punishment for apostasy would be death by slaying or stoning. "The Law of the Kings", *supra* note 14, Chapter XLVI, Section II. This is how individual criminal responsibility is put in place. Zar'a Ya'Eqob, *supra* note 9, at 74.

[31] See, *Fiteha Negest*, *supra* note 15, para 44. Taddesse, *supra* note 8, at 98 ff. The heading of the 1930 Penal Code refers to the Monarch as "Haile Selassye 1st the Appointed of God".

[32] There are records of application of the *Fiteha Negest* from the period of Emperor Sertse Dingil (1563 -1597) until His Imperial Majesty Haile Selassie (1922 -1974). *See*, "The Law of the Kings", *supra* note 14, foreword.

[33] MahitemeSelassie WoldeMesqel (1962 EC), *Zikre Neger, Second Edn* (Addis Ababa) at 52. Paulos GnoGno (2003 E.C) *Atse Menelik be'Hager WusT YeteTsaTsafuachew Debedabewoch* (Aster Nega Publisher). Many of those letters were appointments to public office, instructions to officials either to disburse finance or collect taxes, grant permit, arrest warrants, etc. They are enforced as "law" because non-compliance would be met with punishment. Some of the letters appear to be too personal; yet, the King's words were "the law".

[34] MahitemeSelassie, *supra* note 33, at 60-66. For instance, Art 9(1) of the Courts Proclamation No 165/1962 provides that: "an appellant who has exhausted his rights of appeal [may] apply[] to His Imperial Majesty's Chilot for a review of the case."

[35] See preamble of the 1930 Penal Code, Preamble, para 5, 16,

interpretation method of the Penal Code followed the methodologies of the dual interpretation of the *Fiteha Negest*.[36]

There was no significant legal development between 1930 and 1942. In 1942 when the courts were established in a manner close to what we know them today, there were not many rules to be applied by such courts. Therefore, *Administration of Justice Proclamation No 2 of 1942* (Article 24) provides that "no court shall give effect to *any existing law* which is contrary to natural justice or humanity." The Amharic version rather provides for "natural justice and human conscience." The statute does not define what "law" is and thus "any existing law" would include rules that were in application. The applicable rules were the *Fiteha Negest*, other ecclesiastic laws, a few statutes adopted by the king, and (local) customary rules.[37]

As these rules were the ones that judges had exposure to, it appears they were given a free hand to apply the law they deemed appropriate and the only restriction would be their conscience. Thus, it was unavoidable for the judges to resort to those *Fiteha Negest* rules which they knew too well. This shows that the natural law theory was the dominant theory of the period.

3. Legal Positivism

The classical positivist theory principally holds that a legal rule is valid where it is adopted *by the state exercising its authority*. Insofar as the rule is adopted *following the procedure laid down*, there is no moral judgment regarding the content.[38] It is written in a statute form or otherwise, and often, there is a hierarchy of those rules.

In the preface of the *MeTsehafe Higgigat Abbeyit*, His Imperial Majesty Haile Selassie I stated that although Ethiopia has a long history of government, the government never promulgated laws before the *Fiteha Negest*. This is because the spiritual and worldly matters overlap, and the public has been decent to be governed by canonical laws – Pentateuch and the four gospels.[39] This statement is about "state law" declared as "statutes" to govern secular matters. Other than such laws, Emperor Zar'a Ya'Eqob wrote

[36] Ibid, para 11. However, there is a stark difference in content; while the *Fiteha Negest* was meant to enforce religious morality, the Penal Code was meant to enforce state public morality.

[37] See, for instance, MahitemeSelassie, *supra* note 33.

[38] Hart argues a legal system is a system of primary and secondary rules with minimum moral content. HLA Hart (1994), *The Concept of Law, Second Edn* (Clarendon Press) at 100 ff, 206 ff.

[39] *MeTsehafe Higgigat, supra* note 15.

several books that contain prohibited conduct and punishments; and Emperor Menelik II wrote countless letters which were enforced as "law".[40]

In 1900 (EC, i.e. 1907) Emperor Menelik II established the first eight Ministries and defined their power by their respective statutes.[41] It was in this manner that positive law took root in the Ethiopian legal system even though there were no sufficient statutes promulgated to govern a wide range of social interactions.[42] In the Proclamation that established the modern courts in 1942, it was stipulated that traditional dispute settlements would remain applicable insofar as they would not contradict natural justice and human conscience.[43] However, when the courts were re-established, the law to be applied by the courts was defined to be the one that is published in the *Negarit Gazeta*.[44] It provided that "the law is what is provided by Us", i.e. the Emperor. This appears to be an important milestone in the positivisation of the law disregarding previous practices including customary law.

The shift of power from the church to the monarch facilitated the positivisation of law. In the positive law, criminal punishment is imposed to enforce state authority. The enforcement of religious morality is another state objective to be criminally enforced, not as a sin but as a lesson to others.

Modernisation of the law is more advanced and frequented in the area of criminal law than other subjects. Thus, the 1930 Penal Code can be considered as the first positive criminal law. The lawmaker (the Emperor) is explicit in positivising criminal law. The Preface states that under the *Fiteha Negest*, once a judge finds guilt of the accused, he would refer the matter to the governor for sentencing. The Penal Code was, therefore, intended to make the criminal rule complete – both the prohibited conduct and the consequence are provided for in the Penal Code.[45]

In the earlier phases of the positivisation of the law, rule fundamentalist view was reflected. According to this view, the law is a virtuous institution,

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[40] Paulos, *supra* note 33.

[41] For instance the powers and responsibilities of the Minister of Justice, the Ministry of Interior, and the Ministry of War were defined by the statute creating them. MahitemeSelassie, *supra* note 33, at 68, 104 and 223-224, respectively.

[42] It should be noted that the manner of promulgation of proclamations was through oral pronouncement. A few copies may be found in the Imperial Achieve.

[43] *Administration of Justice Proclamation No 2 of 1942*, Art 23.

[44] *Courts Proclamation 1962*, Proclamation No 195 of 1962, Art 2.

[45] The 1930 Penal Code lists the types of criminal punishments – death, exile, imprisonment, flogging, amputation, fine, etc. Further, under each provision the specific punishments are provided for.

and is the best way of ordering society which it can do so effectively.[46] Legislation and positivisation have been vigorously advocated for by Bejirond TekleHawaryat.[47] He aspired to have laws and a constitution for Ethiopia. His arguments for legislation included the role of law in the preservation and protection of the rights and dignity of citizens, preventing anarchy, state budget efficiency and maintenance of law and order.[48]

He was Russian-educated with exposure to western liberal culture. The demand for legislation is personal to TekleHawariat. He thought that legislation is an important tool to make a clear distinction between whether he is the personal servant of the Monarch or he serves the state of Ethiopia, as he would always aspire to do.[49] As he was a staunch advocate of public service and the duties of citizenship, he desperately wanted to have rules put in place to make his service to his nation count as a public service.[50]

Once he drew up the first constitution under Emperor Haile Selassie in 1931, he explained the virtues and nature of positive law in two rounds of lectures to the officials and the nobility.[51] In his constitutional inaugural lecture, he explained the significance of the Constitution and the meaning of the law. He described the Constitution as a mutual covenant between the Monarch and the people, binding on both. He defined the law functionally as "state command for the maintenance of law and order …".[52] The law, along

[46] His Imperial Majesty states to the nobilities and dignitaries the reasons for the adoption of the Constitution into law. MahitemeSelassie, *supra* note 33, at 764-766. Also see, the lectures of TekleHawaryat. Ibid, at 800-814.

[47] Lij Iyasu had granted his wish to draw up city ordinance for Addis Ababa which was not adopted. TekelHawaryat TekleMaryam (1998 E.C), *Autobiography* (Addis Ababa UP, Amharic) at 161, 223-228, 334-336, 348-353.

[48] Ibid, 161. Although TekleHawaryat was inspired by western legal and political culture, he was very much troubled by the urgent need for law and order which is fundamental for the establishment and maintenance of socio-political order. Also *see* "The Law of the Kings", *supra* note 14, at 272 that the justifications for the law and punishment are the desire to maintain order in society. *Fiteha Negest*, *supra* note 15, sections 1536, 1537.

[49] That is the confrontation he had with HIM Haile Selassie. TekelHawaryat, *supra* note 46, at 338-353.

[50] Ibid. This is also what TeklkeHawaryat attempts to reflect in his lectures to the nobilities regarding the nature of law and the Constitution.

[51] TekleHawaryat, *supra* note 47, at 221-225; MahitemeSelassie, *supra* note 33, at 800 ff., 814 ff.

[52] The Amharic word *mengist* (**መንግሥት**) is vaguely used to refer to "state" and "government" at the same time. The word is translated in to the appropriate meaning depending on the context. Likewise, the Amharic word "ager" (**አገር**) is used to mean

with the army, is the principal instrument of the Monarch to govern its people; it is also a shield for the public in the process of governance.[53] He further stated that "those who transgress it will be subject to penalty by those exercising state coercive power (authority)".[54]

He stated that the law defines the sphere within which the individual is free to act and what is commanded. According to TekleHawaryat, "interest" refers to what the individual is free to act, and he classified such interest into *individual interest* and *collective good*. He further classified interests (individual or collective) into three –property interests, the pursuit of knowledge or wisdom, and moral pleasure (love and religion).[55] He summed up his argument by stating that they are all generally provided for in the Constitution granted by the Emperor.[56]

TekleHawaryat further stated that the details may be provided in the detailed rules that would be adopted in the future. In elaborating on the nature of law, he further stated that "law is essential in keeping everyone under control, both the weak and the strong, that the Monarch is the custodian of state's coercive power to enforce compliance.[57] He gently and humbly explained to the nobility who had always been governed by the might of their power that, in an organised state, the Imperial coercive power is sufficient to coerce compliance with those rules[58] and this is for the common good.[59]

In this argument, he appears to be utilitarian (close to Bentham's views), because the law is for the pursuit of the collective good. TekleHawaryat would argue that the collective good justifies the legitimacy of the constitution because it is an agreement between the Monarch and the people. He is not a purely contractian theorist for two reasons. First, according to his views, the

territory while the normal meaning is a country. Mahiteme Selassie, *supra* note 33, at 806.

[53] Ibid, at 818.

[54] Ibid, at 806.

[55] Ibid. These ends of law would overlap with the natural law theory argument based on natural rights. This is particularly discernible in John Finnis' argument on the basic form of good. See Finnis, *supra* note 4, at 59 ff. Yet, his argument is for positive law.

[56] Ibid.

[57] Ibid.

[58] Ibid, 813. However, such legality or legal subordination of subjects, rule based dominion in the proper sense of the term, is taken equivalent to rule of law in later explanations because the successor to the throne is made predictable. _____(1968), "Patterns of progress: Constitutional Development in Ethiopia, Book XI" (Ministry of Information) at 25, 32, 34.

[59] MahitemeSelassie, *supra* note 33, at 806-813.

Constitution is granted by the Monarch; second, he rather argued from the collective good perspective that it is for the benefit of both: the public governed under the Constitution and the Monarch who wants to govern the public. It should be noted that although the king claims his authority to be divine, that was positivized into the constitution and the signatories were those who had religious, political and social influence at the time.[60]

TekleHawaryat's views on the validity of subsidiary laws appears to be aligned with the Kelsenian validity pyramid, even though his statements precede that of Kelsen. He argued that subsidiary rules would be valid if they are made based on the Constitution, and if there is Imperial assent to it.[61] His argument is pure positivist and has no reference to any supreme justification, no appeal to natural law.

On the first anniversary of the Constitution, he further explained the nature of law, the state and the constitution and several other related legal and political concepts. He argued that the fundamental pillars of the Constitution were the King, the People, Territory and Law. These four elements, he further noted, in turn, constitute the state.[62] His argument seems to have considered the state as the all-inclusive *entity* (statehood/nationhood at country level) that has the King, the People, Territory and the Law as its constitutive elements). Among these elements, he stated that the law is the one that keeps the three in harmony; the law is the boundary never to be crossed over. It passes from posterity to posterity; it can be repealed or replaced by another law by (the will of) the Monarch.[63]

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[60] Those who put their signature and stamp on the 1931 Constitution were Abbuna Qerlos, Abbuna Yisehaq, Abbuna Petros, Abbuna Sawiros, Leoul Ras Kassa Hailu, MeridAzemach Awfawossen, Ras Gugsa Are'aya, Ras Hailu TekeleHaimanot, Ras Seyoum Mengesha Yohannes, Dejazmach HabteMichael, Dejazmach Metaferia, Dejazmach Aberra Kassa, Bittwoded Getachew, Firtawrari Birru – Minister of War, Bittwoded WoldeGebriel – Minister of the Palace, Bittwoded WoldeTsadiq – Minister of Interiror, Afe Negus Mekonnen Demissew – Minister of Justice, Tsehafi Ti'ezaz WoldeMesqel – Minister of Pen, Tsehafi Ti'ezaz Afeworq – Minister of Agriculture and Works, Fitawrari Haile WoldeRufael – Minister of Post, Telegraph and Telephone, Bejirond TekleHawariyat, Ato Ayele Gebre for Municipality. Even though his name does not appear in the list of signatories, there is a picture of him Emperor Haile Sellassie I putting his signature on the Constitution. Ibid, at 776 – 77. They also signed and stamped on the statute creating and defining the power of different branches of the executive. Ibid, at 792.

[61] Ibid, at 806, 810; Hans Kelsen (2005), *Pure Theory of Law* (Max Knight tr, the Lawbook Exchange) at 193.

[62] MahitemeSelassie, *supra* note 33, at 817.

[63] Ibid, at 818.

TekleHawaryat stated that the law is defined or manifested in statute (writing). It is the manifestation of the coercive power of the Monarch, and it governs both the Monarch and the citizens. The unity in the form of the state and the law is manifested in the Constitution. In this regard, his views are aligned with Kelsen when he argues that the state and the law are identical.[64] He also argued that the (constitution) state is constituted of the Monarch, the people, territory and the law. Subject to Hegelian argument based on the dialectical *unity of opposites*, he appears to be violating the rule of identity, because the state law is presented as both an element of and the whole of the thing at the same time. He, however, argued that since there would be no Monarch without people and territory, there would be no state without law. Likewise, the people cannot be well of without the Monarch and territory.[65]

With regard to Criminal law, there are two ways of looking at the enquiry into whether contemporary criminal law is purely positive law. The first issue relates to whether the source of the law is a statute adopted by the state. It is obvious that criminalization, which is a legislation process, is a political decision irrespective of the ends it is intended to achieve. Once it is adopted into law, it becomes a positive law. The second issue that deserves attention is whether the statute is the only source of law. The positivisation of the penal law was complete with the adoption of the 1957 Penal Code, which, *inter alia*, embodies the principle of legality. As such, the criminal law was codified in its entirety so that the Code could be "the only source of penal law".[66] The subsequent adoption of other major codes in the 1960s makes the positivisation of the legal system clear.

While this is the general impression about the law, whether criminal law is purely positive law is debatable. The General Part of the 1957 Penal Code, and the Criminal Code (enacted in 2004), contain principles of interpretation and application of the penal law.[67] Such principles, according to Dworkin,

[64] Ibid. Kelsen, *supra* note 61, at 286 -290.

[65] MahitemeSelassie, *supra* note 33, at 817.

[66] Graven, *supra* note 28, at 281-284. This is now entrenched by the decisions of the Cassation Division. See for instance, *Jemila Mohammed v Federal Public Prosecutor* (26 February 2009, Cass File No 38161, 9 Decisions of the Cassation Division of the Federal Supreme Court); *Worku Fekadu and Shume Arrarso v Benishangul Gumuz State Prosecutor* (24 January 2013, Cass File No 75387, 14 Decisions of the Cassation Division of the Federal Supreme Court).

[67] This includes the objectives of specific legislation stated in the preamble and elsewhere in that statute.

require the judge to go beyond the positive law.[68] The argument on the ends of the specific statutes, their *raison d'être*, etc takes us to the social theory of law. The provisions of Article 1 of the 2004 Criminal Code, and other provisions governing the judicial determination of punishment appear to pursue a consequentialist approach. This is argued elsewhere that, criminal law is not merely a rule of positive law.[69] However, practice shows that the court follows "formal positivism".[70]

It is to be noted that continental criminal law is guided by four principles – the principle of legality, conduct, culpability and personal responsibility, each of which is required to be proved. However, the court applies criminal law rules as written provisions, rather than testing such rules against other fundamental principles, such as the principle of lenity or presumption of innocence.

For instance, the *Special Penal Code Proclamation No 8 of 1974* (Article 12) provides that a person is punishable for breach of trust if the public prosecutor can prove that the defendant: (i) is a government employee, (ii) is entrusted with such government (public) property as part of his work or authority, (iii) has appropriated or alienated such property to procure benefit to himself or a third person. Because the Public Prosecutor would not be able to prove all the elements constituting the crime, however, as in *Prosecutor v. Deputy Commander Yehualaw Mezgebu et al.,*[71] the Provisional Military Administration Council ("PMAC") amended the provision subsequently. The *Special Penal Code and Special Criminal Procedure Code Proclamations Amendment Proclamation No 96/1976*, thus provided that it would be sufficient for the public prosecutor to prove the first two elements to obtain a conviction.

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[68] *See* Ronald Dworkin (1985), *A Matter of Principles* (Harvard UP); Humberto Avila (2007), *Theory of Legal Principles* (Springer).

[69] Simeneh Kiros Assefa (2020), "The 'Non-Positivist' Higher Norms and the 'Formal' Positivism in the Interpretation of Criminal Law in Ethiopia" *14 Mizan L Rev, No 1*; Simeneh Kiros Assefa (2017), "Methods and Manners of Interpretation of Criminal Norms" *11 Mizan L Rev, No 1*.

[70] *ERCA v Daniel Mekonnen* (21 July 2010 Cass File No 43781, 10 Decisions of the Cassation Division of the Federal Supreme Court). Former judge at the Federal Supreme Court judge defended this approach to "formal positivism". Ali Mohammed Ali "Fundamental Error of Law" in Muradu Abdo, Ed (2014), *Cassation Questions in Ethiopia* (Papers Presented at a Symposium Organised in Commemoration of the 50th Anniversary of the Founding of the School of Law).

[71] *Prosecutor v. Dep. Comm. Yehualaw Mezgebu et al.* (15 April 1983, First Instance Special Court Crim File No 24/75).

The Court in *Maj. Goshime*, and *Mulugeta*[72] held that the provision is amended to avoid prolonged litigation and to expedite the disposition of cases while in fact the effect is shifting the burden of proof.[73] This was maintained in the Revised Special Penal Code Proc. No 214/1981, Article 13(3).[74] However, even after the enactment of the FDRE Constitution which expressly provides for the presumption of innocence, *Corruption Crimes Proclamation No 881/2015*, (Article 3) provides that where the material facts are proved, the intent to obtain advantage or injury is presumed. Based on such presumption of obtaining an advantage, the court in *Aschalew*[75] required defendants to enter their defence. The constitutionality of such presumption is yet to be challenged by defendants; or the court is yet to refer the matter to the Council of Constitutional Inquiry.

4. The Social Theory of Law

The social theories of law recognize that law does exist and operate in society. Legal theories develop in a particular socio-economic and political condition. It is, thus, influenced by non-legal factors from other disciplines, such as sociology, economics and political science.[76] Moreover, international relations and comparative experience of other legal regimes have influence in the reception of legal concepts, doctrines and methods.

As highlighted in the preceding sections, the two universal theories of law are *natural law theory* and legal *positivism* because they claim to apply at all times and in all circumstances.[77] When the natural law theory was dominant, the social system was based on religious belief. Positivism evolved at a time when there was the industrial revolution, when power shifted from the church to the monarch, and when there was a shift from faith to reason.[78] Other theories, such as sociological or historical jurisprudence, realist school or

[72] *Special Prosecutor v. Maj. Goshime WondimAgegn* (24 June 1983, Special Frist Instance Court, Crim File No 7/75); *Special Prosecutor v. Mulugeta Girma* (8 December 1983, First Instance Special Court, Crim File No 15/76).

[73] *See* further, Simeneh "Non-Positivist…", *supra* note 69, at 103-104.

[74] *See*, for instance, *Hamid Mohammed v Special Prosecutor* (28 November 1984, Special Court of Appeal, Crim App File No 46/76).

[75] *Federal Attorney General v Aschalew Shewa, et al.,* (11 June 2021, Crim File No 260048, Federal High Court).

[76] Tamanaha, *A Realistic Theory…, supra* note 1, at 12 ff.

[77] Ibid. at 17.

[78] Generally, see M.A. Ntumy (1986), "Neo-Naturalism: Tailoring Legal Philosophy for Capitalism and Neocolonialism" 13 *J Eth Law* 169.

Marxist theory of law or critical studies focus on one or a few aspects of the law taking the positive nature of the law as a foundation.[79] Each legal theory evolved as a justification or a critique of the existing system of rules; some developed as a repudiation of another theory. Yet there is no singular legal theory that is universally applicable to all time.

The social theories of law appear to be instrumentalist views of the law.[80] For instance, the sociological theory of law considers the law as an instrument to change society for the better. There were such instances in Ethiopia where the law was used to change society or the social value system. Yet, the law is also said to have taken root in the tradition of Ethiopian society. Likewise, there are moments when the law is used as a pure instrument of governance. The application of those social theories to Ethiopian law can be examined from the perspectives of sociological jurisprudence, historical legal theory and Marxist theory of law.

4.1 Sociological Jurisprudence

Sociological jurisprudence holds that the law is a very good instrument of social change.[81] Accordingly, the late 1950s and early 1960s were years of extensive transplants of foreign rules into Ethiopia. To use Duncan Kennedy's words, such transplants mark the second wave of globalization of laws and legal doctrines.[82] Ethiopia has always been borrowing legal doctrines, principles and practices from other systems. For instance, several ecclesiastic documents, many of which are considered to be part of natural law, were translated from Egypt and Syria to *Ge'ez*. However, in the classification of areas of religious influence, Ethiopia is under the Oriental Orthodox, to which Egypt and Syria belong. Thus, those documents were considered "ours".[83]

The borrowing of modern and secular legal rules and principles in the early 1950s and 1960s was made having the instrumental nature of the law at heart to achieve secular state objectives. Thus, the preface of the 1957 Penal Code states that "…the contributions of science, the complexities of modern life and

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[79] Tamanaha, *A Realistic Theory…*, *supra* note 1, at 19.

[80] *See* generally, Brian Z Tamanaha (2006), *Law as a Means to an End: Threat to the Rule of Law* (Cambridge UP).

[81] Tamanaha, *A Realistic Theory…*, *supra* note 1.

[82] Duncan Kennedy (2010) "Three Globalizations of Law and Legal Thought: 1850 – 2000" in *The New Law and Economic Development: A Critical Appraisal* (David M Trubek and Alvaro Santos, Eds, Cambridge UP). Also see, Daniel Haile (1973) "Law and Social Change in Africa: Preliminary Look at the Ethiopian Experience" 9 *J Eth L* 380.

[83] Getachew, "*Ke'Ge'ez SeneTsihouf Gar…"*, *supra* note 13, at 32.

consequent increase in the volume of laws require that effective, yet humane and liberal procedures be adopted to ensure that legislative prescriptions may have the efficacy intended for them as regulation of conduct." It further states that the law, along with developments in other fields, would "transform[] the nation and our lives" and "[would] inevitably shape the lives of those who come after us."[84] Therefore, "new concepts, not only juridical, but also those contributed by the sciences of sociology, psychology and, indeed penology, have been developed and must be taken into consideration in the elaboration" of the 1957 Penal Code.[85] Article 1 of the 1957 Penal Code (and the 2004 Criminal Code) provide for the purpose of the criminal law as promoting the "common good" which is new to Ethiopian criminal law.

In the inaugural statement of the *Journal of Ethiopian Law*, His Imperial Majesty stated, law "is an instrument for civilizing the peoples of the world."[86] He further stated that law "is a unifying force in a nation".[87] It is to facilitate the integration of those principles and doctrines into the Ethiopian legal system and help create a shared understanding of laws in general, that the Law School was established and the *Journal of Ethiopian Law* was inaugurated.[88]

The court cases that were reproduced in the first few volumes of the Journal of Ethiopian Law were meant to introduce the legal method.[89] For instance, the first criminal case that was reproduced in the Journal of Ethiopian Law was that of *Pvt. Getachew Gizaw* who invoked criminal irresponsibility as per the 1957 Penal Code (Articles 48 and 49).[90] At the trial court, the appellant was convicted of homicide in the first degree of one Commander Tsegaye Getaneh and, by a majority, the appellant was sentenced to death. His appeal petition was based on criminal irresponsibility. This case was reproduced to

[84] The 1957 Penal Code, Preface, para 1.
[85] Ibid, para 2.
[86] _____(1964), "Inaugural Statement by His Imperial Majesty" 1 *J Eth L*, vi.
[87] Ibid, v.
[88] Ibid.
[89] They may not be representative of the whole case decided by the courts. However, the High Court, presided by the British Judges such as Buhagiar, they were extraordinary in their interpretation taking into account both the principles in the General Part and the specific provisions in the Special Part of the Penal Code.
[90] *Pvt. Getachew Gizaw v Attorney General* (Imperial Supreme Court, Crim. App File No 95/51).

illustrate the application of criminal (ir)responsibility in the then-newly adopted Penal Code.[91]

The medical examination results were explained in the English version of the judgement written by Judge William Buhagiar and, the judgment of the High Court was affirmed by the Imperial Supreme Court. Further, the death sentence was affirmed by His Imperial Majesty as per Article 59 of the Revised Constitution and Article 204 of the Criminal Procedure Code. This marked a significant manifestation of institutional reform, because the death penalty was traditionally imposed only by the King's Court, and later, only on the basis of the *Fiteha Negest*[92] in parts of Ethiopia where it was effectively applied.

4.2 Historical Legal Theory

As a reaction to the sociological approach that uses law as an instrument of social engineering, and as a cultural reaction to the French codification, the German historical school[93] argued that the law is an outgrowth of the social value system; it is a product of the collective conscience. In Ethiopia, the historical theory of law is reflected in the adoption of the 1930 Penal Code which was meant to catch up with the social and economic developments of the time.[94]

In the preface to the 1957 Penal Code, His Imperial Majesty stated that although we borrow legal rules and concepts from other systems, "the point of departure must remain the genius of Ethiopian legal traditions and

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[91] There were several significant contributions introducing and simplifying the interpretation of the then newly adopted 1957 Penal Code of Ethiopia. See, Peter L Strauss (1968), "On Interpreting the Ethiopian Penal Code" *5 J Eth L* 375; Peter L Strauss and Michael R Topping (1970), "Decision Trees" 7 *J Eth L* 447.

[92] The 1930 Penal Code, First Part, First Chapter No 1; MahitemeSelassie, *supra* note 33, at 86 -88.

[93] Tamanaha, *A Realistic Theory*…, *supra* note 1, at 18 ff.

[94] Preface, paras 1, 6 – 9. For instance para 9 states that "[d]amages and fines which in the year 1700 were paid in cattle, in the year 1800 were paid in salt, in the year 1900 in [Birr]. But since the year 1900, owing to the increase in the people's knowledge, the wider spread of trade, the greater love of work, the greater cheapness of the [Birr] and the diminished profit which is gained by the [Birr], the damages and fine have been of no profit to the injured man who has been awarded damages and have been no deterrent and no burden to the offender has had to pay damages. All the advantages of food and clothing which are necessary for human existence which were formerly purchased for one [Birr] cost to-day up to five [Birr] in a district near a town and up to two[Birr] in the country at a distance from a town. For these reasons, it has become necessary to revise the law of damages and punishments."

institutions which have origins of unparalleled antiquity and continuity."[95] He also stated that such law "must be profoundly grounded in the life and traditions of the nation".[96] Jean Graven states that there was an effort to reconcile "tradition" and "progress" in his justification of why flogging and the death penalty were maintained in the Penal Code adopted in 1957. [97] According to the *Fiteha Negest*, punishment is imposed not only for censuring the individual, but also as an expiation of sin, and it focused on corporal punishment. However, the *Fiteha Negest* further instills the understanding that God has created such condition of hierarchy and authority including the imposition and enforcement of punishment to be the foundation of order and peace, and if there is no authority constituted, it assumes there would be no peace.[98]

4.3 Marxist theory of Law

It is in the context of the social theory of law that Marx's instrumentalist critique of law is discussed. Marx's "class instrumentalism" view of law is one of the most influential theories of law that gave rise to other critical thoughts on the law. His principal point of view which is in issue here is that the law reflects the economic base which is manifested in the false universalisation of legal interests by the superstructure; as such, the law is an instrument for the dominant class exercising dominion over the working class.[99]

Marxist theory of law crept into Ethiopia's legal system in the preamble of the *Provisional Military Government Establishment Proclamation No 1 of 1974*. The first action of the PMAC was a repudiation of various laws and institutions of the Imperial Government; it suspended the 1955 Revised Constitution and prominent institutions. The preamble of Proclamation No 1 of 1974 stated that "the Constitution of 1955 was prepared to confer on the Emperor absolute powers; that it does not safeguard democratic rights but merely serves as a democratic façade for the benefits of world public opinion; that it was not conceived to serve the interests of the Ethiopian people; that it

[95] The 1957 Penal Code, Preface, para 4.
[96] Ibid, para 1.
[97] Graven, *supra* note 28, at 288-291.
[98] "The Law of the Kings", *supra* note 14, at 272.
[99] Raymond Wacks (2006), *Philosophy of Law: A Very Short Introduction* (Oxford UP) at 81-83.

was designed to give the baseless impression that fundamental natural rights are given from the Emperor to his people."[100]

It was further stated that the reason for the suspension of the parliament was that: it had not been serving the people; it had been serving its members and the ruling aristocratic classes; that is the reason it refrained from legislating on land reform which was considered to be the basic problem of the country. The preamble of the Proclamation further stated that the parliament was passing laws at various times that were intended to raise the living standard of its members "using the high authority conferred on it by the people to further the personal interests of its members and aggravating the misery of the people."[101] These statements depict the law as an instrument of oppression by the aristocratic class over the ordinary citizenry.

The PMAC used the law as a political instrument even though it had declared itself as dedicated to "serve the public good and capable of developing Ethiopia and coping with the various security problems prevailing at [the] transitional period."[102] It further established a military court "to try those who contravene" the Motto *Ethiopia Tikidem* and other laws that may be adopted by the PMAC.[103] The decision of the military court would be final; and in exceptional situations, where the punishment is a death sentence or life imprisonment, the decision would be reviewed by the Head of State.[104]

In subsequent legislation, the law was manifestly meant for the promotion of political ideology. For instance, the Special Penal Code (Article 35) punishes those who contravene the Motto "*Ethiopia Tikidem*".[105] To bring about "economic justice" among the various "classes", land and urban extra-houses, and means of production were nationalised.[106] "Socialist legality"

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[100] *Provisional Military Government Establishment Proclamation No 1 of 1974,* Preamble, para 3.

[101] Ibid, para 2.

[102] Ibid, para 4.

[103] Ibid, art 9.

[104] Ibid, art 11. *Definition of Powers of the Provisional Military Administration Council and its Chairman*, *Proclamation No 2 of 1974* grants all the necessary state power to the PMAC, such as lawmaking, treaty-making power and defining the PMAC as the Head State and Government, among others.

[105] The *Revised Special Penal Code Proclamation No 214/1981*, art 12 punishes the so-called *Counter-Revolutionary Acts*.

[106] *Government Ownership and Control of the Means of Production Proclamation No 26 of 1975*; *Public Ownership of Rural Lands Proclamation No 31 of 1975*; *Government Ownership of Urban Lands and Extra Urban Houses Proclamation No 47 of 1975.* Also, see, Stefan Brune (1990), "Ideology, Government and Development – The People's Democratic Republic of Ethiopia" *12 Northeast African Studies 189*; Fasil

was strengthened and "dictatorship of the proletariat" was affirmed in the PDRE Constitution.[107] Without having a constitution, the unelected [109 usually stated as 120] Members of the PMAC changed the political, economic and social setting of the nation irreversibly using the might of "the law".[108]

Several of those laws established local dispute resolution institutions thereby making the courts "irrelevant" by denying citizens access to the regular court on politically sensitive disputes.[109] Finally, the Workers' Party of Ethiopia was constitutionally established, as the only political party and the vanguard of the nation, which limits in essence, the political freedom of citizens.[110] Any challenge to the political authority was criminally sanctioned.

Institutionally, because the PMAC did not have trust in the regular courts, it established the first Special-Courts Martial (1974 -1981) which later was changed to Special Court (1981-1987). The regular courts were applying the 1957 Penal Code and the Criminal Procedure Code while the special courts applied the Special Penal Code and the Revised Special Penal Code respectively. The review process of decisions of the special courts reflects the political nature of the juridical process.

Subsequent to conviction and in the determination of the punishment, in various cases, the special court reasoned that such crimes are in opposition to the establishment of a socialist system (communism), a system where there is no class exploitation, and the decision further stated that the convict is one of those anti-revolutionaries acting both from within and external counter-revolution. An extensive statement is made in *Special Prosecutor v Assefa*

Nahum (1980), "Socialist Ethiopia's Achievements as Reflected in its Basic laws" 11 *J Eth L* 83.

[107] *Constitution of the People's Democratic Republic of Ethiopia*, Art 5.

[108] Fasil Nahum calls it "Legal Revolution" except it is negatively affective the lives of citizens. Fasil, *supra* note 106, at 83 ff.

NB- Bahru Zewde states the figure as 110 and Aregawi Berhe cites two different sources which record 109 Derg members.

[109] When everyone is denied of his/her property, resort to the court would be a natural course of action. However, taking jurisdiction away from the regular courts, the *Peasant Association Organization and Consolidation Proclamation No 71/1975* would establish a tribunal for the disposition of rural land dispute at *Woreda* and *Awraja* levels. Likewise, the *Urban Dwellers' Association Consolidation and Municipalities Proclamation No 104/1975* would establish tribunals at *Kebele*, Higher (*kefitegna*) and Central levels to dispose disputes relating to urban land and houses, among others. In similar fashion, labour disputes were handled by other institutions.

[110] PDRE Constitution, *supra* note 107, Art 6.

Aynalem Mehanzel.[111] In the determination of the punishment, the defence pleaded with the court that he should not be seen as against the revolution because the revolution is meant for persons like the defendant as he is from the oppressed class. The court in addressing this issue held that:

> the broader mass is protecting the revolution dearly because it came for the oppressed and the working class, and the people are moving the revolution from one victory to another victory in the class struggle. Yet, some, like the defendant who is against the revolution, are violating edicts of the state. This crime is committed at a time when the class struggle is undergoing to build a socialist system where no one would exploit another and would not be treated lightly.[112]

After the regular courts were side-lined for thirteen years, they absorbed the special courts, and were empowered to enforce the political ideology of the single-party state. Thus, the *Supreme Court Establishment Proclamation No 9/1987* (Article 3) provides objectives of the Supreme Court to:

1. safeguard the political, economic and social system guaranteed by the Constitution and other laws;
2. safeguard the legally guaranteed rights, interests and freedoms of individuals;
3. safeguard the legally guaranteed rights and interests of *State organs*, *mass organizations* and *other associations*;
4. strengthen the maintenance of law and order and *the observance of socialist legality*;
5. educate the people in order *to raise their legal consciousness*.[113]

It is evident that the PMAC used both the law and the institutions as a means of achieving political ends.[114] The political nature of various laws was reflected in the judicial decisions which appear to be a reflection of "socialist

[111] *Special Prosecutor v Assefa Aynalem Mehanzel* (7 June 1982, Special First Instance Court, Crim File No 14/74).

[112] Similar argument is stated in *Mulugeta*, *supra* note 72.

[113] These are also the objectives of the High and Awraja Courts. *High Courts and Awraja Courts Establishment Proclamation No 24/1988*, art 3. [emphasis added].

[114] *See*, Simeneh and Cherinet, *supra* note 21.

legality".[115] Socialist legality, from the reading of such laws, appears to have given primacy to collective interests than individual interests.[116]

5. Positivisation of Natural Law?

As highlighted in Section 3, positivism upholds that law is what is adopted by the state organ that has the authority to make such law following a certain procedure, and it contains only those rules without any moral judgement regarding its content. The non-positivist theory of law, including classical natural law theory, rather holds that law is not limited to the system of rules, there are (moral) principles and postulates (metanorms) that define the binding nature and content of the positive law.

Robert Alexy rather argues for the necessary connection between law and morality. Both in his "Argument from Injustice[117] and "the Ideal dimension of Law",[118] he made a distinction between the real dimension of law, which is the authority of lawmaking and the efficacy of the law, on the one hand, and the ideal dimension on the other. The ideal dimension of the law is that it must be "correct" and it must be "just". This argument is based on Radbruch's formula[119] and when it involves constitutional (human rights) issues, the argument is related to his proportionality thesis.[120]

Even though it may not be appropriate to put these schools of thought in one basket, it is in this line of argument that modern natural law upholds certain higher principles against which the positive law is evaluated. John Finnis argues for basic (essential) life goods which the law is supposed to help accomplish.[121] Likewise, Dworkin argues from a method perspective that the

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[115] Ibid. It is worth mentioning that in his 1980 E.C. Report, the President of the High Court stated that six officers of the court were deployed to the battlefield, and the rest of the staff are actively working to cover the position of those absentees "in accordance with the instruction given by the Workers' Party of Ethiopia". *1 Chilot No 1* (1989) (Booklet of the Addis Ababa High Court, Amharic) at 11.

[116] *See* text for note 113 *supra*.

[117] Robert Alexy (2002), *The Argument from Injustice: A Reply to Legal Positivism* (Trans. Stanley L Paulson and Bonnie Litschewski Paulson, Clarendon Press) at 35.

[118] Robert Alexy (2021), *Law's Ideal Dimension* (Oxford UP) at 18 ff.

[119] Stanley L Paulson (1994), "Lon L Fuller, Gustav Radbruch, and the 'Positivist' Theses" *13 Law and Philosophy 313*; Andrzej Grabowski (2013), *Juristic Concept of the Validity of Statutory Law: A Critique of Contemporary Legal Positivism* (Trans. Malgorzata Kieltyka, Springer) at 526-533.

[120] Alexy, *Law's Ideal*…, *supra* note 118.

[121] Finnis, *supra* note 4, at 85 ff.

law needs interpretation which involves principles[122] that are beyond legal rules.[123] This is particularly so in the interpretation and application of criminal law rules, and the court uses principles (in the General Part of the criminal law) that determine the scope and application of the positive law.[124]

When the PMAC came to power, it criminalized certain conduct and made the criminal law retroactively applicable. The justification was an appeal to certain higher principles that could not be contradicted by the positive law. When Ethiopian Peoples' Revolutionary Democratic Front ("EPRDF") took power in 1991, it adopted a Transitional Period Charter which contains the UDHR as its bill of rights that recognizes the inherent dignity of humankind. The *Central Government Courts Establishment Proclamation No 40/2993* states that "the rule of the Derge-WPE regime for the last seventeen years had particularly been inhuman wherein democratic rights were suppressed and illegal activities widespread". It further stated that it is the historical obligation of the Transitional Government of Ethiopia "to establish and organize a court system based on fundamental principles of justice which would guarantee the observance of human and democratic rights of the peoples of Ethiopia".[125]

The objectives of the courts as provided for under Art 4(1) would therefore be "safeguarding individual and democratic rights, freedoms and interests guaranteed by the Charter". Jurisdiction of the Courts also covered cases "arising under the Charter, International Treaties and the laws of the Central Government."

This approach is also emulated by the FDRE Constitution. Article 10, for instance, provides that "rights and freedoms emanating from human nature are inviolable and inalienable."[126] Moreover, Article 11(3) of the *Federal Courts Proclamation No 1234/2021* provides that "…the Federal High Court may render a decision, judgment or order to protect justiciable human rights specified under chapter three of the Constitution". The question then would be whether a claim for the enforcement of rights and duties on the basis of such constitutional rules, is based on the natural law or the positive law.

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[122] Dworkin, *supra* note 68, at 119 ff.

[123] *See*, Avila, *supra* note 68.

[124] Alexy, *Argument form Injustice*…, *supra* note 117, at 68-81.

[125] *Central Government Courts Establishment Proclamation No 40/2993*, preamble, paras 2, 3.

[126] Art 15 provides for the right to life, art 16 provides for personal security, art 17 provides for the right to liberty, and art 18 provides for the protection against cruel, inhumane and degrading treatment and punishment.

The practice of the court does not show a situation where unwritten law is applied, including international agreements which are not published in the official *Negarit Gazeta*. The courts consistently use only written law.[127] Claims before the courts are always based on statutory law, which is juridically considered to be valid.[128] Any reference to entitlements based on "natural law" can be given effect only if it is expressly provided for in the positive law. When the claim is based on "natural rights" incorporated into the Constitution, it is a claim based on the provisions of the Constitution, the positive law, not based on the (non-statutory) natural law. Therefore, it is palpable to argue that those "natural law" rules are positivised to be given effect.

It is the principle of legality that dictates the nature of criminal law to be exclusively positive law. Thus, both the prohibited conduct and the consequence need to be stated in the statute. However, it is the interpretation of such criminal law that calls for non-positive law materials in the name of principles, such as the principle of lenity.[129]

6. Pragmatist Instrumentalism of the Law: The Way Forward

Positivism appears to be a theory of convenience both in authoritarian and liberal governance. However, other theories are also taking positivism as a foundation. This is because of the certainty of the positive law. While positivism defines the nature of law, other theories rely on the function of positive law. Irrespective of the nature of such function, the law is considered an instrument for achieving certain objectives, often the collective good.

Unfortunately, as the history of modern law in Ethiopia indicates, the state resorts to using the law as an instrument of choice.[130] Political opposition is an ordinary business in politics. However, the ruling party using its state power utilizes criminal law to suppress political opposition.[131] Even though the declaration of emergency by a government is justified only under

[127] For instance, in Daniel Mekonnen, *supra* note 69, the court applied a directive to convict the accused.

[128] _____ (1950), *The Legal Philosophies of Lask, Radbruch, and Dabin* (Trans. Kurt Wilk, Oxford UP) at 112 -114, 119-120.

[129] *See*, Simeneh "Non-Positivist…", *supra* note 69; Simeneh "Methods…", *supra* note 69.

[130] *See*, for instance, Simeneh and Cherinet, *supra* note 21.

[131] Simeneh Kiros Assefa and Cherinet Hordofa Weter, "Instrumentality of the Criminal Law in Ethiopian Political Power" (Forthcoming).

extraordinary circumstances, it is often seen that the state uses its power of declaring a state of emergency when the political heat increases and the government finds itself weaker to suppress such political opposition.

The first legitimate state of emergency declaration was made around the territories bordering the state of Somalia in 1964.[132] However, most declarations of emergency in Ethiopia are exclusively to control local opposition, whatever form it takes. Such instances include: *Declaration of a State of Emergency in Certain Areas of the Teklay Gizat of Eritrea Order, 1970*; the Proclamation Establishing the PMAC itself that was essentially a declaration of state of Emergency; and *Declaration of State of Emergency Proclamation No 55/1975*. The PDRE Government adopted *Council of State Special Decree No 1/1988 to Declare State of Emergency in Eritrea and Tigray*. The EPRDF Government also adopted the *State of Emergency Proclamation for the Maintenance of Public Peace and Security No 1/2016*. These are just illustrations of the different regimes in Ethiopia.

These declarations of Emergency involved the suspension of rights of citizens, whatever rights they have at the moment of adoption of such proclamation,[133] and giving excessive power to state security forces to suppress any "unrest". It grants the government the power to detain individuals without a court order, keeping them in prolonged detention without bringing them to court, unrestricted search and seizure of individuals and items, the power to prohibit citizens from staying in a certain locality, etc. These are obvious manifestations of excessive state coercive force without or with limited accountability.

One would then ask the basic question: what is the purpose of the law? Both from the principle of utility and the theories of justice or rights, one can arrive at the following conclusion. The principle of *utility* pursues that a certain social objective is worth pursuing if it brings about the greatest happiness to the greatest number of people. Thus, the principle of utility creates a democratic society where the law is made by the majority for the benefit of the majority. When the law is made by the majority and applied to

[132] *Declaration of State of Emergency in the Region Bordering the Republic of Somalia Order, 1964*. The other apparently legitimate declaration of state of Emergency relates to address the Covid-19 pandemic. *A State of Emergency Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate Its Impact Proclamation No 3/2020*.

[133] The constitution promised in the PMAC Establishment Proclamation No 1/1975, art 5(b) is adopted only in 1987. In between, despite some argue there is no constitutional gap, *see* Fasil, *supra* note 106, there was no constitution in between. As a result of which there was no right to be suspended, arguably.

everyone without any protection to the minority, against whose interest the law is applied, it is a rule of domination or majority tyranny. However, rights are the protection of individuals against claims based on principles, such as the principle of utility. Therefore, there is the bill of rights as a protection against the tyranny of the majority.[134]

There are, however, several theories that are meant for the protection of the minority against majority tyranny, and they revolve around the bill of rights. They are incorporated both in legal and political theories.[135] The law is an instrument that should serve everyone in society. It must serve society by helping achieve important social ends, creating a fair and just society, creating wealth, or maintaining law and order. However, it must also afford protection to those who are most vulnerable among us. Such balancing of the two is made possible through the doctrine of the *common good*.[136] That common good is pursued by principles, such as *rule of law*.

Yet this argument is vulnerable in that it appears to have required mere benevolence. The making of state law is associated with political power, which in turn is associated with better organisation of a particular group to control such political power.[137] It is this political power that translates its interests and views into law. Therefore it is this group that defines the state interest. Yet, if the minority is defined by an immutable social or natural identity, that group will remain a minority, without ever having a chance to get a platform for its interests.

Therefore, a just society is one wherein everyone takes part in governance and is treated fairly; and a legislation is valid insofar as it maintains this minimum rule. It is the application of such rule that promotes the rule of law. This doctrine of rule of law is not only the institution and implementation of the positive law; rather it also involves the participatory process in lawmaking and implementation.[138]

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[134] Ashutosh Bhagwat (2010), *The Myth of Rights: The Purposes and Limits of Constitutional Rights* (Oxford UP) at 24-26.

[135] John Rawls (1999), *A Theory of Justice, Revised Edn* (The Belknap Press) at 19 -21.

[136] The doctrine of "common good" is legitimation principle for the use of criminal rules in Ethiopian. *See*, Simeneh and Cherinet, *supra* note 21; Simeneh and Cherinet (forthcoming), *supra* note 131.

[137] R Hardin (2006), "Constitutionalism" in B Weingast and DA Wittman (eds), *The Oxford Handbook of Political Economy* (Oxford UP) at 298.

[138] Brian Z Tamanaha (2004), *On the Rule of Law: History, Politics, Theory* (Cambridge UP) at 99-101.

Thus, there has to be a need to have a law, it must be made by the decision of the majority, the lawmaking process must be inclusive, and the law should not be unreasonable and should not be intrusive on the minority.[139] Indeed, the law is the common institution we reign on ourselves. And as years and decades roll on, there can be the need for a constant revision of, and agreement on the "social contract".

7. Conclusion

This article has attempted to review the various theories that are believed to explain the nature and function of criminal law in Ethiopia under three categories – the natural law theory, positivism and social theory of law. The natural law theory has been a dominant theory for several centuries. When the church had a strong grip on society, it enforced its religious morality through criminal punishment. Transgressions to those ecclesiastic rules were treated as a sin deserving corporal punishment for the expiation of such sin, without which the individual would be condemned to punishment in the world without end.

With the modernisation of legislation, positivism grew to govern almost all aspects of life. When power shifted from the church to the monarch, the latter adopted laws, and society progressively moved away from religious rules to secular ones. The positive law is meant to enforce state objectives. Statutory rules are imposed on citizens as effective controlling tools for the state. As power is exercised by the different institutions, the authoritarian nature of the state is diffused among those institutions. The state makes use of positive law excessively. To minimize the instrumental nature of criminal law, it is finally proposed that the law should be employed to its proper utility, *promoting the common good*.

[139] Ibid, at 104-112.

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Examining the Tax Administration Law of Ethiopia in Light of the Tax Compliance Theories

Tewachew Molla Alem ♣ & Yosef Workeluele Tewabe **

Abstract

The problem of tax non-compliance is a serious global phenomenon, especially in developing and least developed countries. In this regard, states design their tax administration laws and tax compliance rules in light of the two most dominant tax compliance theories: deterrence theory and behavioural theory of tax compliance. These theories are ideals or indexes of a good tax administration system. It is thus important to examine the base or policy of tax compliance rules of the tax administration laws of Ethiopia. This Article examines when and in what forms the tax administration law of Ethiopia is designed to embody the tax compliance theories. Doctrinal research method is used and the major findings show that –like many countries– the tax administration proclamation of Ethiopia is largely designed in consideration of the economic deterrence model to achieve taxpayers' compliance which depends on audit and penalties when tax is evaded. However, this approach is criticized due to its administrative inefficiency and its inability to build equitable tax system. Aside from tax penalties, tax administration policies and practice in Ethiopia should give much attention to changing individual taxpayers' attitudes toward the tax system. This requires improving its perceived fairness and equity, making government expenditure in the best interest of the taxpayers, improving procedural justice, tax education, establishing the culture of mutual respect between tax authorities and taxpayers, and making it easy to comply with the tax laws.

Key terms: Deterrence Theory · Ethiopia · Psychological Theory ·Tax Compliance

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Contents

1. Introduction

Citizens who are legally responsible to pay tax are expected to comply with their obligations under tax laws. Compliance theorists indicate how people and organizations respond to laws and other legal directives.[1] Allingham and Sandmo's (1972) work serves as the foundation for a large stream of tax evasion theoretical models that consider a variety of factors such as audit probability, social stigma, and information uncertainty, as well as economic decisions, including time allocation and high expenses that are used to conceal evaded taxes.[2] Since the theoretical analyses of Allingham and Sandmo (1972), a substantial literature has addressed ideas and arguments on the factors influencing tax compliance.[3]

Frequently used acronyms:

TAP	Tax Administration Proclamation
TIN	Tax Identification Number
ETB	Ethiopian Birr

[1] Jeff T. Casey and John T. Scholz, (1991), "Beyond Deterrence: Behavioral Decision Theory and Tax Compliance", *Law & Society Review*, Vol. 25, No. 4, p. 821.

[2] Michael G. Allingham and Agnar Sandmo, (1972), "Income Tax Evasion: A Theoretical Analysis", *Journal of Public Economics*, Vol. 1, North-Holland Publishing Company, pp. 323-338.

[3] Mark D. Phillips, (2011), *Reconsidering the Deterrence Paradigm of Tax Compliance*, Ph.D. dissertation for the Department of Economics at the University of Chicago, pp. 99-106.

These ideas relate to the application of Becker's (1968) economic theory of crime. According to this theory a rational, expected-utility-maximizing agent determines the amount of income to self-report to the government by contrasting his consumption when disobedience is or is not found.[4] The theory is known as the "deterrence" paradigm because it makes the assumption that taxpayers are "deterred" from paying their tax obligations only by the possibility of an audit, discovery, and penalty. The stylized taxpayer in the model behaves almost exactly like a gambler who decides how much to stake in accordance with the probabilities and pay-outs of the noncompliance bet.[5]

According to Larissa-Margareta Bătrăncea *et al,* tax compliance is influenced by behavioural problems that affect how public levies are raised, in addition to economic factors.[6] Governments have recently begun to pay more attention to the behavioural models of tax compliance. As a result, behavioural models based on sociological and psychological factors such attitudes, beliefs, norms, social features, or cultural background came into being.[7] The "slippery slope" framework is one of these models and serves as a remarkable illustration of how faith in authorities and their ability to enforce their will function as major determinants of compliance behaviour.[8] This model's primary contribution is the way it separates compliance quality. Trust in authorities therefore promotes voluntary compliance, whereas the use of force by authorities promotes enforced compliance.[9] The framework, which analyses the dynamics of the relationship between taxpayers and tax authorities, promotes a "service and client" approach that can foster mutual trust and collaboration thereby bringing about increase in compliance levels.[10]

Ethiopia's tax mobilization is lower than most African nations. As part of the federal tax reform agenda, the Tax Administration Proclamation No. 983/2016 (TAP), has been enacted by replacing dispersed tax administration rules in different tax laws. The Proclamation incorporates comprehensive legal provisions that deal with all forms of taxes. Remedies for non-

[4] Ibid.
[5] Ibid.
[6] Larissa-Margareta Bătrâncea *et al*, (2012), "Tax Compliance Models: From Economic to Behavioral Approaches", *Transylvanian Review of Administrative Sciences*, No. 36, pp. 13-26.
[7] Ibid.
[8] Erich Kirchler *et al* (2008), "Enforced versus Voluntary Tax Compliance: The "Slippery Slope" Framework*", Journal of Economic Psychology,* Vol. 29(2), pp. 210-225.
[9] Ibid.
[10] Ibid.

compliance of tax obligations are among of the issues that are extensively addressed in the Proclamation. The Proclamation embodies civil, administrative and criminal liability or penalty if a taxpayer, tax official or any person abets or incites tax non-compliance. As prior research did not discuss the specifics of these tax non-compliance remedies included in the proclamation, the objective of this article is to evaluate and examine the theories of tax compliance under Ethiopia's Federal Tax Administration Proclamation No. 983/2016. The next section deals with general conceptual framework of tax obligation, non-compliance and remedies. The third section highlights economic deterrence and behavioral models. It also discusses the two competing theories on the subject of tax non-compliance. Sections four and five analyze these theories in the context of Ethiopia's tax administration law by using the provisions of the Tax Administration Proclamation.

2. The Concept of Taxpayer's Liability

Tax is a compulsory, unrequited payment to the government. It is unrequited in the sense that benefits provided by the government to taxpayers are not in proportion to the payments they make. Since there is no direct benefit, taxpayers may tend to be resistant to paying taxes. The resistance differs amongst taxpayers but is largely commensurate with the overall tax burden, and the quality of taxation, and the perception of government spending efficiency.[11]

When all taxpayers are compliant and pay their fair share of tax obligations, the level of public goods that the government provides to the public is at its best. Franzoni identifies four fundamental guidelines that a taxpayer should adhere to in order to comply with the law completely: Report the actual tax base to the tax authorities, calculate the tax liability accurately, timely file your tax return, and promptly pay any outstanding balances.[12] If a regulation is broken, the taxpayer is no longer in compliance.

The taxpayers' activities in relation to their resistance to pay tax they are expected to comply with is known as tax non-compliance.[13] Tax evasion and

[11] *See*, for example, Steven Klepper and Daniel Nagin (1989), "Tax Compliance and Perceptions of the Risks of Detection and Criminal Prosecution", *Law and Society Review*, Vol. 23(2), pp. 209-240.

[12] L.A. Franzoni (2000), "Tax Evasion and Tax Compliance", in Bouckaert, B. and De Geest, G., (eds.), *Encyclopaedia of Law and Economics*, vol. IV, Cheltenham: Edward Elgar Publishing, pp. 51-94.

[13] M. Wenzel (2002), "The Impact of Outcome Orientation and Justice Concerns on Tax Compliance", *Journal of Applied Psychology*, pp. 4-5.

tax avoidance are two behaviours that come to mind when discussing non-compliance. The legality of taxpayers' activities is used to draw a contrast between the two ideas. On the one hand, *tax avoidance* does not violate the law *pe se* because it presupposes the use of legal loopholes for the goal of lowering taxes through inventive accounting and therefore avoiding criminal activity.[14] The text of the law is followed, but not the spirit. *Tax evasion*, on the other hand, is prohibited because it involves intentionally breaching the law in order to reduce taxes, which constitutes a crime.[15] It also goes against both the letter and the spirit of the law.

Unquestionably, the higher the acceptance of taxes by the public, the easier the task for the tax administration to collect them. It would be too optimistic, however, to rely only on taxpayers' inner conviction that "paying taxes is the right thing to do." Legal coercion and sanctions are still necessary to enforce taxation. Obligations have to go hand in hand with sanctions.[16] Otherwise, they would become a classic *lege imperfecta*, an unimaginable approach in the public finance domain.[17]

Tax administration laws should establish clear standards and corresponding liability for all persons who may be involved in any non-compliance of taxpayers, agents of taxpayers or the tax authority, government officials, and other potential abusers of the country's interest in taxes.[18] The critical question, therefore, is not whether sanctions should be used but what they should look like. It is to be noted that a tax penalty should influence taxpayer behaviour –it should deter noncompliance and encourage future compliance. Second, it should be more painful than fulfilment of a given tax obligation, yet not repressive.[19]

[14] S. James & C. Alley (2002), "Tax Compliance, Self-Assessment and Tax Administration", *Journal of Finance and Management in Public Services*, Vol. 2, No. 2, pp. 27-42.

[15] *See*, for example, H. Elffers, R.H. Weigel and D.J. Hessing, (1987), "The Consequences of Different Strategies for Measuring Tax Evasion Behavior", *Journal of Economic Psychology*, Vol. 8, no. 3, pp. 311-337.

[16] A. Ripstein (2004), "Authority and Coercion", *Philosophy and Public Affairs*, 32(1), pp. 2-35.

[17] *See*, for example, T. Dębowska-Romanowska (2008), Za co karać podatnika, a za co powinno odpowiadać państwo w stosunku do działających w dobrej wierze podatników? Prawo i podatki.

[18] Id, pp.119-122.

[19] Artur Swistak (2015), "Tax penalties in SME tax compliance", *Financial Theory and Practice*, No.40, pp. 129-147.

The effect of tax penalties lies mainly in deterrence.[20] Taxpayers choose to comply with their tax obligations rather than pay more than the cost of the obligation or lose potential tax benefits (e.g., tax concessions). However, this is so only if they are aware of the consequences of non-compliance, find it unprofitable to cheat, and believe they may be detected. Tax liabilities also motivate taxpayers. This occurs where the liabilities are educative, in addition to which, the tax penalties should be fair and unavoidable. The certainty of being detected and punished is the prerequisite for taxpayer education.[21]

If tax penalties are perceived as fair by other taxpayers, they build up a sense of justice and reward to those who comply. At the same time, a clear message is sent out: "Paying taxes is a right thing to do," "taxpayers are honest: only those few who are non-compliant are punished." Such norms strongly motivate taxpayers, especially individual small businesses, to be compliant about their tax obligations.[22] Therefore, in any tax liability, there must be a reasonable financial outcome and impact –mostly to deter and motivate tax compliance. Tax penalties, unlike criminal penalties, should not aim at repression. [23]

Accordingly, policymakers and revenue authorities should first have to design a proper catalogue, forms, and limits for tax penalties. If there is some leeway for the revenue authority's discretion, the latter must select the appropriate penalty. Even if it is difficult to give a definitive answer to what a perfect penalty should be, some basic directives for effective penalties may be formulated. First, they have to be deterrent enough against any cost-benefit calculations on the taxpayer's side. Fulfilment of a tax obligation must be more advantageous for taxpayers than the option of being non-compliant.

Taxpayers have to respect the financial needs of the government and the predictability of its revenue streams. It is widely accepted that taxpayers may not use unpaid taxes as a source of revenue for financing their business activities. Interests on tax arrears are a primary instrument that prevents such situations and compensates the government for late payments. Moreover, tax

[20] *See,* for example, OECD (2010), "Understanding and Influencing Taxpayers' Compliance Behaviour", Information Note, Forum on Tax Administration: SME Compliance Subgroup, Paris: OECD.

[21] B. Frey & L. Feld (2002), "Deterrence and morale in taxation: An empirical analysis", Working paper, No. 760.

[22] B. Torgler (2007), *Tax compliance and tax morale: A theoretical and empirical Analysis*, Edward Elgar Publishing Limited.

[23] Swistak *supra* 19.

penalties such as fine and incremental increases in interest rates on tax arrears beyond the standard rate are additional means of safeguarding due payments.

Indeed, tax penalties make noncompliance unprofitable and painful. Meanwhile, assessment of understated taxes and payment of interest is a complementary measure because it is only restitution of what should have been paid and compensation for the loss of time value of money. Equally important is the need to note that penalties that are too harsh or destructive are counterproductive because excessive repression never works in all avenues including taxation.

3. Approaches of Tax Compliance: Theoretical Underpinning

Theoretical approaches to tax compliance are commonly divided into deterrence (or economic deterrence theory) and the wider behavioral or norm theory.[24] Main factors in tax compliance behavior includes: detection and punishment, overweighting of low probabilities, burden of taxation, government services, and social norms.[25]

3.1 The Deterrence theory model

Tax compliance has been studied in traditional public economics by heavily relying on deterrence as the most important compliance-increasing factor. The deterrence/ economic deterrence theory states that taxpayer behavior is influenced by factors determining the benefits and cost of evasion, such as the tax rate, the probability of detection, and penalties for fraud.[26] This implies that if detection is likely and penalties are severe, few people will evade taxes. In contrast, under low audit probabilities and low penalties, the expected return to evasion is high. The model then predicts substantial non-compliance.[27]

Although the model has been criticized for focusing exclusively on the coercive element at the expense of the consensual side of compliance,[28] there is some evidence to support the relevance of deterrence strategies to

[24] Frey & Feld *supra* 21, p. 7.
[25] James Alm (1996), Explaining Tax Compliance, in Susan Pozo (ed.), *Exploring the Underground Economy,* Upjohn Institute for Employment Research, pp.104-111.
[26] Allingham & Sandmo, *supra* 2.
[27] Ibid.
[28] A. Sandmo (2005), "The Theory of Tax Evasion: A Retrospective View", *National Tax Journal,* Vol. 58(4), 643-633.

addressing non-compliance.[29] For example, the fear of being detected and punished has in some contexts been found to be an effective strategy to induce truthful behavior.[30]

The deterrence theory is premised on dealing with the challenges of tax compliance in an attempt to seek an enforcement mechanism that can be complemented or substituted by the citizen's tax morality.[31] There is widespread evidence that tax evasion, or what is called illegal or intentional action aimed at reducing the responsibility to pay appropriate taxes is common place in almost all countries.[32]

The dominant deterrence/economic deterrence approach to the analysis of tax compliance follows the economics-of-crime methodology pioneered by Becker.[33] This approach was first applied to tax compliance by Allingham and Sandmo.[34] Becker's analysis is normative; his purpose is to determine optimal punishments by setting a wrongdoer's expected costs equal to the wrongdoer's expected benefits.[35] Becker models expected costs as a function of both the severity of the punishment potentially imposed on the wrongdoer and the probability of punishment. The purpose of his study is twofold. First, Becker attempts to evaluate the resources and punishments needed to enforce the law. In order to do that, he designs a measure of social loss resulting from crimes, and then identifies the outlays of resources and punishments that diminish the social loss.

Allingham and Sandmo's model is based on the following premise: filling in a tax return is a decision under uncertainty due to the lack of assurance concerning an audit performed by tax authorities and a bad repercussion in case of undeclared income. The aim of their study was to analyze taxpayers' propensity towards avoiding taxes by underreporting income and the degree

[29] *See*, for example, M. McKerchar & C. Evans (2009), Sustaining Growth in Developing Economies through Improved Taxpayer Compliance: Challenges for Policy Makers and Revenue Authorities. *eJournal of TaxResearch,* Vol.7, 171-201.

[30] Ibid.

[31] *See*, D. Ortega & P. Sanguinetti (2013), "Deterrence and reciprocity effect on tax compliance, Experimental evidence from Venezuela", p.1.

[32] *See*, for example, James Alm (2013), "Expanding the Theory of Tax Compliance form Individual to Group Motivations", *Turlane Economic Working Paper Series*; L.P. Feld *et al* "Tax Evasion, Black Activities and Deterrence in Germany: An Institutional and Empirical Perspective", University of Warwick, p.1.

[33] Gary S. Becker, (1968), "Crime and Punishment: An Economic Approach", *Journal of Political Economy,* Vol. 76(2), pp.169-217.

[34] Allingham & Sandmo, *supra* 2.

[35] Gray *supra* 33 pp.170, 176.

in which taxpayers display this type of economic behavior.[36] Allingham and Sandmo's model of tax evasion assesses the individual's decision of filling in a tax return under the uncertainty of being audited in a static framework.

Given an exogenously established income, a constant income tax rate and a constant audit probability, the taxpayer is confronted with two alternatives: to declare or to understate his real income. If the taxpayer chooses to declare less than his real income, he is uncertain about his final outcome due to the probability of being audited and fined for non-compliance. Allingham and Sandmo stress that the taxpayer will evade taxes if the expected utility from evasion exceeds the expected utility from full compliance. As this model sets the penalty rate proportional to the undeclared income, the results reported are rather ambiguous.[37]

In the attempt to clarify the mathematics behind Allingham and Sandmo's model, Yaniv offers a comprehensive explanation for the reason why the results reported by the classical tax evasion model are considered ambiguous.[38] Based on graphical representations of the tax compliance demand curve, the author shows that the substitution effect generated by the increase in the income tax rate is annulled by the income effect. According to Yaniv's conclusions, the demand curve of tax compliance can serve as a tool for predicting taxpayer's behavior when other parameters change (*i.e.*, audit probability, penalty rate). Using his graphical representations, it can easily be observed that a rise in enforcement strategies deters tax evasion, and this result is in line both with empirical studies and theoretical grounds concerning the economics of crime.[39]

However, the Allingham and Sandmo model has been extensively criticized. Besides the inconsistent results generated by the application of the penalty to the undeclared income, another notable weakness is that it assumes audit probability to be constant.[40] This assumption is not in tandem with economic realities. For example, the audit probability in the US depends on the amount of income reported. In Romania, tax authorities establish audit probabilities during a process which comprises risk analysis aiming to identify

[36] Bătrâncea, *et al*., supra 6.
[37] Ibid.
[38] G. Yaniv, (2009), "The Tax Compliance Demand Curve: A Diagrammatical Approach to Income Tax Evasion", *Journal of Economic Literature*, Vol.40 (2), pp. 213-224.
[39] Gray *supra* 33, pp.169-217.
[40] J. Andreoni *et al* (1998), "Tax Compliance", *Journal of Economic Literature*, Vol.36 (2), pp. 818-860.

the economic areas subject to a high probability of tax evasion (*i.e.*, excisable commodities, intracommunity trade, production and distribution of agricultural commodities).[41]

The shortcomings of the Allingham & Sandmo model of tax evasion (1972) were addressed two years later by Yitzhaki (in 1974), who suggested that the penalty should be set on the evaded taxes rather than on the undeclared income.[42] According to this view, the substitution effect is consequently eliminated and the increase in compliance will solely relate to the income effect. Thereafter, almost all papers on tax evasion adopted Yitzhaki's recommendation, incorporating also other economic variables (*i.e.*, labor supply, expenses for concealing tax evasion, repetition of reported decisions).

The economic models of tax compliance have been subject to harsh criticism. The first reason for this criticism was that they assumed taxpayers to be fully rational utility maximizers whose behavior is construed as a reaction to different financial benefits and losses. The second reason was that the predictions of the economic models were invalidated by a bevy of empirical studies. [43]

Unlike the general conclusion of these analyses that most people engage in tax evasion, empirical studies suggest that many people are honest taxpayers,[44] or there are some people who never evade paying taxes even when the risk is sufficiently low and susceptible to cheating behavior.[45] Economic models predict far too much tax evasion than actually exists. According to Alm and Torgler, 'the puzzle of tax compliance is not why there is so much cheating. Instead, the real puzzle is why there is so little cheating.[46]

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[41] Ibid.

[42] S. Yitzhaki (1974), "Income Tax Evasion: A Theoretical Analysis', *Journal of Public Economics*, 3(2), pp. 201-202.

[43] *See,* for example, P. Dean *et al* (1980), "Taxpayers' Attitudes to Income Tax Evasion: An Empirical Study", *British Tax Review*, Vol.1, p. 44.

[44] *See* T.M. Porcano (1988), "Correlates of Tax Evasion", *Journal of Economic Psychology*, Vol.9 (1), pp. 47-68; Gordon, J.P.F. (1989), "Individual Morality and Reputation Costs as Deterrence to Tax Evasion", *European Economic Review*, 33(4), pp. 797-805.

[45] *See*, for example, J.C. Baldry (1986), "Evasion Is Not a Gamble: A Report on Two Experiments", *Economics Letters*, Vol. 22(4), pp.333-335.

[46] *See* James Alm & B. Torgler (2011), "Do Ethics Matter? Tax Compliance and Morality", *Journal of Business Ethics*, Vol. 101(4), p. 635; J. Alm *et al* (1992), "Why Do People Pay Taxes? *Journal of Public Economics* Vol.48, p. 22.

3.2. Behavioural Theory of Tax Compliance

The limitations of deterrence approaches such as huge administrative costs[47] like auditing cost and its lesser support to build equitable tax system[48] have paved the way for the development of behavioral or socio-psychological theory of tax compliance. In this model, built on the grounds of socio-psychological determinants, taxpayers are seen no longer as selfish utility maximizers but as human beings motivated to pay taxes on the basis of different attitudes, norms, beliefs, perceptions, feelings, social characteristics, including cultural background, age, gender, religion and other factors.[49]

One such behavioral model of tax compliance is the '*slippery slope*', which encompasses these socio-psychological determinants and bases on trust in authorities and power of authorities as main predictors of compliance behavior.[50] A 'service and client' climate between tax authorities and taxpayers is meant to foster trust in authorities and stimulate taxpaying behavior. Alternatively, a *'cops and robbers'* climate breads distrust and resistance, giving birth to cheating behavior. In the light of these realities, a huge merit of the 'slippery slope' framework is that it promotes a more 'service and client' approach of tax authorities towards taxpayers.

In his study, Kirchler suggests the shift from a perspective of compliance enforced by authorities' power ("cops and robbers approach") to voluntary compliance driven by trust in authorities ("service and client approach").[51] He shapes this suggestion by a slippery slope model according to which deterrence and trust as two equally valid ways of achieving compliance could dynamically interact with each other.

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[47] J. Andreoni et al, *supra* 40.

[48] *See*, for example, Wayan Parsa (2021), "Tax Equity Principles in Online Taxation Systems", International Journal of Business, Economics and Law, Vol. 24, Issue 2; Also *see*, Douglas H. Eldridge (1964), "*Equity, Administration and Compliance, and Intergovernmental Fiscal Aspects*", Princeton University Press, pp. 141-215.

[49] *See*, for example, G. Schmölders (1960), *Das Irrationale in der öffentlichen Finanzwirtschaft*, Frankurt am Main: Suhrkamp; M. Fishbein & I. Ajzen (1975), "*Belief, Attitude, Intention and Behavior: An Introduction to Theory and Research"*, Reading: Addison-Wesley; *See* R.F. Meier & W.T. Johnson, (1977), "Deterrence as Social Control: The Legal and Extra-legal Production of Conformity", *American Sociological Review*, vol.42(2), pp.292-304;

[50] Kirchler *et al*, supra 8.

[51] Erich Kirchler (2007), "*The Economic Psychology of Tax Behaviour*", Cambridge University Press, p.188.

The relationship between taxpayers and tax authorities can be modeled as an implicit or relational contract[52] which also involves strong emotional ties and loyalties.[53] The psychological tax contract is influenced by government policy and procedure, tax authorities' behavior and state institutions.[54] Posner studies the role of social norms in tax compliance.[55] According to his analysis, good governance and fair procedures lead to higher tax compliance by taxpayers. The government can shape tax morale by following these behavioral norms in order to signal citizens that they can reply to such a treatment by themselves trusting in government.[56]

The second view relates tax morale (intrinsic willingness to pay tax) with behavioral tax compliance. Tax morale would thus imply an intrinsic motivation to comply with the tax laws. It is when a person's act of filing their tax returns, declaring all taxable income accurately, and disbursing all payable taxes within the stipulated period without having to wait for follow-up actions from the authority. Tax morale may be affected by (1) the fiscal exchange where taxpayers get public services for the tax prices they pay, (2) the political procedures that lead to this exchange and (3) the personal relationship between the taxpayers and the tax administrators. For instance, when the auditors detect incorrectly reported income in the tax declaration, they can immediately have suspicious intent to cheat, and impose legal sanctions. Alternatively, the auditors may give the taxpayers the benefit of the doubt and inquire into the reasons for the mistake.

If the taxpayer in question did not intend to cheat but simply made a mistake, he or she will most likely be offended by the disrespectful treatment of the tax authority. The feeling of being controlled in a negative way, and being suspected of tax cheating, tends to crowd out the intrinsic motivation to act as an honorable taxpayer and, as a consequence, tax morale will fall. In contrast, when the auditor makes an effort to locate the reason for the error, the taxpayer will appreciate this respectful treatment and tax morale is upheld.

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[52] *See*, for example, George A. Akerlof (1982) "Labor Contracts as Partial Gift Exchange", *Quarterly Journal of Economics, Vol.* 84, pp. 488-500.

[53] O. E. Williamson (1985), "*The Economic Institutions of Capitalism"*, New York: Free Press; Feld and Frey, *supra* 21, p.7; *See*, Denise M. Rousseau & Judi McLean Parks (1993), "The Contracts of Individuals and Organizations", *Research in Organizational Behaviour,* Vol. 15, pp. 1-43.

[54] Lars P. Feld and Bruno S. Frey (2007), "Tax Evasion, Tax Amnesties and the Psychological Tax Contract", *Andrew Young School of Policy Studies*, p. 5

[55] E. A. Posner (2000), "Law and social norms: The Case of Tax Compliance", *Virginia Law Review,* Vol.86, pp.1781–1820; Feld and Frey*, supra* 21*,* pp. 23-24.

[56] Feld and Frey, *supra* 21, p. 24.

For instance, the experience in Switzerland shows the relationship between the respectful treatment of Swiss citizens by the tax authority and the strongly developed citizens' participation rights.[57] Tax authorities in more direct democratic cantons more frequently appear to give taxpayers the benefit of a doubt.[58]

It is to be noted that although deterrence contributes to tax compliance, it may at the same time adversely affect tax compliance because the intrinsic motivation to pay taxes can be crowded out by the state's intervention into individuals' privacy.[59] Thus, enhancing bonds between taxpayers and the state shape individual tax morale thereby positively affecting tax compliance.[60]

In settings where tax compliance incentives are weak, there are incentives to free ride and selfish individuals may opt not to pay or to evade taxes because of the 'probability' of not being detected and the low size of the fines.[61] Therefore, incentives are needed to enforce taxation. That is providing a reward for filing their tax returns, declaring all taxable income accurately, and disbursing all payable taxes within the stipulated period without having to wait for follow-up actions from the authority. However, care needs to be given to avoid the crowding effect of reward.[62] For example, giving monetary rewards may undermine intrinsic motivation or willingness to conform to tax laws.[63] But, this depends on the individual's perception of external interventions as intrusive or supportive depending on how self-determination and self-esteem are affected.[64] In this regard, a reward tends to be perceived

[57] Lars P. Feld & Bruno S. Frey (2002), "Trust breeds trust: How taxpayers are treated", *Economics of Governance* Vol. 3, 87–99.

[58] Ibid.

[59] *See*, Bruno S. Frey (1997), "*Not Just for the Money: An Economic Theory of Personal Motivation"*, Cheltenham: Edward Elgar; Bruno S. Frey (1997), "A Constitution for Knaves Crowds out Civic Virtues", *Economic Journal,* Vol.107, pp.1043–1053.

[60] Feld and Frey, *supra* 57, p.1-5; *See* also, Ramona-Anca Nichita, *et-al*, *Tax Compliance Models: From Economic to Behavioural Approaches*, p.21.

[61] Feld and Frey, *supra* 57*,* pp.*4-6.*

[62] *See*, for example, M. Levi (1988), "*Of Rule and Revenue",* University of California Press.

[63] Feld and Frey*, supra* 57, p. 6.

[64] E.L., Deci, & R.M .Ryan, (1985), "*Intrinsic Motivation and Self-Determination in Human Behaviour"*, New York: Plenum Press; *See* E.L .Deci & R. Flaste (1995), "*Why We Do What We Do: The Dynamics of Personal Autonomy*", New York: Putnam.

as a sign of acknowledgment, and it is preferable to give rewards in non-monetary form.[65]

Furthermore, the norms model maintains that a substantial number of taxpayers comply with their tax obligations through adherence to social or personal norms.[66] The argument here is not that a taxpayer complies with her tax obligations because she fears formal sanctions potentially imposed by the government; rather, she complies because she follows social norms, and she wants to avoid informal sanctions potentially imposed by other taxpayers.[67] The model points in particular to social norms of reciprocal cooperation and trust as drivers of tax compliance.[68]

For example, taxpayers may comply by being induced or in the course of reciprocating the compliance of other taxpayers.[69] This argument similarly applies to personal norms. A taxpayer who values integrity, honesty, and the benefits of citizenship may feel guilt, shame, or similar emotions if she does not meet her tax obligations.[70] These personal norms may depend on whether she regards her tax obligations as legitimate. That, in turn, may depend on whether she sees legal actors, such as government tax officials, satisfying basic concerns of procedural justice such as "neutrality, lack of bias, honesty, efforts to be fair, politeness, and respect for citizens' rights."[71]

4. The Place of Behavioural Tax Compliance Theory under Ethiopia's Tax Administration Proclamation

A comprehensive tax administration law, i.e. tax administration Proclamation No. 976/2016, has been enacted in 2016. Its preamble states the Proclamation's rationale which includes the creation of an effective, efficient, and measurable tax administration system.[72] As discussed above, the

[65] Lars Feld and Bruno Frey (2005), "Tax Compliance as the Result of a Psychological Tax Contract: The Role of Incentives and Responsive Regulation", *Centre for Tax System Integrity, Research School of Social Sciences*, pp.11-12.

[66] Marjorie E. Kornhauser (2007), *"A Tax Morale Approach to Compliance: Recommendations for the IRS"*, *FLA. TAX REV*., Vol. 8, pp. 599, 612–617.

[67] Ibid; *See*, for example, Joel Slemrod (2007), "Cheating Ourselves: The Economics of Tax Evasion", *Journal of Economic Perspective*, Vol. 21, p.39.

[68] Feld & Frey, *supra* 57.

[69] Michael Doran (2009), "Tax Penalties and Tax Compliance", Harvard Journal on Legislation, Vol. 46, pp. 111, pp.131-132.

[70] Id.

[71] Id.

[72] Ethiopia Federal Tax Administration Proclamation No. 983/2016, Preamble [hereinafter TAP).

behavioural approach of tax compliance indicates factors that could contribute to tax compliance apart from tax penalties. These factors include good governance and fair procedures by the government that create a system which shapes the emergence of trust between citizens and between the state and citizens thereby resulting in higher tax compliance by taxpayers.[73] This creates an environment which nurtures the commitment of citizens to follow their civic duty.

Second, there is the need to simultaneously use both respectful treatment as well as incentives.[74] Third, tax morale or psychological contract is a function of the fiscal exchange where taxpayers get public services for the tax they pay.[75] Fourth, taxpayers are seen no longer as selfish utility maximisers but as human beings motivated to pay taxes on the basis of different attitudes, norms, beliefs, perceptions, feelings, social characteristics, and cultural background.[76] An implicit psychological contract between the government and taxpayers creates a 'service and client' climate between them which foster trust in authorities and influence taxpaying behaviour.

This section evaluates the inclusion of behavioural tax compliance approach under Ethiopia's tax administration law. Provisions of the Proclamation, *inter alia*, deal with obligations imposed on tax officers and improving service delivery, self-declaration or self-assessment declarations, tax incentive, crediting and refund of paid taxes. These are stipulated under various provisions of the Proclamation such as Articles 5-8, 21-29, 135, 49-51 respectively. These provisions show the place of behavioural tax compliance theory under the tax administration proclamations of Ethiopia in one way or another.

The TAP requires a tax officer to be honest and fair in the exercise of any power, or performance of any duty or function under a tax law.[77] They also have a duty to treat each taxpayer with courtesy and respect.[78] The TAP also requires the tax officer to avoid any exercise of power and function under the tax law in situations that will involve conflict of interest.[79] For instance, potential threat to conflict of interest is created when the taxpayer has or had

[73] Kirchler, *et-al, supra* 8.
[74] Feld and Frey, *supra* 57*,* pp. 4-6; Levi, *supra* 62.
[75] Doran, *supra* 69, 72.
[76] Schmölders; Fishbein and Ajzen; Meier and Johnson, *supra* 49; Marjorie, *supra* 66; Joel Slemrod, *supra* 67; Feld and Frey, *supra* 57.
[77] TAP, Article 6 (2).
[78] Id.
[79] Id, Article 6 (3).

a personal, family, business, professional, employment, or financial relationship with the tax officer.[80] This provision of the TAP seems to have adopted the approach that good governance and fair procedures will lead to higher tax compliance by taxpayers because fair procedure of tax collection and the personal relationship between the taxpayer and tax officer determine the tax morale of taxpayer's.[81] The requirement of treating taxpayers with courtesy and respect and the duty of tax officers to be honest and fair in enforcing the tax law builds the taxpayer's tax compliance moral standards and strengthens trust and loyalty between a taxpayer and the government.

In this regard, some empirical studies show that attitude of taxpayers towards tax, perceived role of government expenditure, perception of corruption and satisfaction with the tax administration were found to have a statistically significant impact on taxpayers' compliance attitude.[82] Perception of taxpayers regarding government spending is also an identified factor which triggers the government to provide comparable and sufficient social services for the society such as education, health, safety and public transportation from the tax collected in addition to fighting corruption.[83]

There is also another provision that seems to aim at creating bondage of trust between the tax authority and a taxpayer. The taxpayer has the duty to tax declaration, and the declaration should be signed by the taxpayer's tax representative or licensed tax agent verifying that the taxpayer knows the contents of the declaration and assuring that the declaration including any attached material is complete and accurate.[84] The Authority has also a right not be bound by a tax declaration or information provided by, or on behalf of, a taxpayer and the Authority may determine a taxpayer's tax liability based on any reliable and verifiable sources of information available to the Authority.[85]

Another instrument that can create trust between the taxpayer and the government is allowing taxpayer's self-assessment. In relation to this, the TAP provides that a taxpayer's self-assessment "in the approved form for a

[80] Id.
[81] Feld and Frey, *supra* 57, p.5.
[82] Wollela A. Yesegat & O-H Fjeldstad (2013) *Taxpayers' views of business taxation in Ethiopia: Preliminary results from in-depth interviews*, a paper presented at ICTD's annual meeting held 10-12 December 2013, Lome, Togo. *See* also, Wollela A. Yesegat & Odd-Helge Fjeldstad (2016), Business people's views of paying taxes in Ethiopia, p.17;
[83] Id.
[84] TAP, Article 21.
[85] Id. Article 21 (5).

tax period shall be treated, for all purposes of th[e] Proclamation, as having made an assessment of the amount of tax payable (including a nil amount) for the tax period to which the declaration relates being that amount as set out in the declaration." [86] This implies the motive in TAP to establish trust and cooperation between the taxpayer and the government.

According to the literature, voluntary compliance is made possible by enhancing the trust and cooperation between the tax Authority and taxpayers and it envisages the willingness of the taxpayer on his or her own to comply with tax laws.[87] This includes a person's act of filing their tax returns, declaring all taxable income accurately, and disbursing all payable taxes within the stipulated period without having to wait for follow-up actions from the authority.[88] But this does not preclude the government's power to examine the accuracy of the taxpayer's tax declaration or tax assessment. The law enables the tax authority to trace the information given by a taxpayer by using any reliable and verifiable sources of information available to the Authority.[89]

In addition to trust, the behavioural tax compliance model uses sanctions in the form of social or informal sanction to be imposed by another taxpayer to enhance taxpayers' compliance.[90] Practice shows the perception of others' compliance behaviour was found to have a significant impact on compliance attitude, where taxpayers may still commit non-compliance so long as this non-compliance is consistent with in-group expectations and norms.[91] A taxpayer who values integrity, honesty, and the benefits of citizenship may feel guilt, shame, or similar emotions if they do not meet their tax obligations.

In this scenario the government's duty is to cultivate trust among taxpayers that their compliance will not be exploited by other taxpayers. This may include publicizing the fact that most taxpayers comply with their tax obligations and not publicizing criminal tax prosecutions. However, the tax laws of Ethiopia do not entertain such kind of incentive to enhance the

[86] Id, Article 25.

[87] Tilahun Aemiro Tehulu and Yidersal Dagnaw Dinberu (2014), "Determinants of Tax Compliance Behavior in Ethiopia: The Case of Bahir Dar City Taxpayers," *Journal of Economics and Sustainable Development*, Vol. 5, No. 15.

[88] *See*, for example, Nichita Ramona-Anca and Batrancea Larissa-Margareta, (2012), 'The Implications of Tax Morale On Tax Compliance Behavior' *Annals of Faculty of Economics,* 2012, Vol. 1, issue 1, pp. 739-744

[89] TAP, Article 21(4), 25-28.

[90] Doran, *supra* 69, pp.131-132.

[91] G. Chau & P. Leung (2009), 'A critical review of Fischer tax compliance model. A research synthesis', *Journal of Accounting and Taxation* 1(2): 34-40.

behavioural norm of tax compliance. It rather stipulates that "[t]he Authority may from time to time publish a list of the names of persons convicted by final decisions of court of law of an offence under a tax law on its website and through other mass media."[92] This provision focuses on deterrence and it fails to consider the negative effect –of sole focus on such publicity–in building tax morale in society.

More subtly, external intervention such as provision of reward to taxpayers incentivizes their tax compliance. The TAP obliges the tax authority to give reward to a taxpayer for exemplary discharge of his tax obligations".[93] The purpose of this provision is to incentivize and promote the tax compliance norm (behaviour) of the general taxpayer. An award of this kind is explicitly exempted from income tax duty in Ethiopia.[94] The cumulative reading of Article 135 of the Tax Administration Proclamation No. 983/2016 and Article 65 (1(h) of the Federal Income Tax Proclamation No. 979/2016 shows tax exemption to a taxpayer in the form of an award for his exemplary discharge of tax obligation exempted. Hence, exemplary discharge of tax compliance has dual benefits; that is acquiring income in the form of reward from the tax Authority and this income is not taxable. In reality, however, what we can witness from the media shows certification awards for taxpayer who pays his tax without delay. That can incentivize taxpayer's behaviour towards executing their duty of paying tax. Some empirical studies show that tax compliance was positively affected, among others, by the rewarding scheme to loyal taxpayers.[95]

Another illustrative scenario that shows the voluntary compliance driven by trust in authorities by "service and client" approach than "cops and robbers approach" under the TAP is the system of crediting and refund of overpaid tax, and release from tax duty wholly or partly.[96] Credit for tax payments or refund of overpaid tax creates trust on the part of the taxpayer and it guarantees the taxpayer that their tax payment in excess of tax liability will be refunded or credited. This aligns with the "service and client" approach. In addition, relief of the taxpayer from duty of tax payment in cases of serious

[92] TAP, Article 133
[93] TAP, Article 135.
[94] Ethiopia Federal Income Tax Proclamation, No.979/2016, (2016), Article 65(1(h)), (hereinafter, Proc.No.979/2016).
[95] Abdu Mohammed Assfaw and Wondimu Sebhat, "Analysis of Tax Compliance and Its Determinants: Evidence from Kaffa, Bench Maji and Sheka Zones Category B Taxpayers, SNNPR, Ethiopia", *Journal of Accounting, Finance and Auditing Studies*, (2019), p. 58.
[96] TAP, Articles 49-51.

hardship is another context that advances the "service and client approach". That is when the Minister of Finance and Economic Cooperation believes payment of the full amount of tax owed by a taxpayer will cause serious hardship to the taxpayer due to natural cause, or supervening calamity or disaster, or in cases of personal hardship not attributable to the negligence or any failure on the part of the taxpayer. Under such circumstances, the Minister may release the taxpayer wholly or in part from payment of the tax due and any late payment interest payable in respect of the tax due.[97]

Although amounts to the causes will invite interpretation, this provision of the TAP can be an example that fits to the psychological tax compliance theory which is in tandem with service-client relationship between taxpayer and the government. Similarly, owing to the death of a taxpayer, the payment of the full amount of tax owed by the deceased taxpayer will cause serious hardship to the dependents of the deceased taxpayer, and the Minister may release the executor of the estate of a deceased taxpayer wholly or in part from payment of the tax due and any late payment interest that is payable in respect of the tax due.[98]

The duty of confidentiality under the TAP is also another normative ground to establish trust on Authorities.[99] Any tax officer shall maintain the secrecy of all documents and information received in official capacity except the listed exceptions. In spite of these positive indications, however, the empirical reality shows the existence of high tax rates or burden and complicated procedures which are found to be the biggest disadvantages of registering for taxes by both formal and informal businesses.[100]

5. The Place of Deterrence Based Tax Compliance Theory under Ethiopia's Tax Administration Proclamation

Deterrence model of tax non-compliance prevention measures rely heavily on the existence of continuous auditing in the tax compliance culture of taxpayers, as well as providing a coercive punishment that can deter them and enable them to comply as stated in the tax laws. Countries that use the deterrence model frequently try to challenge taxpayers' tax evasion behaviours by stipulating different punishments in their tax laws. Regardless

[97] TAP, Article 51.
[98] Id.
[99] TAP, Article 8.
[100] Tax Compliance Cost Burden And Tax Perceptions Survey In Ethiopia, WB, (2016), p. 42.

of its various forms and structures, this punishment must be greater than any potential financial gain the taxpayer would stand to gain from his deviance.

In the modern tax regime of Ethiopia, the economic deterrence approach has an important place before the tax administration arrangements.[101] In the 1940s, the imperial regime worked hard to modernize the tax system, and some of the country's annual budget was based on taxes collected from direct sources (personal and agricultural income) and primarily from indirect tax bases.[102] Because taxation has no equal counter-benefit arrangement on the taxpayers' side, it is common to see when tax administrators are challenged by taxpayer noncompliance. New developments in the area of taxation are showing the regulators' interest in gradually changing this non-compliance environment and creating a society that considers paying taxes as a good culture.

In the current tax regulatory arrangements as well, the deterrence approach is continuing with its role in increasing taxpayer compliance. In addition to the normative approach, the deterrence economic theory is used as a last resort in the current regulatory arrangement to enforce taxpayer duties. As mentioned in Section 4 above, various legal provisions in the Ethiopian tax legal regime give encourage the voluntary engagement of the taxpayers with the compliance of their duties to pay tax. The economic deterrence instruments are designed to be used only if the normative standards or voluntary engagement instruments fail to achieve the necessary level of taxpayer compliance.

According to the texts of the Ethiopian Tax Administration Proclamation No. 983/2016, a taxpayer who is disobedient with tax duties before the law may face criminal, civil, and/or administrative liabilities. The tax dispute settlement arrangements and the enforcement machinery are also in place for the proper implementation of these liabilities in non-compliance with tax obligations. These liability frameworks in the tax law aim at enhancing the taxpayer's compliance in fear of punishments and administrative measures that may include fine, imprisonment, closure of trading centres, and other related sanctions discussed below.

5.1. Criminal Liabilities

Criminal punishment is among the deterrence aspects of the taxpayers' compliance enhancement strategies in Ethiopia. One of the primary purposes

[101] Ibid.

[102] Taddese Lencho (2010), "The Ethiopian Tax System: Excesses and Gaps", *Michigan State International Law Review*, Vol. 20:2, pp. 327-380

of criminal punishment is to create a deterrence environment for individuals who may engage in criminal activities. Criminal punishments discourage criminal activities when they are designed to exceed the benefits from irregularities. The Ethiopian Criminal Code incorporates criminal punishments.[103] This has also been recognized by the criminal policy of Ethiopia.[104] Article 3 of the Criminal Code recognizes special laws, including the tax laws, and the applicability of the general principles of the Criminal Code in these circumstances.

Unlike the 2002 tax reform activities, which bestowed each tax law with the authority to specify the tax offenses in their perspectives, the Tax Administration Proclamation No. 986/2016 incorporates most of the tax offenses within a single comprehensive legal framework.[105] In addition to administrative actions that may be taken against a taxpayer who disobeys his obligations outlined in the tax laws, the Proclamation recognizes both commissions and omissions that bear criminal penalties.[106] The punishment may range from a fine to the loss of personal liberty. The rationale behind those criminal punishments resulting from tax non-compliance is related to the enhancement of taxpayers' compliance behaviour in the performance of their obligations under the tax laws. The Proclamation states various forms of tax offenses and their respective punishments as highlighted below by using some examples.

Tax Identification Number (TIN) is issued to taxpayers to deter individuals who may take part in non-issuance or issuance of more than one TIN and using another person's TIN. The Proclamation recognizes all these activities as a tax offense. Following this, a person who acts against these prohibitions will face punishments of Ethiopian Birr (ETB) 20,000 and up to three years of simple imprisonment.[107] Taxable income declarations, reports, and other information that could be provided to the tax collection authority by each taxpayer must be free from falsified and misleading statements. Providing falsified and/or misleading information is a tax offense under the Tax Administration Proclamation punishable up to ETB 100,000 and 15 years of rigorous punishment.[108]

[103] The FDRE Criminal Code, Proclamation No.414/2004, Article 1.
[104] The FDRE Justice Policy, 2011.
[105] TAP.
[106] Id Article 100 and 116.
[107] Id Article 117.
[108] Id Article 118.

Taxpayers have the right under the law to reclaim excesses in tax payments. The excess may result from either an error in reporting taxable income or other circumstances. This is meant to protect taxpayers from undue payment of tax that may arise from errors in the tax collection process. It is, however, to be noted that fraudulently requesting exceeds without a claimable right is a tax offense under the Tax Administration Proclamation. The Proclamation imposes fine of ETB 50,000 and three to seven years of imprisonment. This punishment shall not relieve the taxpayer from repaying illegally taken refund. These punishments are designed to discourage or deter taxpayers from unlawful claims exceeding refunds.[109]

Only those taxpayers registered for Value Added Tax (based on the VAT Proclamation) are allowed to collect VAT from the final consumers of goods and services. VAT-registered individuals are responsible for withholding taxes from their customers or clients on behalf of the Tax Authority. Both the collection of VAT without registering for VAT and failure to uphold their responsibility while being a taxpayer registered for VAT are tax offenses. To deter or discourage registered or unregistered taxpayers' involvement in offenses in relation to VAT, the Proclamation imposes punishments up to ETB 200,000 and up to 7 years of rigorous imprisonment.[110]

The Stamp Duty Proclamation and its amendments require the document authentication and registration authorities to charge stamp duty before putting the authentication signature and stamp on the document. The document holders are also required to pay the amount. If there are irregularities with the obligations specified in the stamp duty Proclamation, the criminal liability framework ranges from 25,000 up to 50,000 ETB and three up to seven years of rigorous imprisonment. The stamp document seller has also responsibilities that are articulated in the Proclamation. Failure to act accordingly may cause the liability to pay up to 25,000 ETB and imprisonment of up to three years. [111]

Failure to comply with the responsibility to issue a tax invoice, the duty to use sales register machines, obstructing tax administration activities of the tax authority, obstruction of the tax appeal commission, aiding and abetting non-compliance with tax laws, and other specific activities are mentioned in the Tax Administration Proclamation as grounds for a tax-related offense that may entail criminal liability punishable with fine and imprisonment. [112]

[109] Id Article 121.
[110] Id Article122.
[111] Id Article 123.
[112] Id, Article 117.

According to Article 125 of the Tax Administration Proclamation, tax evasion practice-related offenses refer to activities that involve the concealment of income, failure to file a tax declaration, or failure to pay tax by the due date with the intention of evading tax duties. Taxpayers who violate these prohibitions entail punishments up to 200,000 ETB and up to 5 years imprisonment.

Moreover, withholding agent tax evasion activity is stipulated in the Tax Administration Proclamation as a tax offense and a withholding agent who is responsible by law to withhold taxes from the taxpayers must act in line with the stipulation in the tax laws. Where the withholding agent acts contrary to these obligations, the Tax Administration Proclamation imposes imprisonment from three to five years. The Tax Administration Proclamation also publicizes the names of taxpayers convicted of a tax-related offenses as a deterrence mechanism for taxpayer noncompliance.

The stipulations on tax-related offenses under the Tax Administration Proclamation (highlighted above) presuppose criminal punishment objectives, i.e., prevention, deterrence, and rehabilitation. In addition to rehabilitating a taxpayer from his/her tax non-compliance behaviour, the criminal punishments in the Proclamation aim at preventing tax law violations and deterring taxpayers from engaging in tax non-compliance behaviour. Over time, this economic deterrence strategy is meant to achieve the behavioural/normative theory expectation while also correcting individuals for non-compliance behaviour. This also relates to the role of law in social change and social control.

5.2 Civil Liabilities

Civil liabilities are liabilities that could be imposed to recover monetary loss. This monetary loss may result from either the violation of contractual or extra-contractual and legally prescribed obligations. Violation of the legal obligation in relation to tax duties may also result in civil liabilities. It can be imposed on the taxpayer either individually or in addition to other forms of liabilities, such as administrative and criminal liabilities. Civil liabilities are one aspect of those measures that are designed by Ethiopian law to support the taxpayers' compliance behaviour.

In tandem with criminal liabilities, civil responsibilities are part and parcel of economic deterrence-based tax duty enforcement instruments. A rational taxpayer would expect to conduct a cost-benefit analysis before engaging in tax evasion activities. Cost-benefit analysis will be made between the amount that may be received from the tax evasion practice and the resulting penalty

that may ensue. For this reason, tax laws may follow a stringent approach in the specification of penalties.

The Ethiopian Tax Administration Proclamation identifies various types of civil liabilities that could be imposed on the taxpayer individually or in addition to other types of liabilities.[113] Payment of money intended to recover costs, payments due to civil fraud, and failure to pay penalty are the major tax-related civil liabilities identified in the Proclamation. In addition to paying a sum equal to the unpaid amount of the tax, any taxpayer should cover all costs incurred by the tax administration authority because of his/her non-compliance activities.[114]

When non-compliance behaviour results from fraudulent activity, the taxpayer and any individual who may render support in fraudulent activities shall be jointly and severally liable in relation to the unpaid amount due to fraud.[115] Furthermore, taxpayers who fail to make payment by the due date shall pay late payment interest as a penalty, and the interest "shall be the highest commercial lending interest rate that prevailed in Ethiopia during the quarter immediately before the commencement of the period specified in [Article 37, sub-article (1)] increased by 15%."[116] The interest will be calculated for all months starting from the due date of the payment. But it cannot exceed the actual sum of the tax expected to be paid by the taxpayer. When the taxpayer is liable for penalty and late payment interest in addition to tax liability and makes a payment that is less than the total amount of tax plus penalty plus interest due, the payment shall be distributed in the following order: first for payment of tax liability, second for payment of interest due, and lastly, the remaining balance to cover payment of penalty.[117]

The only defense of the taxpayer in relation to the civil liabilities specified in the Proclamation is a reasonable cause for delinquency.[118] Non-compliance because of factors beyond the taxpayer's control and making a reasonable effort to comply with the law are among the reasonable causes that may be invoked by the taxpayer.

5.3 Administrative Liabilities

The Tax Administration Proclamation provides administrative liabilities as supportive measures to discourage the taxpayers' non-compliance behaviour.

[113] TAP, Article 100.
[114] Id Article 30-31.
[115] Id Article .48.
[116] Id Article 37.
[117] Id Article 34.
[118] Id Article 47.

The administrative liabilities include two types of penalties, namely the so-called "fixed amount penalty" and "percentage-based penalty." These penalties are economic deterrence theory-based instruments for the enhancement of taxpayers' compliance behavior, with or without other forms of liabilities. The Proclamation recognizes approximately fourteen types of taxpayer errors that may result in administrative liabilities.

It includes failure to comply with the registration or cancellation of registration requirements, which may entail an additional 25% of the payable tax. If the taxpayer does not have a recognized payable tax, the payment shall be 1000 ETB per month.[119] A taxpayer who fails to maintain any document as required under a tax law shall be liable for a penalty of 20% of the tax payable by the taxpayer under the tax law for the tax period, to which the failure relates. If no tax is payable by the taxpayer for the tax period the penalty shall be 20,000 ETB for each tax year that the taxpayer fails to maintain documents for the purposes of the income taxes; or 2,000 ETB for each tax period that the taxpayer fails to maintain documents for the purposes of any other tax.[120]

A taxpayer who fails to state TIN on a tax invoice, tax debit or credit note, tax declaration, or any other document as required under a tax law shall be liable for a penalty of ETB 3,000 for each failure. This amount will be ETB 10,000 when the taxpayer provides their TIN for use by another person; or uses the TIN of another person.[121] Late filing or failure to make a declaration of tax liability by the due date can also result in a penalty of 5% to 25% of the unpaid tax being assessed to the taxpayer.[122]

Late payment can also entail penalties of 5% of the unpaid tax that remains unpaid at the expiration of one month or part thereof after the due date; and an additional 2% of the amount of the unpaid tax for each month or part of a month thereafter to the extent that the tax remains unpaid.[123] A person who fails to withhold tax or, having withheld tax, fails to pay the tax to the Authority, as required under the Federal Income Tax Proclamation, shall be liable for a penalty of 10% of the tax to be withheld or actually withheld but not transferred to the Authority. Where the taxpayer is the body, in addition to the penalty imposed on the body, the manager of the body, the chief

[119] Id Article 101.
[120] Id Article 102
[121] Id Article 103
[122] Id Article 104
[123] Id Article 105

accountant, or any other officer of the body responsible for ensuring the withholding and payment of withholding tax shall be liable for a penalty of ETB 2,000 each.[124]

In the case of Art. 92 of the Income Tax Proclamation, both the supplier and purchaser shall be liable for a penalty of ETB 20,000 each. A person, who, with the intention of avoiding withholding tax under Article 92 of the Federal Income Tax Proclamation, refused to supply goods or services to a person who is obliged to withhold tax under that Article shall be liable for a penalty of ETB 10,000. Failure of the taxpayer to apply for registration in relation to VAT can result in penalties ranging from ETB 2,000 to ETB 50,000 as a specified amount, as well as 100% of the value-added amount of taxable transitions beginning from the day expected to apply for registration up to the date of application for this effect.[125]

Failure to apply for VAT registration and issuance of an incorrect invoice are specified in the Tax Administration Proclamation as grounds for taxpayer's liability in relation to value added tax.[126] If a taxpayer who is required to issue a tax invoice fails to do so, they will be fined ETB 50,000 for each transaction to which the failure to issue a tax invoice relates. A taxpayer who understates his/her liability may be required to pay up to 40% of the shortfall.[127] But no penalty shall be imposed under this Article if the tax shortfall arose as a result of a self-assessment taxpayer taking a reasonably arguable position on the application of a tax law on which the Ministry has not issued a ruling prior to the taxpayer filing their self-assessment declaration. In cases of tax avoidance, the taxpayer would be liable to pay double the amount that would have been avoided if the tax authority had not applied anti-tax avoidance measures.[128]

The taxpayer who fails to comply with the electronic tax system without adequate reason is also liable to pay ETB 50,000 as a penalty.[129] Tax agents who fail to comply with their responsibilities under the law are liable to pay a penalty of ETB 10,000. A taxpayer who fails to comply with the responsibility of using a tax registration machine would also be liable to pay penalties ranging from ETB 10,000 up to ETB 100,000 in different circumstances. The Proclamation further recognizes miscellaneous penalty in relation to the

[124] Id Article 106
[125] Ibid.
[126] Id Article 107.
[127] Id Article 109.
[128] Id Article 110.
[129] Id Article 111.

taxpayer penalty for failing to notify any change as required by law, failing to give any information requested by the tax authority, failing to provide details of transactions with related persons, failing to file a copy of the memorandum of association, articles of association, statute, partnership agreement, or other document relating to the formation or registration of the business, or any amendment to such a document.[130]

Procedurally, the tax authority should follow all requirements that are clearly stipulated under Article 115 of the Tax Administration Proclamation in the task of making an assessment of the taxpayer's administrative liabilities. Primarily, the Authority shall serve a person liable for an administrative penalty with notice of the penalty assessed. When the same act or omission may involve administrative penalties in relation to more than one tax, the penalties shall be aggregated after being assessed separately for each tax. A person liable for an administrative penalty may apply in writing to the authority for waiver of the penalty payable, and such application shall include the reasons for the requested remission. The Authority may, upon application or on its own motion, waive, in whole or in part, an administrative penalty imposed on a person in accordance with a directive issued by the Authority. The authority shall maintain a public record of each administrative penalty waived and report it to the ministry on a quarterly basis.

Numerous empirical findings from academic research have been made about the efficacy of deterrence-based tools in Ethiopia. Desta Kassa believes that there appears to have been a historical presumption that penalties and punishments are the only effective ways to ensure tax compliance. However, in the modern world, taxpayers' compliance can be ensured through a straightforward combination of support and fair treatment while dealing with the tax authorities. He also stated that governments ought to emphasize non-coercive methods. He places the normative component of taxpayers' compliance devices ahead of deterrent tools.[131]

According to Wollela Yesegat, there is a considerable and positive correlation between the likelihood of deterrence-based measures, such as audits, fines, and penalties, and the decision to comply with VAT reporting requirements. He shows that the quantity, kind, and prominence of economic

[130] Id., Article 112-114.

[131] Desta Kassa Weldegiorgis (2010), *Assessment Of Taxpayers' Voluntary Compliance With Taxation: A Case Of Mekelle City*, Tigray, Ethiopia, MSc Thesis, Mekele University.

deterrence tools for tax compliance are closely correlated with the taxpayer's compliance attitude. [132]

Ali *et al.* provide evidence of a favorable relationship between compliance behavior and the likelihood of deterrence-based measures like audits, fines, and penalties.[133] Tilahun Aemiro Tehulu regarded the penalty as a determinant factor in Ethiopian taxpayer compliance. However, because deterrence approaches are expensive, he directs efforts toward voluntary aspects rather than deterrence approaches.[134] Tilahun did not deny the role of deterrence in increasing taxpayer compliance, but he suggests more focus on voluntary approaches for cost reasons.

According to Dejene Mamo *et al*., the perception of equity and level of income are the major determinants of tax evasion, followed by fines and penalties and gender perceptions of equity and fairness (low tax evasion).[135] Regarding the rate of fines and penalties, the positive association indicates that when the rate of fines and penalties increases, a high rate of fines will result in low levels of tax evasion. There is a statistically significant association between fines and penalties and tax evasion.[136] These empirical studies highlight the importance of economic deterrent strategies in Ethiopia's tax system although they are expensive, less effective than the voluntary strategy, and call for strong enforcement mechanisms.

The discussion in this section general shows that the Ethiopian tax administration law incorporates the economic deterrence approach as an instrument of increasing the taxpayer's compliance behavior. It embodies three forms of liabilities, and each liability may be used by the tax system either individually or jointly, based on the specific provisions of the Tax Administration's Proclamation.

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[132] Wollela Yesegat (2009), *Value added tax in Ethiopia: A study of operating costs and compliance*, PhD thesis submitted to the University of New South Wales, Australia

[133] Merima Ali, O-H Fjeldstad & I. Sjursen, (2014), "To pay or not to pay?" Citizens' tax attitudes in Kenya, Tanzania, Uganda, and South Africa", *World Development* 64: 828-42.

[134] Tehulu and Dinberu, *supra* 87.

[135] Dejene Mamo *et al* (2014), "Evaluation of Ethiopian Tax Administration System: Emphasis on Taxpayer Compliance", *JBAS*, Vol. 6(2), pp. 46-76.

[136] Ibid.

6. Conclusion

Voluntary compliance of taxpayers with tax laws is believed to be shaped by two major streams of factors: economic and socio-psychological. Many countries including Ethiopia try to emphasize the economic deterrence approach based on the belief is that taxpayers pay taxes only because they fear audit and the subsequent sanctions. The social-psychology approach to taxation, on the other hand, takes the position that taxpayers' non-compliance decision is influenced by various factors such as justice perception, how they value government expenditure, how they feel they are treated by the revenue authority, conformity to social group or social norms, trust between taxpayer and the government, and easy procedure to comply with tax laws.

The deterrence theory, on the other hand, is based on the premise that taxpayers' are economically rational and will evade taxes by failing to self-declare or declaring lesser amount. In this model, tax evasion can therefore be mitigated if expected fines are sufficiently high to deter taxpayers from cheating and there exists a high probability of audit and detection. The sum of revenue obtained from taxation of declared income, detected income evaded, and the fines, less the administrative costs to conduct auditing of taxpayers, is used to provide a certain amount of public goods. That means economic deterrence model can have lower possibility to achieve administrative efficiency and equitable tax system. The limitations of deterrence approaches have paved the way for the development of behavioural models of tax compliance.

In the behavioural or socio-psychological determinants, taxpayers are seen no longer as selfish utility maximizers but as human beings motivated to pay taxes on the basis of different attitudes, norms, beliefs, perceptions, feelings, social characteristics, cultural background like age, gender, race, religion etc. The relationship between taxpayers and tax authorities can be modelled as an implicit or relational contract which also involves strong emotional ties and loyalties. It relies on mutual trust, tax morale, social norm, and other forms. This model is more efficient and helpful to build equitable tax system. This model the tax Authority may take positive measure or treats the taxpayers to systematically build the latter's tax morale which in turn affects the costs of raising taxes.

The government of Ethiopia has issued a harmonized Tax Administration Proclamation to create an effective, efficient, and measurable tax administration system in the country as explicitly provided in its preamble. The close reading of the law shows that it has contained both of the economic deterrence and behavioural tax compliance strengthening mechanisms though

the degree is different. For instance, the law embodies behavioural approach in the form of levying an obligation and responsibility on a tax officer to be honest and fair in the exercise of any power or performance of any duty or function under a tax law. They also have a duty to treat each taxpayer with courtesy and respect and to keep secrecy of taxpayers' information. It gives taxpayers' opportunity to do self-assessment and self-declaration. Through these provisions embrace the behavioural or socio-psychological theory of tax compliance, most of its provisions focus on deterrence against taxpayer's non-compliance, tax audit and consequent penalties based on the economic deterrence approach. The law contains the economic deterrence approach in the form setting probability of audit and penalties which includes civil, criminal and administrative penalties. It also provides deterrence instruments in the form of civil, criminal and administrative liabilities.

Thus, the tax administration law of Ethiopia –in many aspects– depends much on the economic deterrence approach. However, in view of efficiency and equity, the Ethiopian tax law regime should give emphasis to the behavioural theory of tax compliance at least at par with the deterrence theory. Therefore, the tax authorities at different levels of the country have to build trust in the tax system, avoid high tax rates, and build simple tax declaration or assessments and collection procedures in the mind of citizen as a whole and specifically to taxpayers. The government should work towards behavioural developments that nurture the creation of loyal and honest taxpayers who feel guilty if they evade tax though they could not be noticed by the tax authorities. Accountability and transparency of government and tax education and awareness creation of taxpayers deserve utmost attention.

In sum, the significance of whether economic or social-psychological theories matter more is of critical concern, based on which a tax authority should invest its limited resources. Economic theories generally call for increased audits and penalties as the solution to compliance problems. These solutions, of course, are costlier than those proposed by the social-psychological theories. The socio-psychological theories generally lead to policy recommendations which give much attention to changing individual taxpayers' attitudes toward the tax system by improving its perceived fairness and equity, making government expenditure in the best interest of the taxpayers, improving procedural justice, establishing the culture of mutual respect between tax authorities and taxpayers, and making it easy to comply with the tax laws through such measures as increased telephone assistance, and shorter line-ups in tax offices. ■

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Functional Domains of IGR Forums, House of Federation and Ministry of Peace in Ethiopia: The Need for Clarity

Nigussie Afesha ♣

Abstract

Intergovernmental relations have been attached with the House of Federation and the Ministry of Peace until the enactment of the new Intergovernmental relations (IGR) legislation. The new legislation establishes six major intergovernmental consultative forums. It states their areas of engagement and indicates the distinct roles of each institution. The newly established IGR forums can create cooperative and uncompetitive relations between the federal government and regional states thereby changing the contour of the Ethiopian IGR system. This article examines whether the enactment of the new IGR law overlaps with the power and functions of the House of Federation and Ministry of Peace which have been facilitating federal-state or interstate relations. I argue that there are power overlaps and fusion of responsibilities between the House of Federation, the Ministry of Peace, and the newly established IGR forums. In this regard, an attempt is made to draw a clear functional realm among these institutions in connection with their mandates in facilitating smooth federal-state or interstate relations, and also to maintain transparency and accountability within these institutions relative to roles and tasks. The delineation of their power and functions is important to further enhance the IGR system in the Ethiopian federation.

Key terms: IGR forums · functional interface · power overlaps · IGR law · Ethiopia

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Contents

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1. Introduction

Ethiopia has recently endorsed its IGR framework law. The new IGR law[1] contains comprehensive rules and principles to regulate vertical, horizontal, and sectoral relations and it fills the gaps in institutionalizing formal IGR. The Proclamation institutes various IGR forums in which several issues of shared concern are discussed and possibly resolved. The IGR legislation offers detailed provisions regarding intergovernmental relations, institutions and related matters so that the different spheres of government cooperate, negotiate and consult with each other while respecting their respective powers and functions. It outlines the structure, objectives, composition, and function of different intergovernmental consultative forums.

The new IGR legislation specifies its objectives and expressly defines the matters addressed by each IGR forum. It underlines that "no law, regulation, directive or customary practice in contravention of the Proclamation may be applicable to issues provided therein."[2] This provision appears to preclude other institutions that have been in charge of facilitating and serving as a focal point for intergovernmental relations if the stipulation is interpreted to have exclusively reserved intergovernmental matters to the newly established IGR forums.

Frequently used Acronyms:

IGR	Intergovernmental Relations Forums
HoF	House of Federation
HoPR	House of Peoples' Representatives
SNNP	Southern Nations, Nationalities and Peoples

[1] Proclamation No. 1231/ 2021, The System of Inter-Governmental Relations in the Federal Democratic Republic of Ethiopia's Determination Proclamation No. 1231/ 2021, Federal Negarit Gazeta, 27th Year No. Addis Ababa 11th January, 2021.

[2] Ibid, Article 31(1).

On the other hand, there are formally established institutions that have been involved in the process of creating cooperative relations between the federal government and regional states. These institutions are the House of Federation and the Ministry of Peace (previously known as, the Ministry of Federal Affairs).[3] For instance, it is the constitutional power and mandate of the House of Federation "to strive and find solutions to disputes or misunderstandings that may arise between the States."[4] This power and function of the HoF have been extended through a proclamation that defines the duties and functions of the House of Federation (i.e. Proclamation No. 1261/2021) which came into force after the enactment of the IGR Proclamation.[5] Under this law the HoF has the authority to find solutions to disputes or misunderstandings that may arise between the federal government and states, including interstate misunderstandings or disputes.[6]

Under Proclamation No. 1263/2021 –that states the duties and powers of FDRE's executive organs– the Ministry of Peace (one of the federal Executive Organs) is designated to serve as a focal point for smoothening federal-state relationships to strengthen the Ethiopian federal system.[7] The Proclamation authorizes the Ministry of Peace to play a crucial role in negotiation, facilitation of cooperation, and cultivating good relations and cooperation between the federal government and the States.[8] Moreover, the Ministry is allowed to facilitate resolution of disputes that arise between the states without prejudice to the power of the House of Federation.[9] Even after the coming into

[3] Solomon Negussie (2008). *Fiscal Federalism in the Ethiopian Ethnic-based Federal System*, Rev. ed. Wolf legal publishers: Netherlands, p. 98.

[4] *See,* the FDRE Constitution, Article 62(6)

[5] Proclamation No. 1261/2021 A Proclamation to Define the Powers and Functions of the House of Federation Proclamation Federal Negarit Gazeta, 27th Year No .43, Addis Ababa 19th August, 2021, and see also the IGR Proclamation No. 1231/ 2021, *supra* note 1, enacted on 11th January, 2021.

[6] Ibid, Article 33.

[7] Proclamation No. 1263 /2021 A Proclamation to Provide for the Definition of the Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Federal *Negarit Gazeta*, 28th Year No. 4 , Addis Ababa, 25th January, 2022, Article 41(i). *See* also the former Proclamation No. 1097/2018, Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation, Federal *Negarit Gazeta*, 25th Year No.8, Addis Ababa, 29th November, 2018, Article 10(1)(g), 13(1).

[8] Proclamation No. 1263 /2021, Article 41(1)(i).

[9] Id., Article 41(1) (j).

force of the new IGR law, the Ministry of Peace has negotiated and found solutions to the disagreement between the Afar and Somali regional states.[10]

Proclamation No. 1263 /2021 that defines the powers and function of the Federal Executive Organs, which came into force after the enactment of the new IGR proclamation, reauthorizes the Ministry of Peace to play roles in strengthening the federal-states relationship and serving as a site for IGR.[11] The power and functional congruence existing between the IGR forums, the HoF and the Ministry of Peace in facilitating IGR leads to the question of whether all these institutions in fact serve as sites for IGR and work in concert to advance intergovernmental interactions and discussion. Moreover, reauthorizing the HoF and Ministry of Peace to facilitate intergovernmental relations after formal IGR forums are established evokes various issues that need to be examined.

First, the HoF and Ministry of Peace may continue to facilitate interactions in areas that are not covered under the new IGR law. Or, re-empowering the HoF and Ministry of Peace to facilitate relations in situations where formal IGR forums are established to institutionalize IGR might imply that the concerned authorities are not enthusiastic about the establishment of the IGR forums and newly IGR forums which are at present largely inactive.

Hence, there is the need to examine the functional empowerment of these institutions to determine the actual role they play in facilitating interactions and collaborations between institutions of the different levels of government both vertically and horizontally. In this regard, the main question is whether the new IGR legislation is congruent with the powers and functions of the HoF and Ministry of Peace in promoting smooth intergovernmental relations.

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[10] *See* the Press Statement the Ministry of Peace release over the peaceful conclusion of the disputes between the Afar and Somali regional states; 08 April 2021. Fana Broadcasting Corporate S.C, https://www.facebook.com/123960474361367/posts/3925382204219156/?sfnsn=mo and also Walta Media and Communication Corporate, https://www.facebook.com/489211707826282/posts/4175793315834751/?sfnsn=mo The news is read as follows. "የአፋር እና የሶማሌ ብሔራዊ ክልላዊ መንግሥታት በቅርቡ ተከስተው የነበሩ ግጭቶችን በሰላም ለመፍታት ተስማሙ:: መጋቢት 30 /2013 (ዋልታ) - የአፋር እና የሶማሌ ብሔራዊ ክልላዊ መንግሥታት በርዕሰነ መስተዳድሮቻቸው የተመራ የከፍተኛ አመራሮች ቡድን በቅርቡ በሁለቱ ክልሎች አዋሳኝ ቀበሌዎች የተፈጠሩ ግጭቶችን በሰላም ለመፍታት ስምምነት ላይ ደርሰዋል፡፡ ርዕሰነ መስተዳድሮቻቸው በሰላም ሚኒስትር ወይዘሮ ሙፈሪሃት ካሚል ሰብሳቢነት ነው ዛሬ ስምምነት ላይ የደረሱት፡፡ በሰላም ሚኒስቴር የሁለቱ ክልሎች ከፍተኛ አመራሮችና የፌደራል መንግሥት የጸጥታ አካላት በተገኙበት በሁለቱ ክልሎች አዋሳኝ ቀበሌያት የተከሰቱ ግጭቶችን በአፋጣኝ ለማስቆምና በቀጣይ ችግሮችን ለመፍታት መስማማታቸውንም ከሰላም ሚኒስቴር ያገኘነው መረጃ ያመለክታል።"

[11] Proclamation No. 1263 /2021, Art 41(1(i)).

The next section of this article deals with the conceptual and analytical framework of intergovernmental relations and their structure. Section 3 discusses the structures, areas of focus, and the composition of the newly established IGR forums. Against this backdrop, the fourth section examines and scrutinizes whether the power and functions assigned to the newly established IGR forums are in consonance with the mandate and function of the HoF in facilitating and advancing intergovernmental relations and dialogues. To this end, the section reviews and compares the roles of these institutions and it examines the points where these roles converge or diverge in facilitating cooperative relations between the federal government and the states. The fifth section deals with the power and duties of the Ministry of Peace *vis-à-vis* the power and function of the newly established IGR forums in facilitating intergovernmental relations. An attempt is made to indicate the IGR matters that still remain under the ambit of Ministry of Peace.

2. Intergovernmental Relations and Institutions: A Conceptual Framework

Federations comprise multiple levels of government imbued with functional independence and interdependence that necessarily interact.[12] In many federations, specific constitutional powers, with varying scopes of jurisdictional authority, are allocated to each level of government. Yet the allocation of power and functions is not watertight.[13] As Watts notes, power overlaps and functional interdependence are inevitable in any federation.[14] The functional interdependence, which usually exists between the different tiers of government, requires the institutionalization of various intergovernmental relation processes, institutions or councils to facilitate collaboration and coordination of shared governmental activities.[15]

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[12] Robert Agranoff (2006). "Intergovernmental Policy Management: Cooperative Practices in Federal Systems" *in* the Michael A. Pagano & Robert Leonard (eds.), *The Dynamics of Federalism in National and Supranational Political Systems,* Palgrave Macmillan, New York, 248-283, p. 248.

[13] Jennifer Wallner (2017). *Ideas and Intergovernmental Relations in Canada*, 50(3) PS: America Political Science Academy, 717-722, p.717; Bertus De Villiers and Jabu Sindane (2011). Cooperative Government: The Oil of the Engine, Konrad Adenauer Stiftung.

[14] Ronald L. Watts, (2006). 'Comparative Conclusions' in Brown, DM, Kincaid, J., Majeed, A., Watts, RL, (eds.), in Distribution of Powers and Responsibilities in Federal Countries, McGill-Queen's University Press, Canada, 322- 350, p.323.

[15] Ibid.

In the words of Cheryl Saunders, "however careful the allocation of powers is, substantial interaction, collaboration and cooperation between governments is inevitable, because of the complexity of a social organization, increased economic integration and the exigencies of politics**.**"[16] Lori also argues that interaction between the different spheres of government and their institutions is likely to occur whenever the constitution assigns functions to both levels, fails to allocate a policy area clearly and exclusively, or when governments lack the resources to perform their allotted tasks.[17]

The empirical record of the federal political systems, over the past several decades, has revealed that policy interdependencies have increased, formal separation of jurisdictions has been blurred and incentives for interaction between the different spheres of government have become intensified.[18] This implies that federalism's default position is one of overlapping federal and state governance, which requires extensive interaction for the coordination of policy programs and coordinated application of powers by formally autonomous governments.[19] Given the allocation of shared powers and functions to the different orders of government, political decisions made or administrative actions taken by a sphere of government may have a spillover effect in all or some of the sub-national states. Hence, there should be intergovernmental toolkits to deal with externalities or gain surplus from coordinated action.[20] Besides, the challenges facing modern-day governments (due to the increase and intensification of the roles and size of government), coupled with the scarcity of resources, demand all levels of governments to collaborate, consult and integrate their activities for the interest and benefits of the general public.[21]

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[16] Cheryl Saunders (2002). "Collaborative Federalism", A*ustralian Journal of Public Administration*, Vol. 61 No. 2, pp. 69-77, p. 69.

[17] Lori Thorlakson (2003). "Comparing Federal Institutions: Power and Representation in Six Federations", *West European Politics*, Vol 26 No. 2, pp. 1-22, p. 7.

[18] Nicole Bolleyer (2006). "Federal Dynamics in Canada, The United States, and Switzerland: How Substates' Internal Organization Affects Intergovernmental Relations", *Publius: Journal of Federalism*, Vol. 36 No. 3, pp. 471-502, p. 471.

[19] Trevor W. Morrison (2009). "The State Attorney General and Pre-emption" *in* William W. Buzbee (eds.) *Pre-emption Choice: The Theory, Law, and Reality of Federalism's Core Question*, Cambridge University Press, Cambridge, 81-97, p. 84.

[20] Nathalie Behnke & Sean Mueller (2017). "The Purpose of Intergovernmental Councils: A Framework for Analysis and Comparison", *Regional and Federal studies*, Vol. 27, No 5, pp 507-527, p. 508.

[21] Bertus De Villiers and Jabu Sindane (2011). *Cooperative Government: The Oil of the Engine*, Konrad Adenauer Stiftung, p 8.

The foregoing discussions portray that intergovernmental relation is central to, the integral component of and the working principle of most federations.[22] Accordingly, each federation –guided by particular circumstances and conditions– formulates its distinct path to organize intergovernmental institutions, structures and processes. The variations in structuring intergovernmental relation institutions are associated with "the society of which they are a part, the constitutional regime within which they are set, the governmental institutions of which they are in part the expression, and the internal and external conditions which shape the life of the given country at a particular time."[23] Thus, federations, both old and new, have formal and informal councils, committees, and conferences to share information, discuss common problems and contemplate coordinated or joint actions.[24] Some also argue that "a second chamber in a federal system has the capacity to serve as a site of legislative IGR."[25] In sum, as seen in many federations, the federal second chambers, some agencies, or functional authorities serve as intergovernmental relation forums and institutions.[26]

Most federations are characterized by a dense network of relations between governments in which intergovernmental relations and negotiation take place between heads of government, ministers, other elected officials, senior civil servants, and policy advisors of the central and regional units of government.[27] One can discern that, at the highest level, in most federations, it is heads of government and some ministers that are deeply involved in intergovernmental relations.[28] In other federations, heads of government usually have intergovernmental relations offices close to them and have regular meetings,

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[22] Wallner, *supra* note 13, p. 717; R ichard Simeon & Beryl A. Radin (2010), "Reflections on Comparing Federalisms: Canada and the United States", *Publius: Journal of Federalism*, Vol 40, No 3, pp 357-365, p. 362; *See* also Dale Krane and Richard H. Leach, (2007) "Federalism and Intergovernmental Relations: Theories, Ideas, and Concepts", 65 *Pub. Adm & Pub. Pol*., p 491.

[23] Id., p. 124.

[24] John Phillimore (2013). "Understanding Intergovernmental Relations: Key Features and Trends." *Australian Journal of Public Administration*, Vol 72, No. 3, 228-238, p. 231.

[25] Yonatan T. Fessha (2021). Second chamber as a site of legislative intergovernmental relations: An African federation in comparative perspective, *Regional & Federal Studies*, Vol 31(4), 495-517, p. 497.

[26] Behnke & Mueller, *supra* note 20, p. 509.

[27] George Anderson. (2008). *Federalism: An Introduction*, Oxford University Press, Oxford New York, p. 68.

[28] Ibid.

which can help resolve problematic issues and develop friendly relationships.[29] Finance ministers play a significant role in intergovernmental relations and negotiations in the course of dealing with fiscal federalism and other economic issues. This envisages highly developed links between the federal government and the state's finance officials and specialized staff for this function.[30]

It is important to note that some federations have a constitutional base relating to the institutions, structure and processes that foster intergovernmental cooperation and coordination, while most do not.[31] In the older federations, such as the USA, Canada, and Australia, due to the prevalence of coordinated government, their constitutions generally establish very few IGR institutions to deal with relations and interactions between the federal government and states.[32] However, the younger federations, such as Germany, India, and South Africa –drawing lessons from the gradual growth and intensification of concurrency in the older federations – have established various IGR institutions and mechanisms.[33]

Yet, compared to the German and Indian federations, the South Africa federation recognizes the importance of IGR, and its constitution requires all spheres of government to 'co-operate with one another in mutual trust and good faith.[34] Besides, the South African Constitution sets basic IGR principles to concretize cooperative governance, develop viable intergovernmental relations and create intergovernmental conflict resolution mechanisms. To this end, the South Africa Constitution requires the national Parliament to provide the processes, structures, and institutions for promoting relations and appropriate mechanisms and procedures to expedite settlement of

[29] Ibid.
[30] Ibid.
[31] Taiwo Akanbi Olaiya (2016). "Federalism and Intergovernmental Relations in Africa", *Public Administration Research*; Vol. 5, No. 2, 87-103, p. 93.
[32] Phillimore, *supra* note 24, p. 231.
[33] Ibid.
[34] Rassie Malherbe (2006). "Does the Intergovernmental Relations Framework Act 13 of 2005 Confirm or Suppress National Dominance", *Journal of South Africa Law*, pp. 810-818. p. 811, Modimowabarwa Kanyane (2016) "Interplay of intergovernmental relations conundrum" in the Daniel Plaatjies *et al*. (eds.) State of the Nation South Africa 2016: Who is in Charge? Mandates, Accountability and Contestations in the South African State, Cape Town: Hsrc Press 92-116, p. 94, D.M Powell, (2001) "South Africa's Three-Spheres System: The Challenge for Governance", in the Norman Levy and Chris Tapscott (eds.) *Intergovernmental Relations in South Africa: The Challenges of Co-Operative Government*, 254-273, p. 258.

intergovernmental disputes.[35] Hence, an intergovernmental relation framework Act[36] enacted by the National Parliament provides the details regarding intergovernmental relations, institutions and matters associated with it.[37] The Act outlines the structure, objectives, composition, and function of different intergovernmental consultative forums.[38]

Unlike South Africa, the FDRE Constitution does not give sufficient legal platform to regulate and institutionalize intergovernmental relations. Nevertheless, following the political transition in 2018, Ethiopia endorsed its first intergovernmental relations framework legislation, and this is a positive step in the Ethiopian federation.[39] The new IGR law provides a comprehensive legal framework to govern and institutionalize intergovernmental interactions and collaborations. Some institutions have been re-empowered to engage in promoting intergovernmental cooperation and interactions between the federal government and regional states and amongst the states. These formally established institutions are further empowered to continue facilitating collaboration between the federal government and the states and among the regional states. Thus, in spite of the weakly designed Constitutional provision, the Ethiopian federation manages its intergovernmental relations through various proclamations, and established political practices.[40] The following section discusses the role of the HoF and the Ministry of Peace *vis-à-vis* the newly established IGR Forums in embedding stable cooperation and effective interactions between the federal government and the regional states.

[35] Lianne Malan (2005). "Intergovernmental Relations and Co-operative Government in South Africa: The Ten-Year Review", *Politeia*, Vol. 24 No. 2, 226-243, p. 227.

[36] *See* the Republic of South Africa Intergovernmental Relations Framework Act (IGRFA) (No. 13 of 2005)

[37] Bertus De Villiers (2012). Codification of intergovernmental relations by way of legislation: the Experiences of South Africa and Potential lessons for young multi-tiered systems, 671-694, p. 678

[38] *See* the Intergovernmental Relations Framework Act 13 of 2005, Chapter Two.

[39] Proclamation No. 1231/ 2021, the System of Inter-Governmental Relations in the Federal Democratic Republic of Ethiopia's Determination Proclamation, Federal Negarit Gazetta, 27th Year No. 7, Addis Ababa 11th January, 2021.

[40] Assefa Fiseha (2009). The System of Intergovernmental Relationship (IGR) in Ethiopia: In Search of Institution and Guidelines, *Journal of Ethiopia Law*, Vol. 23, No.1, 96-131, p. 119.

3. IGR Forums in Ethiopia: Power, Functions, and Composition

The new IGR legal framework establishes several IGR forums that tie the federal government and the regional states (among the regional states). It is worth underlining that the IGR legislation contemplates several intergovernmental forums with clear objectives on which they focus and define the roles they discharge. The forums are the National Legislative Forum, the National Executive Forum, the National Judicial Forum, House of Federation and Regional States forums, National Sector Executives Forum, All-embracing, and sector-driven relations forum between (among) regional states.[41] The composition, role, and functioning of each forum are sufficiently defined. Though all of the forums seem consultative forums, they vary in design, composition including the authority they enjoy and the matters they see.

As discussed below from Sections 3.1 to 3.6, the new IGR legislation provides a comprehensive legal framework to institutionalize and govern intergovernmental interactions and collaborations. There are visible efforts to integrate intergovernmental relations and cooperation in the federal system, political practice and institutional construction of the Ethiopian federation. The IGR legislation offers sufficient legal and institutional spaces through which the federal government and regional states cooperate, negotiate, and consult with each other while respecting the powers and functions of each sphere of government. The new IGR law, specifying its aims explicitly, outlines the IGR forums and their engagement in intergovernmental relations. It contains the structure, objectives, composition, and function of different intergovernmental consultative forums. It can be argued that the IGR law has established well-designed, properly regulated and highly institutionalized IGR forums, which can contribute to the stability and healthy development of the Ethiopian federation. The intergovernmental forums, alliances, and collaborations enable both tiers of government to develop national solutions for issues that have national significance. They also address concerns of two or more regional states in the context of their effective participation.

3.1 The National Legislative Forum

The *National Legislative forum* is established to carry out the relations between the federal and regional state legislative bodies. In this forum, only the legislative bodies of the two tiers of government meet to discuss and consult shared matters. The forum comprises speakers of the two federal

[41] Proclamation No. 1231/ 2021, Article 6.

houses (HoPR and HoF) and all state legislative bodies, including the Addis Ababa and Dire Dawa City Administration Councils, as well as, the speakers of the SNNP Regional State Council of Nationalities and Harari National Council.[42] The establishment of such a forum implies the presence of shared legislative power between federal and regional state legislative organs.

For instance, the federal government and regional states exercise concurrent powers regarding civil and criminal laws as well as the state of emergency.[43] The Constitution explicitly confers the power to enact criminal law to the federal government, while allowing the regional states to pass penal law on matters that are not expressly covered in the federal penal code (FDRE Constitution art 55(6)). Likewise, the federal parliament may enact civil laws concerning subjects that the HoF deems necessary to sustain one economic community. If exercised, such matters result in concurrent legislation.

Both the federal government and the regional states have the power to jointly levy and collect profit, sales, excise, and personal income taxes on enterprises they jointly establish.[44] At the same time, the federal government and states are jointly empowered to levy and collect taxes on the profits of companies and on dividends due to shareholders. They further jointly levy and collect taxes on incomes derived from large-scale mining and all petroleum and gas operations, and royalties on such operations.[45] The power to levy and collect taxes on these tax sources overlaps; and this implies that the federal and regional state legislative organs have shared legislative power on the issues.

Under these circumstances, the National Legislative forum enables the federal and regional state legislative organs to enact harmonized laws on their shared legislative powers. Guided by this logical foundation, the forum is sanctioned to work for the enactment of harmonized, coordinated, and complementary laws with the law of the other level of government.[46] In extension, the legislative body of each level of government is mandatorily required to consult and assist another level of legislative body to have a

[42] Unlike other regional states, the SNNP and Harari regional states have bicameral houses.
[43] Solomon, supra note 3, p. 65.
[44] *See* The FDRE Constitution, Art 98(1)
[45] Id., Art. 98 (2) and (3)
[46] Proclamation No. 1231/ 2021, Article 8(1).

common understanding over the law being enacted before it moves to materialize its legislative competence.[47]

The forum is tasked to identify issues of cross-national implications and makes deliberation on those issues and thereby suggest the enactment of laws that ensure the common interests of the people and strengthen co-existence.[48] A series of consultations are made in the forum towards shared understanding of the laws, policies, and strategies of the federal government and to bring proximity in the implementation of the same across regional states.[49] The forum is also mandated to ensure the execution of agreements concluded between the executive bodies with the constitutional provisions, oversee the implementation and performance of those joint executive deals.[50] If the forum finds the agreement concluded between the executive bodies contradicting the constitutional provisions, it takes or causes corrective measures to be taken. In light of the composition of the forum and its functional assignment, it can be argued that the forum is sufficiently equipped and becomes an essential institutional platform for coordination and managing overlap of powers (interdependence) between the legislative bodies of both levels of government.

However, nearly two years after its establishment, the forum recently hosted its first meeting. In its first meeting, the forum did not start exercising its assigned duties.[51] Members discussed the need to have an IGR law and to create shared understanding on the same. They also deliberated on the need to establish a secretariat office that facilitates legislative IGR and how the future National Legislative Forum meetings are going to be hosted and who can own them. All these issues are already addressed in the IGR law and have remote connection with the exercise of shared legislative powers. Although the National Legislative Forum is empowered to ensure the involvement of regional state legislative councils or facilitate their inputs in the federal law-making process, it has not yet attained the desired result of facilitating legislative intergovernmental relations.

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[47] Id., Article 8(2).
[48] Id., Article 8(2).
[49] Id., Article 8(4).
[50] Id., Article 8(5).
[51] *See* the official website of the House of Peoples Representative posted on 29, January 2022 https://m.facebook.com/story.php?story_fbid=304674755032859&id=100064710097423&sfnsn=mo and also *see* Fana Broadcasting Corporate website posted on 29, January 2022 https://www.facebook.com/123960474361367/posts/4866574600099907/?sfnsn=mo

3.2 The National Judicial Forum

The other IGR is the *National Judicial Forum*, which is designed to regulate the relations between the Federal and State judicial bodies. The rationale for the establishment of the National Judicial consultative forum is the existence of concurrent judicial power between federal and state judicial organs. The FDRE Constitution assigns concurrent judicial jurisdiction to the federal and state courts;[52] and federal judicial power is exercised not only by federal courts but also by state courts. The state Supreme and High courts, in addition to matters exclusively given to them, have the power to exercise Federal High and First-Instance Courts jurisdiction, respectively, until the federal government establishes High and First-Instance Courts in different parts of the Country.[53] In effect, the States Supreme and High courts apply and interpret the existing federal laws in the course of handling delegated federal matters.[54] As the State Supreme and High courts are charged to enforce federal laws, this is an acknowledgment that there are matters that need the attention and alliance of both the federal and state judicial bodies. They should make consultations to ensure a harmonized interpretation of the federal laws in the state courts.

Another equally important point that demanded the establishment of consultative forums is the issue of determining the financial cost necessary to carry out delegated federal judicial power. As a rule, the Constitution requires the HoPR to allocate compensatory budgets for states whose Supreme and High courts exercise the jurisdictions of the Federal High and First-Instance Courts concurrently.[55] Hence, the federal government shall defray the costs state courts incur, and the regional states should not bear the budget for activities that they are not constitutionally assigned to undertake exclusively.[56]

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[52] *See* the FDRE Constitution. Article 80, and *see* also Assefa Fiseha and Zemelak Ayele (2017) 'Concurrent Powers in the Ethiopian Federal System', in the Nico Steytler (ed.) *Concurrent Powers in Federal Systems Meaning, Making, Managing*, 241-260, p.247

[53] Id., Article, 78(2), and *see* also Gedion T. Hessebon and Abduletif k. Idris (2017), 'The Supreme Court of Ethiopia: Federalism's Bystander', in Nicholas Aroney and John Kincaid (eds.) Courts in Federal Countries: Federalists or Unitarists? 165-192, p. 178.

[54] It should be noted that space of delegation of federal courts jurisdiction to the regional state courts is restricted to state High courts. The Constitution does not contain a structural and recognized place for regional first instance courts on the delegated power.

[55] The FDRE Constitution, Article 79(7).

[56] Solomon, *supra* note 3, p. 236., and Assefa Fiseha and Zemelak Ayele (2017) 'Concurrent Powers in the Ethiopian Federal System', in Nico Steytler (ed.) *Concurrent Powers in Federal Systems Meaning, Making, Managing*, 241-260, p.247

Estimating compensatory budget involves intergovernmental financial relations. The Federal and State Supreme Courts should thus establish processes and institutions to regularly deal with financial issues that arise from delegated federal judicial powers. The Federal and State Supreme Courts should negotiate and determine the required financial expenditure necessary to carry out delegated judicial powers. Estimating the compensatory budget needs the attention and coordination of both the Federal and State Supreme Courts.

It is important to note that the establishment of the National Judicial Forum seems to substitute the seemingly judicial intergovernmental interaction, otherwise named as Plenum of the Federal Supreme Court. The Plenum of the Federal Supreme Court was established with the intent to facilitate interaction between the federal and state judicial organs as per Proclamation No. 25/1996, which defined the jurisdiction of the Federal Courts following the introduction of the federal system.[57] The Plenum comprised the President, Vice-Presidents, and all judges of the Federal Supreme Court, the Federal High and First Instance Court Presidents, and the state Supreme Courts President. In the Plenum, the resolution was adopted by a majority vote. In case of a tie, the chairman, Federal Supreme Court president, had a casting vote. The Plenum seemed to have had the power to handle various issues including the federal and state judicial organs' financial relations and to coordinate the inevitably overlapping judicial powers. It also could facilitate dialogue between the federal and state Supreme Courts to manage delegated federal judicial power and other administrative matters in connection with that.[58]

The federal courts' Presidents and Federal Supreme Court judges had dominated the forum. The figure showed that the Federal Supreme Court has had fifty-one judges and eight federal courts Presidents.[59] The participation of fifty-one judges and eight federal courts Presidents, *vis-à-vis* eleven participants from state judicial organs in the Plenum, gives federal judicial organs an overwhelming position.[60] This scheme negates the status that must exist for effective judicial intergovernmental conversations.

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[57] *See*, Proclamation No. 25/1996, Federal Courts Proclamation, Federal Negarit Gazeta, 2nd Year No. 13, Addis Ababa, 15 February 1996, Article 31.

[58] Nigussie Afesha (2021). *Intergovernmental Relationships in Ethiopia Federation: A Comparative Study- Special Reference to South Africa and India* (August 2021), Unpublished Doctoral Dissertation, Andhra University.

[59] Ibid.

[60] Some may contest the argument raised in connection with the overrepresentation of the federal judicial organ in the Plenum because members of the federal representatives participating in the Plenum have individual autonomy and are not expected to vote in

Under the revised Federal Courts Proclamation, revision in the level of participation has not be made in the Plenum of the Federal Supreme Court.[61] The Plenum has not delivered the desired result of facilitating judicial intergovernmental relations. A given forum is deemed to be an IGR forum and serves as a site for judicial IGR when it envisages equitable representation of the federal and state judicial organs in if it allows a co-equal status in the decision-making process of inter-judicial interaction.[62]

Unlike the Plenum, the National Judicial Forum comprises Presidents of the Federal and State Supreme Courts.[63] The federal and state judicial organs are given equal place and representation in the forum, and this enables them to negotiate on matters that concern the judicial organs of the two tiers of government. In this regard, the forum is tasked to carry out several works such as strengthening the justice and judicial system in the Country, achieving harmonized interpretation of the federal laws at regional state courts, and other related matters.[64] The forum also strives towards building up an independent and impartial judicial system that earns the public trust at large, which is a fundamental component in strengthening the justice and judicial system in the Country.[65]

The National Judicial Forum enables members to discuss several issues associated with federal judicial powers given to the state courts through delegation and other related administrative matters related.[66] This stipulation embodies a workable tool to compute the number of federal cases adjudicated

a bloc. The current design of the Plenum does not press representatives of the federal and state judicial bodies to speak in unison. Some members might create a unified front even though the members might belong to different levels of the judicial organs. This means that when the members vote on matters affecting either the federal or state judicial organs, they may cast an independent vote. This line of argument may emanate from the constitutional provision that stipulates "[j]udges shall exercise their functions in full independence and shall be directed solely by the law" (*See* the FDRE Constitution, Art 79(3). Save the above argument, the equal representation of the federal and state judicial organ intergovernmental relations forum is one of the key cardinal principles that need to be maintained to establish trust and partnership between the organs of the two levels of government.

[61] Proclamation No.1234/2021, Federal Courts Proclamation, *Federal Negarit Gazeta*, 27th Year No. 26, Addis Ababa, 26th April, 2021, Arts 41-43.

[62] Nigussie, *supra* note 58, p. 222.

[63] Proclamation No. 1231/ 2021, Article 11(1).

[64] Id., Article 12(3).

[65] Id., Article 12(4).

[66] Id., Article 12 (5).

in the state Supreme and High courts and sets standard criteria to calculate the cost incurred by the state Supreme and High courts while exercising delegated federal judicial power. The federal and state judicial organs cooperatively estimate the compensatory budget allocated for the state supreme courts and decide how a proposed compensatory budget is apportioned among the state Supreme courts.

So far, it is the Federal Supreme Court that exclusively decides the proposed compensatory budget given to the Supreme Courts of regional states, and this power includes the apportionment of the budget among the state Supreme courts.[67] The IGR legislation is thus found necessary to expressly provide regular inter-judicial relations that would facilitate the execution of multifaceted judicial activities by integrating capabilities of the federal and the state judicial bodies'. This, *inter alia*, envisages consultations on the exchange of best experiences to enhance levels of performance. However, the forum has not been functional thus far.

3.3 The National Executives Forum

The *National Executives Forum* is established with the explicit aim to facilitate collaboration, interactions, and cooperation between the federal and state executive organs. The forum mainly includes the Prime Minister as chairman, selected federal ministers, and Heads of Government of all States, including the Mayors of Addis Ababa City and the Dire Dawa Administrations. Of the twenty-two (22) federal ministries, the ministries in the National Executives Forum are the Minister of Finance, Minister of Peace, Ministry of National Planning and Development, Minister of Women and Social Affairs and the Minister of Justice. The selection of these ministries seems to have some linkage with the intended functions and the focus of the forum.

It is to be noted that the federal government is represented by seven members while each regional state has one. This raises the issue whether this violates equitable representation and co-equal status of federal and state executive organs in an intergovernmental decision-making process. One may also raise the question whether it is a deliberate design to counterbalance the state executive organs. This, in some way, reinforces the fear of some state political actors who argued, at the initiation stage of the IGR law, that the enactment of the IGR law further intensifies centralization in Ethiopia.[68]

[67] Nigussie, *supra* note 58, p 374.
[68] Assefa, *supra* note 40. 96.

The National Executives Forum is entrusted to foster cooperation, coordination, and evaluation of shared policies and is expected to discuss major issues.[69] It is assigned to carry out discussions and consultations on several points. Some of the areas of focus are discussions and consultations on issues common to the two levels of government as well as policy proposals of national significance and matters of a general character.[70] It also deliberates on national policies, strategies, programs, and plans, including the creation of a common understanding between them on vital issues of national importance.[71] The IGR legislation further states that the federal and state executive organs shall deliberate on sustainable peace, democracy, good governance, and rapid and fair socio-economic development issues that have cross-national implications.[72] While the federal government carries out its mandate and responsibilities in the states, the Forum shall deliberate with the concerned states and listen to their views and opinion.[73] This initiative is indeed a breakthrough move to the Ethiopian federalism system, known for its top-down strategies and programs and policymaking. It also changes the contour of sectoral intergovernmental relations in many respects.

Unlike the previous forums, National Executives Relations Forum has so far met three times. The meetings of the forum was held at different locations.[74] In the two consecutive meetings of the National Executives Forum, the participants (stated in the IGR legislation) discussed issues related to the 'law enforcement operation' activities in Tigray regional state. As the name indicates, the forum ought to be a consultation session in which only federal executive and regional executive bodies can take part. Unlike the first and second meetings, the higher-level leaders of the Prosperity Party –who are not members of the federal executive body nor regional executive body– attended in the meeting of the National Executives Forum in clear contradiction with what the IGR law stipulates.[75] In this forum as well, the agendum was, as usual, a review of the law enforcement operation exercise in the Tigray regional state.

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[69] Proclamation No. 1231/ 2021, Article 10.
[70] Id., Article 10 (1).
[71] Id., Article 10 (2).
[72] Id., Article 10 (3).
[73] Id., Article 10 (6).
[74] The first was held in Bahir Dar, the second in Guba and the third in Addis Ababa.
[75] *See* Fana Broadcasting Corporate official website posted on 27, January 2022 https://www.facebook.com/123960474361367/posts/4857539884336712/?sfnsn=mo (Last accessed on 15, May 2022).

From the three consecutive meetings, it seems clear that the major functions assigned to the Forum in cultivating cooperative governance are side-lined. If the move of the Prosperity Party during the third meeting of the Forum is not constrained forthwith, the overwhelming political domination of the Prosperity Party is likely to render the Ethiopian IGR system ineffective. It follows that, as in the EPRDF reign, government institutions will not be independent to implement the FDRE Constitution and genuinely constrain the political party in power from making constitutional abuses and taking arbitrary actions. Like the other forums, this forum has remained in disuse so far seen against the tasks assigned to it.

3.4 The Forum of the House of Federation and Regional States

The fourth intergovernmental forum, i.e., the *Forum of the House of Federation and Regional State* aims at resolving misunderstandings or disputes that could arise between the states. The forum comprises speakers of the House of Federation and all regional states, heads (regional state presidents[76]) of Governments of the all Regional States, mayors of the Addis Ababa and Dire Dawa City Administrations as well as three federal ministries, namely the Ministry of Finance, Ministry of Peace and Ministry of Revenues.[77] Akin to the other IGR forums, such forum is also entitled to invite representatives of other bodies or institutions whom it considers necessary to participate in its sessions, be it in the capacity of a member or informant.[78] Among other duties and responsibilities, the forum is assigned to deliberate on the causes that might trigger conflict between the regional states and various communities and their disposal.

The forum is required to formulate a mechanism that would enable to rectify such conflicts so as not to create a lasting contradiction and further strengthen fraternal ties between the States and various communities.[79] This may include creating conducive conditions in which disputant parties discuss their differences and resolve them peacefully. What is missing in the legislation is the power to resolve disagreements or deadlocks that occur between the federal government and the states. Since the existing IGR legislation is silent regarding who can settle disputes or misunderstandings that arise between the federal government and the states, it can be argued that these matters are resolved mainly through intergovernmental relation settings organized and hosted by the House of Federation. This forum also has not

[76] *See* the Amharic version of Proclamation No. 1231/ 2021, Article 16(1) (c).
[77] Proclamation No. 1231/ 2021, Article 16(1).
[78] Id., Article 16(1)
[79] Id., Article 17(4)

been operational, and indicated above, the resolution of disputes or misunderstandings which arise between the states is undertaken by the Ministry of Peace.

3.5 Regional States Relation Forum

The *Regional States Relation Forum*[80] is a horizontal relation forum that encompass all regional states. It comprises heads of all the regional state governments, including Mayors of the Addis Ababa and Dire Dawa City Administrations.[81] The forum is entrusted with several duties and responsibilities. It evaluates the positive and adverse bearings observed in the implementation of the national policies, strategies, or plans; and submits amendment proposals to the federal government, when it is deemed necessary.[82] The forum also deliberates on those issues that require the special attention of the federal government and reports their common position to the pertinent federal body.[83] The other important task of the forum is to create intergovernmental relation implementation protocols so that a case determined in a given state will be implemented in other states without any difficulty.[84] The IGR Proclamation fills the gaps due to lack of constitutional or statutory provision that obliges the states to respect each other's public acts, records, and judicial proceedings thereby facilitating healthy relations and harmony between the regional states.

The forum is also tasked to devise a joint mechanism for comparable performance –regarding development, good governance, handling and protection of fundamental human rights and freedoms– that facilitate conditions for sharing experience.[85] This task of the forum reflects the acceptance and recognition of differences across the states concerning their socio-economic development and institutional competence in performing their constitutionally allocated functions. The Forum enables states to share their experiences and to narrow down the disparity seen in their performance regarding development, good governance and protection of fundamental human rights and freedoms. Moreover, it serves as forum in the formulation of programs and projects that would interconnect regional states and resolution of cross-boundary predicaments; and the forum discusses the

[80] Proclamation No. 1231/ 2021, Article 18.
[81] Id., Article 18 (1).
[82] Id., Article 19(1).
[83] Id., Article 19(4).
[84] Id., Article 19(2).
[85] Id., Article 19(3).

vitality of such programs and projects, and conveys its recommendation to the appropriate body.[86]

Apart from the Regional States Relations Forum, two or more neighbouring regional states can create joint horizontal States Relations forums. In such a case, members of the forum are heads of government of the neighbouring regional states. Besides, there could be a horizontal sectorial Executive Forum, which could be formed by neighbouring Regional States' Sectorial Executive Offices. The specific duties and responsibilities of these two forums, i.e., the joint Heads of Governments or Sectorial forums, are determined by directives.[87] Neither the all-inclusive Regional States Relation Forum nor the joint horizontal forum of neighbouring regional states are operational.

3.6 The National Sectorial Executives Forum

The final forum relates to sector-driven relation forums which can be formed between the Federal executive bodies with their counterparts in the States: namely the Joint and National Sector Executives Forums.[88] The National Sectorial Executives Forum comprises heads of the federal and all Regional States Sectorial Executive Offices, including Addis Ababa City and Dire Dawa City Administration Sectorial Offices.[89] However, if the situation so demands, the forum invites other bodies, agencies, or institutions to participate in its sessions, be it in the capacity of a member or informant.[90] As the National Sectorial Executives Forum is designed as a vital sectorial intergovernmental forum, it is entrusted to undertake essential responsibilities that have national importance (and dimension) and to facilitate the carrying out of sectorial development and functional governance activities.[91]

In the forum, members make consultations on outstanding issues of national importance in each policy sector.[92] Deliberation is made on the preparation and implementation of sector-driven policies, strategies, and plans of the Federal Government, wherein the views and opinions of the regional states are listened to.[93] The forum creates the system in which concurrent, and framework powers are integrated and executed in collaboration with one

[86] Id., Article (19)(5).
[87] Id., Article 20.
[88] Id., Article 13 and 15.
[89] Id., Article 13(1).
[90] Id., Article 13(2).
[91] Id., Article 14.
[92] Id., Article 14(1).
[93] Id., Article 14(2).

another.[94] It discusses the quality of service delivery and the level of performance of every sector, and the formulation of shared mechanisms to enhance the quality of services they provide for the public.[95] It also deliberates on the preparation, implementation, follow-up, and evaluation of the sector-driven nationwide plans and programs executed at the regional level.[96]

The forum devises and holds consultations on how exchange of best experiences is undertaken to make the levels of performance closer with one another and follow up the implementation thereof.[97] It further devises a peer-evaluation system that would enable one to bring the performance results which are registered in the Regional States to a similar level, carry out consultations on the method of its application and thereby follow up the implementation thereof.[98] It also discusses, as deemed necessary, such other related affairs as might strengthen the sectorial duties and render directives to that effect.[99] The Joint Sectorial Executive Bodies or Forum is established by two or more Sectorial Executive Bodies whenever they find it necessary. Members of the Joint Sectorial Executive Forum could determine specific duties and responsibilities of the forums in pursuance of the spirit contained in the IGR Proclamation.[100] However, such IGR forums have also remained non-functional.

In light of the brief observation discussed above regarding the IGR forums established under the IGR Proclamation, the following section discusses the roles of the HoF as a site of IGR against the power and functions of the aforementioned IGR forums. The question is whether the HoF is designed as a forum for IGR and whether it continues to serve as an IGR forum in the context of several IGR Forums. This evokes the issue whether there are any intergovernmental relation matters that are not covered by the existing IGR legislation but undertaken by the HoF? These issues relate to the delineation of power overlaps and fusion of responsibilities between the House of Federation and the newly established IGR forums.

[94] Id., Article 14(3).
[95] Id., Article 14(4).
[96] Id., Article 14(5).
[97] Id., Article 14(6).
[98] Id., Article 14(7).
[99] Id., Article 14(8).
[100] Id., Article 15.

4. The House of Federation's Role as a Site for IGR vis-a-vis IGR forums

The House of Federation, the second House of the federal parliament, seems to be the guardian of the Ethiopian federation in view of its broad constitutional authority to resolve 'disputes or misunderstandings that may arise between States.'[101] Such power of the House is also embodied in Proclamation No. 1261/2021 that redefines the powers and responsibilities of the HoF.[102] Under this law, the HoF "shall strive to resolve inter-state or Federal-State government disputes and misunderstandings."[103] Thus, it can be argued that most 'disputes or misunderstandings'[104] (such as various forms of misunderstanding, ordinary disputes, or border disputes) which may arise between the federal government and states or between (among) the States are solved under the auspices of the HoF. In connection with this, the House needs to install traditional and modern ways of conflict prevention and resolution mechanisms, including devising and institutionalizing working procedures to resolve misunderstandings or disputes.[105] This gives the impression that the HoF needs to build a feasible setting to resolve multi-dimensional misunderstandings or disputes that could arise between the different levels of government.

4.1 Overlapping mandates as a site for IGR

The new IGR Proclamation institutes an IGR forum (i.e. "the House of Federation and the Regional States Relations Forum") that works on resolving misunderstandings or disputes that could arise between the states. This forum,

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[101] The FDRE Constitution, Article 62(6). *See* also Dejen Mezgebe (2015), "Decentralized governance under centralized party rule in Ethiopia: The Tigray experience," *Regional & Federal Studies* 25, No. 5: 473-490, p. 483; Tesfa Bihonegn (2015) "The House of Federation: the practice and limits of federalism in Ethiopia's second federal chamber", *Journal of Eastern African Studies*, Vol 9 No. 3, pp. 394-411, p 402; Ronald L. Watts (2008), Comparing Federal Systems, (3rd ed.), McGill-Queen's University Press, Montreal & Kingston, p. 154; Adem Kassie Abebe (2013) "Umpiring Federalism in Africa: Institutional Mosaic and Innovations", *African Studies Quarterly*, Vol.13, No.4, pp. 53-79, p. 65; Tom Patz, (2005) 'Ethiopia,' in the Ann Griffiths (ed.) Handbook of Federal Systems, Montreal & Kingston: McGill-Queen's University Press, Vol. 20 No. 5, pp. 135-148, p. 139.

[102] Proclamation No. 1261/2021 A Proclamation to Define the Powers and Functions of the House of Federation Proclamation Federal Negarit Gazeta, 27th Year No. 43, Addis Ababa 19th August, 2021, Article 33.

[103] Proclamation No. 1261/2021, Article 33.

[104] Id., Article 33.

[105] Id., Article 45

as mentioned in Section 3 is, *inter alia*, entrusted to deliberate on the causes that might trigger conflicts between the States and various communities and their disposal.[106] To this end, the forum is instructed to formulate mechanisms that would enable it to rectify conflicts between the States and various communities to give lasting solutions and further strengthen fraternal ties between them.[107] The question is whether this mandate of the 'the House of Federation and the Regional States Relations Forum' contravenes the mandate given to the HoF in resolving misunderstandings or disputes that may arise between the states.

HoF's involvement in the conduct of intergovernmental relations and negotiation emanate partly from the Constitution and are further reinforced by a Proclamation that defines its power. Thus, the 'House of Federation and the Regional States Relation Forum' neither substitutes nor abridges the constitutional mandate of the House to resolve misunderstandings or disputes between the regional states. Hence, the power and function given to the "the House of Federation and the Regional States Relations Forum' contravenes the constitutional mandates given to HoF and it shall be of no effect. In effect, the HoF can continue working as an IGR forum, at least, to resolve any kind of misunderstanding, ordinary dispute, or border dispute that arises between the regional states. In this regard, Asnake argues that "the HoF has emerged as a key federal institution of conflict resolution."[108]

It can also be argued that the HoF and the Regional States Relations Forum undertakes conflict-related tasks before the materialization of disputes or misunderstandings. The focus of such IGR forum could be to arrest conflict-prone behavior and address the causes that trigger disputes or misunderstandings that can arise between the regional states. If conflict or misunderstanding occurs between the regional states or between the federal government and the states, it falls under the constitutional mandate of the HoF, and it should be handled by it, HoF.

4.2 HoF's inadequate performance in IGR

It is to be noted that HoF has remained passive for a long time and played a limited role in the peaceful settlement of disputes and the prevention of deadlocks. For instance, there was potential tension and misunderstanding

[106] Id., Article 17(4)
[107] Id., Article 17(4)
[108] Asnake Kefale (2020). "Federal Democratic Republic of Ethiopia Political Reforms and Federalism" in Ann Griffths et.al, (eds.). *The Forum of Federations Handbook of Federal Countries 2020*, Palgrave Macmillan, Switzerland, pp. 135-149, p. 139.

between the federal government versus the Tigray regional state, on one hand, and the Amhara Regional states versus again the Tigray regional state. The tension was aggravated following the decision of the Tigray regional state to hold its sixth regional election and practical moves in that respect. This decision of the Tigray Regional State came after the postponement of the sixth national and regional elections scheduled for August 2020 by the federal government due to Coronavirus outbreak. The Tigray regional state pursued with the election processes without the permission of the National Electoral Board and in transgression of the HoPR decision regarding the postponement of the national and regional elections. Yet, none of the political leaders showed interest in bringing the issues to the HoF.

Again, in the Amhara versus Tigray regional state disputes or misunderstandings, residents of border areas of both regional states have submitted written petitions to the HoF. Moreover, the Somali Regional State President accused TPLF, alleging that some members of the party and its military generals committed 'gross human violation' and 'mass' killing.[109] The President thus demanded formal apology from TPLF for the alleged 'gross human violation' and 'mass killing' that occurred in various parts of the regional state during the TPLF-led Ethiopian People's Revolutionary Democratic Front (EPRDF) rule.[110]

One may raise the issue whether submission of a written application is a mandatory requirement for HoF's engagement towards resolving interstate or federal-state government disputes or misunderstandings. An issue also arises as to why the HoF opted to remain passive in the issues and insisted on the fulfilment of procedural requirements. Opinions are divided in this regard. Some argue that the HoF has nothing to do with these issues until cases are formally submitted to it by either the federal or state governments.[111] Others argue that it is not the procedural requirement that inhibits the HoF from reviewing the cases; instead, it is the lack of political commitment and

[109] *See* the statement the President of the Somali Regional State, Mustafa Omer, on the Ethiopia broad Casting television on April 21, 2020, and the Somaliland Standard new agency, "Ethiopian Somali President demands apology from TPLF for mass killings", https://somalilandstandard.com/ethiopian-somali-president-demands-apology-from-tplf-for-mass-killings/, (Last Accessed, July 29, 2020).

[110] Ibid.

[111] Interview with Mr Yakob Bekele, Director of Intergovernmental Transfers and Equitable Regional Development Directorate, in House of Federation, Addis Ababa, (Oct. 03, 2019).

willingness from both sides that escalated the disagreement and aggravated the tensions.[112]

A respondent in an interview also stated that the federal government was uninterested in the resolution of the procedural challenge that prohibits the HoF from calling concerned parties for discussion.[113] The inadequate performance of the HoF opened the door for religious fathers and elders to involve in resolving the polarized position of the contending parties and deescalating the tension and misunderstanding between the federal government and the Tigray Regional State. Despite such attempts to settle the matter peacefully, the situation escalated, and conflict broke out. This failure in IGR can, *inter alia*, be attributed to gaps in the political culture of intergovernmental dialogue, institutional ineffectiveness in IGR, dependence on the party apparatus for solving disputes, and looking for a political solution for every conflict or misunderstanding than a legal solution.[114]

4.3 Political and legal solutions in inter-regional state disputes

In the Somali region versus Oromia regional state dispute, there were series of problems with the border areas of the two regional states. The political leaders of the regional states had tried to discuss and resolve the issue. The then president of the Oromia regional state, Lema Megeresa, issued and submitted a formal letter to the HoF to resolve and decide over disputes that erupted on the border areas of these regional states, which became the cause for the displacement of many Ethiopians. The case was referred to and discussed at the standing committee of the HoF. The standing committee of the HoF referred the case back to the speaker of the House and the higher executive officials to be resolved politically instead of referring the matter to the experts of the HoF for further investigation and study with the assumption that it needs a political decision than a legal one.[115]

This case reveals that submitting a written application for a solution to interstate disputes or misunderstandings is not a mandatory requirement. The formality requirement raised by the HoF personnel is a pretext. This case

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[112] Interview with Ato Lema Gezume, Speaker of the House of the Council of Nationalities, in SNNP Regional State, Hawassa, (Oct. 25, 2019).

[113] Interview with Mr Tsegabirhan Tadesse, Director of Intergovernmental Relations Strengthening Directorat, in Ministry of Peace, Addis Ababa, (Oct. 03, 2019).

[114] See, for example, Dejen *supra* note 101, p. 483

[115] Interview with Mr Yakob Bekele, Director of Intergovernmental Transfers and Equitable Regional Development Directorate, in House of Federation, Addis Ababa, (Oct. 03, 2019).

further shows that there has been overextended use of the party apparatus for resolving disputes or misunderstandings, and institutions tasked to handle these kinds of matters have been continuously side-lined from the issues. In this regard, one has to note that there was more party engagement than institutional engagement in the Ethiopian federal dispensation for a long time.[116] This situation has established party supremacy thereby resulting in weak government institutions by default.[117] This situation reveals that informal political negotiations have solved several constitutional and political issues instead of using formal institutions and procedures. This situation needs to be revisited, and corrective measures should be taken to capacitate the existing institutions.

In this regard, the recently enacted Proclamation (Proclamation No. 1261/2021) reverses the age-long passiveness of the HoF in resolving interstate and Federal- regional state disputes. The Proclamation empowers the HoF to take the initiative towards resolving misunderstanding or dispute that arises between the federal government and the regional states or among the states if disputant parties have not begun a discussion or if one of them have not submitted an application to it seeking a solution.[118] Submission of the formal and written petition is no more a prerequisite to consider and entrain disputes or misunderstandings that arises between the regional states or between the federal government and the states.

It is important to note that the role the HoF plays and its involvement in resolving disputes or misunderstandings vary depending on the nature, gravity, and intensity of disputes or misunderstandings. If non-border disputes arise between the federal government and regional states or amongst the states, the concerned parties are expected to settle their misunderstandings through discussion, and the HoF must assist the parties to resolve their difference.[119]

However, if the concerned parties cannot resolve their misunderstandings through discussion, the HoF strives to find a solution in 'any mechanism possible'.[120] It is evident that the HoF should devise proper tools and procedures to facilitate a resolution of intergovernmental misunderstandings or conflicts and institutionalize the same. This may include creating a

[116] Interview with Dr. Temesegen Burka, Coordinator of Research, in Prosperity party, Addis Ababa, (Dec. 23, 2019).
[117] Ibid.
[118] Proclamation No. 1261/2021, Article 35(3)
[119] Id., Article 44(1).
[120] Id., Article 44(2).

conducive environment in which the disputant parties discuss and resolve their differences amicably. A series of intergovernmental discussions and negotiations are likely to be held until the misunderstanding or disputes are fixed. However, if the concerned parties are not able to resolve their disputes or misunderstandings through discussion, or the discussion held between the two have ended in disagreement, the HoF seeks solutions to disputes that may arise between the federal government and the State without prejudice to the principles of the division of power stipulated in the Constitution.[121] By implication, the HoF decides over the dispute with due respect to the constitutional status, institutional integrity, powers, and functions of the federal government and the regional states.

The other instance that calls for intergovernmental relationships relates to border disputes that may arise between regional states. The Constitution provides that all State border disputes shall be settled by agreement of the concerned States.[122] If the states reach an agreement to resolve their dispute through discussions, the House shall strive to ensure the fruition of their discussions. It shall also follow up the progress of the discussion.[123] Here, the duty to negotiate in good faith to resolve disputes among the disputant parties is implicit in the wording of the provision.

Since most border disputes have arisen between political groups working under the same political party, border issues are addressed through 'conventional intergovernmental relations.' This helps in alleviating misunderstandings and tensions between the disputant parties. "However, when a situation arises that allows different political groups to control the various regional structures, border issues would be one of the daunting tasks that need to be addressed through complex intergovernmental relations."[124] Where the concerned regional states fail to reach an agreement, the House of Federation shall decide on such disputes based on settlement patterns and the wishes of the people concerned.[125] The House of Federation should render a final decision on a border dispute submitted to it within two years.[126]

[121] Id., Article 44(3).
[122] The FDRE Constitution, Article 48(1).
[123] Proclamation No. 251/2001, Article, 24(3).
[124] Semahagn Gashu (2014). *The Last Post-Cold War Socialist Federation: Ethnicity, Ideology and Democracy in Ethiopia*. England: Ashgate Publishing Limited, 194.
[125] The FRDE Constitution, Article 48(1).
[126] Id., Article 48(2).

Moreover, Proclamation No. 1261/2021 lays down substantive and procedural requirements through which disputes or misunderstandings that may arise between States are managed. The first Substantive requirement is the 'duty of readiness' to make a genuine discussion.[127] The party called for resolving disputes or misunderstandings must be ready for a genuine discussion within a maximum of thirty days.[128] As clearly indicated in the Amharic version of the Proclamation, the second requirement is the duty to negotiate in good faith.[129] This stipulation places an obligation to cooperate with other levels of government in mutual trust and partnership to reduce conflict and avoid litigation. Each tier of government must exert reasonable effort to resolve their difference through intergovernmental negotiation and political discussion adhering to agreed procedures. They must cooperate with others and foster friendly relations. In course of the discussion, the HoF is duty-bound to ensure the fruition of the discussion and follow up on the progress of the dialogue.[130] The disputants shall hold their meetings under the auspice of the HoF, which follows up on the fruition and progress of the same.[131]

In this regard, the Proclamation puts some procedural requirements that the disputant parties need to adhere to. The first procedural requirement is a submission of a written application to call for discussion.[132] Once the call for discussion is initiated by either the federal government or a state, the other party must be ready for a genuine conversation within a maximum of thirty days.[133] If the party called for discussion becomes reluctant for dialogue within the specified time interval (i.e., within thirty days) or if the dialogue between ends up in disagreement, the other party can submit the case to the House of Federation for final decision.[134] The HoF may, when a claim is filed to it, seek a temporary solution or cause others to find a solution in consultation with related bodies.[135]

It is to be noted that the HoF should, before giving a final decision, create a conducive condition wherein the concerned parties could continue their discussion or cause the parties to provide issues of their differences in writing

[127] Proclamation No. 1261/2021, Article 34(2).
[128] Id., Article 34(2).
[129] *See* the Amharic version of Proclamation No. 1261/2021, Article 34(2).
[130] Proclamation No. 1261/2021, Article 34(2).
[131] Id., Article 34(2).
[132] Id., Article 34(1).
[133] Id., Article 34(2).
[134] Id., Article 35 (1).
[135] Id., Article 35 (2).

within a specified time. It may also cause the parties to produce all pieces of evidence in their possession.[136] "It is only when negotiations and discussions have failed that a dispute might be referred to the HoF for final resolution."[137] Even after the dispute has been submitted to it, the HoF strives to facilitate further discussions. This requirement indicates the priority given to the political resolution of conflicts between the different levels of government than for litigation.

The forging discussion reveals that the HoF is the sole institution tasked to see and resolve misunderstandings or disputes that could arise between the different levels of government. Thus, the HoF is the leading IGR institution charged to facilitate intergovernmental discussion and negotiation if the matter involves misunderstandings or disputes. This could be even the reason that The Ministry of Peace is also charged to resolve disputes that arise between the regional states without prejudice to the powers of the HoF. The following section shows the role of that the Ministry of Peace in facilitating intergovernmental discussion and negotiation.

5. The Ministry of Peace Assignment as Focal point for IGR vs. IGR Forums

The Ministry of Peace, one of the federal Executive Organs, is designated to serve as a focal point of the federal-states relationship to strengthen the federal system in Ethiopia.[138] It is entrusted with the task of institutionalizing intergovernmental relations between different governments at various levels. It is also authorized to play a crucial role in intergovernmental negotiation, and facilitation of cooperation, and tasked to cultivate good relations and cooperation between the federal government and regional states.[139] The Ministry needs to work for the establishment of intergovernmental bonds and the non-hierarchical exchange of information between the institutions of the two levels of government.

The Ministry shall also develop good relationships and cooperation between the federal government and regional states on the basis of mutual understanding and partnership.[140] In so doing, the Proclamation attempts to set rules that govern intergovernmental interaction and collaboration. This

[136] Id., Article 36 1 (c).
[137] Adem, *supra* note 101, at 66.
[138] Proclamation No.1263/2021, Article 41(1)(i)and (k), and Art.19(8).
[139] Id., Article 41(1)(i) and (k)).
[140] Ibid.

component gives the impression that the principles of partnership and mutual understanding need to be taken into account because the idea of partnership presupposes, at times, dictates non-hierarchal relations which pave the way for fostering mutual understanding. A mutual understanding between the federal government and the states is created if there is regular interaction between the orders of government. These principles, at least theoretically speaking, are imperative to constrain destructive behavior during the IGR dialogue and circumvent hierarchical relations between the federal government and the regional states.

The Ministry of Peace, therefore, needs to establish a forum to process bargaining, negotiation, and persuasion between levels of government while both levels of government remain responsible to their legislatures and electorates for the actions they take. The Ministry may also work to institutionalize intergovernmental relations and devise its working procedure. In this context, extensive intergovernmental relationships could be held under the backing of the Ministry of Peace.

An issue that may arise is whether the power and function of the Ministry of Peace is revoked by the new IGR Proclamation. As highlighted in Section 3, the powers and functions given to the Ministry of Peace in connection with organizing, conducting, and hosting IGR are apportioned to the various IGR forums established under the new IGR Proclamation. By implication, the power and function of the Ministry of Peace to regulate the relations exercised between the Federal government and regional states in the vertical axis as well as those between (among) regional states themselves are revoked under the new IGR Proclamation.

The Ministry of Peace is also allowed to facilitate the resolution of disputes that arise between the regional states.[141] The Ministry of Peace is permitted to engage in resolving disputes arising between states without prejudicing the power of the House of Federation. This shows power overlap between the HoF and the Ministry of Peace in their conflict-handling power. One may then question how this power overlap can be reconciled. Some argue that the HoF deals with the legal aspect of a conflict, while the Ministry of Peace handles the administrative, political, and developmental affairs of the conflict. For instance, the Ministry of Peace facilitates political negotiations between disputant regional states and undertakes 'non-binding consensus building or political negotiations.'[142] Unless such interpretation resolves the power overlap, "there is nothing that prohibits the HoF from adopting the same

[141] Id., Article 41(1)((k).
[142] Assefa, *supra* note 40, p. 124

process of dispute settlement in addition to its quasi-judicial function of constitutional interpretation and dispute settlement."[143]

Moreover, there is the need to clarify the activity undertaken by the Ministry but not by the HoF regarding the resolution of disputes that arise between the regional states. Since the Ministry of Peace mediates conflicts or misunderstandings that occur between the regional states, there is the need for extensive consultation and negotiation settings. The Ministry of Peace has set up some structures and mechanisms of consultation and negotiation to efficiently resolve conflicts or disagreements that arise between the states or among the states. However, as discussed above, the powers to facilitate resolution of disputes between the regional states are under the sole domain of the HoF. Even the power to tackle conflict-triggering situations is given to the 'House of federation and the Regional States Relations forum'. This mandate of the Ministry of Peace is again impliedly repealed by the new IGR Proclamation.

There is indeed the need for the authorization of the Ministry of Peace, without prejudice to the provisions of the relevant laws and upon the request of the regional states, to devise and implement sustainable solutions to disputes and conflicts that may arise within the States.[144] Disputes and conflicts that may arise within the regional states may include disputes that arise between the state with local government or among local governments. The task of maintaining sustainable solutions to disputes or conflicts that may arise between the regional state with local government or among local governments requires extensive formal and informal processes of interaction among political actors. As the IGR law limits its scope of applicability to govern the relations exercised between the Federal government and Regional states in the vertical axis as well as those between (among) regional states themselves in the horizontal line, such mandate of the Ministry of Peace is not inconsistent with the IGR Proclamation so that it keeps on working to cultivate good relations and cooperation between the regional states with local government and between (among) local governments.

[143] Ibid.
[144] Proclamation No.1263/2021, Article 41(1)(k).

6. Concluding Remarks

Installing a system of intergovernmental relations is an essential aspect of every federation. The entrenchment of robust intergovernmental relationship systems in most federations suggests that a national government and states do not operate in isolation as portrayed by the competitive model, but instead, they interact frequently. For this reason, each federation, guided by particular circumstances and conditions, has tailed its distinct path to organize intergovernmental institutions and processes and also develops its own unique IGR ecosystem that evolves over time. It follows that intergovernmental relations structures can vary considerably gradually, influenced by external and internal factors.

In Ethiopia, intergovernmental relations have been handled by the House of Federation and the Ministry of Peace until the new IGR legislation was enacted in 2021. Both institutions have tried to create cooperative relationships between the federal government and regional states as well as among the states. These institutions have been working on effective ways of managing the functional interface among the various government institutions.

Under the IGR Proclamation, intergovernmental consultative forums have enormous capabilities to create cooperative relationships between the federal government and regional states as well as to change the contour of the Ethiopian IGR system. The establishment of formal IGR forums shows that these forums collectively engage in facilitating cooperation relations between the institutions of the two levels of government.

In addition to the newly established IGR forums, HoF and the Ministry of Peace are assigned to undertake some functions in connection with IGR. It means that the systematic and thorough examination of power and functions of HoF and the Ministry of Peace against the new IGR forums reveals power overlaps in the functions of these institutions. The issue in this regard is whether the new Proclamation takes away or narrows down the involvement of other institutions in facilitating IGR entirely. One can also raise the question whether these institutions can continue their engagements and pursuits in harmony to manage and facilitate IGR without superseding the power and functions of the other institution. It can indeed be argued that the mandates and functions of the HoF concerning IGR remain unrepeated while most of the functions of the Ministry of peace are taken away by the IGR legislation and distributed to the various IGR forums. ■

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Integrating Traditional and State Institutions for Conflict Prevention: Institutional, Legal and Policy Frameworks in Ethiopia

Awet Halefom ♣

Abstract

Despite the prevalence of traditional institutions and the growing official and academic need to 'recognize,' 'empower' and incorporate them in the state system, competition and harmony between the two persists. There are seventy-six officially listed ethnic groups in Ethiopia, and there exists a great plurality of livelihoods, social organizations, belief systems, and political and legal systems in the country. Notwithstanding the human right issues, traditional institutions operating outside the state are the dominant form of conflict prevention and resolution in Ethiopia. However, the relationship between traditional institutions and state institutions remains unclear. Previous researches either focus on the constitutional set-up and legal framework of states, or their scope is too specific relating to local case studies and their relationship with the state local institutions. This relationship does not, however, only involve legal issues or concerns at the bottom, but it is also an issue of governance and political structure. This article is based on content and document analysis and examines the harmony and competition between the state and traditional institutions in Ethiopia. I argue that despite their practical prevalence, the policy, legal and institutional frameworks in Ethiopia do not plainly address the relationship between the state and traditional institutions. Although *de facto* recognition seems to exist, the practice shows that the state that envisages the importance of traditional institutions undermines their role in case of conflict with state institutions.

Key terms:

Conflict prevention · Integration · Traditional institutions · State institutions

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Contents

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1. Introduction

The continuing role and influence of traditional institutions of conflict resolution in Africa is apparent. These traditional institutions continue to demonstrate their relevance in day to day lives of the society. Nonetheless, the relationship between the state and traditional institutions should not be taken for granted for it is a contested terrain fraught with complexities. Previous researches conducted on the subject either focus on the constitutional set-up and legal framework of states[1] or are too specific taking a specific local case study and analyze the relationship with the state local institutions.[2] The relationships are not, however, of only a legal issue, but also involve issues of governance and political structure.

Researches that focus on the cooperative or competitive aspect of traditional and state institutions have addressed the issue of justice by analyzing the linkage *vis-a-vis* the court system of a country.[3] In this Article,

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[1] Susanne Epple and Getachew Assefa (2020), *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions,* transcript Verlag.

[2] Gebre Yinteso, Assefa Fisseha, & Fekade Azeze (2011), *Customary Dispute Resolution Mechanisms in Ethiopia*, Volume 1, Ethiopian Arbitration and Conciliation Center.

[3] Alula Pankhurst & Getachew Assefa (2008), *Grass-roots Justice in Ethiopia: The Contribution of Customary Dispute Resolution* (1st ed.), Centre Français des études éthiopiennes; Gebre Yinteso, Fekade Azeze & Assefa Fisseha (2012), *Customary*

an attempt has been made to grasp the legal, institutional and policy frameworks of Ethiopia to address the current status of traditional institutions.

This article will focus on the enabling conditions in Ethiopia at the macro level by taking laws, policies and the institutional setup of the country which are directly related to traditional institutions. The FDRE Constitution, Codes of the 1960's (i.e., the Civil Code, the Civil Procedure Code, the Criminal Procure Code), and the 2004 Criminal Code are part of the key national legal frameworks that are analyzed. The policy analysis involves the Criminal Justice Policy, the Crime Prevention Policy, and the Peace Policy Implementation Strategy. Institutionally, the Ministry of Peace, the Federal Police Commission, the Ministry of Justice, the House of Federation (HoF), the House of Peoples and Representatives (HPR) and the Reconciliation Commission are consulted.

The first three sections briefly discuss national legal frameworks and traditional institutions in Ethiopia. The next section deals with policy frameworks and traditional institutions in Ethiopia with the aim of assessing the accommodativeness thereto. Sections 3 to 7 address laws, policies and institutional frameworks in the accommodation traditional institutions.

2. The Role of Traditional Institutions in Conflict Prevention: An Overview

2.1. Traditional institutions

Research works have examined traditional institutions under various designations: 'popular dispute resolution mechanisms'[4], 'traditional institution of conflict resolution'[5], 'customary dispute resolution

Dispute Resolution Mecahnisms in Ethiopia, Volume 2, Ethiopian Arbitration and Conciliation Center; Fekade Azeze Assefa Fisseha & Gebre Yinteso (2011), *Annotated Bibliography of Studeis on Customary Dispute Resolution Mecahnisms in Ethiopia,* Ethiopian Arbitration and Conciliation Center. *See* also Susanne and Getachew, *supra note* 1; Gebre et al, supra note 2;

[4] Gebreyesus Teklu Bahta (2014), "Popular dispute resolution mechanisms in Ethiopia: Trends, opportunities, challenges, and prospects" *African Journal on Conflict Resolution* Vol. 14 No. 1.

[5] Meron Zeleke (2010), "*Ye Shekoch Chilot* (the Court of the Sheikhs): A traditional institution of conflict resolution in Oromiya zone of Amhara regional state, Ethiopia". *African Journal on Conflict Resolution*, Vol.10, No.1.

mechanisms'[6], and 'traditional methods of conflict resolution[7]. Alula and Getachew noted that the prefix 'alternative' does not show the Ethiopian context in the sense that "in some regions of the country these forms of dispute resolutions are fairly strong in contrast to the state justice system". Furthermore, the word 'informal' does not seem to be acceptable because there are traditional institutions that have strong rules and even recognitions in some regional states.

The word 'traditional' is used in this article for two reasons. First, 'customary' refers to custom-based norms and practices usually practised in conflict resolutions. The prefix 'customary' implies that these institutions are founded on custom/customary rules while carrying out their functions. However, the term traditional shows the 'traditionality' of these institutions without reference to the source of their power or decisions. It is a synonym to the word 'tradition' used in like the 'common law tradition' or 'civil law tradition' which connotes an established system of laws for a long period of time. Second, I argue that traditional institutions have roles in preventing conflicts whether the bases of their functions may or might not be attributed to custom.

2.2. Conflict prevention

A review of major literature on the subject shows lack of consensus regarding its definition. According to Ackerman, much of the conceptual confusion over the concept of conflict prevention is related to two questions: Should conflict prevention be limited only to the early and non-escalatory stages of conflict, or also encompass the escalation and post-conflict stages of a conflict (….) or should conflict prevention address only the immediate causes of conflict or also its underlying roots, or both?[8]

Thus, different definitions of conflict prevention are discussed in the literature.[9] Leaving the controversy on the taxonomy of conflict prevention,

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[6] Alula and Getachew , *supra* note 3

[7] Martha Mutisi & Kwesi Greenidge (ed) (2012), *Integrating Traditional and Modern Conflict Resolution: Experiences from selected cases in Eastern and the Horn of Africa*, Africa Dialogue Monograph Series No. 2/2012, African Centre for the Constructive Resolution of Disputes (ACCORD), South Africa: Durban

[8] Alice Ackermann (2003), "The Idea and Practice of Conflict Prevention", *Journal of Peace Research*, Vol. 40, no.3, p.340.

[9] Among the widely known definitions the following can be cited: (i) "conflict prevention refers to non-violent (or creative) conflict transformation and encompasses activities designed to defuse tensions and prevent the outbreak, escalation, spread or recurrence of violence" (the ECOWAS Conflict prevention framework); (ii) "Constructive actions undertaken to avoid the likely threat, use or diffusion of armed force by parties in a

definitions along the concept can be categorized into two: those which extend conflict prevention to have a role in all phases of conflict and those that limit conflict prevention to the early phase only. In this article, conflict prevention is defined broadly and refers to preventing the emergence and reemergence of conflicts and preventing the escalation of conflicts. This research adopts the definition given by the Carnegie commission and the ECOWAS conflict prevention frameworks.

2.3. Conflict prevention and traditional institutions

I have shown elsewhere[10] that traditional institutions have a role in conflict prevention. One of the elements of conflict prevention is preventing its escalation. The following table summarizes instances of methods of preventing escalation of conflicts among different ethnic groups in Ethiopia.

Ethnic group (Regional State)	Method of prevention	How it works
Afar	Habi	guarantees the good behavior of the parties before a reconciliation starts
Oromia	Waata	A system of custody of the offender and a means of preventing direct contact between the conflicting parties
	Sagada	convincing the victim family not to resort to a revenge[11]
	Siinqee	A way of prevention escalation of conflict[12] where women carry their *siinqee* and automatically stop a conflict/war

political dispute" (Wallenstein); (iii) "the use of diplomatic techniques to prevent disputes arising, prevent them from escalating into armed conflict…and prevent the armed conflict from spreading" (Boutros-Ghali); (iv) "the aim of preventive action is to prevent the emergence of violent conflict, prevent ongoing conflicts from spreading and prevent the re-emergence of violence (Carnegie Commission)".

[10] Awet Halefom (2022), "The Role of Traditional Justice Institutions in Peacebuilding: Lessons Learned from the Gereb in Northeast Ethiopia" Wilson *Center Africa Program Research Paper* No.31.

[11] Mulgeta Negasa (2011), Sereguma dispute resolution mechanism in Adea Liben Wereda (Amharic), in Gebre Yinteso, Assefa Fisseha, & Fekade Azeze (2011), *Customary Dispute Resolution Mechanisms in Ethiopia*, Volume 1, Ethiopian Arbitration and Conciliation Center, p.239.

[12] Tolosa Mamuye (2011), The Siinqee-women's institution for conflict resolution in Arsii p.287 in Gebre Yinteso, Assefa Fisseha, & Fekade Azeze (2011), *Customary Dispute Resolution Mechanisms in Ethiopia*, Volume 1, Ethiopian Arbitration and Conciliation Center, p. 287

Kebena (SNNP)	Hooda	a system of preventing escalation of conflict before reconciliation process
Guraghe (SNNP)	Keterat	a system of preventing escalation of conflict before reconciliation process
Shoa (Amhara)	Exile (offender and his family)	Exiling the offender and his family before any reconciliation process[13]
Irob (Tigray)	Priests and Deacons holding up a cross to prevent escalation	The victim's family respectfully responds to the church's request for reconciliation [14]

3. The FDRE Constitution and Regional Constitutions

3.1 The FDRE Constitution

Based on a survey of world constitutions, Cuskelly stated that "the highest level of recognition of customary law is found in African constitutions, both in terms of the number of countries with relevant provisions and the breadth of aspects of customary law covered."[15] Of the 52 African constitutions studied, 33 referred to customary law in some form. Almost all of the constitutions have provisions relating to the protection of culture or tradition extending to the duty of the state to protect and promote them. On the institutional aspect, the recognition ranges from a broad recognition of customary authorities or chiefs, a guarantee of non-abolition of such authorities, to more specific arrangements providing for a specific body with specific functions concerning customary law.

On a similar pattern, Articles 39 and 91 of the 1995 Ethiopian Constitution affirm the promotion of cultures of nations, nationalities and peoples of the country. Three provisions are useful with regard to the recognition of

[13] Alemu Kassaye (2011), Reconciliation (irq) in Blalo Mama Midir Wereda North Shoa (Amharic), in Gebre Yinteso, Assefa Fisseha, & Fekade Azeze (2011), *Customary Dispute Resolution Mechanisms in Ethiopia*, Volume 1, Ethiopian Arbitration and Conciliation Center, p.166

[14] Seyoum Yohanes, Customary dispute resolution in Irob, in Gebre Yinteso, Fekade Azeze & Assefa Fisseha (2012), *Customary Dispute Resolution Mechanisms in Ethiopia*, Volume 2, Ethiopian Arbitration and Conciliation Center, p.168

[15] Katrina Cuskelly (2011), *Customs and Constitutions*: *State recognition* of *customary law around the world*, IUCN, p.6.

traditional institutions. The first provision directly linked to the subject matter is Article 34(5) which makes direct reference to adjudication of disputes relating to personal and family matters in accordance with customary laws, with the consent of the parties to the dispute. It provides:

> This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute. Particulars shall be determined by law.

Regarding civil matters going beyond family and personal issues, the Constitution does not clearly prohibit or endorse the operation of traditional systems or laws. Although this could potentially provide the space for the involvement of traditional systems in other legal domains, the fact that traditional institution or laws are mentioned in the context of family and personal law without reference to other legal areas creates the impression that justice rendered by traditional institutions is or should be restricted to family or personal law.

Under Chapter Nine of the Constitution that deals with the judiciary, Article 78(5) makes reference to religious and customary courts:

> Pursuant to sub-Article 5 of Article 34 the House of Peoples' Representatives and State Councils can establish or give official recognition to religious and customary courts. Religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organized on the basis of recognition accorded to them by this Constitution.[16]

The Constitution accords official recognition to religious and customary courts in three ways: (i) direct establishment of religious and customary courts by law-making organs at the federal and state levels –which involves the process of establishing new religious and customary justice systems based on long-standing religious and customary beliefs; (ii) recognition of religious and customary courts –that were operating as *de facto* informal justice systems– by the federal and state law-making organs; and iii) automatic recognition of religious and customary courts, which were functioning *on the basis of official recognition* before the promulgation of the FDRE Constitution. However, the establishment of these institutions is limited to personal and family matters.

[16] The Constitution of the Federal Democratic Republic of Ethiopia, *Federal Negarit Gazetta*, 1st Year, No. 1, Article 78(5)

The statement "religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organized on the basis of recognition accorded to them by this Constitution" may be interpreted as recognition of traditional institutions serving the society prior to the Constitution as long as they do not contravene the basic tenants of the constitution.

Another pertinent provision is Article 37(1) of the Constitution, which states that "everyone has the right to bring a justiciable matter to, and obtain a decision or judgment by, a court of law or any other competent body with judicial power." It places more emphasis on the right to bring a justiciable matter to judicial or quasi-judicial bodies. Despite the practice of traditional institutions in criminal matters, the Ethiopian constitution appears to restrict the practice at the grassroots.

A cumulative observation of these three constitutional provisions signifies a limited legislative recognition to a non-state justice system that is not accorded exclusive jurisdiction and coercive powers which can be clearly observed from the consent clause embodied in the FDRE Constitution. Although the Constitution appears to confine the jurisdiction of traditional institutions to family and personal problems, prior research demonstrates that customary justice systems exercise jurisdiction over all types of conflicts, including civil and criminal cases.[17] Thus, the reality has always been that most conflicts, from trivial to complex, are settled through customary systems in various parts of Ethiopia.[18]

Proponents of the state law want the customary legal forum to give way to the modern unitary legal forum than traditional institutions. They, *inter alia*, argue that traditional institutions may reflect societal structures and represent dominant interests, usually men who may pass judgments that are against the interests of women, children, and minorities. On the other hand, advocates of customary laws argue that the state-centered unitary approach must give way to different alternative paradigms to create a hybrid brand that contains elements of the formal and the informal laws.[19]

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[17] Meron Zeleke, *supra* note 5*; see* also Gebre Yenteso, Assefa Fesseha, Fekede Azeze, (2012), *Customary Dispute Resolution Mechanisms in Ethiopia*,Volume 2, Ethiopian Arbitration and Conciliation Center;

[18] Alula and Getachew, *supra* note 3

[19] Alula Pankhrust & Getachew Assefa (2008), *supra* note 3; *see* also *Gebre Yntiso* (2020), "Understanding customary laws in the context of legal pluralism", in Susanne Epple and Getachew Assefa (editors), *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions,* Transcript Verlag.

Those who hold a middle ground on the issue argue that the phrase 'particulars shall be determined by law' in Article 37(5) of the Constitution and the phrase 'religious and customary courts –that had functioned prior to the adoption of the Constitution' in Article 78(5)– may imply that the Constitution does not prohibit customary laws or traditional institutions, but rather leaves this to be determined by a specific law to be enacted, or the courts should have been functional before the adoption of the Constitution. Based on this argument, traditional institutions that have been functional before 1995, and customary laws that are considered to be applicable by future laws are recognized to function accordingly. This argument is substantiated by the legal, institutional as well as policy frameworks, discussed below.

3.2 Regional Constitutions

With the exception of the Somali and Afar Regional states constitutions, all regional states constitutions have the same dispensation as the Federal Constitution regarding customary laws and courts. Article 56 of the Somali Regional State Constitution states that "the State Council shall form elders and clan leaders Council." Similarly, the Afar Regional State Constitution provides that "the State Council may establish Councils of Elders at various hierarchies as may be necessary." Other regional constitutions are silent in this regard. The table below compares the FDRE Constitution and Regional Constitutions.

Constitutions	Religious or Customary Laws on Personal and Family Disputes	Elders Council	Customary and Religious Courts Prior to the Constitution Recognized
FDRE Constitution[20]	Article 34(5)	-	Article 78(5)
Tigray Regional State constitution[21]	Article 35(5)		Article 60
Afar Regional State constitution[22]	Article 33(5)	Article 63	Article 65

[20] Constitution, *supra* note 16.
[21] Tigray Regional State Constitution, 1994
[22] The 2002 Revised Constitution of the Afar Regional State

Amhara Regional State Constitution[23]	Article 34(5)	-	Article 65[24]
Oromia Regional State Constitution[25]	Article 34(5)	-	Article 62
Benshangul Gumuz Regional State Constitution[26]	Article 35(5)	-	Article 66
Gambella Regional state Constitution[27]	Article 35(5)	-	Article 67
Somali Regional State Constitution[28]	Article 34(5)	Article 56	Article 66
Harari Regional State Constitution [29]	Article 34(5)	-	Article 68
Southern Nation, Nationalities and Peoples[30]	Article 34(5)	-	Article 73

[23] Proclamation Issued to Provide for the Approval of the 2001-Revised Constitution of Amhara Regional State No.59/2001 Constitution.

[24] Ibid. The Amhara regional state preferred 'Tribunal' over 'courts'

[25] A Proclamation Issued to Provide an Approval of the 2001 Constitution of Oromia Regional State No.4/2001.

Concerning customary courts, the Oromia Regional Government has come up with a new law of establishing customary courts, a new of its kind in Ethiopia. The regional state issued a proclamation called 'A Proclamation to Provide for the Establishment and Recognition of Oromia Region Customary Courts, No. 240/2021'. A regulation -A Regulation to Implement the Oromia Region Customary Courts Regulation No. 10/2021- is issued to enforce the basic principles enumerated in the Proclamation. The law provides detailed rules on the selection of elders, jurisdiction of customary courts and working procedures of customary courts. Upon the consent of the parties, customary courts are empowered to entertain cases of civil or criminal nature. The Proclamation limits the power of customary courts to receive and deal with a matter pending before a customary court with the consent of the parties saving over appeals. (Article 8 of the Proclamation)

[26] A proclamation Issued to Provide an Approval of the 2002 Benshangul Gumuz Constitution No--2002

[27] A Proclamation issued to Provide an Approval of the 2002 Gambella Regional State Constitution No.27/2002

[28] Revised Constitution of the Regional State of Somali 2002

[29] Revised Constitution of the Regional State of Harari, 2005

[30] Revised Constitution of the Southern Nations, Nationalities and Peoples Regional State Proclamation No.35/2001.

4. The Civil Code and Civil Procedure Code

4.1 The Civil Code

Codification in African countries that have adopted the civil law tradition (which includes Ethiopia) has pursued the path of making of a new, unified and systematic law. To accomplish this goal, various methods have been used. In some states, codification was preceded by a lengthy investigation of local customary laws while in others codification was initiated without a full prior study of the local, and very diverse, customary laws.[31]

From the late 1950s to the mid-1960s, six codes of law were enacted in Ethiopia.[32] Emperor Haile Selassie I, who pioneered the 'modernization efforts' and codification of Ethiopian laws in the 1950s and 1960s, appears to have been torn between modernizing the laws and his desire to include the country's rich legal and cultural tradition. The Emperor's preface to the Ethiopian Civil Code supports this view:

> The rules contained in this Code are in harmony with the well-established legal traditions in our Empire … as well, upon the best systems of law in the world. No law which is designed to define the rights and duties of the people and to set out the principles governing their mutual relation can ever be effective if it fails to reach the heart of those to whom it is intended to apply and does not respond to their needs and customs and to natural justice"[33]

Despite this intention, the codes adopted at the time were highly dependent on international experience; less detailed in the content and breadth of the issues they covered; not adequately consistent with the conflict management styles of the various ethnic and religious groups; insensitive to the people's communal ideologies, lifestyles, and demands; incongruent with the multiplicity and diversity of people's adjudicative activities and procedures; and new to both.[34] These rules have a distinctly Western flavor and appear to bear little resemblance to Ethiopia's traditional patterns of life.

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[31] The codification in Madagascar falls in the first category whereas the Ethiopia and Cote d'Ivoire case meets the second approach. *See* Max Gluckman, Editor (1966), *Ideas and Procedures in African Customary Law*, Studies Presented and Discussed at the Eighth International African Seminar at the Haile Sellassie I University*, Addis Ababa, January 1966*, Routledge, 2018. p.32.

[32] These are: the Penal Code, Civil Code, Commercial Code, Maritime Code, Criminal Procedure Code, and Civil Procedure Code.

[33] Civil Code of [] Ethiopia Proclamation No. 165 OF 1960, preface

[34] Gebre *et al*, *supra* note 2, p. 3.

The objective for enacting the codes was to have a national unifying force as well as a guide to the Ethiopian people's progressive growth. However, if a code of law is incompatible with prevalent social ideals, it may go largely unenforced, undermining the very objectives that are sought. As a result, the question of how the codes of law missed customary rules and institutions of the time have become subject to discourse.

In support of the codification process, which he considered as the revolutionary approach, René David, expert drafter of the Ethiopian Civil Code, stated the following:

> The development and modernization of Ethiopia necessitate the adoption of a 'ready-made' system. We [Europeans] observe the stability of our private law, and we believe with difficulty in the efficiency of laws which pretend to impose on private individuals another mode of conduct than that practiced by them…. This position is not that of Ethiopians while safeguarding certain traditional values to which she remains profoundly attached, Ethiopia wishes to modify her structures completely, even to the way of life of her people. Consequently, Ethiopians do not expect the new code to a work of consolidation…. of actual customary rules. They wish it to be a program envisaging a total transformation of society and they demand that for the most part is set out new rules appropriated for the society they wish to create."[35]

The rationale given at the time was that Ethiopian law was not systemized and was often difficult to find, was quite diverse and lacked a case reporting system.[36] Krzeczunowicz also noted the practical non-existence of customary rules on certain matters, as well as the fact that most customs are uncertain or vary from place to place, group to group, and time to time, making it inconceivable even to consider the idea of a simple legislative consolidation of all customary rules as found to be followed in practice. The proponents of these views claim that customary laws that were available and consistent with the contemporary understanding of law were incorporated into the new laws or otherwise allowed to operate. Krzeczunowicz, for example, contended that the Civil Code has integrated customs by direct reference, filling a legal gap

[35] René David (1963), "A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries", *Tulane Law Review*, Volume 37, p.193.

[36] René David (1967), "Source of Ethiopian Civil Code", *Journal of Ethiopian Law*, Vol. 4, No. 2, p. 342.

in the Code that is employed in judicial interpretation, and that there are paralegal outlets for customs.[37]

However, the manner and magnitude of the incorporation cannot be regarded as a realistic and adequate representation of the country's customary law, on three grounds. The *first* ground relates to the methods of incorporation that were adopted because they could not possibly represent and accommodate the diverse customary laws in Ethiopia. *Second*, the so-called 'incorporation of general custom' was established in limited areas and does not correspond to the body of customary laws, which contain a veritable mass of rules in all areas of civil and criminal law. *Third*, Ethiopia's modern legal system made little room for the customary institutions that exist in various areas of society. Article 3347 of the Civil Code confirms this reality, and it reads: "Unless otherwise expressly provided all rules whether written or customary [that were] previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed."

The repeal provision of the Civil Code did not only aim at those customary rules that were inconsistent with the provisions of the Code but rather customary rules concerning matters provided for in the Code, whether they are consistent with the Civil Code or not. This is an *abolitionist* approach because the state recognizes non-state justice institutions only by legislation that explicitly delimits broad areas in which the non-state norms may not be applied any longer, or it expressly prohibits the institution in its entirety; this represses or ignores the existence of customary laws or institutions.[38]

In spite of the pledge to provide uniform and modern legal regime for the socio-economic development of the country and effective nation-building, customary laws and institutions are still active and vibrant in Ethiopia half a century after the enactment of the codes.[39] The abolitionist approach that disregards these institutions thus requires rethinking and revision. Regardless of the form of government and method of legal transplantation and criticism against traditional institutions, the fact on the ground shows that sustainable legal system demands consideration of the deep-rooted traditional systems.

It is, however, to be noted that the Civil Code should be commended because some concepts of traditional institutions are incorporated. For

[37] George Krzeczunowicz (1963), "The Ethiopian Civil Code: Its Usefulness, Relation to Custom and Applicability" *Journal of African Law*, Volume 7 No. 3, pp. 172–177.

[38] *Connolly*, Brynna (2005) "Non-State Justice Systems and the State: Proposal for a Recognition Typology" *Connecticut Law Review*, Vol. 38, 239–294.

[39] Alula and Getachew, *supra* note 3 and *see* also Meron *supra* note 5.

example, the provisions under Title XX of the Civil Code recognize reconciliation *(Irq),* where parties to a dispute entrust a third party with the objective of bringing them together for reconciliation and if possible negotiating a settlement between them.

4.2 The Civil Procedure Code

In the domain of the state-enacted law, courts are among the means of social control towards maintaining peace and harmony among members of a community despite opposing interests. In western legal procedure this function is largely in the hands of a highly specialized class of professional lawyers in courts. Litigation is frequently treated as a game, with the judge acting as umpire awarding the victor.

On the contrary, the proceedings in the traditional justice system are transparent since cases are frequently processed in public. The participation of community members as spectators, witnesses, and comment providers render the final rulings widely acknowledged and respected. The procedures in the traditional justice system are embedded in local values and beliefs. Gebre explains the participatory procedures used by traditional institutions:

> First, the involvement of community members as observers, witnesses, and commentators increases the credibility and transparency of customary laws. Second, non-confidential proceedings help to put public pressure on parties to honor and respect agreements. Non-compliance to decisions is rare, mainly because nonconformity is likely to be interpreted as a rebellion against community values and interests. Finally, since decisions are passed in the presence of community observers, the possibility for corruption and prejudiced judgment is limited.[40]

The preface of Civil Procedure Code incorporates abolitionist provision which reads "all rules [procedural rules], whether written or customary, previously in force concerning matters provided for in the Civil Procedure Code of 1965 shall be replaced by this Code and are hereby repealed."[41] This indicates that if an issue of procedural law is covered by the Code, any other rule dealing with the matter is repealed, even if the rule is not inconsistent with the Code. Yet, there are instances where the Civil Procedure Code incorporates ceremonial provisions such as the traditional practice of 'beat of

[40] Gebre, *supra* note 19, p. 84
[41] Civil Procedure Code of [] Ethiopia (1965), Decree No. 52 of 1965.

a drum' which is of lower likelihood and importance with regard to 'execution'.[42]

Nevertheless, as a matter of substantive law, the Code permits that the parties may by compromise terminate a dispute before any suit has been filed. If a dispute gets into court, parties may enter into compromise agreement or withdraw the case thereby resorting to compromise. On the making of compromise agreement, Article 275 provides the following:

(1) A compromise agreement may at any time be made by the parties at the hearing or out of court, of their own motion or upon the court attempting to reconcile them.

(2) The court may, on the application of the parties, indicate to them the lines on which a compromise agreement may be made.

The provisions of the Code, therefore, are designed to encourage the parties to compromise whenever possible. The court may take the initiative in attempting to effect a compromise and upon application of the parties may indicate the lines on which a compromise agreement could be made. However, the court may not record a compromise decree where the terms are not 'contrary to law or morals.'

The Code's reference to 'morals' seems to refer to the standards setup by the judges themselves, not the custom, tradition or practice of the societies. There is no recognition to customary procedure or traditional institutions. The procedure and the trial processes adopted in the Civil Procedure Code are taken from the 'modern' legal systems including the Indian Code of Civil Procedure. As the drafter stated "there was little emphasis on procedures in Ethiopia."[43] However, the inadequacy in the recognition of traditional systems in the Civil Procedure Code, cannot be interpreted as absolute lack of compromise because judges are empowered to refer cases to compromise at any stage of the trial.

Even though Arbitration and Conciliation Working Procedure Proclamation is promulgated in 2021, it regulates contract-based arbitration or conciliation and does not provide room to the procedures of traditional institutions. The Proclamation mentions 'customary practice' only under two provisions, i.e. Article 61(2) that requires the conciliator to consider the

[42] Article 402(2) of the Civil Procedure Code.

[43] Robert Allen Sedler (1968), *Ethiopian Civil Procedure*, Faculty of Law, Haile Selassie I University; See Also Robert Allen Sedler (1972) "Law Without Precedent" The *American Journal of Comparative Law*, Volume 20, Issue 2, 343–347

customary practice surrounding the dispute and Article 78(3) which states the inapplicability of customary practices inconsistent with the Proclamation.[44]

5. The Criminal Law and Procedure

5.1 The Criminal Code

Researches indicated that much of the justice system that is delivered in Ethiopia using traditional institutions have a restorative capacity, participatory procedures, predictable process and outcomes, enforceable community-based sanctions, avoidance of coercive measures and building community cohesion.[45] The preamble of the 2004 Criminal Code states that the main objective of punishment is to "protect society by preventing the commission of crimes."[46] The Code states that the aim of crime prevention can be attained by giving notice of the crimes and the penalties, and if this is ineffective punishing criminals is meant to deter them or others from committing crimes.

Contrary to the practice of customary laws and institutions which consider crime as a violation of the relationship between individuals and the community at large, the criminal law views a criminal act (in the form of either act or omission) primarily as a violation of the state's criminal laws that are enacted to protect the public. The Ethiopian criminal law focuses on the offender's crime and takes punishment as its primary purpose. Victims of the crime are not at the center of the Ethiopian criminal justice system. The law only recognizes the victim, and does not give due attention to his/her families, his/her relatives, or any other part of the community. Unlike the traditional justice system or traditional procedures, the Ethiopian criminal justice system excludes the community from participation.

In the criminal law, the amount of money collected in the form of fine, as well as confiscated or forfeited property, goes to the public coffer and not to the victim of the crime. The victim can only be compensated if s/he brings a civil suit before the court. In this regard, Article 101 of the Criminal Code provides:

> Where a crime has caused considerable damage to the injured person or to those having rights from him, the injured person or the persons having rights from him shall be entitled to claim that the criminal be

[44] Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021, *Federal* Negarit *Gazetta*, 27th Year No 21, Article 61(2) and 78(3).

[45] Alula and Getachew, *supra* note 3, introduction.

[46] The Criminal Code of the Federal Democratic Republic of Ethiopia 2004, Proclamation No.414/2004, preamble.

> ordered to make good the damage or to make restitution or to pay damages by way of compensation. To this end they may join their civil claim with the criminal suit.[47]

This is the only remedy for compensation embodied in the Criminal Code as a solution to the victim. As Endalew Lijalem notes that "it is not common for Ethiopian criminal courts, in practice, to entertain the issue of compensation simultaneously with criminal proceedings" because "the victims are not aware of this right or the public prosecutors [may not]… lodge the claim for compensation as part of the criminal proceedings under the pretext of [avoiding] delay to criminal proceeding."[48]

With regard to repentance and reparation, as well as victim reconciliation, the Criminal Code –in exceptional instances– recognizes some basic features of the traditional justice system. The first instance relates to extenuating circumstances to mitigate the penalty where remorse and repairing the victim's damage are invoked by the accused. The Criminal Code enables the court to mitigate the penalty if the accused shows genuine repentance for his actions after the crime by providing assistance to his victim and admitting his fault by mending the damage caused by the crime. The second situation is conditional release which gives due attention to reform of the prisoner after conviction if the offender has served two-thirds of his sentence. In this case, the condition that must be fulfilled by the offender is that "he has repaired, as far as he could reasonably be expected to do, the damage found by the Court or agreed with the aggrieved party."[49]

Moreover, the Pardon Proclamation that aims at re-integrating offenders into the community, provides the conditions that the granting body should take into account which include "the petitioner's confession and repentance, his effort to reconcile with the victim or his family and compensate them, or his ability and willingness to settle the compensation decided against him." Where it is possible to contact them, the opinion of the victim or his family on the petition for pardon are among the factors that are considered in the pardon process.[50] Although the law is unclear on how the amount and mode

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[47] Id., Article 101.

[48] Endalew Lijalem Enyew (2014) "The Space for Restorative Justice in the Ethiopian Criminal Justice System" *Bergen Journal of Criminal Law & Criminal Justice*, Volume 2 No. 2, p. 235.

[49] Criminal Code 2004, *supra* note 46, Article 82

[50] *Procedure of Granting and Executing Pardon Proclamation No. 840/2014*, Federal Negarit Gazeeta, 20th Year No. 68, 2014, Article 20(7).

of compensation are determined, an interview with federal high court judges revealed that the process of reconciliation and the mode and amount of compensation are usually settled according to the customary laws of the locality and the traditional institutions entrusted to settle them.[51]

5.2 The Criminal Procedure Code

There are gaps and limitations that are frequently alleged against the traditional procedure systems. They include simplicity and lack of formality; reliance on 'irrational modes' of proof and decision; complex or multiplex relations outside the court-forum among the parties (often the judges too), relations which existed before and continue after the actual appearance in court, and which largely determine the form that judicial hearing takes; common sense as opposed to a legitimate approach to problem solving; the underlying desire to promote the reconciliation of the contesting parties, rather than focus on the overt dispute which they have brought to court.[52]

Total disregard to traditional systems cannot be justified on the basis of such limitations which can be addressed. On the contrary, however, the Criminal Procedure Code has no room for traditional institutions or customary laws. There is no room for private prosecution (other than offences that can be initiated upon complaint), where the victim will bring an action, in lieu of the public persecutor. According to the drafter of the Criminal Code, the primary purpose of criminal prosecution is to vindicate the interest of society rather than the interest of the private complainant (Jean Graven, 1965**).** Few spaces are left to private prosecution.[53]

Unlike the Civil Code, which expressly makes a sweeping repeal of customary law, the Criminal Procedure Code contains no repeal provision. Article 1(2) of the Criminal Procedure Code states that the provisions of the Code "shall apply to all matters coming within the jurisdiction of the courts, the prosecution and police authorities." Although the status of practices – which are not inconsistent with any provision of the Code– are not settled down, the Code impliedly repeals inconsistent statutory and customary rules. But the Criminal Procedure Code does not specifically repeal customary law. Nor does it accommodate customary practices, either directly or by reference. In contrast to the customary procedure, most cases are brought by a public prosecutor, rather than the injured party, and payment of 'blood money' (to

[51] Judge Fantahun, Federal Supreme court, personal communication, July 15, 2020)
[52] Gluckman, *supra* note 31.
[53] Allen Sedler (1967), "The Development of Legal systems: the Ethiopian Experience" *Iowa Law Review* Volume *53*, p.562–635

which victims are entitled in various customary practices) will not generally insulate the accused from criminal liability.

Elders, whose participation formed a vital part of the traditional criminal process, have no role in the trial process inquiries. Traditional practices have not been entirely rejected in the new law; a kind of lip-service has been made.[54] The 1961 Criminal Procedure Code had maintained the traditional institution known as, the '*atbia dagnias*' (local judges), which were established in 1947 as local judges to hear very minor civil and criminal cases. Under Article 223(1) of the Criminal Procedure Code, the *atbia dagnia* is empowered to settle –by compromise– offenses of insult, assault, petty damage to property or petty theft where the value of the property stolen does not exceed *Birr* 5 (Five). Other than these exceptions, there is no space for traditional procedures, traditional institutions and traditional mechanisms of settlings conflicts.

The justification anticipated by the codifiers for the exclusion of tradition-based procedures ranges from the denial that customary procedures really existed in Ethiopia, to negative comments on its changeability, lack of uniformity, incompleteness, obscurity, and low status.[55] Experts on the Ethiopian criminal procedure law, such as Fisher, however, disclosed that before the Italian invasion of Ethiopia in 1935, there was a working indigenous system of criminal procedure. There were a variety of striking features marking the scheme. Some are common to many African customary systems, such as ordeal, oath-taking, and the position of elders: others may be more specific to Ethiopia, such as guarantors and wagers. The traditional system of criminal proceedings was very deeply rooted in the religious culture and highly stratified society of Ethiopia and relied on the social background of the close-knit rural community for its effectiveness.[56]

5.3 The Draft Criminal Procedure Code

A major policy shift is made in the *Draft Criminal Procedure Code*, which has assigned a chapter for alternative solutions. The first part establishes the principles, effect and procedures of reconciliation. The basic assumption behind the incorporation of reconciliation is to prevent conflicts so as to bring

[54] Stanley Z Fisher (1971), Traditional Criminal Procedure in Ethiopia, *The American Journal of Comparative Law,* Vol. 19, No. 4, p. 709.
[55] David, *supra* note 36, and Krzeczunowicz *supra* note 37.
[56] Fisher *supra* note 54.

sustainable peace within the society.[57] Reconciliation (*irq*) can be made if the crime is simple or chargeable upon private prosecution, and if the accused and the victim agree upon for reconciliation. The reconciliation process can be initiated by the accused, the victim, community leaders, the police, the public prosecutor or the court.

The State recognizes the traditional justice system to exercise jurisdiction and also provides support in terms of using its coercive powers to enforce decisions made by a non-state justice system. The justification for the recognition is founded on the basic assumption that traditional solutions will promote sustainable peace in the community by facilitating community based solution to the crime committed. As long as the consent of the accused in detention is guaranteed, the victim might be consulted. The exercise of jurisdiction in the Draft Code is exclusive and a case addressed by one system cannot be taken afresh to the other system. Moreover, a person may not appeal from the non-state justice system to the state courts and the decision given by a traditional institution is final.[58] The consent of the accused and the victim seems to be the reason that is considered as justification to limit the constitutionally guaranteed appeal right of the parties.

However, customary solutions are not applicable on crimes related to human rights, human dignity, and crimes that endanger national security. When the public prosecutor decides to settle the case in a traditional manner, it shall make sure that there is evidence that makes the suspect guilty. When a decision is made by the traditional institutions, it shall be made in a language spoken in the locality and should be presented to the local district court translated in the working language of the local court where the solution is implemented and the language of the local authority court shall be translated and written in a local district court.[59]

These provisions of the Draft Criminal Procedure Code are indeed positive steps toward enabling the traditional institutions exercise judicial powers throughout the country. Implicitly, this draft law recognizes the procedural and substantive laws that have been practiced by the traditional institutions. However, the questions on the legality of the draft law *vis-à-vis* the constitutional prohibition on jurisdictions of traditional institutions persist.

Moreover, there are issues that remain unanswered in the draft law. These issues include the procedure and means of communication between the Public

[57] *Federal Democratic Republic of Ethiopia Draft Criminal Procedure Code* (Amharic), 2020, Article 164.
[58] Id., Article 168 and 197
[59] Id., Article 176.

Prosecutor and the traditional institution empowered to entertain the case, the mechanisms of enforcing the order of the traditional institutions (such as social disapproval), and the financial or any other support of the state to these institutions. According to officials at the Ministry of Justice, the details on these issues will be addressed by the working manual and directives to be issued after the law is enacted.

6. Policy Frameworks

6.1 Criminal Justice Policy

Ethiopia has introduced a new Criminal Justice Policy in 2011 with the aim of, *inter alia*, rectifying the existing problems and to introduce new legal thinking, practice and procedures into, the Ethiopian criminal justice system.[60] The policy focuses on (i) preventing reasons for criminal offenses and (ii) finding proper and lasting solutions through the standard criminal justice system and other alternatives so as to bring public satisfaction.

The Criminal Justice Policy implies the recognition of the traditional justice system as an integral part of the country's criminal justice system. The *first* setting is when the Attorney General (currently Ministry of Justice) has the opinion that settlement of the dispute through traditional institutions and customary laws brings about the restoration of lasting harmony and peace among the victim and the wrongdoer rather than resolving the case by the state formal justice system. The crime could be serious punishable offence with rigorous imprisonment, or it may be simple crime punishable with simple imprisonment. The *second* situation where investigation or prosecution can be interrupted is in case of crimes punishable with simple imprisonment or upon complaint and if the disputing parties have settled their differences through reconciliation and upon the initiation or request of the parties.

However, the policy does not specify the kind of relationship, the means and manner of communication between the Attorney General or courts and traditional institutions when the Attorney General decides to leave a case to the traditional justice system under these two specific conditions. The practice simply shows that this is a policy document that shows the willingness of the state to give a chance to the traditional institutions to settle cases and restore peace within the society. This element of the policy has not yet been accompanied by implementation at the grassroots in a manner that can clarify

[60] *FDRE Criminal Justice Policy* (Amharic, 2011)

the ways of communications and the concurrent management of issues by the Attorney General and the traditional institutional concerned.[61]

The Criminal Justice Policy creates a procedure for the use of out-of-court mechanisms so as to provide a fair and sustainable solution to a crime. Yet this is too general and lacks clarity. These principles are impliedly assumed to address the gaps in the state-backed criminal justice system, and the policy aspires to attain an effective, fair, impartial, accessible, timely, predictable and transparent criminal justice system. These broad goals cannot be achieved without the traditional institutions in the country.

The policy states two basic principles that deal with (i) reconciling the perpetrator and the victim and requiring the accused to pay compensation to the victim and (ii) the condition that the interests of the public and the victims are better protected by the use of out-of-court mechanisms than the regular court system. Certain conditions are required to be fulfilled to enable the system functional. Accordingly, the type of crime, the character of the accused, and the circumstances of the commission of the crime need to be considered.[62]

The policy states that "certain criminal cases may be referred to the out-of-court mechanism at any stage of the criminal justice process upon the request of the public prosecutor or the accused, or upon a motion of the court" so as to make the criminal justice system speedy and accessible.[63] The Criminal Justice Policy also provides *three* specific conditions which must be fulfilled to refer the criminal case to out-of-court mechanisms. *First*, the accused person must willfully admit to all elements of the crime and sincerely express his repentance in writing after receiving sufficient legal advice to that effect. *Second*, the accused must present an apology to the victim and express his readiness to repair or compensate for the damage caused. *Thirdly*, the accused should be informed, in advance, that he has the right to refuse the referral of the case to the out-of-court mechanism. These are indeed basic elements in the ideals of restorative justice.

[61] Interview with officials at the Ministry of Justice, Oct 20, 2021. The Ministry has issued a directive on criminal cases reconciliation (*irq*) process. The directive provides conditions for reconciliation, venue and time for reconciliation and principles of reconciliation. However, the procedure of case referral to traditional institutions is not addressed in the directive. *See* Directive on Criminal Affairs Reconciliation No. 1/2020, Ministry of Justice.

[62] Criminal Justice Policy, *supra* note 60, p. 39.

[63] Id, p.37.

Guided by these general principles and specific conditions, the police, prosecutors and judges are given discretionary power to refer certain criminal cases –which are punishable by simple imprisonment or only upon private compliant– to out-of-court mechanisms. The Criminal Justice Policy, therefore, provides a general framework to alternative mechanisms that possibly are referring to the traditional justice systems practiced in Ethiopia. The problem, however, is that the policy is not a legislative proposal, but rather a document showing the government's policy objectives. Its implementation thus requires a specific law that clearly defines the alternative mechanisms, aspirations and principles of the policy. No law is yet promulgated to create a space for alternative mechanisms stated in the Criminal Justice Policy save the draft Criminal Procedure Code. Even though the policy implies a framework towards embracing traditional justice systems, more concrete legislative reforms need to be taken.

6.2 Crime Prevention Strategy

The Crime Prevention Policy has employed a definition embodied in the UN Guidelines for the Prevention of Crime which states that "crime prevention comprises strategies and measures that seek to reduce the risk of crimes occurring, and their potential of harmful effects on individuals and society, including fear of crime, by intervening to influence their multiple causes."[64] A broad definition of conflict prevention is adopted which, *inter alia*, does not limit prevention to 'preventing from reemergence', and which instead enables it to include measures of reducing crimes.

The strategic principle of the policy is to undertake appropriate criminal prevention activities by avoiding suitable conditions for crimes and establishing mechanisms that can establish a system to ensure the implementation and follow up of effective criminal prevention activities by formulating the duties and responsibilities of stakeholders and partners in criminal prevention.[65] The Four approaches of conflict prevention are included in the policy document: *developmental prevention* refers to interventions designed to prevent the development of criminal potential in individuals; *community based prevention* approach is designed to change the social conditions and institutions that influence offending in residential communities; *Situational prevention* is structured to prevent the occurrence of crimes by reducing opportunities and increasing the risk and difficulty of offending; *Criminal justice prevention* or *law enforcement approaches* –

[64] Guidelines for the Prevention of Crime ECOSOC Resolution 2002/13, Annex
[65] *National Comprehensive Conflict Prevention Strategy* (Amharic), 2020, p.2

including deterrence, incapacitation, rehabilitation and reintegration– are conducted by law enforcement and criminal justice system organs broadly by giving due attention to the perception of crime in the society.[66]

Under the section that deals with community prevention, the policy document includes community leaders, institutions and organizations, community members, governmental and non-government bodies who provide economic and social services or other governmental and non-government bodies who work on the development of social and economic infrastructures as major players. The Crime Prevention Policy enumerates ten crimes with lists of responsible bodies and activities in charge of their prevention. The major role of crime prevention is entrusted to governmental institutions while nongovernmental organizations, religious institutions, elders and clan leaders are mentioned as responsible stakeholders in the policy. To be specific, clan leaders, elders, and religious institutions are part of the enforcement process on crimes against women, crimes against the child and crimes against the peace and security of the society (usually communal conflicts).

The Ministry of Peace is entrusted with the prevention of crimes against the peace and security of the society that relate to communal conflicts. The policy requires the Ministry to make consultations with concerned bodies, relevant government bodies, religious institutions and other organs to promote peace and mutual respect among nations, nationalities and followers of various religions and beliefs in the course of working towards the prevention of conflicts.

The literature of crime prevention shows the significance of a collaborative, multiagency, multi-sectoral approach that is a key scheme in many crime prevention strategies and programs. This approach enables all relevant stakeholders to work as a team in a coordinated fashion. It shows that the most successful interventions "are those which combine multiple approaches and emphasize multi-agency involvement as no single government or organization is equipped to deal with crime and violence or the underlying causes thereof in their totality."[67] Thus, collaborative approach must be taken at policy making, program development, program implementation, and program evaluation at all levels. The importance of this approach is that "collaboration and coordination permeate other prevention-based approaches to crime, including community policing, the defining characteristic of which is

[66] Id, pp.14-27; see also Brandon Welsh and David Farrington(2009), *Making Public Places Safer Surveillance and Crime Prevention,* Oxford University press, 2009

[67] Stephen Schneider (2015) *Crime Prevention: Theory and Practice* (2nd ed.), Taylor & Francis Group, p.21.

partnerships between the police and the communities they serve."[68] Against this background, the Crime Prevention Policy has failed to mention traditional institutions as key stakeholders of crime prevention.

6.3 Draft Ethiopian Peace Policy Implementation Strategy

Criticizing the peace building policy of the West owing to its inability to bring peace or make a positive contribution to nation-building, the draft strategy enumerates policy drivers, tools and actors of implementation.[69] It adopts the 'Negative and Positive Peace' definition of John Galtung.[70] It recognizes the importance of indigenous knowledge and institutions and states the need for legal, policy and operational support that makes use of their constructive role in ensuring lasting peace.[71] Conflict prevention gets special attention in the policy strategy. The document further acknowledges the need for integrating the deep-rooted community based means of conflict prevention with modern means of conflict prevention.

The Policy is founded on the ultimate goal of creating a society that has moved from conflict and violence to peace and development measured by preventing conflict and a lasting solution to conflicts. It gives due attention to the 'deep-rooted' socio-cultural values of the Ethiopian people and notes their utility for sustainable peace. Moreover, it strives to strengthen traditional conflict resolution institutions and to integrate them with modern conflict resolution systems. With all these positive development, however, it confines traditional institutions to conflict resolution and does not give due attention to the aspects of prevention. Moreover, in spite of its aspirations for the inclusion of community based values and institutions, it does not address the legal, institutional and policy frameworks of integrating traditional institutions in the state systems.

7. Institutional Frameworks

In the realm of institutional arrangements, there are constitutions in Africa that range from a broad recognition of customary authorities or chiefs to more specific arrangements providing for a specific body with specific functions

[68] Ibid.
[69] *Draft Ethiopian Peace Policy Implementation Strategy (Amharic),* Ministry of Peace, 2022.
[70] John Galtung (1964), An Editorial, *Journal of Peace Research*, volume 1 number 1, 1964, pp. 1-4.
[71] Id, p.13

concerning customary law[72]. The examples in this regard include: (i) National House of Chiefs and Regional Houses of Chiefs in Ghana's constitution (ii) Council of Traditional Leaders-empowered to advise the President in Namibia's constitution; (iii) Council of Chiefs-responsible for advising the King on customary issues in the Swazi constitution; (iv) the Botswana constitution that provides for a House of Chiefs which submits resolutions to the National Assembly on Bills affecting customary issues; and (v) Madagascar's constitution that recognizes a customary dispute resolution body called the 'Circle for the Preservation of Fihavanana.'[73]

Kenya's constitutions allows representation in established government institutions, Somalia's charter allows the involvement of traditional leaders when appointing members of parliament and requires the government to work with traditional elders in restoring peace, Angola provides local government should include traditional authorities. In Ethiopia, at the federal level, there is no institutional framework to back up traditional institutions to have wider recognition and perform their functions accordingly.

The Ministry of Peace was established in 2018, and it is empowered, under its constitutive proclamation, to "ensure the maintenance of public order; develop strategies, and undertake awareness creation and sensitization activities to ensure the peace… security of the country and its people."[74] With regard to institutional cooperation, the Ministry of Peace is instructed to work "in cooperation with relevant government organs, cultural and religious organizations, and other pertinent bodies to ensure peace and mutual respect among as well as nations, nationalities and peoples."[75] To this end, the Ministry of Peace has established a department that, *inter alia*, undertakes the functions of coordinating and cooperating with traditional institutions in the country. However, no policy or strategy has yet been crafted to create enabling environments for these institutions.

The House of Peoples Representatives (HPR), the highest legislative body in Ethiopia, has a committee called Peace and Security Standing Committee. The committee is empowered to review governmental organs entrusted to work on peace and security. Asked to respond to the concern of accommodating traditional institutions in the legal framework of the country

[72] Cuskelly, *supra* note 15, p.7.
[73] Id, p.7-9.
[74] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 1097/2018, *Federal Negarit Gazetta*, 25th Year No.8, Article 13(1) (a).
[75] Id, Article 13(1)(c).

and institutional set-up of the house, the chairperson of the committee replied that "we understand the importance of these institutions in fostering peace in the society but we are short of researches how to accommodate them in the process."[76] Similar responses are forwarded from the House of Federation and Federal Police Crime Prevention Division that there is no institutional set-up to create connections with these institutions with a view to preventing crime or conflict in the process.[77] This far, if conflict occurs or if consultation is needed with the traditional institutions in a specific area, there is no formal channel other than approaching them through informal communications.[78]

8. Conclusion

In the 1960s Ethiopia has passed through an abolitionist approach of legal 'modernization' that excluded customary laws and traditional institutions. The post-1991 reality in Ethiopia shows how religious, customary, indigenous and community-based conflict prevention and resolution mechanisms operate concurrently with state institutions with some overlapping mandates. This article has examined the ambiguity surrounding the recognition of traditional institutions in Ethiopia. The FDRE Constitution limits the judicial power of traditional institutions to family and personal matters. The 1960 Civil Code follows an abolitionist approach by repressing pretexting traditional institutions, laws, norms and practices unless they are incorporated impliedly or expressly in the Code. The repeal provision of the Civil Code did not only aim at those customary rules that were inconsistent with the provisions of the Code, but it also set aside customary rules concerning matters provided in the Code, whether they are consistent with the Civil Code or not.

The 2004 Criminal Code does not give due attention to the social conception of crime practiced by traditional justice mechanisms. Although the legal regime on civil procedure opens up space for traditional ways of compromise it requires the ratification of the court. The criminal procedure court leaves no room for the traditional justice system and areas of private prosecution. Yet, it is to be noted that, the draft Criminal Procedure Code duly

[76] *The Chairperson of the Peace and Security Standing Committee*, House Peoples Representatives, Personal Communication, August, 2020.

[77] (Head of Crime Prevention Division, Ethiopian Federal Police Commission, personal communication, October, 2020) and (Chairwomen of Constitutional issues standing committee of the House of Federation, personal communication, August, 2020).

[78] (Head of Crime Prevention Division cited above, Chairwomen's of the committee cited above at the HPR and HoF, Vice director of the Ministry of Peace, personal communication, cited above)

provides an explicit recognition of traditional institutions with exclusive jurisdiction upon the consent of the accused so that the decision given will become final and unappealable.

With regard to the policies examined above, the Crime Prevention Policy and the Early warning system have failed to incorporate traditional institutions as actors in the enforcement process whereas the Criminal Justice Policy recognizes the importance of the traditional justice system as an integral part of the country's criminal justice system. Regardless of the kind of crime, if the Ministry of Justice (MoJ) believes that the settlement of dispute by customary means brings about the restoration of lasting harmony and peace among the victim and the wrongdoer, it may in consideration of public interest decide not to prosecute such a crime. Likewise, in cases of crimes that are punishable with simple imprisonment or upon complaint, the investigation or prosecution can be interrupted if the disputing parties have settled their differences through reconciliation.

However, the Criminal Justice Policy does not specify how the formal and customary justice systems should communicate and interact if the Ministry of Justice decides to leave a case to the customary justice system. Moreover, it ignores the role of these institutions in crime prevention. It is indeed commendable that the Draft Ethiopian Peace Policy Implementation Strategy declares the importance of integrating Traditional Institutions with state institutions. Yet if fails to uncover the policy of integration and tools of implementation. The analysis in the document is unidimensional because traditional institutions are only observed through the lens of conflict resolution.

The analysis in the preceding sections of this article thus reveals that no institutional, legal or policy framework is placed to guarantee the continuous and sustainable existence of conflict resolution or prevention traditional institutions that have not been empowered. Although some developments and draft documents show the government's shift of policy towards accommodating traditional institutions, more concrete steps need to be taken to work out the relationship between the two systems. The most effective way to do this would be through policy reform accompanied by legislative reform and enabling institutional setups. ■

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Presumed Consent as an Option to Improve Ethiopian Organ Donation Law

Natae Ebba Kitila[♣]

Abstract

There are two types of legislation underlying organ donation that may be based on *presumed consen*t and *expressed consent*. In expressed consent, individuals are donors when deceased only if they had registered their consent while alive. In presumed consent, any individual is presumed as a donor when deceased unless "no" is registered. Ethiopia operates under *Expressed Consent* regime. However, the country is under a severe shortage of organs and tissues for transplantation. One of contributing factors for the shortage relates to the legal regime. Based on qualitative research methodology, I argue in favour of modest legislative modification or the need for policy measures because *presumed consent* is believed to fill the gap between supply and demand for organ donation.

Key terms: Organ donation · Presumed consent · Expressed consent · Ethiopia

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1. Introduction

> "Human Nature is not a problem that can be fixed by rules and regulations. All solutions to the existing problems must be based on how people behave, not on how we think they should behave." (Kirk Chisholm)

There are negative and positive left-outs in laws depending on the context of the choice. Mostly the left outs make a room for inaction that can adversely affect social welfare even though inaction in some cases might be of great value if it is harnessed wisely. A noble prize-winning concept about choice architecture influencing choice –a libertarian paternalistic approach– has come up with a solution in changing the context.[1] The notion of changing the context to influence choice can be traced to the works of Sunstein and Thaler. A policymaker may want to do something to influence choice between two options –from Option-A to Option-B. The *first tool* that is popular with policymakers and governments is the *notion of restriction*[2] by simply banning Option-A. When this is done, it leaves people with no option but to choose Option-B. The challenge with the restrictions approach is that they often create a backlash. Mostly, people contend who is the government, after all, to decide what is good for me.

The *second tool* policymaker can exercise is a *carrot and stick option,*[3] incentives. When this option is exercised the policymaker can create a positive incentive such as subsidy or reward, to move the target public from Option-A to Option-B, or the policymaker could create a negative incentive for people that choose to stay at Option-A, such as taxing them. The *third tool* that one can use in pushing choice from Option-A to Option-B is awareness creation. If the majority is at Option-A, the policymaker tries to give enough information about why the majority should be at point B. The above three tools are fairly traditional approaches in influencing behavior. The *fourth scheme*, the focus of this article, is the *notion of choice architecture*.[4] The

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[1] Cass R. Sunstein & Richard H. Thaler, (2003). "Libertarian Paternalism is not an Oxymoron", *The University of Chicago Law Review* , Vol. 70, No. 4 (Autumn, 2003), pp. 1159-1202

[2] A restriction is an official rule that limits what you can do or that limits the amount or size of something. *Restriction definition and meaning, Collins English Dictionary*, https://www.collinsdictionary.com (Last visited: Jan 23, 2022).

[3] The 'carrot and stick' approach is a method of persuasion or coercion characterized by both the offer of reward and the threat of punishment, Carrot-and-stick Definition & Meaning - Merriam-Webster, https://www.merriam-webster.com (Last visited: Jan 23, 2022).

[4] Choice architecture is a method to retain consumer sovereignty (the right to choose) but nudging consumers to make certain choices. The idea of choice architecture originated

policymaker can influence choice without changing economic incentives, without imposing restrictions, and without promotions. This is through wisely harnessing the defaults or the area that remains behind the options. Accordingly, the planner needs to seek the legislative option which is responsive or engaging.

These tools need to be carefully examined in the realm of organ donation in Ethiopia so that the most viable option can inform legislative reform because there are currently many patients seeking different organs to stay alive. There is very wide mismatch between the demands for organ donation *vis-à-vis* very few donors. The problem for the legislature and policy makers is, therefore, how to increase the number of donations and how that can be achieved. Whether the existing system of organ donation in Ethiopia is appropriate given the number of patients deserves further investigation is the central question addressed in this article. To this end, there is a need to examine the options of presumed consent *vis-à-vis* seeking expressed consent, the type of legislative measure that will help Ethiopia to secure more organ donation, and the legislative measures that can secure more organ donation. It is also necessary to examine whether the legislative measure does not have drawbacks, the possible challenges encountered in adopting the legislative measure, and the benefits of such legislative measures.

Most, organ donation laws including Ethiopian legislation are limited to the aspect of allowing donation when the donors give consent. Such laws are criticized for not giving due attention to the vast majority of potential donors. In expressed consent system, explicit endorsement of consent is at the center of the system. On the other hand, the Presumed Consent system presumes the donor's consent from the very beginning. This article focuses on the Libertarian Paternalistic Choice Architecture in the spectrum of organ donation. This approach envisages a law that is responsive to the needs and interests of all subjects of the law, and this is done through enacting laws cognizant of social dynamics or behaviors.

There is a rising interest by regulators, administrative agencies, as well as public administrations towards a better understanding of human behavior based on the results produced by decades of experimental research.[5] Accordingly, there is enhanced attention towards the behavioral dimension of

in a book *Nudge: Improving Decisions about Health, Wealth, and Happiness*. https://www.economicshelp.org (Last visited Jan 23, 2022).

[5] Eldar Shafir (2013). *The Behavioral Foundations of Public Policy*, Princeton University Press, 440 https://doi.org/10.2307/j.ctv550cbm.

legislative enactment. In the past, policymakers usually approached human behavior from the perspective of the rational agent model, which relies on prior analysis. The model assumes that people make insightful, well-planned, highly controlled, and calculated decisions guided by considerations of personal utility.[6] This has (for a long time) been ineffective in terms of the result aspired, if not to an erroneous conclusion. This by and large underscores the need to give emphasis to how law-governed subjects actually react to specific legislation.

The next section outlines the overview of Ethiopia's organ donation legislation. Section 3 discusses the reason why the country needs to reconsider its organ donation law. Section 4 attempts to deliberate on the notion of libertarian paternalistic choice architecture. Section 5 compares presumed consent and expressed consent organ donation laws. Section 6 attempts to examine the possible challenge faced in the course of adopting presumed consent regime, followed by concluding remarks.

2. Overview of Ethiopia's Organ Donation Legislation

Consent is at the very heart of individuals' rights in their bodies. Every individual has the right to do whatever they like with their body, in order to protect and preserve health and personal privacy. Therefore, any examination or treatment done on a person involving any interference with physical integrity is unlawful unless it is done with consent; it constitutes the crime of assault and the tort of trespass to the person.[7]

> According to Article 18/1, "The act by which a person disposes of the whole or a part of his body shall be of no effect … where such act is to be carried out *before (his) death* … (and) if such act (causes) *a serious injury* to the integrity of the human body." The exception to this rule is an act accepted by medical practice (Art. 18/2). A promise for the disposition of one's body in whole or in part before or after death is revocable (Art. 19/1).[8]

Anyone can dispose of the whole or part of his body upon death. However, Article 19(1) of the Civil Code stipulates the revocability of "the act by which he [the donor] has disposed of the whole or a part of his body." This phrase relates to the intention for organ donation and essentially refers to the existence of some act that shows the consent of the donor. The regulation

[6] Ibid

[7] *See* Art 18-22 of the Civil Code of Ethiopia, 1960

[8] Elias N Stebek (2009). *Ethiopian Law of Person*, *Introduction, Exercises and Materials* (Justice and Legal Systems Research Institute, Addis Ababa) p. 146.

enacted by the Ethiopian Food Medicine & Health Care Administration & Control Authority (FMHACA)[9] embodies similar provisions. This authority is currently the Ethiopian Food and Drug Authority (EFDA) which is "established as an autonomous federal government body" based on Article 66 of Proclamation No. 1263/2021,[10] and accountable to the Ministry of Health.[11]

An executive organ and inspector tasked to oversee food, medicine, and health care in Ethiopia was established by Proclamation No. 661/2009.[12] Its mandate includes the issuance of a regulation, and accordingly, it has enacted Food, Medicine and Health Care Administration and Control Council of Ministers Regulation No. 299 in 2013. The regulation can be cited as the first transplantation act to discuss deceased donation in a clear manner. Particulars of the regulation require permits for transplant to be undertaken only at hospitals that have been issued with transplant license. They also require that living donation must be between individuals related by blood or marriage. Moreover, the National Transplant Committee must review and approve donor and recipient pairs before surgery.

Moreover, the regulation provides for the possibility of deceased donation. In such a case, organ donation can be done without the need to be related by blood or marriage.[13] The provisions applicable in the case of deceased donation under Art 60 of the Regulation include the following:

1) Where a person has consented to donate his organs or tissues upon his death, the organs and tissues that can be used for transplantation may be collected upon his death.
2) No health institution may collect organ, and tissues pursuant to sub-article (I) of this Article without obtaining a special license from the Authority
3) Where there is no written evidence showing express prohibition of donation made by the deceased, while alive, and where the spouse, children or parents or siblings of the deceased, in the order of their list,

[9] *See* EFDA – Ethiopian Food and Drug Administration, http://www.fmhaca.gov.et/ (last visited Feb 20, 2022).

[10] Definition of Powers and Duties of the Executive Organs Proclamation No. 1263/2021, Art. 66.

[11] Id., Art. 95

[12] Food, Medicine and Health Care Administration and Control Proclamation No. 661/2009

[13] Food, Medicine and Health Care Administration and Control Council of Ministers Regulation No. 299/2013, Art-59 (2) 'Any person may donate or prohibit the removal of his organs or tissues in any other way while alive or after his death.

> agree with the donation, organs and tissues that can be used for transplantation may be collected from the deceased. …

Articles 59 to 62, *inter alia*, deal with organ donation and transplantation in Ethiopia and they require consent. The law requires express consent which can be revoked by the promisor. And as cited above, Article 60(3) of the Regulation allows family members and relatives of the deceased to agree with the organ donation unless the deceased expressly prohibits such donation.

Even though it is not expressly stated in the law, Ethiopia's current organ donation law, therefore, follows the *Expressed Consent* system, also known as Opt-In. Under this system the person himself should agree or expressly consent to donate an organ upon death and/or their family must decide to donate the deceased's organ. This principle works under "presumptions of non-consent"[14] in the absence of express consent. Therefore, anyone satisfying the law of status under the Civil Code of Ethiopia and the requirements of capacity is legible to donate or promise to donate his/her organ. In the absence of a deceased's consent while alive, it's up to the transplant professional to obtain the permission of the deceased's family members, in the order of their list stated under Article 60(3) of the Regulation.[15]

3. Do We Need to Re-consider the Organ Donation Law?

Various factors can enhance or reduce the magnitude of organ donation in a country. The supply of organs is a crucial element in the continued success of organ transplantation. However, the express consent system fails to meet the ever-growing demand for transplantable organs. The current express consent organ donation system in Ethiopia fails to procure enough organs, at least in part, because it operates under the assumption that individuals are not organ donors in the absence of their express consent.

Even though organ donation should not necessarily give prime attention to public altruism,[16] it should not lead to realities whereby many organs end up in the graveyard. Normally, the number of potential deceased donors is higher than the number of living donors motivated by sense of altruism. The vast majority of organ donation in Ethiopia comes from living donors. In addition

[14] Maxwell J. Mehlman (1991). "Presumed consent to organ donation: a reevaluation", 1 *Health Matrix* 31.

[15] Regulation No. 299/2013, Article 60(3)

[16] Altruism is when we act to promote someone else's welfare, even at a risk or cost to ourselves. Altruism Definition | What Is Altruism, https://greatergood.berkeley.edu/topic/altruism/definition (last visited Feb 21, 2022).

to the unavailability of deceased donations, Ethiopia has not established a legal framework that recognizes a brain death.[17] Recognizing brain death is the best way to procure a large number of organs. Recognition of brain death in Ethiopia is of paramount importance in enhancing the presumed consent.

Although Medical science has made possible the transplantation of various organs such as kidneys, liver, lungs, heart, pancreas, intestines, hands and eyes, Ethiopian hospitals are only capable of transplanting eyes and kidneys. Facilities that provide dialysis is a recent phenomenon in the country, and it started in 2001.[18] Transplantation of the kidney –which started in 2015– is the most recent experience in Ethiopia. The same is true for corneal grafting.[19] Even after the availability of these services, the service-providing centers have encountered a huge gap between the supply and demand for organs.

In the year 2016, there were 30 hemodialysis centers with a total of 186 hemodialysis chairs and approximately 800 patients on hemodialysis.[20] Cost of a single hemodialysis session is unaffordable for the majority of the patients. Among the patients on maintenance dialysis, a study conducted in 2013 indicated that only about one-third received treatment.[21] In medical treatment, the best treatment for chronic kidney disease is renal transplantation or kidney transplantation. However, from 2015 to 2018 only 85 kidney transplantations were made by the National Kidney Transplantation

[17] Brain death is defined as the irreversible loss of all functions of the brain, including the brainstem. The three essential findings in brain death are coma, absence of brainstem reflexes, and apnoea. An evaluation for brain death should be considered in patients who have suffered a massive, irreversible brain injury of identifiable cause. A patient determined to be brain dead is legally and clinically dead.

[18] Yewondwossen T. Mengistu & Addisu M. Ejigu, *Global Dialysis Perspective: Ethiopia*, KIDNEY360 10.34067/KID.0006902021, 4 (2022), https://kidney360.asnjournals.org/lookup/doi/10.34067/KID.0006902021 (Last visited: Aug 11, 2022).

[19] Corneal transplantation, also known as corneal grafting, is a surgical procedure where a damaged or diseased cornea is replaced by donated corneal tissue (the graft). B. E. Frueh & M. Böhnke, *Corneal grafting of donor tissue preserved for longer than 4 weeks in organ-culture medium*, 14 CORNEA 463–466 (1995).

[20] Ahmed, Momina M.; Tedla, Fasika M.; Leichtman, Alan B.; Punch, Jeffrey D. (2019), *Organ Transplantation in Ethiopia*, https://journals.lww.com/transplantjournal/Fulltext/2019/03000 (last visited Mar 23, 2019).

[21] Tamiru Shibiru, Esayas Kebede Gudina, Belete Habte, Amare Deribew & Tewodros Agonafer (2013), *Survival patterns of patients on maintenance hemodialysis for end stage renal disease in Ethiopia: summary of 91 cases*, BMC Nephrol 14, 127 https://doi.org/10.1186/1471-2369-14-127.

Center (NKTC). Even though, the data until 2018 showed 800 patients in 30 hemodialysis centers, only 85 of them got transplantation,[22] *inter alia*, owing to low donation rates.

As indicated in a study conducted in 2017, between 130 and 150 corneas are reported to be collected yearly.[23] In a national blindness study released in 2006, 300,000 Ethiopians were blind due to corneal scarring. From 2003 to 2017 the Eye Bank distributed 1,818 corneas for transplant, and out of these 1,192 transplants were done during the six years following its partnership with SightLife and HCP. [24] Even though these figures are not based on current data, they show the existing disparity between demand and supply of corneal grafting. The best option to rehabilitate impaired vision is corneal transplantation. However, the potentially limiting factor in planning transplantation is the shortage of donated corneas. It is also aggravated by the availability of inefficient domestic eye banks, lack of potential donors, and weak cooperation of close relatives to collect pledged cornea.[25]

The increased success of organ transplantation has led to the steadily rising demand for organs which substantially exceeds the supply.[26] As organ donation remains unchanged, the rise in the death toll and patients on the waiting list worsen the scarcity of organs. Professionals are thus continually expressing their expectations of legislation that enhances the availability of organs commensurate with the need.

4. The Notion of Libertarian Paternalistic Choice Architecture

Although Ethiopia has enacted laws that allow donation, the law does not sufficiently address the demand for organ transplantation. Choices will inevitably be influenced by default rules, framing effects, and starting points, and therefore, libertarian paternalists attempt to steer people's choices in welfare-promoting directions without eliminating freedom of choice.[27] This is most common in organ donation law. For instance, in the Opt-In (*Expressed*

[22] Ahmed et al., *supra* note 19.

[23] Mohammed Seid Hussen, Kbrom Legesse Gebreselassie, Asamere Tsegaw Woredekal & Nebiyat Feleke Adimassu (2017). *"Willingness to Donate Eyes and Its Associated Factors among Adults in Gondar Town, North West Ethiopia," BMC Ophthalmology* 17 (Last Visited March 3, 2021), https://doi.org/10.1186/s12886-017-0577-1

[24] "Eye Bank of Ethiopia Celebrates 15 Years of Service," Last Visited March 25, 2021, https://www.cureblindness.org/eye-on-the-world/news.

[25] "Eye Banking: An Introduction", https://www.ncbi.nlm.nih.gov/pmc/articles/ (Last Visited March 26, 2022)

[26] Observation of St. Paul's Hospital Millennium Medical College- SPHMMC

[27] Sunstein & Thaler, *supra* note 1, at 1162.

Consent) system, the framing mostly entails "If you subscribe to donate, you will be a donor" and the underlying default position is a non-donation. Hence the system is highly criticized for letting the majority of potential donors to be non-responsive.

In any legislative process, there is an inevitable presence of choice architecture. This architecture always struggles in articulating options. In organ donation laws too, the architecture has a choice to frame an option between laws upholding strict freedom of choice or maintaining societal wellbeing via default rules. The choice architecture thus crafts the options in a way that enhances societal welfare. In crafting the choice there should be some level of paternalism that will take into consideration societal welfare. In addition to being paternalistic, it should be libertarian. This is to say, there has to be some level of freedom of choice maintained. What a libertarian paternalistic choice architecture (the legislature in our case) can do –in making organ donation law– is to presume the consent of all. If individuals are not willing to donate their organs upon death they can simply *opt out* from the presumption. In this case, the paternalistic approach is *meant* to save life and the notion of libertarianism involved is the *opt-out* option. Libertarian paternalism does not avoid freedom of choice, but it will *nudge*[28] individuals. It makes individuals cautious in the process rather than being passive.

A default is a very powerful nudge, as it requires one to actively object the system to make it non-functional. Sometimes, it's possible to design situations where decisions need to be made in a way that if you decide automatically, you naturally make the right choice. The default is set up in a way that if you do nothing, you'll still do the right thing by sticking to the pre-set standard. As Cass R. Sunstein notes:

> Whether or not we notice them, default rules are omnipresent. He argues that defaults establish settings for many activities and goods, including cell phones, rental car agreements, computers, savings plans, health insurance, and energy use. In countless domains, they identify the consequences if choosers do nothing. In part because of the power of inertia, default rules tend to stick.[29]

[28] "[A] nudge is a *subtle shift in the way options are presented***,** making the preferential choice the most attractive, to help people make the best decision. Nudges are quite powerful, as they tend to take advantage of people's existing intentions and make it easier to enact them.": https://www.itcilo.org/pt/node/1506

[29] Cass R Sunstein (2013). "Deciding by Default", 162 *University of Pennsylvania Law Review* 57.

In most organ donation laws, donation can take place based on the free will of the donors. It is few who do not desire to donate, while the vast majority ignore the system. So, it is necessary to bridge the gap between ignorance and the system. Nowadays, default is a common practice employed to bridge the gap. For instance, in most online platforms including social media, the apps will gather users' information unless the user prohibits such interference. Accordingly, in organ donation laws too, the default rule suggests presumption of consent unless the presumed donor *opts out* from the presumption. The following section discusses the two most common consent regimes in the sphere of organ donation.

5. Presumed vs. Expressed Consent

The shortage of organs available for transplant has been a serious worldwide problem since such surgeries were first made feasible and safe several decades ago.[30] Countries relied on different strategies to alleviate this problem with varying levels of success. There is visible disparity in having higher or lower rates of organ donation mainly owing to the kind of the legislation that is adopted.[31] Two most common types of legislation underlie organ donation. The *opt-in* and *opt-out* systems, are also known as *informed consent* and *presumed consent* regimes respectively. In countries following opt-out consent, anyone is a potential donor upon death.[32] On the contrary, in the *explicit consent* or *opt-in system*, individuals are donors when deceased only if they had registered their consent while alive. The opt-out system is present in some European countries, although it is not uniformly enacted in these countries.

The opt-in or opt-out legislation has its own default area. However, defaults in the two systems vary according to the context adopted. Consequently, any proposed amendment whether opt-in or opt-out legislation is an amendment of context regarding what should be the default position. The option regarding

[30] Sheldon Zink, Rachel Zeehandelaar & Stacey Wertlieb (2005), "*Presumed vs Expressed Consent in the US and internationally*", 7 *AMA Journal of Ethics* 610–614, https://journalofethics.ama-assn.org/article/presumed-vs-expressed-consent-us-and internationally/2005-09 (last visited Feb 19, 2022).

[31] Lee Shepherd, Ronan E. O'Carroll & Eamonn Ferguson (2014). *an international comparison of deceased and living organ donation/transplant rates in opt-in and opt-out systems: a panel study*, 12 BMC MED 1–14, https://bmcmedicine.biomedcentral.com/articles/10.1186/s12916-014-0131-4 (last visited Jan 28, 2022).

[32] The meaning of default options for potential organ donors, https://www.pnas.org/content/109/38/15201 (last visited Jan 28, 2022).

the default position highly determines the response to that legislation. Any law with an effort to increase the consent for donation needs to plan on default or the grey area.

5.1 Expressed consent laws

In the *expressed consent* system, individuals are considered as donor when deceased if their consent is registered while alive. So, the default position in such a system is non-donation because silence amounts to the non-acceptance of the donation. Failure to enrol in the donation scheme (irrespective of the reason) automatically classifies a person as a non-donor, and in effect, there is a lesser probability of individuals to engage in organ donation. The presumption is non-donation, and individuals can easily avoid the effort to give their consent. Therefore, the probability of securing higher donation rate is narrow, as the system depends on those individuals who take the initiative to register their consent. Unlike the opt-out system, legal next-of-kin are eligible for authorization in the expressed consent system. Yet, the consent of the donor is given priority, and family consent is consulted upon the death of the donor.

The United States, Denmark, the United Kingdom, Canada, and Brazil are some of the countries that operate under a model of expressed consent. A Gallup poll found that 70 percent of the US respondents said they wanted to donate their organs; however, the proportion that is registered to do so is significantly lower.[33] Similarly, in the UK, only 15 percent of the public formally join the National Health Service Organ Donation Register.[34] Despite public opinion polls, the actual donors' rate registered for donation is very low. The opt-in or Express Consent regime thus presents difficulties in securing many organs. The barriers include factors such as family consent, psychological factors, and awareness.

5.1.1 Family consent

In opt-in system, family consent and family refusal is a major limiting factor in the success of organ transplantation.[35] Family's refusal should not be underestimated in this regard. The Ethiopian Eye Bank acknowledges this problem. Weak family cooperation in the procurement of deceased cornea is

[33] Zink, Zeehandelaar, and Wertlieb, *supra* note 30 at 612.
[34] Ibid.
[35] Laura A. Siminoff, Nahida Gordon, Joan Hewlett, and (2001). "Factors Influencing Families' Consent for Donation of Solid Organs for Transplantation," *Jama* 286, no. 1: 71–77.

one of the impeding factors in eye graft. It also has an adverse impact in the course of implementing the decision of posthumous organ procurement promised by the deceased. In Ethiopia, donor must express his/her consent to the authority before his death. When he/she dies family will be asked for their consent as per Art 60(3) of the Regulation as cited earlier in Section 2.

Family consent is highly dependent on whether the family is aware of the deceased's wishes.[36] If a family member who is registered to donate his/her organ has not informed the legal next of kin, there is a high probability of refusal from family members. The family of the deceased might feel harassed or pressured in the event of being asked about their consent.[37] Admittedly, it adds stress on relatives of the deceased when they are asked about the procurement of the organ. Thus, it is difficult for hospitals to get the consent of family members.

5.1.2 Psychological factor

There are no data on public perception of organ donation and transplantation in Ethiopia. Countrywide investigation is required to know the society's perception. For the purpose of some insights, I have tried to explore the perception of individuals on my network. In doing so, I created a poll on Facebook. The question presented on the poll created is, whether the participants responding to the poll are willing or promise to donate their organ upon death. The poll provided two options, i.e., whether the respondent is willing or not. 75% of participants were willing to donate.[38] But none of them took a step to get registered for donation.[39] What accounts for such disparity between intention and action is, at least partially, because many people fear to envision their own death but they don't fear to respond to the issue at a conceptual level. [40]

Further, research conducted on a willingness to donate cornea in Gondar by Hussein (in 2017) proved the same. A community-based cross-sectional

[36] Jennifer Chandler (2005). *Priority Systems in the Allocation of Organs for Transplant: Should we Reward Those Who Have Previously Agreed to Donate?* 13

[37] Siminoff et al., *supra* note 35.

[38] The sample size is 2432 Facebook friends. However, participants are only 122 friends. What has to be underlined here is not about the validity of the sample size, but is meant to show the disparity between intention and action. (1 November 2022).

[39] This is identified from subsequent conversation made with friends.

[40] Fady Moustarah (1998), *"*Organ procurement: let's presume consent*"*, *CAN MED ASSOC J* 4.

design study was employed for the study.[41] Around 57% of the participants responded that they have heard about it. However, none of the participants took a step to donate. This indicates the psychological factor that participants want to be buried with their whole bodies.

5.1.3 Difficulty in continuous Awareness Creation

It is difficult to mobilize and allocate sustainable budget to enhance the awareness of the public at large to Opt-In. In one study, it is stated that participants who had the educational status of high school, and College/University were 2.90 and 2.23 times (respectively) more likely to be willing to donate their eyes than those who had no formal education.[42] It was also found that educational status, awareness and religion were identified as statistically significant factors.[43] The study suggests that planning awareness creation programs have strategic importance to mobilize the community. However, this requires the requisite amount of budget.

5.2 Presumed Consent Laws

This model takes the assumption that all individuals are automatically donors unless a "no" is registered. In this form of organ donation, unless an individual votes out from the presumption of being a donor, he/she is presumed to be a donor. The probability of having a higher donation rate is wider than the opt-in regime. The default position in the absence of express objection is a donation. For any country which values the dignified burial of individuals opt-in is an option. On the other hand, for a country that values saving lives, opt-out is the solution.

In the opt-out system, explicit consent is not required. It is sufficient that the deceased person did not object while s/he was alive.[44] An opt-out system can be "hard" or "soft" opt-out system. In a "hard" system, the lack of an objection from the deceased is sufficient authority for organ removal to proceed regardless of the family's wishes, which are neither considered nor

[41] A community-based cross-sectional survey was conducted on 774 adults who were selected using multistage random sampling in Gondar town, North West, Ethiopia. The data were collected through interviews.

[42] Mohammed Seid Hussen et al., *supra* note 23.

[43] Ibid.

[44] Remco Coppen, Roland D. F Riele1, Richard L. M Arquet1, Sjef K. M. Gevers (2005), "*Opting-out Systems: No Guarantee for Higher Donation Rates," Transplant International 18*, no. 11 (November): 1275-1279.

requested.[45] In such a system the consent of the legal next of kin will not be considered. The presumption here is outright, disregarding the consent of the deceased family.

Few countries however strictly follow this "hard" system, with most presumed consent nations using the "soft" model, whereby physicians still consult with family members, such that they have the opportunity to explain the law to relatives and ask them if they know whether the patient had an unregistered objection to organ donation.[46] In a soft system, families are consulted about the likely fate of the organ procurement even though no objection is registered by the deceased. Whether or not an opt-out system can be ethically and legally defended as a feasible option for Ethiopia depends on various issues. The first issue that can be considered is whether presumed consent would lead to increased availability of donor organs and tissue in the country. On the Bulletin of the World Health Organization (WHO) 16 December 2014, it was elucidated that:

> Explicit opt-out laws have long been among the major interventions used to increase the pool of potential donors in countries such as Austria, Belgium, the Czech Republic, Finland, France, Greece, Hungary, Israel, Italy, Luxembourg, Norway, Poland, Slovenia, Spain, Sweden, and Turkey. There is evidence that supports the association between presumed consent and increased donation rates and that countries with opt-out laws have rates 25 to 30% higher than those in countries requiring explicit consent. However, presumed consent appears to be only one of several influential factors.[47]

WHO in its bulletin underlined the significance of adopting the opt-out system. It was noted that the increase in donation rate from 25-30% increase in donation than those countries following opt-in system. It is argued that switching to a presumed consent law would increase the organ donation rate, the basic idea behind this being that the presumed consent system benefits from the organs of donors who have not declared any preference for a

[45] Jennifer Dolling (2009), *Opting in to an opt-out system: presumed consent as a valid policy choice for Ontario's cadaveric organ shortage*, (LLM thesis, Faculty of Law, University of Toronto) 18.

[46] Jennifer M. Krueger (2000). "Life Coming Bravely Out of Death: Organ Donation Legislation Across European Countries" 18 *Wis. Int'l L.J.* 321 at 331

[47] WHO | Increasing organ donation by presumed consent and allocation priority: Chile, WHO, https://www.who.int/bulletin/volumes/93/3/14-139535/en/ (last visited Mar 21, 2019).

donation while living.[48] Comparisons between countries are difficult to interpret because there is a myriad of other factors (necessary to ensure a successful transplant program) which are highly variable from country to country. Such factors include the predominant cause of death, the availability of trained staff and transplant surgeons, and the number and characteristics of patients on the waiting lists.[49] Yet, it is possible to say that legislation takes the lion's share.

It is not easy to evaluate the proposition that an opt-out system leads to increased availability of donor organs, given the number of variables that can impact donor rate.[50] However, it important to go through the experience of a country in adopting an opt-out system. For example, the experience in Spain shows the highest donation rate through adopting opt-out legislation among European countries. Spain adopted the opt-out system in 1979, and it appears that the decision to appoint donor transplant coordinators to every ICU in the country, not only those hospitals with a transplant unit, contributed largely to Spain's success by increasing the likelihood that opportunities would not be missed to recover organs from potential organ donors who died in smaller hospitals.[51]

One can find arguments that the success in opt-out countries is not because of the legislative measure taken. Kennedy stated that factors other than legislative defaults have been hypothesized to affect deceased donation rates, including the level of wealth, religious and cultural responses to death and the body after death, social norms, education, and the social security system.[52] Furthermore, Price states that "a highly organized and well-resourced system, employing large numbers of transplant coordinators in a decentralized system,

[48] Philippe Fevrier and Sebastien Gay (2004). *"Informed Consent versus Presumed Consent: The Role of the Family in Organ Donations*".

[49] Kathleen Robson, "*Systems of Presumed Consent for Organ Donation - Experiences Internationally*" 9 (Scottish Parliament Info Center (SPICe), Briefing No. 05/82, (January 29, 2023), http://www.scottish.parliament.uk/business/research/briefings-05/SB05-82.pdf at 11.

[50] Teri Randall (1991). "Too Few Human Organs for Transplantation, Too Many in Need and the Gap Widens," *Jama* 265, no. 10: 1223–1227.

[51] Sean T. Gallagher (2004). "The Spanish Model's Capacity to Save Lives by Increasing Organ Donation Rates" 18 *Temp. Int'l & Comp. L.J*. 403 at 411.

[52] I Kennedy, RA Sells, AS Daar, RD Guttmann, R Hoffenberg, M Lock, J Radcliffe-Richards, N Tilney (1998). The case for "presumed consent" in organ donation, 351 *The Lancet* 1650–1652.

can itself have a major impact on donor rates."[53] Convincing evidence that presumed consent can lead to higher procurement rates is found in a study by Abadie and Gay, who constructed a dataset on organ donation rates and potential factors affecting organ donation and used a panel of twenty-two countries over the ten years, between 1993 to 2002, to analyze the impact of presumed consent laws on donation rates.

> Abadie and Gay recognized other factors that appeared to have had an impact on donation rates, such as the predominant cause of death, the availability of beds and staff in ICUs, the number and efficiency of transplant coordinators, the number of transplantation surgeons, the number of specialized units in the region, and the number and characteristics of patients on waiting lists, including which organs they required, as well as religious and cultural views of and attitudes towards death and the body. However, using regression analysis they found that although these factors accounted for some of the variations in the donor rates, presumed consent laws had "a positive and sizeable effect on organ donation rates," and when other determinants of donation rates were accounted for, presumed consent countries had on average roughly 25–30% higher donation rates than informed consent countries ...[54]

Therefore, irrespective of various contributory factors stated above, there is a robust justification for Ethiopia to amend its legislation towards presumed consent system.

6. Challenges on Ethiopia's Possible Success

6.1 Ethical Concerns

Questions concerning the boundary between life and death have cultural roots in many societies. Bowman and Richard note that "the space between life and death is socially, culturally and politically constructed, and is fluid and open to dispute."[55] Ethiopian society has its own perspective on deceased donation. A study conducted in Gondar to identify willingness to donate eyes revealed that 25.7% of participants want dignified burial (without losing any part of their body), and 15.1% of the participants believe there is religious restriction. In the meantime, extensive awareness creation program should be conducted,

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[53] David Price (2000). Legal and Ethical Aspects of Organ Transplantation (Cambridge University Press).

[54] Dolling, *supra* note 45

[55] Kerry Bowman and Shawn Richard (2004). "Cultural considerations for Canadians in the Diagnosis of Brain Death*"* 51:3 *Can. J. Anesth*, at 273, 274.

to enhance the view that such thoughts do not have a religious basis. For example, a Muslim scholar, Dr. Zakir said that in Islam it is not necessary to die maintaining physical integrity.[56] Likewise, in the Holy Bible, there is no verse that deals with organ donation.[57] If individuals are hesitant, they can opt out from the system.

6.2 Disregard of consent in the Opt-Out system

Some argue that the presumption of consent is misleading and in fact, in the opt-out system there is no consent at all. Under presumed consent, the argument goes, the language of presumed consent is adopted even when there is no basis for this presumption, and according to the critics, it is not possible to presume that everyone who has not executed an opt-out, in fact, would want to have their organs used.[58]

The opt-out system is also criticized for relying on an individual's silence. In this regard some argue that silence may not be "universally indicative of a deliberate undertaking[59] because it cannot be considered as agreement, and it may be construed otherwise. Accordingly, critics argue that it is not fair to consider tacit consent as if it is deliberate intention.

On the other hand, the Committee on Increasing Rates of Organ Donation stated that silence could be valid and effective consent, depending on the nature and structure of social practices, as well as the competence and understanding of those whose silence was presumed to be consent, and the

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[56] There is no verse in the Holy Qur'an that directly prohibits or allows organ donation, and it is silent on that issue. There were various conferences conducted on this issue by various Ulemas throughout the world, including Malaysia, Jeddah, Riyadh, and India. According to these conferences, organ transplantation is allowed, if it satisfies 3 conditions. First, the organ donated to a recipient should be directed to save life. Only if life of an individual is in danger, and seeks donation. Second, the person donating the organ should not do it for economic reasons. Third, organ donation should not cause loss of the donor's life.

[57] The Bible, especially the New Testament provides guiding principles that can be applied to all situations at all-time rather than separate rules for every segment of life. As a result, Christians can apply the general rules to their day-to-day activities. The same principle applies concerning organ donation. There is no Bible verse that prohibits organ donation, and charity is rather encouraged. What is required is that organ donation should be based on the donor's free will, and not by coercion.

[58] Robert M. Arnold MD, *et al* (1995), editors. *"Procuring Organs for Transplant: The Debate over Non-Heart Beating Cadaver Protocols",* Baltimore: The Johns Hopkins University Press, at 202.

[59] Marie-Andrée Jacob (2006). "Another Look at the Presumed –Versus-Informed Consent Dichotomy in Postmortem Organ Procurement" 20(6) *Bioethics*, at 294-295

voluntariness of their choices.[60] Accordingly, the opt-out system can duly imply tacit consent because the donor is empowered with the lifetime right to opt-out in objection of donation. Under this view, failure to opt-out can be considered as the presumption of consent. This can be plausible assuming that the deceased in question –was during life– aware of the regime and the implications of action or inaction, had a reasonable time within which to object, and that the potential effects of refusing were not extremely detrimental.[61]

It is hardly possible to secure the consent of all citizens of Ethiopia and we cannot assume that all would agree. However, after in-depth awareness creation, it is possible to enforce an opt-out system. To those anti-libertarians who are suspicious of freedom of choice and would rather prefer to embrace welfare, it is often possible for paternalistic planners to make common cause with their libertarian adversaries, by adopting policies that promise to promote welfare and at the same time make room for freedom of choice.[62]

Although some critics of presumed consent claim that a presumption of organ donation takes away an individual's freedom and violates their personal autonomy, one can argue that presumed consent does not negate the right of individuals with respect to their bodies, as a means of refusal is always provided and individuals are given ample opportunity to object during their lifetime. A person can do little before their death to ensure that their organs will not be donated by their family after death, but under an opt-out system, that person is better able to control the situation because there would be a formal mechanism to record their objection that would have to be respected.[63]

6.3 Differing interests

A country's choice between the opt-in and opt out options in organ donation depends on which interest is needed to be addressed. There is the interest of the deceased in only having their organs donated following their prior wishes, the interest of society in overcoming the organ shortage, the interest of the

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[60] James Childress and Catharyn Liverman (2006), editors. *Committee on Increasing Rates of Organ Donation, Organ Donation: Opportunities for Action*, Washington D.C.: The National Academies Press, at 209

[61] J. Childress (1988). "*Ethical Criteria for Procuring and Distributing Organs for Transplantation" in D. Mathieu, ed. Organ Substitution Technology: Ethical, Legal and Public Policy Issues*, Boulder: Westview Press, 87 at 96.

[62] Sunstein & Thaler, *supra* note 1.

[63] M. A. Somerville (1985). "*'Procurement' vs 'Donation'--Access to Tissues and Organs for Transplantation: Should 'Contracting out' Legislation Be Adopted?"* Transplantation Proceedings 17, no. 6 Suppl 4 (December): 53–68.

recipient in being saved, and the interest of the family of the deceased in having their emotional stability preserved at a time of loss.[64] Accordingly, the choice between the two systems certainly expresses the weight given to the preferred interest.

Whether consent for organ donation should be expressed or presumed depends on how one weighs the interests of those awaiting organ transplants. Although utility as well need not be neglected in the political process of lawmaking, utility alone would not justify the ethics of choice. Organs from the dead are a potential source of life for others. Thus, from a utilitarian perspective, enhancing the opportunities for organ donation is highly valuable with the potential to save lives. [65] Yet, presumed consent or opt-out regime does not consider human dead bodies as 'spare parts'. On the other hand, the societal importance attached to donated organs in an opt-out policy puts the burden on those who object to organ donation to register their objection. Jennifer claims that this regime does not radically deviate from traditional humanistic values because "by making the basic presumption, one which favors life and thus putting the burden of objecting upon persons who would deny life to another, the policy of saving human life is given priority."[66]

6.4 Implementation Issues

The burden of registering refusal to donate need not be unduly heavy to impose on individuals and that simple mechanism for registering an objection could easily be made available so as to provide ample opportunity for objection to organ donation.[67] Legislative change should be duly communicated to citizens about the opt-out legislation and the means to opt-out. Moreover, it would be necessary for public education to precede reform, with a sufficient period of time prior to the enforcement of presumed consent legislation to ensure that people had enough time to register their objections.[68] After the introduction of opt-out legislation, a rise in donation rates would

[64] Kelly Ann Keller (2002). "The Bed of Life: A Discussion of Organ Donation, Its Legal and Scientific History, and a Recommended Opt-Out Solution to Organ Scarcity," *Stetson L. Rev*. 32: 855.

[65] *See*, for example, Abadie, Alberto and Gay, Sebastien, The Impact of Presumed Consent Legislation on Cadaveric Organ Donation: A Cross Country Study (July 2004). NBER Working Paper No. w10604, Available at SSRN: https://ssrn.com/abstract=563048

[66] Dolling, *supra* note 45.

[67] Ibid

[68] Ibid

have to be anticipated in advance so that hospitals are prepared to handle additional operations and post-operative care for transplant patients.

Moreover, implementing opt-out considerably requires cost for building suitable infrastructure. This includes the cost for public awareness and subsequent education. Capital expenditures would also be required for the development and establishment of a secure database, running costs, the cost of the initial data entry, and the ongoing training of healthcare professionals.[69] Indeed, there is shortage of hospitals in Ethiopia in quality and quantity, and this certainly exerts pressure on them to work beyond their capacity. Yet, enhanced organ donation and organ transplantation rates can, for example, reduce dialysis cost approximately three times as compared to the cost of successful transplantation.

7. Conclusion

The advance in the transplantation of human tissue and organs is of a paramount societal benefit in saving lives. This demands societal cooperation and further requires behaviourally informed legislative frameworks. Laws adopted in any society are, *inter alia*, expected to enhance the level of care and concern for members of the society at large. In the Ethiopian context, many die and remain blind due to the shortages in organ donation because the supply of organs is dependent upon living donation.

The donation rate within a society can be attributed to different contributing factors. As the discussion above shows, the adoption of a presumed consent system can indeed enhance organ donation rates. Therefore, we must be cognizant of the ramifications of our public policy choices and the failure of the current *opt-in* system to bridge the gap between the supply of organs for transplant *vis-à-vis* the hope and despair of many patients who are under imminent danger of losing their lives. A modest legislative modification or designing policy that presumes consent in terms of deceased organ donation can thus save many lives.

[69] R. Rieu (2010), "The Potential Impact of an Opt-out System for Organ Donation in the UK," *Journal of Medical Ethics* 36, no. 9 (September 1): 534–38.

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The Room for Imposing Performance Requirements on Foreign Investors under the Ethiopian Legal Regime

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Abstract

There is the need to maximize the benefits from Foreign Direct Investment (FDI). As studies suggest, performance requirements can be used as an important policy instrument for maximizing benefits of FDI and countering potential abuses of foreign investors. This article examines the existence of a room for applying performance requirements on foreign investors in Ethiopia and explores challenges and opportunities that may arise in doing so. To this end, qualitative methodology, involving both doctrinal and non-doctrinal legal research approaches have been employed. Primary and secondary data are utilized; semi-structured interviews were used as data collection tools for gathering data from respondents. The findings indicate that although there is the policy and legal premise to apply performance requirements, Ethiopia is not imposing adequate performance requirements on foreign investors. The absence of adequate requirements does not enable Ethiopia to gain optimal benefits from foreign investment. Therefore, Ethiopia should apply performance requirements such as export performance, local content, and technology transfer requirements to ensure optimal benefits from FDI and boost its contribution towards sustainable development.

Key terms:

Performance requirement · Foreign investment · Policy instrument · Sustainable development

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Contents

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1. Introduction

The gains of Foreign Direct Investment (FDI) do not accrue immediately across countries even though it is an integral part of an open and effective international economic system. Neither inflows of FDI nor materialization of the possible benefits from such inflows are automatic because commercial interests of foreign companies do not always go in line with host countries' development goals.[1] Thus, obtaining the potential benefits from FDI is not

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Acronyms

BIT	Bilateral Investment Treaty
EIC	Ethiopian Investment Commission
FDI	Foreign Direct Investment
FDRE	Federal Democratic Republic of Ethiopia
PSRC	Policy Study and Research Center
GATT	General Agreements on Trade and Tariffs
ICSID	International Convention on the Settlement of Investment Disputes
IIT	International Investment Treaty
LDCs	Least Developed Countries
MNCs	Multi-National Companies
NAFTA	North American Free Trade Agreement
PRs	Performance Requirements
SDGs	Sustainable Development Goals
TRIMS	Trade-Related Investment Measures
UNCTAD	United Nations Commission on Trade and Development
WTO	World Trade Organization

[1] Suzy H. Nikiema (2014). *Performance Requirements in Investment Treaties: Best Practice Series,* (International Institute for Sustainable Development) 1. ; *see* also,

simple and fixed as a result of which some host states have benefited more than others.[2]

Developing and implementing investment policies and regulatory frameworks which are coherent, transparent, and appropriately designed to mobilize FDI can provide the greatest benefits in terms of sustainable development.[3] One of the policy instruments which are used by host countries –to maximize the benefits and minimize the disadvantages of FDI– is imposing performance requirements.[4] Though, there is no universally agreed and comprehensive definition for performance requirements[5], it can be defined as stipulations imposed by the government of investment hosting country on foreign investors, requiring those investors to meet certain specified goals with respect to their operation in the host country and considered as one kind of host country operational measures.[6]

There is a divergent view and debate among scholars, capital exporting countries, and host countries regarding the role of performance requirements. Capital exporting countries, specifically the US, consider performance requirements (investment measures) as barrier to free trade flow and thus another form of non-tariff trade barriers (trade distorting measures); hence need to be prohibited by WTO Agreement of TRIMs.[7] This argument is based on the premise that performance requirements affect free trade and such view originates from the classical theory of FDI which requires FDI to be free from any host state regulator's actions. On the other hand, host countries argue

Selma Kurtishi-Kastrati (2013). 'The Effects of Foreign Direct Investments for Host Country's Economy' *European Journal of Interdisciplinary Studies, Vol.* 5/1, 26, p. 31.

[2] Harnessing Investment for Sustainable Development <www.oecd.org/investment/business-investment-sdgs.htm> accessed 12 March 2021.

[3] Economic and Social Commission for Asia and the Pacific (2019). *Foreign Direct Investment and Sustainable Development in International Investment Governance: Studies in Trade, Investment and Innovation No. 90* (United Nations Publication) 24.

[4] Economic and Social Commission for Asia and the Pacific (2017). *Handbook on Policies, Promotion, and Facilitation of Foreign Investment for Sustainable Development in Asia and the Pacific,* (United Nations Publication) 131.

[5] Performance Requirements <http://jusmundi.com/en/document/wiki/en-performance-requirements> accessed 12 January 2021.

[6] United Nations Commission on Trade and Development (2003). *Foreign Direct Investment and Performance Requirement: New Evidence From Selected Countries* (United Nations Publications, New York and Geneva), 2.

[7] Eric M. Burt (1997). 'Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization' *American University International Law Review* Vol. 12/6, 1015, p. 1034.

against the prohibition of performance requirements on the basis of the role of performance requirements in boosting the potential benefits to be gained from FDI; and if there is a need to prohibit performance requirements for the sake of free trade flow, the WTO Agreement on TRIMs should only prohibit those measures that directly and significantly affect trade and allow other measures.[8]

Despite the arguments of capital exporting countries against the imposition of performance requirements, they have been used by both developing and developed host countries to achieve both economic and non-economic goals.[9] Host countries require foreign investors to fulfill certain performance requirements as part of their policies so as to promote linkages, local industries, jobs and promote exports.[10]

Almost every developing country needs the inflow of FDI to achieve various development needs; however, allowing FDI without any conditions makes the country vulnerable to the potential abuses of foreign investors and an inequitable distribution of benefits.[11] Thus, the utilization of performance requirements is designed to control the potential abuses of foreign investors and to harness the potential benefits of the foreign investors' investment to serve the development goal of the host country.[12]

I argue that Ethiopia has not made adequate effort to maximize the benefits that it should obtain from FDI and is not gaining the benefits commensurate with its legitimate expectations. Ethiopia is facing capital shortage caused the level of investment and gaps between export and import.[13] The country also needs advancement in technology to transform and make its industry competitive.[14] Despite the grand vision of industrial development and an

[8] Id. 1035.

[9] H. Nikiema *supra note* 1, p. 1.

[10] Roberto Echandi, Jana Krajcovicova and Christine Zhenwei Qiang, (2015). 'The Impact of Investment Policy in a Changing Global Economy: A Review of the Literature' *World Bank Group Policy Research Working Paper* 7437, p. 27 <http://econ.worldbank.org> Accessed March 2021. *See* also Shujiro Urata and John Sasusa (2007), *An Analysis of the Restrictions on Foreign Direct Investment in Free Trade Agreements* (RIETI) 19.

[11] M. Burt *supra* note 7, 1026.

[12] *Ibid.*

[13] Mulu G/eyesus, Birhanu Beshah and Girum Abebe (2017). *Foreign Direct Investment in Ethiopia: Challenges, Opportunities and Policy Options for Effective Use to Stimulate Industrialization* (FDRE- PSRC and Ethiopian Development Research Institute) 1.

[14] Ibid.

aspiration of becoming a middle income country by the year of 2025, Ethiopia's central focus has been on attracting FDI while little attention has been given to maximize the benefits from FDI.[15]

This article examines the room for applying performance requirements on foreign investors under the Ethiopian legal regime and to explore the challenges and opportunities that may arise while trying to apply them. The article also assesses whether there is a legal room under international law for Ethiopia to apply performance requirements. It further highlights the advantages and disadvantages of applying performance requirements.

The next three sections (i.e. Sections 2 , 3 and 4), *inter alia*, provide an overview of performance requirements including the meaning and objectives of performance requirements, arguments against and in favor of performance requirements, the status of performance requirements under international investment legal regime, and the experience of some selected countries. Section 5 examines the room for applying performance requirements under the Ethiopian legal regime. It also explores the challenges and opportunities of applying performance requirements.

2. Performance Requirements: General Overview

2.1 Meaning and categories of performance requirements

Though, there is no universally agreed and comprehensive definition for performance requirements[16], it can be defined as stipulations imposed by the host state on foreign investors, requiring those investors to meet certain specified goals with respect to their operation in the host country, and it is considered as one kind of host country operational measures.[17] Performance requirements are also defined as terms and conditions, imposed on foreign investors, requiring them to meet certain specified goals with respect to their operations in the host country of investment.[18] The UNCTAD publication describes performance requirements as one among the kinds of host country operational measures which are imposed by the host government.[19] They are imposed by FDI hosting states so as to guarantee that the foreign investor

[15] Ibid.
[16] Performance Requirements *supra* note 5.
[17] United Nations Commission on Trade and Development *supra* note 6, p.2.
[18] Ibid.
[19] Z. Boroo (2012). 'Effective Use of Performance Requirement's and Investment Incentives' *The Mongolian Journal of International Affairs* 97, p. 98.

exports a percentage of his production, buys local products and services, and employs local labor in the process of the production.[20]

Performance requirements have been extensively used by a large number of countries at different stages of development and its incidence varies depending upon the development strategy, endowments of natural and other resources, and market size, etc.[21] They are set by the host government and made to be in line with its development strategies, the violation of which may result in legal sanctions ranging from withdrawal of operating license, penalties up to loss of rights in case of mandatory requirements, or loss of benefits or incentives in case of voluntary requirements.[22]

There are a number of performance requirements that can be imposed by a host state which can be divided into three major categories;[23] the first category includes those performance requirements which are explicitly prohibited by the WTO Agreement on Trade Related Investment Measures due to their contradiction with Article III and XI of GATT/1994; the second category consists of those requirements which are explicitly prohibited, conditioned or discouraged by interregional, regional or bilateral agreements; and the third category consists of those performance requirements which are not prohibited by any international investment agreement.[24]

Category	Performance requirements
Prohibited by the TRIMs Agreement	• Local content requirements • Trade-balancing requirements • Foreign exchange restrictions related to the foreign-exchange inflows attributable to an enterprise • Export controls
Prohibited, conditioned or discouraged by IIAs at bilateral or regional levels	• Requirements to establish a joint venture with domestic participation • Requirements for a minimum level of domestic equity participation • Requirements to locate headquarters for a specific region • Employment requirements • Export requirements

[20] M. Sornarajah (2010). *The International Law on Foreign Investment*, 3rd edn. (Cambridge University Press) 205.
[21] Boroo *supra* note 19, p. 101.
[22] H. Nikiema *supra* note 1, p. 2.
[23] United Nations Commission on Trade and Development *supra note* 6, table 1.
[24] Boroo *supra* note 19, p. 98.

	• Restrictions on sales of goods or services in the territory where they are produced or provided • Requirements to supply goods produced or services provided to a specific region exclusively from a given territory • Requirements to act as the sole supplier of goods produced or services provided • Requirements to transfer technology, production processes or other proprietary knowledge Research and development requirements
Not restricted	All other performance requirements

Source: UNCTAD, *Foreign Direct Investment and Performance Requirement: New Evidence from Selected Countries* (UN Publications, New York and Geneva 2003) Table 1.

Performance requirements may also be classified into *mandatory* or *non-mandatory* (voluntary) based on the nature of the requirement.[25] Mandatory performance requirements need to be compulsorily complied-with by the investor so as to either commence an investment or expand an already existing investment.[26] Such requirements are attached to the conditions for the entry and operation of the investment.[27] Non-compliance with the mandatory requirements could result in rejection of the investment by the host state and the investment could never materialize or be expanded.[28]

Voluntary performance requirement is non-mandatory, and it relates to access to certain advantages, such as tax exemptions or subsidies by the host country.[29] Yet, the investor can choose not to fulfill such requirements and sill continue with the investment.[30] Thus, voluntary requirements are generally attached with certain incentives like tax benefits or subsidies which the host state might offer if the investor complies with the prescribed requirement.[31]

[25] Satwik Shekhar (2017). 'Performance Requirements: Prospects for the EDEs' *Center for WTO Studies Working Paper* CWS/WP/200/3, p. 7.
[26] Ibid
[27] H. Nikiema, *supra* note 1, p.2
[28] Shekhar, *supra* note 25.
[29] Ibid
[30] Ibid
[31] Ibid

2.2 Objectives of performance requirements

Performance requirements are used to enhance the contribution of FDI to the host state's development.[32] They may also be used to address market or policy failure, information asymmetries, or to compensate for possible negative externalities associated with FDI.[33] In facilitating FDI's positive spillovers for their economy, a host state's recourse to performance requirements aims at benefits out of the incoming investments.[34] As indicated earlier, performance requirements have been used in both developing and developed countries to achieve both economic and non-economic goals of host states.[35] They are imposed by host states so as to guarantee that the foreign investor exports a percentage of his production, buys local products and services, and employs local labor in the process of the production.[36]

The following is a non-exhaustive list of the main objectives of performance requirements;[37]

i. Strengthening the industrial base and increasing domestic value added;
ii. Creation of domestic employment opportunities;
iii. Creation and promotion of linkage of foreign companies with domestic enterprises; and technology transfer;
iv. Export generation and performance;
v. Trade balancing;
vi. Promotion of Sub-national regional development;
vii. Avoidance of restrictive business practices;
viii. Generation and distribution of rents;
ix. Various non-economic objectives, such as political independence and distribution of political power.

2.3 Arguments against and in favor of performance requirements

Some consider performance requirements as inconsistent with the principle of liberal markets, while others perceive them as an essential component of a domestic development strategy.[38] Initially, performance requirements were

[32] Economic and Social Commission for Asia and the Pacific (2017), *supra* note 4, 131.
[33] Ibid.
[34] Shekhar, *supra* note 25, p. 3.
[35] H. Nikiema, *supra* note 1, p. 1.
[36] Sornarajah, *supra* note 20, p. 205.
[37] Economic and Social Commission for Asia and the Pacific (2017), *supra* note 4, p. 131.
[38] Sornarajah, *supra* note 20, p. 79.

used by both developed and developing countries until developed countries started opposing their imposition by host states.[39]

Developed countries argue against the imposition of performance requirements and consider them as host government interference with a liberal trade regime.[40] As a capital exporting country, during the time of TRIMs negotiation, US presented a comprehensive list of performance requirements that need to be prohibited by WTO agreement which include; local content requirements, export performance requirements, trade balancing requirements, product mandating requirements, domestic sales restrictions, foreign exchange and remittance restrictions, local equity requirements, technology transfer and licensing requirements, and investment incentives.[41]

On the other hand, developing countries argue in favor of the imposition of performance requirements on foreign investors since they are necessary measures to counter abusive practices of foreign investors.[42] Beyond controlling the abusive practices of foreign investors, developing countries highly emphasize on the significance of applying performance requirements in channeling FDI to national development objectives.[43] The reasoning of developing countries in relation to applying performance requirements primarily aims at boosting the contribution of FDI to the host state development.[44]

In this regard, developing countries consider the TRIMs Agreement as deficient since it only focuses on the outcome of performance requirements and ignores the underlying causes for their imposition, i.e., the aim of performance requirements to counterbalance the benefit distorting practices of foreign investors.[45] As Burt notes, "developing countries desire FDI for realizing their development objectives, but allowing FDI without conditions

[39] H. Nikiema, *supra* note 1, p. 1.
[40] M. Burt, *supra* note 7, p. 1034.
[41] Alexandre Genest (2017). 'Performance Requirement Prohibitions in International Investment Law- PhD Thesis' (University of Ottawa) p. 32 and ff. *see* also M. Burt *supra* note 7, p. 1034.
[42] M. Burt, *supra* note 8, p. 1035.
[43] *Ibid*. see also John Croome (1995). *Re-shaping the World Trading System: A History of the Uruguay Round* (WTO), pp. 15-16.
[44] Economic and Social Commission for Asia and the Pacific (2017), *supra* note 4, 131.
[45] M. Burt, *supra note* 7, 1038. *See* also United Nations Commission on Trade and Development (2004), *International Investment Agreements: Key Issues* Vol. I (United Nations Publications, New York and Geneva), p. 29.

may expose such countries to the potential abuses of foreign investors and an inequitable distribution of benefits.[46]

3. Performance Requirements under International Investment Legal Regime

At the International level, there are no uniform treaties among a large number of countries that furnish a comprehensive codified international foreign investment law in spite of repeated efforts.[47] There is a multilateral treaty, ICSID,[48] which entered into force on October 14, 1966. It provides facilities for conciliation and arbitration of international investment disputes between contracting states and nationals of other contracting states under the convention. Although the ICSID was successful convention in the field of international investment law, it is a procedural convention that deals with the settlement of investment disputes through arbitration.[49]

At the international level, FDI is largely governed by BITs and customary international law. Despite the unsuccessful efforts to bring a multilateral investment agreement in place, the Uruguay Round came up with a patchwork of partial investment rules under the umbrella of WTO.[50] Thus, currently, at the multilateral level, investment in relation to performance requirements is governed by the Agreement on Trade-Related Investment Measures (TRIMS) that came into existence after the Uruguay round negations of WTO and which prohibits trade-related investment measures governments could impose on foreign investors as performance requirements.

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[46] M. Burt, *supra* note 8, p. 1026.

[47] Economic and Social Commission for Asia and the Pacific, *supra note* 4, 116. *See* also Global Agenda Council on Global Trade and FDI (2013), 'Foreign Direct Investment as a Key Driver for Trade, Growth and Prosperity: The Case for a Multilateral Agreement on Investment' (World Economic Forum, Geneva) 23 <www.WEF_GAC_GlobalTradeFDI_FDIKeyDriver_Report_2013.com> Accessed 12 January 2021. *See* also Sornarajah *supra* note 20, p. 79; Getahun Seifu (2008), 'Regulatory Space in the Treatment of Foreign Investment in Ethiopian Investment Laws' *The Journal of World Investment & Trade* Vol. 14/15, p. 1.

[48] International Convention on the Settlement of Investment Disputes

[49] Sornarajah, *supra note* 20, p. 80. *See* also United Nations Commission on Trade and Development, *supra note* 46, p. 17.

[50] Global Agenda Council on Global Trade, *supra* note 47, p. 23.

3.1 Performance Requirements under BITs and Customary International Law

The prohibition of performance requirement by international agreements is not widely practiced in the international jurisprudence; however there are some treaties dealing with the prohibition of performance requirements. In 2021, for example, 2219 BITs were effective (at the global level) out of 2844 BITs.[51] This shows that BITs are one of the major international instruments regulating investment. The BITs signed by Ethiopia and model BITs of high capital exporting countries is discussed below in relation to the status of performance requirements.

Performance requirements which are imposed by host countries on foreign investors have only been prohibited in international investment agreements concluded by a few countries.[52] In the past, international investment law only focused on post-entry regulation, thereby allowing states to have full control over whether or not to admit foreign investments, which can be inferred from the BIT practice of countries such as Germany, Italy, the Netherlands, and the United Kingdom.[53] In addition to traditional investment protection standards, a few states have recently concluded agreements that include binding commitments like prohibition of performance requirements at pre and post entry stage; and in particular, this is a notable feature of most US and Canadian treaties.[54]

In addition to the categories of requirements prohibited by TRIMs Agreement, US BITs prohibit the imposition of employment requirement, technology transfer requirement, research and development performance requirements. [55] The US-model BIT which was first elaborated in the 1980s, revised in 2004 and again most recently revised in 2012; and it contains restrictions on performance requirements.[56] Article 8 of the model BIT

[51] United Nations Commission on Trade and Development, 'International Investment Agreements Navigator' last updated 7 July 2021 <https://investmentpolicy.unctad.org/international-investment-agreements/countries/67/ethiopia> accessed 25 August 2021 [hereinafter UNCTAD Navigator].

[52] Sornarajah, *supra* note 20, p. 205.

[53] Karl P. Sauvant and Federico Ortino (2013). *Improving the International Investment Law and Policy Regime: Options for the Future* (Ministry for Foreign Affairs of Finland) 23.

[54] Ibid.

[55] M. Burt, *supra* note 7, p. 1029.

[56] Global Agenda Council on Global Trade, *supra* note 47, p. 25.

contains detailed rules on the prohibition of performance requirements. Unlike the US Model BIT, the 2008 Model BIT of Germany did not contain rules on the prohibition of performance requirements.

For instance, Article 2 of the BIT signed between US and Democratic Republic of Congo provides that "within the context of its national economic policies and goals, each Party shall endeavor to avoid imposing on the investments of nationals or companies of the other party conditions which require the export of goods produced or the purchase of goods or services locally".[57] The US-Ukraine BIT provides that neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.[58] These restrictions are, for example, embodied in Article 2 of a BIT entered between Malaysia and the United Arab Emirates.

Unlike the examples of BITs stated in the preceding paragraph, the BITs signed between China and Great Britain, China-Netherlands, China-Germany, and China-South Africa, do not incorporate provisions on the prohibition of performance requirement on investors of the contracting states.[59] Until 2021, Ethiopia has signed a total of 35 BITs, out of which 21 BITs are in force and the remaining ones are either terminated or not adopted.[60] None of the BITs signed by Ethiopia deal with the prohibition of performance requirements.

[57] United Nations Commission on Trade and Development (2004), *supra* note 45, p. 96.

[58] Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment art. II, 6 [hereinafter US-Ukraine BIT].

[59] Agreement between the Government of the United Kingdom of Great Britain and North Ireland and the Government of the People's Republic of China concerning the Promotion and Reciprocal Protection of Investments; Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments; Agreement on encouragement and reciprocal protection of investments between the Government of the People's Republic of China and the Government of the Kingdom of the Netherlands; Agreement Between the Government of the People's Republic of China and the Government of the Republic of South Africa concerning the Reciprocal Promotion and Protection of Investments. Available at: UNCTAD Navigator, *supra* note 51.

[60] UNCTAD Navigator, *supra* note 51.

3.2 The Agreement on TRIMs

One of the WTO agreements, the Uruguay Round Agreement on TRIMs[61] bans certain categories of performance requirements.[62] Trade Related Investment Measures were among the so called new issues under the Uruguay Round of negotiation.[63] Prior to the negotiation of the Uruguay Round, the jurisdiction of GATT did not incorporate investment measures since they were not considered tariffs or subsidies and thus they were outside of the scope of GATT.[64] Thus, according to the Uruguay Round Agreement of TRIMs, TRIM is generally any host country investment related restriction or measure that directly affects free flow of trade.

The prohibition of certain category of performance requirements by the TRIMs Agreement seems to be made following the influence of the classical theory that requires avoidance of any regulatory actions by host states on foreign investors. On the other hand, the position of the agreement in relation to its prohibition of limited number of performance requirements seems to be made because of the influence of the middle path theory which hardly asserts the need for giving regulatory space for host states that enables them to maximize the benefits and minimize its costs.

According to Article 1 of the TRIMs, the scope of application of the agreement is limited to investment measures affecting trade in goods.[65] Accordingly, the member states are not allowed to apply trade related investment measures in contradiction with the following GATT two articles; i.e., Article III (in relation to national treatment), and Article XI (with regard to the prohibition of quantitative restrictions). The Annex to the agreement provides the list of investment measures that violate these two principles of GATT.

Investment measures in violation of WTO member's national treatment obligation include local content requirements and trade balancing requirements. Investment measures in violation of GATT's prohibition on quantitative restrictions include general import restrictions and trade balancing restrictions, foreign exchange balancing restrictions on imports, and

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[61] Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, Legal Instruments Results of The Uruguay Round (1994) [hereinafter TRIMs Agreement].

[62] United Nations Commission on Trade and Development (2004), *supra* note 45, p. 29.

[63] M. Burt *supra* note 8, p. 1033.

[64] Ibid.

[65] TRIMs Agreement, *supra* note 61.

domestic sales requirements or export restrictions. Investment measures not covered by the TRIMs Agreement include: local equity requirements, technology transfer and licensing requirements, local manufacturing requirements, personnel entry restrictions, local employment requirements, remittance restrictions, and export performance requirements, among others.[66]

4. Comparative Experience in Selected Countries

This section examines the experience of some selected countries in utilizing local content requirement, technology transfer requirement and export performance requirement. The selected countries are chosen because they are more or less successful in maximizing the gains from FDI by imposing performance requirements, and they were at nearly similar stage of socio-economic development with Ethiopia at the time when they applied performance requirements on foreign investors.

Historically, numerous countries, both developing and developed, required foreign investors to fulfill certain performance requirements as part of their policies so as to promote linkages, local industries, jobs and promote exports.[67] During the early stages of their development, today's developed countries, who argue against the imposition of performance requirement, have used performance requirements on foreign investors as a policy instrument to build up their national economy.[68] Performance requirements in regulating FDI have continued even after the prohibition of certain category of performance requirements by the WTO TRIMs Agreement.[69]

4.1 Export performance requirement

Theoretically, performance requirements are imposed for the purpose of boosting the contribution of FDI for host states; accordingly, one of the primary objectives of imposing such requirements is increasing the level of export performance.[70] And practically, in a number of host countries, imposing export performance requirement on foreign investors was found

[66] United Nations Commission on Trade and Development (2001). *Host Country Operational Measures* (United Nations Publications, Geneva and New York) 3.
[67] Echandi et al, *supra* note 2, 27. *See* also Urata and Sasusa *supra* note 10, p. 19.
[68] Ha-Joon Chang (2004). 'Regulation of Foreign Investment in Historical *Perspective' European Journal of Development Research* Vol. 16/3, p. 687.
[69] Echandi et al, *supra* note 2, p. 27.
[70] Economic and Social Commission for Asia and the Pacific (2017), *supra* note 4, p. 131.

effective in, *inter alia*, increasing the export-orientation of foreign investors to third countries.[71]

Malaysia is one of the states which have succeeded in expanding its manufacturing exports through imposing export performance requirements which required investors to export certain percent of their products; and this has enabled the country to generate the desired foreign currency for the purpose of financing its national development objectives.[72] The other country that succeeded in utilizing export performance requirement was China through imposing mandatory performance requirement at the time of entry which pushed foreign investors to export large portion of their products to foreign markets.[73]

Likewise, Chile has also succeeded in diversifying the country's export base through the devise of export performance requirements on foreign investors that enabled the country to increase its exports.[74] South Africa is successful in promoting an internationalization of the South African automotive industry by making export performance requirement an integral part of the Motor Industry Development Program.[75]

Export performance requirement is also successfully employed for triggering the growth of export-focused investments in the automotive industry of Brazil, Mexico and Thailand.[76] The government of Thailand, which started imposing export performance requirements on foreign investors in the middle of 1980s achieved the desired objective and became the third largest exporter of automotive products in the continent of Asia.[77]

With regard to the experience of Korea and Taiwan, they provided extensive financial incentives to foreign investors while at the same time imposing extensive performance requirements.[78] These two Asian states provided different incentives that require investors to export certain amount

[71] Kumar Nagesh (1998). *Globalization, Foreign Direct Investment and Technology Transfers: Impacts on and Prospects for Developing Countries* (Routledge, London and New York) cited on United Nations Commission on Trade and Development (2003) *supra* note 6, p. 22.
[72] Ibid.
[73] Ibid.
[74] United Nations Commission on Trade and Development (2003), *supra* note 6, p. 22.
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Chang *supra* note 68, p. 706.

of their products so as to get the available incentives and they became successful in maximizing the gains from FDI.[79]

Thus, comparative experience shows that export performance requirement has been practically successful in helping different countries to gain the maximum benefit out of FDI. According to Moran, positive evidence has been found with regard to the benefits of export performance requirements.[80] In particular, export performance requirement has helped developing countries and countries with their economies in transition.[81]

4.2 Technology Transfer Requirement

For the purpose of facilitating the process of industrialization that FDI can bring to their economies, investment receiving countries resort to applying performance requirements on incoming investments.[82] Ensuring technology transfer and creating linkages are among the major objectives of imposing performance requirements on foreign investors.[83] Accordingly, numerous countries require certain performance requirements to promote linkages and upgrade local industries through the opportunity of new technologies brought by foreign investors.[84]

Chang indicates that some developed countries which recently argue against the imposition of performance requirements, have (during their early stages of development) applied performance requirements on foreign investors including technology transfer requirements as a national policy instrument of building up their national economy through the means of FDI.[85] During the Uruguay Round negotiation of WTO, the European Union had opposed the prohibition of technology transfer requirement under the Agreement of TRIMs in light of its practical advantages.[86]

The practical experience of countries regarding the success of technology transfer requirements shows its benefits. China's extensive use of technology transfer performance requirement has, for example, become successful in developing its solar and wind power sectors thereby upgrading the level of

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[79] Ibid.

[80] Theodore H. Moran (1998). *Foreign Direct Investment and Development: The new Policy Agenda for Developing Countries and Economies in Transition* (Institute for International Economics, Washington D.C).

[81] Ibid.

[82] Shekhar, *supra* note 26, p. 3.

[83] Economic and Social Commission for Asia and the Pacific (2017), *supra* note 4, p. 131.

[84] Echandi et al, *supra* note 2, 27; Urata and Sasusa, *supra* note 10, p. 19.

[85] Chang, *supra* note 68, p. 687.

[86] M. Burt, *supra* note 7, p. 1034.

local industries.[87] South Africa also utilized technology transfer performance requirement and became successful in its Motor Industry Development Program.[88]

4.3 Local Content Requirement

Local content requirement is imposed for the purpose of creating economic linkages in the upstream and downstream chain of the investment activities in order to ensure the creation and diversification of related economic activities in the FDI host state.[89] Such requirement is widely used by FDI host states to ensure that foreign investors utilize local raw materials, products, and services in the process of production.[90]

Local content performance requirements attached with various investment incentives have been imposed by many countries; and foreign investors have willingly complied with such requirements through sourcing part of their production inputs from local raw material supplies.[91] For example, lessons can be drawn from the demand of China on foreign investors which required them to introduce high technology, and the performance requirements included the foreign currency balance, import substitution of and encouraging exports; and these requirements were not relaxed until the country achieved its targeted objectives.[92] China's wind and solar power sectors have benefited from the extensive use of local content performance requirements.[93] The government of Indonesia also applied extensive local content performance requirements on the investors of United States, Japan, and Europe.[94]

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[87] *See* Mazzucato Mariana (2015), The Entrepreneurial State: Debunking Public vs. Private Sector Myths (Anthem Press, London).

[88] United Nations Commission on Trade and Development (2003), *supra* note 6, p. 213.

[89] H. Nikiema, *supra* note 1, p. 2.

[90] Sornarajah, *supra* note 20, p. 205.

[91] Gary Clyde Hufbauer *et al* (2013). *Local Content Requirements: Report on a Global Problem* (Peterson Institute for International Economics) 22.

[92] Lu Yuan and Terence Tsai (2000). 'Foreign Direct Investment Policy in China since 1973' *China Review* 223, p. 234 <www.jstor.org/stable/23453369> Accessed 12 March 2021.

[93] Mariana, *supra* note 87.

[94] Hufbauer *et al*, *supra* note 91, p. 22.

5. The Room for FDI Performance Requirement under the Ethiopian Legal Regime

This section examines the availability of both legal and policy rooms for Ethiopia to apply performance requirements on foreign investors. In doing so, it tries to assess the status of performance requirements under the Ethiopian investment legal regime; and it examines whether there exists a legal room under international investment law for Ethiopia to apply performance requirement without violating any commitment. Moreover, the opportunities, potential gains and the challenges in applying performance requirements as a national policy instrument are highlighted.

5.1 Ethiopia's investment laws

The Investment Proclamation and its regulation regulate the entry, establishment and operation of foreign investment and the protection accorded to investors and their investments. The new investment Proclamation No. 1180/2020 enacted on 2nd April, Regulation No. 474/2020, and Investment Incentive Regulation No 517/2022 are the laws that specifically focus on investment including the laws concerning the regulation of FDI in Ethiopia.

Under its preamble, the Proclamation states the primary goal of the law as improving the living standard of the people of Ethiopia, through creating an economic framework that fast-tracks the global competitiveness of the National economy, increases export performance, generates more and better employment opportunities and to further increase and diversify FDI inflow, to accelerate inward transfer and diffusion of knowledge, skill, and technology.[95] In spite of these elements in the preamble, the provisions of the Proclamation do not embody performance requirements such as technology transfer, export performance and local content requirements.

Moreover, the law does not specifically require most of the major fulfillment of performance requirements (such as local content, technology transfer, backward and inward linkage with local economy and technology transfer) upon the issuance of investment permit. Instead of mandatory technology transfer requirement, the law has rather opted to promote technology transfer agreement between foreign investors and domestic investors.[96]

[95] Federal Democratic Republic of Ethiopia Investment Proclamation No. 1180/2020

[96] Id., Art. 15. *See* also Federal Democratic Republic of Ethiopia Council of Ministers Investment Regulation No. 474/2020, Art. 15. [hereinafter Investment Regulation]

However, in relation to employment requirements the Proclamation as well as the Regulation require the Ethiopian Investment Commission (EIC) in collaboration with the Ministry of Trade and Industry (MOTRI), to prepare and implement a guideline regulating the duty of foreign investors to design and provide training programs for Ethiopian workers so as to employ them.[97]

Moreover, the Proclamation requires foreign investors to employ all workers from Ethiopia as an employment performance requirement.[98] In this regard Article 22(1) provides:

> Any investor may employ duly qualified foreigners necessary for the operation of his investment in positions of higher management, supervision, trainers and other technical professions. However, foreigners may be employed only when it can be ascertained that Ethiopians possessing similar qualification or experience required by the sector are not available.

Article 15 of Regulation No. 474/2020[99] provides rules for technology transfer agreements; Article 19 deals with the procedures for the training and the transfer of knowledge and skills to Ethiopian employees by foreign investors. Yet, this regulation does not incorporate minimum local content requirement and technology transfer requirement as policy instrument on foreign investors.

Although both the former investment regulation and the current regulation require foreign investors to give training for Ethiopian employees so as to transfer knowledge and skills thereby enabling local employees to substitute expatriate staff, there is a large presence of domestic employees in the areas that require low technical knowledge;[100] and Tihitina observes that foreign investors engaged in mobile assembly, textile and garment sub-sectors have employed foreign experts in many areas for a long period of time without substituting them with Ethiopians.[101]

With regard to investment incentives, a new investment incentive regulation is enacted and became operative as investment incentive regulation

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[97] Investment Regulation Art. 19. *See* also Investment Proclamation, *supra* note 95, Art. 22.

[98] Investment Proclamation, *supra* note 95, Art. 22 (1).

[99] Investment Regulation, *supra* note 96.

[100] Tihitina Ayalew Getaneh (2020). 'The Role of the Investment Legal Framework in Ethiopia's FDI-development Nexus: PhD Thesis (Tilburg University) 160.

[101] Id., p. 161.

No 517/2022.[102] Similar to the former repealed Regulation No 270/2012, the new investment incentive regulation provides investment incentives for foreign investors who are capable and willing to export certain portion of their products to a foreign market, which shows the existence of voluntary performance requirements attached with incentives under the Ethiopian legal framework.[103] Although these incentives seem to aim at encouraging export performance of foreign investors, minimum local content and technology transfer requirements are not embodied as a precondition for the benefits provided under the incentive scheme.

The regulation gives two years of income tax exemption for investors who export or supply to exporter at least 60% of their products or services. Yet, this author argues that such requirement alone cannot guarantee sustainable export of products to a foreign market, since investors may cease to export after benefiting from the two years income tax exemption which substantially decreases tax revenue of the country thereby aggravating the loss if investors cease to export at the end of the incentive. Thus, I argue that there should be additional requirement attached to such incentive which requires export for additional years once they benefit from the incentive.

Foreign investors who want to operate in industrial parks are required to to export their products to a foreign market as per the terms of the contract.[104] However, there is no such requirement on using minimum local input and transfer of technology as per the responses of experts from the EIC. Thus, other than employment requirement and training of domestic workers to transfer knowledge and skill, Ethiopia's investment laws have failed to legally impose mandatory performance requirements on foreign investors who are investing or want to invest in the country.

5.2 International agreements ratified by Ethiopia

According to the FDRE Constitution,[105] all international agreements signed and ratified by the Government of Ethiopia are part and parcel of the law of the land; thus BITs to which Ethiopia is a party are applicable. As indicated in Section 3.1, Ethiopia has signed a total of 35 BITs, out of which 21 BITs

[102] Council of Ministers Investment Incentive Regulation No. 517/2022, enacted on July 22, 2022

[103] Id., Art. 6.

[104] Interwiew with Mr. Aschalew Tadesse, Investment Promotion Directorate, EIC (Addis Ababa, Ethiopia, 11 August 2021); Mr. Ermias Jano, Legal Expert, EIC (Addis Ababa, Ethiopia, 10 August 2021).

[105] The Federal Democratic of Ethiopia Constitution Proclamation No.1/1995, Art. 9(4).

are in force and the remaining ones are either terminated or not ratified by Ethiopia.[106]

Ethiopia has concluded bilateral investment promotion and protection agreements with different states which are still in force.[107] However, the overall assessment of the BITs covered under this article reveals that there is no single BIT that prohibits Ethiopia from imposing performance requirements on foreign investors of the other contracting party. The absence of any BIT, to which Ethiopia is a party, which prohibits the imposition of performance requirement is a great opportunity for Ethiopia to apply any of the performance requirements without violating its bilateral commitment.

For instance the WTO Agreement on TRIMs prohibits certain category of performance requirements that it deems contrary to liberal trade regime.[108] Accordingly, the performance requirements prohibited by the WTO Agreement of TRIMs are; local content requirements, trade balancing requirements, general import restrictions and trade balancing restrictions, foreign exchange balancing restrictions on imports, and domestic sales requirements or export restrictions.[109] Performance requirements not prohibited by the WTO agreement include local equity requirements, technology transfer requirements, local manufacturing requirements, local employment requirements, and export performance requirement.

Since Ethiopia is not member of WTO, it will not be bound by the WTO Agreement of TRIMs that prohibits certain category of performance requirements; and there is no BIT that prohibits Ethiopia from imposing such requirements on foreign investors. As Ethiopia is in the process of accession to the WTO, it will be prohibited from imposing the performance requirements (listed in the preceding paragraph) as per the rules of TRIMs Agreement so as to be compliant with the WTO regime. Ethiopia is in the process of WTO accession for the past two decades, and imposing the performance requirements prohibited under TRIMs Agreement can cause hurdles in the process. Yet, the country is free to impose other performance

[106] UCTAD Navigator, *supra* note 51.

[107] Ethiopia's agreements with Egypt, Finland, Sweden, Austria, Libya, Germany, Israel, Iran, France, Netherlands, Algeria, Denmark, Tunisia, Turkey, Sudan, Yemen, Malaysia, Switzerland, China, Kuwait and Italy available at UNCTAD Navigator, *supra* note 51.

[108] TRIMs Agreement, *supra* note 61.

[109] UNCTAD Navigator, *supra* note 51, p. 3.

requirements which are not prohibited by the TRIMs Agreement even after joining WTO.

The investment protection provided under Ethiopia's law is in conformity with the international standard.[110] In this regard, Ethiopia's central focus has been on attracting FDI while little attention has been given to maximize the benefits from FDI.[111] Thus, there is the need to strike a balance between attraction, protection, and maximizing the benefits from FDI thereby enhancing its contribution towards sustainable development. Thus, the existence of a legal room under international law to apply performance requirements for Ethiopia could be an important opportunity to apply such requirements on foreign investors.

5.3 Unattained opportunities due to failure to impose performance requirements

The rationale behind the employment of each of performance requirements is to control the potential abuses of foreign investors, and to secure the potential benefits of foreign investment in host countries. The absence of regulatory schemes such as performance requirements exposes host countries to the abuses of foreign investors and inequitable distribution of benefits.[112] Even though Ethiopia offers tax incentives to foreign investors, such benefits are often abused by foreign investors since the conditions attached to the incentives are not adequate and have not been mandatorily imposed.[113]

As it can be inferred from an interview conducted by Capital News with the Commissioner of EIC in August 2021, shortage of foreign currency is a major challenge in investments, and the major cause for such shortage is low export level of the country and increased imports.[114] This can imply that the tax incentives provided for investors with the aim of increasing their export level are not adequately effective in contributing towards narrowing down the shortage of foreign currency in the country. Although the rationale behind

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[110] Martha Belete Hailu and Zeray Yihdego (2017). 'The Law and Policy of Foreign Investment Promotion and Protection in Ethiopia: An Appraisal of Theories, Practices and Challenges' in Zeray Yihdego and others (eds), *Ethiopian Yearbook of International Law* (Springer International Publishing AG) 27.

[111] G/eyesus *et al*, *supra* note 13, p. 2.

[112] Interview with Professor Zeray Yihdego (PhD), Chair in Public International Law, School of Law, University of Aberdeen (Aberdeen, Scotland, 30 September 2021 interviewed via Email)

[113] Ibid.

[114] Staff Reporter, 'Promoting Investment' Capital News (Addis Ababa, 16 August 2021) <www.capitalethiopia.com/interview/promoting-investment/amp/> Accessed 25 August 2021.

giving incentives for exporters is to enhance the export level of the country – thereby decreasing the huge gap between export and import levels– the realities on the ground show that the objectives of the incentives have not been achieved.

Technology transfer from MNCs to the host country can materialize through two major means; first through adaptation, imitation or direct introduction of technologies that domestic firms come in contact with, and second, through labor productivity that emanates from employment opportunities in foreign companies.[115] However, there is significant gap in knowledge transfer due to the failure to implement legal provisions that require foreign companies to replace their expatriate staff members with local staff by upgrading local employees.[116] Thus, adequate training is not provided for domestic employees by foreign investors as a result of which the desired technology transfer has encountered severe gaps.

Although Ethiopia promotes a direct technology transfer agreement which is registered by the Ethiopian Investment Commission, the number of technology agreements registered by the EIC is very low.[117] The investment incentives also seem to concentrate on export sectors. Thus, regarding technology transfer, there is gap in the legal framework in capturing foreign technologies that can contribute towards facilitating sustainable development.[118] The degree of technology transfer in Ethiopia is not to the expected level as compared to the duration of FDI operations.[119] Some studies show the deficiency of technological knowledge and skill in Ethiopia which is needed to transform and make the country's industry internationally competitive.[120] However, technology transfer agreements that are promoted by the law are not effectively functioning as a channel for the transmission of the desired technology from foreign investors.[121]

Theoretically transfer of the latest and updated technology is seen as one of the major spillovers that host states could get from foreign investors. In the absence of adequate monitoring mechanisms, foreign investors may bring obsolete and outdated technologies which are unwanted in their home country.

[115] Tihitina, *supra* note 100, p. 160.
[116] Id., p. 171.
[117] Interview with Mr. Ahmed Nur Yusuf Hassen, Director License and Registration Directorate, EIC (Addis Ababa, Ethiopia, 10 August 2021).
[118] Tihitina, *supra* note 100, p. 106.
[119] Interview with Mr. Aschalew and Mr. Ermias, *supra* note 118.
[120] Mulu G/eyesus et al, *supra* note 13, p. 1.
[121] Tihitina, *supra* note 100, p. 160.

Such obsolete and outdated technologies adversely affect health and the environment. Furthermore, such technologies will not enable Ethiopia to gain the potential benefits from FDI that can help to achieve sustainable development.

As stated by the Commissioner of EIC, one among the options to overcome the existing shortage of foreign currency in Ethiopia is minimizing the country's import items through adequately working on import substitution.[122] One possibility in this regard could be encouraging local raw material suppliers to increase both the quantity and quality of such materials and legally requiring foreign investors to use certain minimum thresholds of local inputs from domestic suppliers.

However, since there is no mandatory minimum local content requirement which is imposed on foreign investors, most of the foreign investors import raw materials either from their home country or other foreign suppliers.[123] For instance a Chinese manufacturing company that is engaged in the manufacturing of clean materials and child health supplies in Ethiopia imports all of its raw material inputs from China.[124] But, such manufacturer complains that quality input raw materials for their production are not locally available, and that is why they are importing from abroad.

As one study shows, foreign investors engaged in the manufacturing sector, like in textile and garment, are importing almost all of their raw materials from abroad, while domestic cotton producers, on the other hand, are complaining on lack of market for their products.[125] The complaints from some manufacturers regarding one of the causes for importing all of their raw materials from abroad is the non-availability of quality raw material in the domestic market.[126] Thus, to satisfy the interest of investors with regard to the availability of quality raw materials from the domestic market, a great effort is required from the Ethiopian government in enhancing the quality of domestic raw material supplies.

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[122] Staff Reporter, *supra* note 114.

[123] Interview with Mr. Ermiyas Melesse, Legal Expert , EIC, (Addis Ababa, Ethiopia, 15 August 2021).

[124] Interview with Mr. Wing, Manager, Clean Material and Child Health Supplies Manufacturing PLC (Addis Ababa, Ethiopia, 14 August 2021).

[125] Yechalework Aynalem (2019). 'Opportunities and Challenges of Industrial Park Development in Ethiopia: Lessons from Bole Lemi and Hawassa Industrial Parks: MA Thesis (Addis Ababa University) 78.

[126] Ibid.

It can be argued that one of the causes may be the lack of desire from the manufacturers to use local materials and, in effect, procure benefits to their sister companies (in their home states) that supply such materials. This problem has been exacerbated by the absence of adequate performance requirements in Ethiopia's laws and gaps in the availability of quality raw materials in the domestic market. There is thus the need to strike a balance between attracting and designing adequate policy and legal instruments that can help in ensuring the contribution of FDI to sustainable development.

5.4 The need to apply performance requirements: Advantages and opportunities

As discussed above, imposing mandatory export performance requirements can enhance export levels, and minimum local content requirement decreases the level of raw material imported from abroad. With regard to technology transfer, training to be given by foreign companies for local enterprises that supply raw materials in the textile and garment sectors (to ensure the quality of such products) can be regarded as one of the elements of technology transfer.[127] Such skill transfers (in the value chain) should accompany the technical skills mentoring and training provided to the local technical staff in the process of production at the investment site.

Imposing such technology transfer requirements on foreign companies on the production process for local suppliers of raw materials can help to improve the quality of raw material supply to foreign investors. Moreover, technology transfer could also be made through merger or joint venture of foreign companies with domestic ones.[128] Thus, applying joint venture requirements can pave the way for domestic companies to benefit from the technology and skills that can be obtained from foreign companies.

As highlighted earlier, various countries such as Malaysia, Thailand, China, Brazil, Mexico, South Africa, and Chile, have succeeded by applying different performance requirements as their national policy objective. In relation to local content requirement and technology transfer requirements China has succeeded in developing domestic wind and solar power sectors through extensive use of local content and technology transfer performance requirements.[129] Malaysia is one of the states which have succeeded in expanding its manufacturing exports through imposing export performance

[127] Tihitina, *supra* note 100, p. 160.
[128] Id., p. 31.
[129] Mariana *supra* note 87.

requirements that enabled the country to generate the desired foreign currency for the purpose of financing its national development objectives.[130] The other country that succeeded in utilizing export performance requirement was China through imposing mandatory performance requirement at the time of entry which pushed foreign investors to export large portion of their products to foreign markets.[131]

The 2030 Agenda for Sustainable Development, which was adopted by the UN General Assembly in 2015, incorporates 17 Sustainable Development Goals (SDGs) including goals on poverty eradication, food security, health, education, basic infrastructure, economic growth and decent work, among others.[132] FDI is among the principal means of financing the 2030 Agenda for Sustainable Development and realizing the corresponding 17 Sustainable Development Goals.[133]

FDI has a great potential towards contributing to sustainable development in numerous important ways; among others, through bringing in foreign exchange, expanding access to market, contributing in skills and human capital growth, and technology transfer.[134] However, the development and implementation of investment policies and regulatory frameworks that provide the greatest benefits in terms of sustainable development are critical.[135]

Based on the discussion in the preceding sections, the author argues that applying performance requirements can help Ethiopia to maximize benefits from FDI thereby accelerate the country's objective of realizing sustainable development. Export performance and local content requirements can increase the existing low export level and decrease the level of raw material imports, which can help the country to minimize the existing shortage of foreign currency. Furthermore, I argue that by requiring foreign companies to give training on the production process for local suppliers of raw material as a technology transfer requirement, it is possible to ensure the quality of local raw material supplies.

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[130] Nagesh *supra* note 71.
[131] Ibid.
[132] United Nations Commission on Trade and Development (2021), *Investing in the Sustainable Development Goals: The Role of Diplomats; Investment Advisory Series A, number 9* (United Nations Publications, Geneva) 5.
[133] Economic and Social Commission for Asia and the Pacific *supra* note 3 (2019), p. 1.
[134] Ibid.
[135] Ibid.

5.5 Challenges that might arise in applying performance requirements

The implementation of performance requirements may not be free from challenges and such challenges may vary depending on the nature and type of performance requirements to be imposed. The challenges may relate to fear related to decline in the attraction of FDI, lack of the necessary human capacity that can monitor the implementation of such requirements and the availability of the required local raw materials. As one study shows, in Bole Lemi and Hawassa Industrial Parks, some foreign investors engaged in garment and textile sub-sectors raise lack of quality local raw material supply as a defense for importing all of their raw materials from abroad.[136] The possible way out for such challenge could be increasing the quality of local raw materials through providing the necessary training on the production process for suppliers of raw materials in such sectors.

Devising and implementing investment policies and regulatory frameworks that are coherent, transparent, and appropriately designed to mobilize FDI that provide the greatest benefits in terms of sustainable development are very crucial.[137] Yet, there is a need to strike a balance between attracting and incentivizing foreign investors and realizing host country sustainable development objectives.

In imposing mandatory performance requirements there can be the fear of losing the attraction of FDI,[138] and Ethiopia has failed to apply certain performance requirements such as mandatory local content, export and technology transfer requirements, due to fear of losing the attraction of FDI.[139] However, I argue that this fear of foreign investment decline is unjustified because absence of performance requirements might harm the country's economy more than the potential decline in foreign investment. Moreover, a country should not enact and apply its laws to merely appease foreign investors at the expense of its own socio-economic interest and environmental sustainability.

Thus, the fear of discouraging foreign investors cannot be raised as a justification for not imposing performance requirements; rather it is better to work on other favorable conditions that are intended for ensuring mutual win-win benefits to the foreign investor, its home state and the host state. This calls

[136] Aynalem, *supra* note 125. p. 78.
[137] Economic and Social Commission for Asia and the Pacific (2019), *supra* note 3, p. 24.
[138] Economic and Social Commission for Asia and the Pacific (2017), *supra* note 4, p. 136.
[139] Interview with Mr. Aschalew, *supra* note 104.

for transcending beyond mere focus on quantity of investments and giving due attention to the quality of investments. This requires aligning investment attraction legal frameworks with the development needs of the country so as to get the desired gains from FDI.[140] Accordingly, I argue that instead of totally avoiding performance requirements under the fear of decline in FDI attraction at the expense of national interest, the policy and legal frameworks can accommodate performance requirements side by side with the FDI attraction schemes.

Therefore, the performance requirements need to be in tandem with the business policy of foreign investors and should not undermine its overall goal.[141] Foreign investments may not be attracted if foreign investors are mandatorily required to utilize a minimum of their inputs from local sources when such sources are perceived to produce substandard inputs that will affect the investors' reputation.[142] Similarly, if there are no local producers that produce quality inputs, forcing foreign investors to obtain their inputs from local producers becomes a disincentive against FDI.

On the other hand, if other favorable domestic conditions –that are available for foreign investors– outweigh the performance requirements to be fulfilled by such investors, performance requirements may not affect the attraction of FDI. In this regard, the experience of South Korea and Taiwan, which provided extensive financial incentives to foreign investors while at the same time imposing extensive performance requirements reveals that the maximum benefits can be derived from FDI when carrots are combined with sticks, rather than when either carrots or sticks alone are used.[143] With regard to local content requirements, for example, the Ethiopian government should thus work on increasing the quality and quantity of local raw material supplies before mandatorily imposing minimum local content requirements on foreign investors.

[140] Tihitina, *supra* note 100, p. 139.
[141] Economic and Social Commission for Asia and the Pacific, *supra note* 4 (2017), p. 136.
[142] Ibid.
[143] Chang *supra* note 68, p. 706.

6. Conclusion and the Way Forward

Although Ethiopia has given due attention to various incentives to attract FDI, there is lack of effort in maximizing the benefits thereof. Thus, the country is not gaining the expected benefit from FDI, since attracting foreign investment and maximizing its benefit are different and require different policy devices. Performance requirements are one of the policy instruments that help countries to get the maximum benefits from FDI. Mere focus on FDI attraction without sufficient regulatory schemes such as performance requirements exposes host countries to the abuses of foreign investors and inequitable distribution of benefit. In this regard, lessons can be drawn from the comparative experience of numerous developing countries that have gained the maximum benefits from FDI through applying performance requirements.[144]

Thus based on the analysis made on the preceding sections, the author argues that there is both policy and legal room for applying performance requirements on foreign investors under international law and the Ethiopian legal regime that can boost the contribution of FDI to the country's sustainable development. Specifically, there is no BIT or international investment agreement, to which Ethiopia is a party that prohibits Ethiopia from imposing any performance requirement which can be the best opportunity for the country to apply such requirement without violating any international commitment. It can be imposed on both already established investments and those to be established in the future. However, it is better to not impose new performance requirements on investments already established, because doing so may contravene the legitimate expectation of investors.

It is to be noted that only limited category of performance requirements are prohibited under TRIMs Agreement. Thus, as long as Ethiopia imposes those categories of performance requirements which are not prohibited under TRIMs Agreement, investment performance requirements will not affect its WTO accession process. Moreover, if there is a possibility of violating the national treatment standard in the BITs and IITs to which Ethiopia is a party, the performance requirements can be uniformly applied on both domestic and foreign investors based on national priority areas and other sector specific considerations.

[144] For instance, *see* United Nations Commission on Trade and Development (2003), *supra* note 6, p. 22; Chang *supra* note 68, p. 706 and Mariana, *supra* note 87; Hufbauer *et al*, *supra* note 91, p. 22.

Thus, I argue that Ethiopia should impose permissive and mandatory performance requirements on the basis of national development priority objectives like export performance, local content, and technology transfer requirements on foreign investors. Such requirements should not be arbitrarily imposed since their effectiveness depends on their economic importance, the country's capacity to implement and monitor their impact, among others. For this purpose, the Ethiopian Investment Commission should build the capacity of its experts who can efficiently and diligently execute and monitor the compliance of investors with such requirements. Moreover, the EIC while negotiating BITs, should give due caution in relation to those countries that intend to prohibit performance requirements under their BITs. ■

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Major Themes in the Study of Ethiopian Customary Laws

Muradu Abdo ♣

Abstract

The literature covered in this Article reveals different perspectives. On the one hand, there is the idea that customary law systems should be set aside as they are inimical to national development and unity. On the other hand, there is the view that those customary legal systems which do not offend individual rights shall be given due place owing to their multifaceted benefits while only those customary laws which violate individual rights shall be abolished is gaining importance. The issue of whether customary laws should be given recognition on account of collective identity or because of their instrumental value is not addressed in the researches reviewed. The interface between customary law systems and state legal system is not fully investigated in the existing literature on the subject. There is some research conducted on customary law systems of Ethiopia on the initiative and financial support of the Government at Federal or regional levels. The initiative aims at deploying these researches as inputs for legal and institutional reform, to use them for the benefit of the current generation as well as to preserve, improve and pass them on to the next generation. This article recommends that researches on customary law systems of Ethiopia conducted by anthropologists, social workers, historians and political scientists deserve future review as the current article has not considered them. Those customary legal systems of Ethiopia which are not yet studied or insufficiently studied warrant exploration. Notwithstanding various research initiatives with the financial support of international institutions, there is a need to have government-led and financed study on customary systems of the country. There should be an institution which assumes this responsibility. The extent of recognition given to customary law systems in the Federal Constitution, proclamations and policies should be duly examined; and there should be policy and detailed legal framework regarding customary law systems of the Country.

Key terms:

Customary laws · Customary legal systems · Law and development · Modernization · Socialist legality · Post-modernism · Sharia law

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ሙራዱ አብዶ (2015 ዓ.ም.)፣ "በኢትዮጵያ ልማዳዊ ሕግ ሥርዓቶች ላይ የተከናወኑ ምርምሮች ፍተሻ"፣ ሚዛን የሕግ መጽሔት፣ ቅጽ 16፣ ቁ. 2፣ ገጽ 423-454

Contents

በኢትዮጵያ ልማዳዊ ሕግ ሥርዓቶች ላይ የተከናወኑ ምርምሮች ፍተሻ

አጽህሮተ ጽሑፍ

በዚህ ጽሑፍ ዳሰሳ የተደረገባቸው ምርምሮች በጥቅሉ ሲታዩ፣ ልማዳዊ የሕግ ሥርዓቶች ለሀገር ልማትና አንድነት ስለማይበጁ መጥፋት አለባቸው የሚለው አስተሳሰብ እየከሰመ መምጣቱን፤ በምትኩ የመብት ጥሰቶችን የማያስከትሉ የልማዳዊ ሕግ ሥርዓቶች በብዙ መልኩ ጠቃሚ በመሆናቸው ቦታ ሊሰጣቸው እንደሚገባ፣ በአንፃሩም መወገድ ያለባቸው የመብት ጥሰት የሚያደርሱት ብቻ እንደሆኑ የሚገልፀው አስተሳሰብ እየጎላ መምጣቱን፤ ልማዳዊ የሕግ ሥርዓቶች እውቅና ሊሰጣቸው የሚገባው በመሣሪያነታቸው ነው ወይንስ የማህበረሰብ ማንነት መገለጫ በመሆናቸው የሚለው ጥያቄ በሚገባ አለመጤኑን፤ በልማዳዊ ሕግ ሥርዓትና በመንግሥት ሕግ ሥርዓት መካከል ያለው ተግባራዊ መስተጋብር በቅጡ አለመፈተሹን፤ ለሕግ ማሻሻያ ግብዓት እንዲሆኑ፣ አሁን ያለው ትውልድ እንዲጠቀምባቸው፣ እንዲሁም ለመጪው ትውልድ ተጠብቀው መተላለፍ ይችሉ ዘንድ በመንግሥት አነሳሽነትና የፋይናንስ ድጋፍ ልማዳዊ የሕግ ሥርዓቶችን በሚመለከት የተከናወነ የምርምር ሥራ አለመታየቱን የሚያመለክቱ ናቸው። በምክረ-ሓሳብ ረገድ፣ በሥነ-ሰብእ ባለሙያዎች፤ በሶሺያል ዎርከርስ፤ በታሪክና በፖለቲካ ሳይንስ ባለሙያዎች ምርምሮች ላይ ተመሥርተው በልማዳዊ ሕግ ሥርዓቶች ላይ የተሠሩ ጥናቶች በዚህ ጽሑፍ ያልተሸፈኑ በመሆኑ በቀጣይ ሊፈተሹ ይገባል፤ ያልተጠኑ ልማዳዊ የሕግ ሥርዓቶች፣ እንዲሁም ተጠንተውም በጥልቀት ያልተሄደባቸው ስላሉ በእነዚህ ላይ ምርምር ሊደረግ ይገባል፤ በተለያዩ በውጭ ተቋማት የገንዘብ ድጋፍ የሚሠሩ ጥናቶች እንደተጠበቁ ሆነው መንግሥት እራሱ የሚመራውና በገንዘብ የሚደግፈው በልማዳዊ ተቋማት ላይ የሚደረግ ምርምር እንዲኖር ያስፈልጋል፤ ይህንንም የሚያከናውን ተቋም ሊኖር ይገባል፤ በኢፌዴሪ ሕገ መንግሥት፤ በአዋጆችና በፖሊሲዎች ለልማዳዊ ሕግጋት የተሰጠው እውቅና በቅጡ ሊፈተሽ ይገባል፤ የልማዳዊ ሕግ ሥርዓቶች የሚመለከት ፖሊሲና ዝርዝር የሕግ ማዕቀፍ መቅረጽ ያስፈልጋል የሚሉ የመፍትሔ ሓሳቦችን ይህ ጽሑፍ ያቀርባል።

ቁልፍ ቃላት

ልማዳዊ ሕጎች፤ ልማዳዊ የሕግ ሥርዓቶች፣ እውቅና፣ መስተጋብር፣ ሕግ እና ልማት፣ ዘመናዊነት፣ ሶሻሊስታዊ ሕጋዊነት፣ ድህረ-ዘመናዊነት፣ የሸሪዓ ሕግ

ይዘት

1. መግቢያ

አያሌ የአፍሪካ አገራት እኤአ ከ1960ዎቹ እስከ 1970ዎቹ[1] ልማዳዊና ዘመናዊ የሕግ ሥርዓታቸውን እንዴት አጣጥመው መሄድ እንዳለባቸው ያውጠነጥኑና ይከራከሩ ነበር። ኢትዮጵያ ግን፣ በዚሁ ጊዜ የልማዳዊ ሕግጋቷን በአብዛኛው በመሻር ከምዕራቡ ዓለም ያመጣቻቸውን ሕግጋት ተግባራዊ ለማድረግ እየጣረች ነበር። ይህንንም ጥረቷን ስድስት ዘመናዊ ሕብረ-ሕግጋትን/ መድብለ-ሕግጋትን (law codes) በማወጅ አሳይታለች።[2] እነዚህን ሕግጋት የሚተገብሩ ባለሙያዎችን ለማሠልጠን ይረዳ ዘንድ በሀገሪቱ የመጀመሪያ የሆነውን የሕግ ፋክልቲም በቀዳማዊ ኃይለሥላሴ ዩኒቨርሲቲ (በአሁኑ ወቅት አዲስ አበባ ዩኒቨርሲቲ) እኤአ በ1963 መሥርታለች። ከምዕራቡ ዓለም በተለይም ከአሜሪካ የመጡ የሕግ መምህራን የመጀመሪያዎቹ መምህራን ነበሩ።

በእነዚህ ሕግጋት ላይ የሕግ ምርምር እንዲሠራም በንጉሠ ነገሥቱ በራሳቸው የበላይ ጠባቂነት የኢትዮጵያ ሕግ መጽሔት የተጀመረውም እኤአ በ1964 ነበር። በዚህ መጽሔትና በሌሎች ታዋቂ የዓለም አቀፍ የምርምር መጽሔቶች ሕብረ-ሕግጋቱን የማብራራትና ለልማዳዊ ሕግ ምን ያህል ቦታ እንደቸሩ ከነምክንያቶቹ ጭምር ተተንትነዋል። እንዲሁም ሕግጋቱ ወጤታማ እንዳይሆኑ እንቅፋት ሊሆኑ የሚችሉ ጉዳዮች ተለይተዋል። ሕግጋቱ ወደ ሕዝቡ መዝለቅ አለመዝለቃቸውንም ፈትሸዋል። እኤአ እስከ 1970ዎቹ አጋማሽ ዓመታት የሀገሪቱ አጠቃላይ ጥረት ልማትና ዘመናዊነትን የምዕራቡን ዓለም ሕግ በመጠቀም ማምጣት ይቻላል በሚል እምነት ላይ የተመሠረተ ነበር።

እኤአ በ1970ዎቹ አጋማሽ ከፈነዳው የኢትዮጵያ አብዮትና ተከትሎት ከመጣው ርዕዮተ-ዓለም ለውጥ ጋር ተያይዞ የተከሰተው ሁኔታ በዚህ የሕግ ሥርዓት የማዘመን ጥረት ላይ ጥላ አጠላበት። ይህም ደርግ እስከ ወደቀበት እኤአ እስከ 1990ዎቹ መጀመሪያ ድረስ ዘልቋል። ይህ ወቅት በተለይ በልማዳዊ ሕግ ሥርዓት ላይ የተሠሩ ምርምሮች ያልታዩበት ነበር።

እኤአ ከ1990ዎቹ ጀምሮ ጀምሮ ለውጦች ተስተውለዋል። በአንድ በኩል በኢፌዴሪ ሕገመንግሥት ሀገሪቱ የሰብአዊ መብቶችን ለማክበር ቃል-ኪዳን ገብታለች። በሌላ በኩል ደግሞ በዚሁ ሕገመንግሥት ሀገሪቱ የሕዝብ የራስን እድል በራስ የመወሰን መብት ተቀብላለች። ይህም ሀገሪቱ የሰብአዊ መብቶች ጥሰት ውስጥ ሳትገባ የሕግ ብዝሀነትን የሚያመለክተውን የቡድን የራስ ገዝ መብት እስከምን ድረስ ተግባራዊ ማድረግ ትችላለች በሚለው ጭብጥ ምርምሮች እኤአ በ1990ዎቹ ተከናውነዋል። የዓለም አቀፍ ልማት ድርጅቶች ፊታቸውን ወደ ልማዳዊ ሕግ ማዞራቸውን ተከትሎ በጉዳዩ ዙሪያ ምርምር እንዲደረግ የገንዘብ ድጋፍ ማድረግ መጀመራቸው፤ እንዲሁም ደግሞ የመደበኛው ሕግ ሥርዓት ውሱንነት ማለትም የዳኞች ቁጥር ማነስና የተደራሽነቱ እጥረት ግልጽ ሆኗል።

የዚህ ጽሁፍ ዓላማ እኤአ ከ1960ዎቹ ጀምሮ በኢትዮጵያ ልማዳዊ የሕግ ሥርዓቶች ላይ ለሕትመት የበቁ ምርምሮችን በጥቅሉ በመዳሰስ ለፖሊሲና ሕግ ግብዓት የሚሆኑ ሓሳቦችንና ተጨማሪ ጥናት የሚሹ ጭብጦችን መጠቆም ነው። ይህ ጽሁፍ እያንዳንዱ

[1] በዚህ ጽሑፍ የተጠቀሱት ዓመተ ምህረቶች የአውሮፓውያን የዘመን ቀመር የተከተሉ ናቸው።

[2] Penal Code (1957); Civil Code (1960); Commercial Code (1960); Maritime Code (1960); Criminal Procedure Code (1961) and Civil Procedure Code (1965).

ምርምር ላይ ጥልቅ ትንተናና ሂስ የመስጠት ዓላማ የሌለው መሆኑን ጸሐፊው ለአንባቢያን ማሳወቅ ይፈልጋል።

በርዕሱ ላይ በተለይም እኤአ ከ1990ዎቹ ጀምሮ የተካሄዱ ምርምሮች የተበታተኑ በመሆናቸው ምን ያህል ጥልቀትና ሽፋን እንዳላቸው እምብዛም አይታወቅም። ገብረየሱስ ተክሉ እንዳመለከተው፣

> … እስካሁን የተካሄዱ የምርምር ሥራዎች የተበታተኑ፣ በርስ በርስ ማጣቀሻ ረገድ ድክመት ያላቸው፣ ለተመራማሪዎች እና አንባቢዎች ተደራሽ ያልሆኑ ሆነው ተገኝተዋል፤ ሌሎች ደግሞ በምርመራ ረገድ ጥልቀት የሌላቸው እና በይዘትና እና በጂኦግራፊያዊ ሽፋን ረገድ ውሱንነት የሚታይባቸው ናቸው።

> "…existing research works are found to be scattered, poorly cross-referenced and out-of-the-reach of researchers and readers; while others are shallow in their investigative depth and limited in thematic and geographical coverage."[3]

በተጨማሪም፡

> አብዛኛዎቹ ጥናቶች የተበታተኑ፣ ተደራሽ ያልሆኑ፣ እና በበቂ ሁኔታ ማጣቀሻ የሌላቸው በመሆኑ፣ በትንታኔ ጥልቀት፣ በይዘት ትኩረት፣ በባህላዊ ዳራ እና በጂኦግራፊያዊ ሥፍራ ረገድ ስለ ሽፋናቸው አድማስ ያለው ዕውቀት አነስተኛ ነው። በሌላ አነጋገር፣ ልማዳዊ የግጭት አፈታት ዘዴዎች በበቂ ያልተዳሰሱ፣ በቂ ሽፋን ያላገኙ እና ብዙም (ወይም ምንም) ያልተጠኑ በመሆኑ በዚህ ረገድ በቂ የሆነ እውቀት የለም።

> "Since most studies are scattered, inaccessible, and inadequately cross-referenced, little is known about their coverage in terms of analytical depth, thematic focus, cultural backgrounds, and geographic locations. In other words, comprehsnive knowledge is lacking about customary dispute resolution mechanisms that have been sufficiently explored, inadequately covered, and little/never studied."[4]

ይህም የምርምሮቹን ግኝቶችና ምክረ-ሀሳቦች ለፖሊሲና ሕግ ግብዓትነት መጠቀም አስቸጋሪ አድርጎታል። የዚህ ጥናት ወሰን እኤአ ከ1960ዎቹ እስከ 2021 ድረስ የታተሙ ምርምሮችን በሦስት በመክፈል፣ ማለትም እኤአ ከ1960ዎቹ እስከ 1970 አጋማሽ፤ ከ1970ዎቹ ሁለተኛ አጋማሽ እስከ 1980ዎቹ መጨረሻ እና ከ1990ዎቹ መጀመሪያ እሰከ 2021 ድረስ የታተሙ በሚል ቀርቧል። በሕግ ባለሙያዎች የተሠሩ ምርምሮች ላይ ትኩረት ተደርጓል።

ነገር ግን በሥነ-ሰብእ (በአንትሮፖሎጂ)፤ ታሪክ፤ ሶሻል ወርክ እና ፖለቲካ ሳይንስ ዘርፍ የታተሙ ሥራዎች እንዲሁም በጉዳዩ ያልታተሙ ምርምሮች አልተፈተሹም።

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[3] Gebreyesus Teklu, 2014, "Popular Dispute Resolution Mechanisms in Ethiopia: Trends, Opportunities, Challenges and Prospects", *AJCR*, 14 (1) pp. 99-100.

[4] Gebre Yntiso *et al (eds)*, 2011, *Customary Dispute Resolution Mechanisms in Ethiopia*. Addis Ababa: The Ethiopian Arbitration and Conciliation Centre, p. 473.

ይህ ጽሑፍ በክፍል ሁለት እኤአ ከ1960ዎቹ እስከ 1970 አጋማሽ፤ በክፍል ሦስት እኤአ ከ1970ዎቹ ሁለተኛ አጋማሽ እስከ 1980ዎቹ መጨረሻ፣ በአራተኛው ክፍል ደግሞ እኤአ ከ1990ዎቹ መጀመሪያ እስከ 2021 የታተሙ ምርምሮች፣ በመጨረሻም መደምደሚያና ምክረ-ሓሳብ በሚል ተዋቅሯል።

ያልታተሙትን ማግኘት ለዚህ ጸሐፊ አዳጋች ስለሆነ ለሕትመት በበቁት ላይ ትኩረት ተደርጓል። ከታተሙትም መካከል የዚህ ጽሑፍ አድማስ በሕግ ተመራማሪዎች ሥራ ላይ እንዲወሰን የተደረገው በሌሎች ሙያዎች ምሁራን የተሠሩት ጥናቶች ከዚህ ጸሐፊ ሙያዊ ትኩረት ውጭ በመሆናቸው ነው። በዋናነት በሕግ ባለሙያዎች ለተሠሩ ምርምሮች ሽፋን የተሰጠ ቢሆንም፣ የሕግና ሥነ-ሰብእ ባለሙያዎች በጥምረት የሠሯቸው ሥራዎች ታይተዋል። እኤአ ከ1960ዎቹ እስከ 2021 በታተሙት ምርምሮች ላይ ፍተሻ ለማድረግ በዚህ ጽሁፍ የተመረጡት መሥፈርቶች፣ ምርምሮቹ የተከተሉት ጥናት ዘዴ፤ ሽፋንና ጥልቀት፤ የምርምሩ በጀት ድጋፍ ሰጭዎች፣ እንዲሁም በምርምሮቹ የተነሱት ዋና ዋና ጭብጦች ናቸው።

2. እኤአ ከ1960ዎቹ እስከ 1970ዎቹ አጋማሽ

በታወቁ ዓለም አቀፍና የሀገር ውስጥ ጆርናሎች ከ1960ዎቹ እስከ 1970ዎቹ አጋማሽ ለሕትመት የበቁ ከሀያ በላይ የምርምር ጽሁፎች በዚህ ክፍል በጥቅሉ ተፈትሸዋል። የእነዚህ ጽሁፎች የተለየ ቀለምና ልዩ ትኩረት ከግምት ውስጥ ሳይገባ በጥናት ዘዴ፤ ሽፋንና ጥልቀት፤ ባለቤትነትና በተነሱት ዋና ዋና ጭብጦች ላይ በማተኮር ጠቅለል ያለ ፍተሻ ተደርጓል።

2.1 የጥናት ዘዴ

ምርምሮቹ በዋነኛነት እኤአ በ1960ዎቹ የወጡት ሕብረ-ሕግጋት ልማዳዊ ሕግጋትን ማካተት አለማካተታቸውን በመፈተሽ ላይ ያተኮሩ ነበሩ። የልማዳዊ ሕግጋትና ተቋማትን ባህሪና ያሉበትን ሁኔታ ለማወቅ አካባቢ ተኮር የመስክ ጥናት እምብዛም አይታይባቸውም። የዚህም ዋናው ምክንያት ምርምሮቹ የተሠሩት በጊዜው ቀዳማዊ ኃይለስላሴ ዩኒቨርስቲ (የአሁኑ አዲስ አባባ ዩኒቨርስቲ) ሕግ ፋክልቲ ስለነበርና ፋክልቲው የተሰጠው ተልእኮ ሕብረ-ሕግጋቱን ማስተማርና ምርምር መሥራት ከመሆኑ ጋር ይያያዛል።[5] በሌላ አነጋገር የወቅቱ የመንግሥት ሥርዓት የልማትና ሕግ እሳቤ የመንግሥት ሕግን ውጤታማ ማድረግ የሚለውን መሠረት ያደረገ ነበር። የዚህም መነሻ የኢትዮጵያ የፖለቲካ አንድነት ማስጠበቂያ እንዲሁም የኢኮኖሚና የማኅበራዊ እድገቷ የማዕዘን ድንጋይ ሆኖ የሚያገለግለው የሕግ አንድነቷ ነው የሚል ይመስላል። በሁለተኛ ደረጃ በምክንያትነት የሚጠቀሱት የገንዘብ እጥረት፤ የተማራማሪዎቹ የቋንቋ ተግዳሮት እና ለሀገሩና ለባህሉ እንግዳ መሆን ናቸው። ነገር ግን መስክ ቀመስ ምርምር በወቅቱ በፍጹም አለተከናወነም ማለት አይደለም።[6]

[5] Stanley Fisher, 2014, "50 Years of Legal Education in Ethiopia: A Memoir" *Journal of Ethiopian Law*, vol. 26; Kaius Tuori, 2010, "Legal Pluralism and Modernization: American Law Professors in Ethiopia and the Downfall of the Restatements of African Customary Law", *Journal of Legal Pluralism, no 62*

[6] Norman Singer (1970-1971), "A Traditional Legal Institution in a Modern Legal Setting: The Atbia Dagnia of Ethiopia" *UCLA L. Rev.* vol. 18; Stanley Fisher, 1966, "Some

2.2 ሽፋንና ጥልቀት

ጥናቶቹ ጥቅልና ጭብጥ ተኮር ስለነበሩ የእያንዳንዱን ማኅበረሰብ ልማዳዊ ሕግጋትና ተቋማትን ወደ ማጥናት አላተኮሩም። እንዲሁም የልማዳዊ ሕግ ሥርዓትን መሠረታዊና ሥነ-ሥርዓት ሕግጋትን እንጂ (substantive and procedural laws) ተቋማዊ ገጽታዎቻቸውን (institutional aspect) አልተመለከቱም። በዚህም የተነሳ ከማኅበረሰብ ባህላዊ የሕግ ሥርዓትና ጭብጥ አኳያ ሲታዩ ጥናቶቹ ክፍተት ይታይባቸዋል።

2.3 የምርምሩ በጀት ድጋፍ

እስከ እኤአ 1970ዎች አጋማሽ የተጠኑ ጥናቶች በቀዳማዊ ኃይለ ሥላሴ ዩኒቨርስቲ ሕግ ፋክልቲ ያስተምሩ የነበሩ የውጭ ሀገር የሕግ ምሁራን በፎርድ ፋውንዴሽን በተደረገላቸው የገንዘብ ድጋፍ የተከናወኑ ናቸው።[7] ከፎርድ ፋውንዴሽን በተጨማሪ ከስኮትላንድና ከቤልጂየም መንግሥታት የምርምር ገንዘብ ተገኝቶ ነበር።[8] በኢትዮጵያ መንግሥት ወይም አገር በቀል ድርጅት ድጋፍ ተሠርቶ ለሕትመት የበቃ በጉዳዩ ላይ የተከናወነ ምርምር መኖሩን የሚያመለክት መረጃ ይህ ጸሐፊ አላገኘም። ይህም ተመራማሪዎቹ፤ ምርምሩና ገንዘቡ ከውጭ ምንጭ የተገኙ መሆናቸውን የሚያሳይ ነው።

2.4 የተነሱ ዐበይት ጭብጦች

ጥናቶቹ በዋነኛነት ያነሷቸው ጥያቄዎች በሀገሪቱ እኤአ ከ1957 እስከ 1965 የወጡት ሕብረ ብሔር ሕግጋት ምን ያህል ልማዳዊ ሕግጋትን አካተዋል? ይህ በቂ ነው ወይ? ልማዳዊ ሕግጋት በምን ምን ጉዳዮች ላይ የሰፋ ቦታ ሊሰጣቸው ይገባል? በምን ምን ጉዳይ ቦታ ሊሰጣቸው አይገባም? ለምን? ልማዳዊ ሕግጋት በዘመናዊ ሕግጋት በበቂ መልኩ ያልተካተቱበት ምክንያት ምንድነው? እነዚህ ዘመናዊ ሕግጋት በማሕበረሰቦች ውስጥ ምን ያህል ዘልቀው ገብተዋል ወይም ዘልቀው እንዲገቡ ምን መደረግ አለበት? ወዘተ የሚሉ ነበር።[9]

ምርምሮቹ በአብዛኛው የዘመናዊነት እሳቤ (የሞደርናይዜሽን ቲዎሪ) ውላጅ በሆነው ሕግና ልማት በሚባለው አስተሳሰብ ተጽዕኖ ሥር የወደቁ ነበሩ። የሕግና ልማት እሳቤ ልማት ለማምጣት የመንግሥት ሕግ አማራጭ የሌለው መሣሪያ ነው፤ ልማዳዊ ሕግጋት ግን ለሀገር ልማትና አንድነት መሰናክል ናቸው የሚል እምነት ያራምድ ነበር።[10] በመሆኑም ምርምሮቹ የሕግ ትምህርትን፤ ምርምርንና ሥልጠናን በመጠቀም ሕብረ-

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Aspects of Ethiopian Arrest Law: The Eclectic Approach to Codification", *Journal of Ethiopian Law*, 3 (2)

[7] Jayanth Krishnan, 2012, "Academic SAILERS: The F Academic SAILERS: The Ford Foundation and the Efforts to Shape Legal Education in Africa, 1957-1977", *American Journal of Legal History*, Vol. 52

[8] Ibid; Kaius Tuori, 2010, cited above.

[9] George Krzczunowicz, 1966, "The Law of Filiation under the Civil Code", *Journal of Ethiopian Law*, 3 (2); Jacques Vanderlinden, 1966, ''An Introduction to the Sources of Ethiopian Law from the 13th to the 20th Century'', *Eth. J. L.* 3 (1); Rene David, 1967, ''Sources of the Ethiopian Civil Code'', *Eth. J. L. 4 (2)*

[10] Yong-Shik Lee, 2017, "General Theory of Law and Development", *Cornell International Law Journal*, 50 (3), https://scholarship.law.cornell.edu/cilj/vol50/iss3/2

ሕግጋትን መውጤታማ ማድረግ (ማለትም የሀገር አንድነትንና ልማትን ማምጣት) የሚቻልበትን መንገድ መዘየድ ቀዳሚ ዓላማቸው ነበር ማለት ይቻላል። ያም ሆኖ ግን፣ በአንዳንድ ውሱን ጉዳዮች የመንግሥት ሕግ ሥርዓት ያለበትን የሕግ ክፍተትና የተደራሽነት እጥረት ለመቅረፍ ልማዳዊ ሕግጋት ጥቅም ሊሰጡ እንደሚችሉ እሳቤው ያምናል።

በአንፃሩም፣ ሕብረ-ሕግጋቱን የህልም ሕግጋት ናቸው ምክንያቱም አንዳንድ ድንጋጌዎች አንዳንዱ ብቻ ተፈጻሚ የሚሆኑ ናቸው፤ ሕጎቹ የኢትዮጵያን ነባራዊ ሁኔታ ወደ ጎን ገሸሽ አድርገዋል የሚሉ ተችቶችን የተወሰኑ ምርምሮች አቅርበዋል። ከዚህ በመነሳት ልማዳዊ ሕግጋት የበለጠ እንዲካተቱ መክረዋል። ልማዳዊ ሕግጋት ራሳቸውን ችለው ዋና የሀገሪቱ የሕግ ሥርዓት አካል ይሁኑ የሚል ምክረ-ሓሳብ ግን አልሰነዘሩም። የመጠን ጉዳይ ነው እንጂ እነዚህ የኋለኞቹ ጽሁፎችም ከዘመናዊነት ንድፈ ሓሳብ (Modernization Theory) እና ከልማትና ሕግ (Law and Development) እሳቤዎች ተጽዕኖ ያልተላቀቁ ነበሩ።

ምርምሮቹ እንደሚያሳዩት ሌሎች አፍሪካውያን በወቅቱ በዘመናዊ ሕግና በልማዳዊ ሕግ ምርጫ ተወጥረው በነበሩበት ወቅት ኢትዮጵያ ግን ሳታወላውል ሕግጋትዋን የማዘመን አማራጭን የተከተለችበት ጊዜ ነበር። ይህን በተመለከተ የሚከተለውን ለአብነት መጥቀስ ይቻላል፦

> ከነፃነት በኋላ የአፍሪካ ሀገራት በአንድ በኩል ባህላዊ ቅርስ የሆነውን የአፍሪካ ልማዳዊ ሕግ ሥርዓት ለመጠበቅ በነበራቸው ስሜት፣ በሌላ በኩል ደግሞ በዘመናዊነት፣ ዕድገት እና በአገር ግንባታ ፍላጎቶች መካከል በሚሰነዘሩ ተቃራኒ ግፊቶች መካከል ለመወሰን ይጥሩ በነበረበት ወቅት፣ በአንፃሩ በኢትዮጵያ፣ ባለፉት ጥቂት ዓመታት የምዕራባውያን ሕግ መርሆዎችን መሠረት ያደረገ የፍትሐ ብሔር ሕግ መውጣቱ እና ተግባራዊ መሆኑ ከአዲስ አበባ እና ከሌሎች ጥቂት ከተሞች ወሰን ውጭ ሕግን በእጅጉ የሚሸር ሁኔታ እንዲፈጠር አድርጓል።
>
> While "after independence African countries were often torn between the contradictory impulses of preserving the traditional African legal heritage and the demands of modernization, progress, and nation building", in Ethiopia, "[t]he last few years have shown that the enactment and attempted application of a Civil Code based on principles of western law… has led to severe nullification of the law outside the bounds of Addis Ababa and a few other cities"…[11]

የሀገሪቱ ፍትሐ ብሔር ሕግ አርቃቂ ፕሮፌሰር ሬኔ ዳቪድ የሚከተለውን ብለዋል። ኢትዮጵያ በጥብቅ የተቆራኘችባቸውን አንዳንድ ባህላዊ እሴቶቿን በመጠበቅ፣ የሕዝቧን የአኗኗር ዘይቤ እንኳ ጨምሮ መዋቅሮቿን ሙሉ በሙሉ ማሻሻል ትፈልጋለች። ስለሆነም ኢትዮጵያውያን አዲሱ ሕግ ... በተግባር ላይ የሚገኙ የልማዳዊ ሕግጋት ስብስብ ይሆናል ብለው አይጠብቁም። [የፍትሐ ብሔር ሕጉ] የሕብረተሰቡን ሁለንተናዊ ለውጥ የሚያመላክት መርሀ ግብር እንዲሆን ይሻሉ፤

[11] Schiller, 1966, as quoted in Kaius Tuori cited above p. 45 & 48.

እናም በአብዛኛው ወደፊት ሊፈጥሩ ለሚሹት ሕብረተሰብ ተስማሚ የሆኑ አዳዲስ ሕጎችን [የፍትሐ ብሔር ሕጉ] እንዲደነግግ ይፈልጋሉ፡፡

"While safeguarding certain traditional values to which she remains profoundly attached, Ethiopia wishes to modify her structures completely, even to the way of life of her people. Consequently Ethiopians do not expect the new Code to be a work of consolidation … of actual customary rules. They wish it to be a program envisaging a total transformation of society and they demand that for the most part, it set out new rules appropriate for the society they wish to create."[12]

ንጉሡም በዚህ ረገድ እንደሚከተለው የገለፁት መጤው ሕግ የአንድነት ኃይልና ወጥነትን የማስፈን ዓላማ እንዳለው የሚያመለክትና ይህን ነጥብ የሚያጠናክር ነው፡-

ሕግ በአንድ ሀገር ውስጥ የአንድነት ኃይል ነው፡፡ ዘመናዊ ሕብረ-ሕጎችንና ሌሎች ሕጎችን የማውጣት ግቦች ከሆኑት መካከል አንዱ ሕጉ በመላው ግዛት (ኢምፓየር) አንድ ወጥ እንዲሆን ማስቻል ነው፡፡

"Law is a unifying force in a nation: one of the goals sought to be attained by the enactment of modern codes and other legislation is that the law be uniform throughout the Empire."[13]

የሚከተሉት የፍትሐ ብሔር ሕግ እና የፍትሐ ብሔር ሥነ-ሥርዐት ሕግ ድንጋጌዎችም ከላይ የተጠቀሱትን የፍትሐ ብሔር ሕግ ዋና አርቃቂና የንጉሡን ሐሳቦች የሚያጠናክሩ መሆናቸው መገንዘብ ይቻላል፡፡

"ግልጽ የሆነ ተቃራኒ ድንጋጌ ከሌለ በቀር በዚህ በፍትሐ ብሔር ሕግ ውስጥ ለተመለከቱት ጉዳዮች፣ ከዚህ በፊት በልማድ… ይሠራባቸው የነበሩ ደንቦች ሁሉ በዚህ የፍትሐ ብሔር ሕግ ስለተተኩ ተሽረዋል፡፡"[14]

"ግልጽ የሆነ ተቃራኒ ድንጋጌ ከሌለ በቀር በዚህ የፍትሐ ብሔር ሥነ ሥርዓት ሕግ ውስጥ ለተመለከቱት ጉዳዮች፣ በልምድ… ይሠራባቸው የነበሩ ደንቦች ሁሉ በዚህ የፍትሐ ብሔር ሥነ ሥርዓት ሕግ ስለተካተቱ በሙሉ ተሽረዋል፡፡"[15]

ሕብረ-ሕግጋቱ ከፀደቁ ከአሥር ዓመት በኋላ ምን ያህል ሕዝቡ እየተጠቀመባቸው ነበር የሚለውን ጥያቄ ለመመለስ እኤአ በ1970ዎቹ የተደረጉ ጥናቶች የሚያሳዩትን እውነታ መመልከት ይቻላል፡፡ በዚህ ረገድ ካውስ ታዎሪ፣ "ማናቸውም ሕግ የሰዎችን መብትና ግዴታ ለመግለጽ እንዲሁም በመካከላቸው ያሉት ግንኙነቶች የሚተዳደሩበትን መሠረታዊያን ሐሳቦች ለመግለጽ የወጣ ሲሆን፣ ሕጉ ከወጣላቸው ሰዎች ልብ የሚደርስ ፍላጎታቸውን፤ ልማዳቸውን ወይም የተፈጥሮ ፍትሕን የሚጠብቅ ካልሆነ በቀር ዋጋ

[12] Rene David, 1963, "A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries", *Tul. L. Rev.* 37 (2) p. 193.
[13] *Haile Sellassie I,* 1964, p. v England, Bath.
[14] የፍትሐ ብሔር ሕግ ድንጋጌ ቁጥር 165/1952፣ አንቀጽ 3347 (1)
[15] የፍትሐ ብሔር ሥነ-ሥርዐት ሕግ ድንጋጌ ቁጥር 52/1958 መግቢያ

ሊኖረው አይችልም፣"[16] "... no legal tradition will live in writing if it is not part of the social reality" በማለት አስገንዝበዋል።[17]

በወቅቱ የተከናወኑ ምርምሮችን ውጤታማነት በተመለከተ ሁለት ዐበይት ክርክሮች ይቀርባሉ። አንዳንዶች ምርምሮቹ (የሕግ ትምህርትን ጨምሮ) በሀገሪቱ የግለሰቦች መብት እንዲከበርና የሕግ የበላይነት እንዲሰፍን የመሠረት ድንጋይ የተጣለበት አድርገው ይወስዱታል። "[Legal research and education of the time] helped to lay a foundation fo continued growth and development of Ethiopia`s legal system, and for the rule of law."[18] ሌሎች ደግሞ የሀገሪቱን ባህላዊ ሕግጋት በማጥፋት የአሜሪካን ኢምፔሪያሊዝምን ለማስፋፋት የተደረገ በጎ ሓሳብ የነበረው ነገር ግን የተጨናገፈ እብሪተኛና ገራገር ፕሮጀክት አድርገው ያቀርቡታል።[19]

3. እኤአ ከ1970ዎቹ ሁለተኛ አጋማሽ እስከ 1980ዎቹ መጨረሻ

በዚህ ጊዜ በኢትዮጵያ ልማዳዊ ሕግጋት ላይ በሕግ ተመራማሪዎች የታተመ ሥራ አናገኘም። ለዚህም በምክንያትነት ሊቀርቡ የሚችሉት፣ ከኢትዮጵያ አብዮት ጋር ተያይዞ በአዲስ አበባ ዩኒቨርስቲ ሕግ ፋክልቲ በጉዳዩ ምርምር ያደርጉ የነበሩ የውጭ ሀገር መምህራን ወደ ሀገራቸው መመለስ፤ ለምርምር ይውል የነበረው የውጭ የገንዘብ እርዳታ ከዚሁ ጋር አብሮ መቋረጥ እና በጊዜው ከነበረው የመንግሥት ርዕዮተ-ዓለም ጋር በተገናኘ ለሕግና ለሕግ ምርምር የተሰጠው አነስተኛ ቦታ ናቸው። ሕግና ልማት የሚለው አስተሳሰብ በተለያዩ ምክንያቶች እየተዳከመ መጥቶ ነበር። የውጭ ገንዘብ የአሜሪካ ኢምፔሪያሊዝም የማስፋፊያ መሣሪያ ነው በሚል በጥርጣሬ ይታይ ነበር። በፊውዳሉ ሥርዓት ከውጭ የተቀዱትን ሕግጋት ርዕዮተ-ዓለማዊ መሠረቶች አብዮቱ ጥያቄ ምልክት ውስጥ ስለከተታቸው በእነሱ ላይ ምርምር መሥራት ያልፈለገም ይመስላል። በዚህ ወቅት ከሕግ ሙያ ውጭ ባሉ ተመራማሪዎች የታተሙ ምርምሮች ቢኖሩም እጅግ ውስን ናቸው።

4. እኤአ ከ1990ዎቹ እስከ 2021

4.1 የጥናት ዘዴ

በእነዚህ ዓመታት የተከናወኑ ምርምሮች ሕጉን ብቻ ከመፈተሽ (doctrinal research) ባለፈ ማህበረሰብ ተኮር የመስክ ጥናቶች አካተው ይታያሉ። የመስክ ምርምሮቹ ልማዳዊ የሕግ ሥርዓቶችን ከምንጫቸው ድረስ በመሄድ ቁልፍ መረጃ ሰጪዎችን በማነጋገርና ምልከታ በማድረግ የማጥናት ዝንባሌ ይታይባቸዋል።

4.2 ሽፋንና ጥልቀት

በጥናቶቹ ከሀምሳ በላይ ብሔር ብሔረሰቦችና ሕዝቦች ሽፋን አግኝተዋል። አንዳንዶቹ ምርምሮች የዳሰሳ ጥናቶች ስለሆኑ ጥልቀት ያንሳቸዋል። ሌሎቹ ደግሞ ጭብጥ ተኮር በመሆናቸው ክፍተት ይታይባቸዋል። አንዳንዶቹ ምርምሮች በአንድ ብሔረሰብ ላይ

[16] Civil Code of Ethiopia of 1960 Preface, Para 2
[17] Kaius Tuori, 2010, cited above p. 62.
[18] Stanley Fisher, 2014, cited above p. 204.
[19] Jayanth Krishnan, 2012, cited above

በተደጋጋሚ የተሠሩ ናቸው። ይህም ያልተጠኑ የብሔር ብሔረሰቦችና ሕዝቦች ልማዳዊ ሕግጋት መኖራቸውን ያመለክታል።

> ከዚህ ቀደም በባህላዊ ግጭት አፈታት ዘዴ ላይ የተደረጉ ጥናቶች እና በዚህ ቅጽ ላይ የተካተቱ ጥናቶች የሚሸፍኑት የኢትዮጵያን ሕዝብ የተወሰነ ክፍል ብቻ መሆኑን ተገንዝበናል። በባህላዊ ግጭት አፈታት ዘዴዎች ሥር ከሚሸፈኑ ጉዳዮችም መካከል በጥናቶቹ የተሸፈኑት ጥቂት ናቸው። ይህም የሚጠቁመው በጥናቶቹ ባልተካተቱት የባህላዊ ግጭት አፈታት ዘዴዎች እንዲሁም ጥናቱ ያልሸፈናቸውን ማህበረሰቦች በሚመለከቱ ጉዳዮች ላይ የላቀ ሰፋት ያለው ሥራ እንደሚያስፈልግ ነው።
>
> "Our observation is that previous studies on CDRM (Customary Dispute Resolution Mechanism) and the studies in this volume cover only a portion of the Ethiopian population. They also cover only a few of the items that fall within the mandate of CDRMs. This hints the need for a more comprehensive work on the CDRMs of the uncovered areas as well as uncovered items in the different communities."[20]

4.3 የምርምር በጀት ድጋፍ

እነዚህ ምርምሮች በማን የገንዘብ እርዳታ ነው ተሠርተው ለሕትመት የበቁት? የሚል ጥያቄ ሲነሳ፤ በሲዳ፤ በፈረንሳይ ኤምባሲ፤ በዩኤንዲፒ፤ በፒስካፕና በኖርዌ ኤምባሲ የሚል መልስ እናገኛለን። በተወሰነ መልኩም በመንግሥት ዩኒቨርስቲዎች የገንዘብ ድጎማ በድህረ-ምረቃ ተማሪዎችም የተሠሩ ጥናቶች እንዳሉ መገንዘብ ይቻላል። የምርምሮቹን የገንዘብ ምንጭ ለማወቅ የሕትመቶቹን የምስጋና ገጽና የመጀመሪያ ገጽ የግርጌ ማስታወሻ መመልከት በቂ ይሆናል።

4.4 የተነሱት ዋና ዋና ጭብጦች

የምርምር ጽሁፎቹ የሚከተሉትን አሥር ዐበይት ጭብጦች አስተናግደዋል።[21]

4.4.1 በዛሬይቱ ኢትዮጵያ የሕግ ሥርዓት ሲባል ምን ማለት ነው?

ለዚህ ጥያቄ በምርምር ጽሁፎቹ ምላሽ ለመስጠት ተሞክሯል። በአገራችን ሁኔታ የሕግ ሥርዓት ሲባል እኤአ በ1950ዎቹ እና በ1960ዎቹ የታወጁትን ስድስት ሕብረ ሕግጋት (law codes)፤ እንዲሁም የእነርሱ ውላጅ የሆኑትን ዘመናዊ የሕግ ተቋማትና መዋቅሮች ከነማሻሻያቸው ይጨምራል። እነዚህን ሕግጋትና ተቋማት ተከትለው ባለፈው ግማሽ ምዕተ ዓመት የታወጁት አገር አቀፍና የክልሎች ሕግጋት፤ እንዲሁም ኢትዮጵያ ያፀደቀቻቸው ዓለም አቀፍ ስምምነቶች እና እነዚህን ተከትለው የተፈጠሩት የሕግ ተቋማት በዚሁ ምድብ የሚካተቱ ናቸው።

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[20] Gebre Yntiso *et al* (eds), 2011, cited above

[21] በዚህ ንዑስ ክፍል የተብራሩት ዐበይት ጭብጦች የተወሰዱት በሚከተለው መጽሐፍ ውስጥ በጸሐፊው በተዘጋጀው የመግቢያው ንዑስ ክፍል (ለ) ከተገለጹት በከፊል ነው። (*የባሕል ሕጎችና ተቋማት በኢትዮጵያ* ቅጽ 1፣ የፍትሕና ሕግ ሥርዓት ምርምር ኢንስቲትዩት፣ አዲስ አበባ፣ ኤልያስ ኑር እና ሙራዱ አብዶ (አርታኢዎች)፣2007 ዓ.ም/እኤአ 2015

ነገር ግን ይህ የኢትዮጵያን የሕግ ሥርዓት ሙሉ ሥዕል እንደማይሰጠን ይታወቃል። በሕብረ-ሕግጋቱ እና ከዚያም ቀጥለው በታወጁ ሕግጋት እውቅና የተሰጣቸው ኃይማኖታዊና ባህላዊ ሕግጋትና ተቋማትም የኢትዮጵያ የሕግ ሥርዓት አካላት ናቸው። የአገሪቱ የሕግ ሥርዓት አድማስ ከዚህም ያለፈ ነው። ምክንያቱም በዘመናዊው የመንግሥት ሕግጋት ይሁንታ ያላገኙና ያልተካተቱ አያሌ ባህላዊ ሕግጋትና ተቋማት እንዳሉ ይታወቃል። ጥናቶች እንደሚያሳዩት የኢትዮጵያ የሕግ ሥርዓት እነዚህንም ባህላዊ ሕግጋትና ተቋማት ይመለከታል። ከዚህ የሕግ ብዝሀነት አንፃር የኢትዮጵያ የሕግ ምህዳር በነጠላ *የሕግ ሥርዓት* ተብሎ ከሚገለጽ ይልቅ *የሕግ ሥርዓቶች* ቢባል ይመረጣል።

ይህም ሕግ ምንድነው? ወደሚለው ትልቅ ጥያቄ ያመራናል። በኢትዮጵያ ከ80 በመቶ በላይ የሚሆነው ሕዝብ ገጠር የሚኖር እንደመሆኑ፣ እንዲሁም በየዓመቱ ከሚከሰቱ 7.4 ሚሊዮን የሕግ ጉዳዮች (ችግሮች) ውስጥ 83 በመቶ የሚሆኑት ክርክሮች በአማራጭ የፍትሕ መስጫ መንገዶች በተለይም በባሕላዊ የሕግ ሥርዓት መፍትሔ የሚያገኙ ከመሆናቸው አኳያ፣ ማለትም፣ 17 በመቶ የሚሆነው ጉዳይ ብቻ መደበኛ ተብሎ ወደ የሚጠራው የፍትሕ ሥርዓት የሚያመራ[22] መሆኑ፣ ሰፊ የሆነ የሕግ ጽንሰ-ሓሳብ እንድንይዝ ያስገድደናል።

በዚህ ረገድ ፕሮፌሰር ኖርማን ሲንገር፣ ሕግን በመተርጎም ረገድ ሰፊ አድማስ ወዳለው የሕግ እሳቤ በመሸጋገር ጎብረተሰብ አግባብነት ባለው፣ ውጤታማ በሆነና መስተጋብር በተሞላበት አኳኋን እንዲራመድ ማድረግ እንደሚገባ አሳስበዋል።[23] ይህ እጅግ ሰፊ የሕግ እሳቤ ሲሆን፣ ያንኑ ያህል ደግሞ ከዚህ በታች እንደተመለከተው ሕገ መንግሥታዊ ድንጋጌዎች እንደተጠበቁ መሆናቸውን መገንዘብ ያሻል።[24]

4.4.2 ልማዳዊ የሕግ ሥርዓትና ሕገመንግሥታዊ ድንጋጌዎች

በምርምር ጽሁፎቹ የተነሳው *ሁለተኛ* ነጥብ ልማዳዊ የሕግ ሥርዓት ከሕገመንግሥታዊ ድንጋጌዎች ጋር ሊጣጣም የሚገባ መሆኑ ነው። በሕገ መንግሥታዊ ድንጋጌዎች መሠረት (ሀ) ከኢትዮጵያ ሕገ መንግሥት ጋር የሚቃረን ማናቸውም ሕግ ወይም ልማድ ተፈጻሚነት አይኖረውም፤ (ለ) ሴቶች ከጎጂ ባህል ተጽዕኖ የመላቀቅ መብት አላቸው፤ (ሐ) ይህንኑ የሴቶች መብት መንግሥት የማስከበር ኃላፊነት አለበት፤ (መ) ሴቶችን የሚጨቁኑ ወይም በአካላቸው ወይም በአዕምሯቸው ላይ ጉዳት የሚያስከትሉ ወጎችና ልማዶች የተከለከሉ ናቸው፤ እንዲሁም (ሠ) ባህሎችና ልማዶች በእኩልነት እንዲጎለብቱና እንዲያድጉ መንግሥት የመርዳት ኃላፊነት ያለበት መሠረታዊ መብቶችን፤ ሰብዓዊ ክብርንና ዴሞክራሲን እስካልፃረሩ ድረስ ነው የሚሉት ነጥቦች ተሰምሮባቸዋል።

መወገድ የሚገባቸውን የልማዳዊ ሕግጋትና ተቋማት ገጽታዎች፣ ለምሳሌ የሴቶችን ሰብአዊ መብቶች የሚጋፉ ተግባራት (ዕድሜ ሳይደርስ ጋብቻ፤ የሴት ልጅ ግርዛት፤

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[22] HiiL, 2020, "Justice Needs and Satisfaction in Ethiopia: Legal Problems in Daily Life" https://www.hiil.org/wp-content/uploads/2019/09/JNS_Ethiopa_2020-1.pdf Accessed April 22, 2022

[23] Norman Singer, July 2008, "Three Eye-opening Events", *Mizan Law Review*, 2:2, p. 344.
"we [ought to] grow toward having a wider conception of legal rules as set of norms and processes that enable a society to function properly, effectively, and harmoniously"

[24] የኢፌዴሪ ሕገ መንግሥት፣ አንቀጽ 9 (1); አንቀጽ 35 (4) እና አንቀጽ 91(1) ይመለከቷል።

በጋብቻ ወቅትና ጋብቻ ሲፈርስ ሴቶች በንብረት ላይ ያላችው መብት የተጣበበ መሆን፤ የጠለፋ ጋብቻ፣ እንዲሁም በፍርድ ሂደት ሴቶችንና ወጣቶችን አሳታፊ በማደረግ ረገድ ያሉትን ክፍቶተች፣ ወዘተ) ምርምሮቹ በሚገባ ለይተዋል። ምርምሮቹ እነዚህ ጉድለቶች የሚወገዱበትን ስልት በተመለከተ የጠለቀ ምርምር የማከናወን፤ ዘመናዊ ትምህርት የማስፋፋት፤ ሕግ የማሻሻልና የመተግበር፤ እንዲሁም ለነዚህ ተግባራት የመንግሥታዊና መንግሥታዊ ያልሆኑ ድርጅቶችን ተሳትፎ የሚመለከቱ ዋና ዋና ስልቶችንም አመልክተዋል።

ከዚህም በተጨማሪ፣ ከልማዳዊ ድርጊቶች መካከል የተወሰኑትን ለይቶ ለማስወገድ መስፈርት እንደሚያሻ ግልጽ ተደርጓል። የሚወገዱትን ልማዳዊ ሕግጋት ለመለየት የሚያገለግሉን መስፈርቶች ግን በሚገባ ትንታኔ አልተሰጣቸውም። በምርምር ጽሑፎችና በተለያዩ ሀገራት ሕግጋት የምናገኛቸው መመዘኛ መስፈርቶች የልማዳዊ ሕግጋት ከሰብዓዊ መብት ያለመቃረን፤ ከፍትሕና ሞራል ጋር መጣጣም፤ ለሀገር አንድነት እንቅፋት ያለመሆን፤ ከዲሞክራሲ መርሆዎች ጋር መናበብ እንደ ሕጻናትና ሴቶች ባሉ ተጋላጭ የሕብረተሰቡ አካላት ላይ ጉዳት ያለማድረስ የሚሉ ሁነው እናገኛቸዋለን። የትንታኔው አስፈላጊነትም የሚመነጨው ከእነዚህ መስፈርቶች አሻሚና አወዛጋቢ መሆን ነው።

ሳጂ ልማዶችንና የሚወገዱበትን ዘዴ ከመለየት ባሻገር በማህበረሰቡ እግር ተተክቶ እነዚህን መወገድ ያለባቸው ልማዶች ማህበረሰቡ ለምን እንደፈጠራቸው የማወቁ ጉዳይ በእነዚህ ጥናቶች ሽፋን አላገኘም፤ ነገር ግን ይህ ጉዳይ እነዚህን ልማዶች እንዳናስወግዳቸው ምክንያት ይሆነናል ለማለት ሳይሆን ቢቻል ከሕብረተሰቡ ምንም ተቃውሞ የማያስነሳ ወይም አነስተኛ ተቃውሞ ብቻ የሚያስነሳ የማስወገጃ ዘዴ ለመዘየድ ፋይዳ አለው ለማለት ነው። ለአንድ ችግር ፍቱን መድኃኒት ማግኘት ይቻል ዘንድ በሚመለከተው ማህበረሰብ እግር ተተክቶ ጉዳዩን መመርመር አስፈላጊ ስለመሆኑ፤ አንድ ታዋቂ የወባ በሽታ ሊቅ ትንኞችን የመቆጣጠር ፍላጎት ካለን እንደ ትንኞች ማሰብን እንደምንማር በተምሳሌት ያስተምሩናል።[25]

4.4.3 የልማዳዊ ሕግጋትና ተቋማት ትርጉም

ስለልማዳዊ ሕጎች በተደረጉ ጥናቶች የምናገኘው ሦስተኛ ጭብጥ ስለልማዳዊ ሕግጋትና ተቋማት ፍቺ የተሰጠ መሆኑን ነው። ከአንድ ማኅበረሰብ ልማድ የመነጨ አስገዳጅነት ያላቸው ድንጋጌዎች ባህላዊ ሕግጋት በመባል ይታወቃሉ። አስገዳጅነት እንዳላቸው በማሰብ ለረጅም ጊዜ የማኅበረሰቡ አባላት ተቀብለው የተገበሯቸው ድንጋጌዎች ናቸው። ያም ሆኖ ግን፣ ወረድ ብለን እንደምንገልጸው ልማዳዊ ሕግጋት ሳይለወጡ ይዘልቃሉ ማለት አይደለም። እነዚህ ሕግጋት በአብዛኛው ከትውልድ ወደ ትውልድ በቃል ሲተላለፉ የመጡ ናቸው። ባህላዊ ሕግጋት ከቦታ ቦታ፤ ከጊዜ ወደ ጊዜ ሊለያዩ ይችላሉ። ባህላዊ ሕግጋትን አለመከተል ቅጣትን ወይም ካሳ መክፈልን ያስከትላል። ነገር ግን በእስር፤ በገንዘብ ወይም በሞት መቀጣትን ዋና ዓላማቸው አያደርጉም። የሻከረውን ወንድማማችነትና እህትማማችነት ወይም ጉርብትና እንዲታደስ በማድረግ እርቅና ሰላም

[25] "If you wish to control mosquitoes, you will learn to think like mosquitoes". Samuel Darling as quoted in Benjamin Paul, 1955, *Health, Culture and Community: Case Studies of Public Reactions to Health Programs* (New York: Russel Sage Foundations), p. 1.

ማውረድ ዐብይ ዓላማቸው ነው። በመሆኑም የልማዳዊ ሕግጋትና ተቋማት መሠረት የሆኑት ይቅር ባይነት፤ ባህልን ማክበር፤ እውነትን መናገር፤ በሰላም አብሮ መኖር እና ሰብአዊ ክብርን መጠበቅ፣ እንዲሁም ሌሎች ማህበራዊ እሴቶች በጽሁፎቹ ተለይተው እናገናቸዋለን።

እርቅ አላወርድም ያለ ወገን ከቅጣቶች ሁሉ የከፋ ሊሆን የሚችለው ማኅበራዊ መገለል እንደሚጠብቀው ተጠቁሟል። ለአብነት አቶ ሰላሙ በቀለ የመገለልን ቅጣት ከባድነት ከሞት ቅጣት ጋር ከማመሳሰል በተጨማሪ፤ ከሰው ተራ አውጥቶ ከዱር አራዊት ጋር የሚቀላቅል ተግባር በሚል እንዲህ ይገልጹታል፦

> የግለሰብ ጥፋት ማኅበራዊ ኑሮን የሚያናጋ ሲሆን መጀመሪያ ከተግባሩ እንዲቆጠብ ይመክራል፤ አልተው ሲል ከማኅበሩ እንዲለይ ይደረጋል። ይህም የሞት ቅጣት (ነው)። ይህ ቅጣት የደረሰበት [ግለሰብ] ሌላ ማኅበረሰብ ፈልጎ አግኝቶ እዛ መኖር ስለማይችል ኑሮው ብቸኛ ሰው ሆኖ ከዱር አራዊት ጋር ይሆናል ማለት ነው።[26]

እነዚህ ባህላዊ ሕግጋት ተፈጻሚነት እንዲኖራቸው የሚያደርጉ መዋቅሮች ባህላዊ የፍትሕ ተቋማት በሚል ይታወቃሉ። በማኅበረሰቡ ዘመናዊ መንግሥት ያልተመሠረተ ከሆነ ወይም ዘመናዊ መንግሥት ተመሥርቶም የመንግሥት ሕግ የማስፈጸም አቅሙ ደካማ ሲሆን የባህላዊ ተቋማት ሚና የላቀ ነው። የመንግሥት የፍትሕ ሥርዓት ጠንካራ በሆነበትም ሁኔታ እነዚህ ተቋማት በተጓዳኝ ህልውና ሲኖራቸው ይስተዋላል። በሕግጋቱ ብቻ ሳይሆን በተቋማቱም ላይ ጥናቶቹ ትኩረት በማድረግ፤ አደረጃጀታቸውን፣ የባሕላዊ ዳኝነትን እርከን፤ የዳኝነትን ማዕቀፍ፤ የዳኞችን ማንነት፤ እንዲሁም የሥልጣናቸውን ምንጭና የሥራ ዘመን የሚፈትሹ ናቸው። የፍርድ ሂደትንም በተመለከተ ቅድመ-እርቅ፤ የእርቅ ሂደት (ጉዳይ ማጣራት፤ የችሎት አካሄድ፤ ውሳኔ አሰጣጥና ቅጣት) እና ድህረ-እርቅ (የማሳረጊያ ደንብና የውሳኔ አፈጻጸም) ሥርዓቶችን ይመረምራሉ። በተጨማሪም በሀገራችን በሚገኙት በርካታ ልማዳዊ ሕግጋትና ሥርዓቶች መካከል ያለው ልዩነት ብቻ ሳይሆን አንኳር የጽንሰ-ሓሳብ እና የእሴት አንድነትንም የሚያመላክቱ ናቸው።

4.4.4 የባህላዊ ሕግጋትና ሥርዓቶች ፖሊሲ ስለመቅረጽና ሕግ ስለ ማውጣት

የኢፌዲሪ ሕገ መንግሥት ባህላዊ ሕግጋትና ሥርዓቶችን በተመለከተ እውቅና የቸሩ ድንጋጌዎችን ቢያካትትም፤ ድንጋጌዎቹን ሥራ ላይ ለማዋል በፌደራልም ይሁን በክልል ደረጃ እስካሁን ድረስ ፖሊሲ አለመቀረጹና ሕግ አለመውጣቱ ከጥናቶቹ የሚታይ አራተኛ ጭብጥ ነው። በዚህም የተነሳ ለምሳሌ ያህል በባህላዊና በመደበኛ ፍርድ ቤቶች መካከል ያለውን ግንኙነት የሚገዛ የፖሊሲና የሕግ ማዕቀፍ የለም። የባህል ፍርድ ቤቶች እንዲቋቋሙ፤ ከሕገ-መንግሥቱ ጋር የሚጣጣሙ ልማዳዊ የሕግ ሥርዓቶች እንዲጎለብቱና እንዲያድጉ መንግሥት የመርዳት ሕገ መንግሥታዊ ኃላፊነት ያለበት ቢሆንም፣ መንግሥት ልማዳዊ ተቋማት እንዲያድጉና እንዲጠበቁ እኩል ድጋፍ ያደርጋል የሚለው ኃላፊነት ምን ማለት እንደሆነ በዝርዝር የሚገልፅና ይህን ወደ ተግባር የሚያሸጋግር ሕግ አልታወጀም። ከዚህ ጋር በተያያዘ የፌዴራልና የክልል መንግሥታትን ሚና የሚደነግግ፣ እንዲሁም በልማዳዊና በመንግሥት የፍትሕ ተቋማት መካከል ሊኖር ስለሚገባው ግንኙነት የሚገልፅ የሕግ ማዕቀፍም የለም። በሌላ አገላለጽ አግባብነት ያለው የሕግ ማዕቀፍ ከመመርመር አንፃር፤ በኢፌዲሪ ሕገ መንግሥት ለልማዳዊ የሕግ

[26] ሰላሙ በቀለ፣ 2001፣ *ሕግን እንወቅ* (አዲስ አበባ፣ ኢትዮጵያ)፣ ገጽ፣ 35

ሥርዓቶች የተሰጠው እውቅና ክፍተት እንደሚታይበት፤ ለምሳሌ ልማዳዊ ተቋማት ከመደበኛ ፍርድ ቤቶችና ከመንግሥት አስተዳደር አካላት ጋር ሊኖራቸው የሚገባው ግንኙነትና የሥልጣን ወሰናቸው ግልጽ አይደለም የሚሉትን ነጥቦች የምርምር ጥናቶቹ በሚገባ አመልክተዋል።

ነገር ግን ጥናቶቹ ያልተመለከቷቸው ጉዳዮች አሉ። ከእነዚህም ጉዳዮች መካከል በሕገ መንግሥቱ ለልማዳዊ ሕጎች የተሰጠውን እውቅና በቂነት በሚመለከት ለምሳሌ ልማዳዊ የወንጀል የፍትሕ ሥርዓቶች ቦታ አላቸው ወይ? ዝርዝር የሕግ ማዕቀፉ መውጣት ያለበት በፌዴራል ሕግ አውጪ አካል ነው ወይንስ በክልል? ሕገ መንግሥቱን ተከትለው የወጡ ፖሊሲዎችና አዋጆች ለልማዳዊ ሕግጋትና ተቋማት ምን ያህል ቦታ ሰጥተዋል? የሚሉት ጥያቄዎች ይገኝባቸዋል። ከቀበሌና ወረዳ አስተዳደሮች ጋር ያላቸው ግንኙነት ምን ይመስላል? ከወረዳና ዞን ፍርድ ቤቶች፤ ፖሊስና ዐቃቤ ሕግ ጋርስ? ባህላዊ ሽማግሌዎች በሕዝቡ ዘንድ ያላቸውን ተቀባይነትና ተአማኒነት የሚያሳጣ ግንኙነት ከአካባቢያቸው አስተዳደር ጋር የማድረግ ዝንባሌዎች ይታያሉን? ጉዳይ ተኮር የተዳቀለ ሕግ ወይም ተቋም (ለምሳሌ የባህላዊና ዘመናዊ ፍርድ ሂደት የሚስተዋልባቸው በአሁኑ ሰዓት በገጠሪቱ ኢትዮጵያ ሥራ ላይ የምናገኛቸው የገጠር መሬት አጠቃቀምና አስተዳደር ኮሚቴዎች) የሚፈጠርበት ሁኔታ ይስተዋላልን? ይህ ለሁለቱ ሥርዓቶች ግንኙነት ምን አንድምታ ይኖረዋል? የሚሉና የመሳሰሉት ጥያቄዎችም ሊጠኑ ይገባል።

ልማዳዊ ሕግጋትን የሚገዛ ሕግ አልወጣም፣ ፖሊሲም አልተቀረጸም ማለት ምንም ጥረት አልተደረገም ማለት አይደለም። ለማለት የተፈለገው አንድ ወጥ ፖሊሲና ሕግ አልወጣም ነው። ከሕግጋት መካከል ለምሳሌ ባህላዊ ሕግጋትና ሽማግሌዎችን መጠቀም የሚያስችሉትን የገጠር መሬት አጠቃቀምና አስተዳደር አዋጆችን መጥቀስ ይቻላል። ከፖሊሲ ደግሞ የወንጀል ፍትሕ ፖሊሲ[27] እና የባሕል ፖሊሲን ማየት ይቻላል። በተጨማሪም አንዳንድ ልማዳዊ ሕግጋት ላይ ብይን የሰጡ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ውሳኔዎችን መመልከት ይቻላል። እነዚህ ሕግጋት፤ ፖሊሲዎችና የሰበር ችሎች ውሳኔዎች በጥናቶቹ አልተነሱም።

በጥናቶቹ የተስተናገደው ሌላው ተያያዥ ጉዳይ የመንግሥት ሕግና ባህላዊ ሕግጋት ይፋዊ ያልሆነ መስተጋብር ያላቸው መሆኑ ነው። የዚህ ምንጭም ሁለቱ የሕግ ሥርዓቶች በጊዜ፤ በቦታና በጉዳይ ጎን ለጎን ሲኖሩ (ወይም co-exist ሲያደርጉ) ስለሚታይ ነው። በዚህ የተነሳ አንዱ በሌላው ላይ ተፅዕኖ ሲፈጥር፤ አንዱ የሌላውን ጽንሰ-ሓሳብና ዘዴ ሲወርስ ይስተዋላል። በአንድ በኩል ባህላዊ ሕጎችንና ተቋማትን በዚያው ማኅበረሰብ እይታ መመርመር፣ በሌላ በኩል ደግሞ ከመንግሥት ሕግ ጋር ያላቸውን መስተጋብር መገንዘብ በዘርፉ የሚደረጉ ጥናቶችን ዘዴ በመምረጥ ረገድ አንድምታ አላቸው። ስለሆነም ሰነዶችን፤ ሕግጋትንና ቀደምት ጥናቶችን ከመጠቀም በተጨማሪ፤ መረጃ መሻት ያለብን ለማጥናት በመረጥነው አካባቢ ከሚገኙ እንስትና ተባዕት ሽማግሌዎች፤ ወጣቶች፤ ተመራማሪዎች እንዲሁም ደግሞ በመንግሥት ፍትሕ ሥርዓት ከሚገኙ ሰዎች ጭምር ነው። በሌላ አገላለጽ ልብ ሊባል የሚገባው፣ ልማዳዊ ሕግጋትና ተቋማት ከመደበኛው የሕግ ሥርዓት ጋር ስላላቸው ተግባራዊ መስተጋብር (interface) በሚገባ የአለመጠናቱ ጉዳይ ነው።

[27] ፍትሕ ሚኒስቴር፣ "የኢፌዴሪ የወንጀል ፍትሕ ፖሊሲ" የካቲት 25፣ 2003 ዓ.ም.

በተግባር የሁለቱ መስተጋብር እንዳንዱ ውድድር (ፉክክር) አንዳንዱ ደግሞ ትብብር ይታይበታል።[28] በአንዳንድ ቦታዎች የሚታይና ይፋዊ በሆነ ፖ`ሊሲ ያልተደገፈ የሁለቱ ሥርዓቶች መስተጋብር የልማዳዊ ሕግ ሥርዓቶችን ቅቡልነት በሚሸረሽር መልክ እየተደረገ ስለሚመስል ይህ ተገቢ እንዳልሆነ ምርምሮቹ ይመክራሉ። የሁለቱ ሕግ ሥርዓቶች የሚተባበሩበት ዘዴ በምርምሮቹ ውስጥ እንብዛም አልተጠቆመም። ንጽጽራዊ ጥናት በማድረግ ለምሳሌ ብዙ ርቀት የተጓዙ የሌሎች አፍሪካ አገራት ተሞክሮዎችን ምርምሮቹ ሲያነሱ አይስተዋልም።

4.4.5 የባህላዊ ሕግጋትና ሥርዓቶች ሕገመንግሥታዊ እውቂያ ተግባራዊነት

የጥናቶች *አምስተኛውና* ሌላው ዐብይ ሓሳብ ለባህላዊ ሕግጋትና ተቋማት እውቅና መስጠት፤ በእነሱ ላይ ጥናት ማድረግ፤ እንዲያድጉና እንዲበለጽጉ መንግሥታዊ ድጋፍ ማድረግ የማስፈለጉን ምክንያት መመርመር ነው። ይህን ጉዳይ መሣሪያዊ ጠቀሜታ (instrumental function) እና የማንነት ጉዳይ ብለን በሁለት ልንመድበው እንችላለን። የመጀመሪያው ባህላዊ ሕግጋትና ተቋማትን በመሣሪያነታቸው ወይም ከሚሰጡት ተጨባጭ ጥቅም አንፃር ሲመለከታቸው፤ የኋለኛው አተያይ ግን እንደ መሣሪያ ሆነው ባገለገሉን መጠን የምናነሳቸው፤ የማይጠቅሙን ሲመስለን አውልቀን የምንጥላቸው ሳይሆኑ፤ የማኅበረሰብ የጋራ ክብር በመሆናቸው ብቻ (the fact that they form a community`s collective dignity) ቦታ ይሰጣቿል። እነዚህ ሁለት አስተሳሰቦች በአጭሩ እንደሚከተለው ተብራርተዋል።

ሀ) ባህላዊ ሕግጋትና ተቋማትን እንደ መሣሪያ የመመልከት አስተሳሰብ

ባህላዊ ሕግጋትና ተቋማት የአንዲት አገር የሕግ ማሻሻያ መሠረት ሊሆኑ ይችላሉ፤ ይገባልም። ይህ ተግባር እውን ሊሆን የሚችለው አገሪቱ በባህልዋ የመጠቀም ፍላጎትና ቁርጠኝነት ሲኖራት እንዲሁም ባህላዊ ሕግጋትና ተቋማት የሕግ ማሻሻያ በሚደረግበት ወቅት ወይም ቀደም ብሎ በጸሑፍ ሰፍረው የተገኙ ከሆነ ነው። ለአብነት ያህል ፈረንሳይ በ18ኛው ክፍለ ዘመን ማክተሚያና በ19ኛው ክፈለ ዘመን መባቻ አምስት ሕብረ-ሕግጋትን (law codes) በቀረጸችበት ወቅት የተጻፉ ባህላዊ ሕግጋት ስለነበሯት በሚገባ ልትጠቀምባቸው ችላለች። ነገር ግን ከፈረንሳይ አንድ መቶ ሀምሳ ዓመት ዘግይታ ስድስት የተጻፉ ሕብረ-ሕግጋትን ያፀደቀችው ኢትዮጵያ ይህንን ዕድል አላገኘችም። ልማዳዊ ሕግጋትና ተቋማትን በመንግሥት የሕግ ማዕቀፍ ማካተት የመንግሥትን የሕግ ሥርዓት ተቀባይነትና ውጤታማነት እንደሚጨምር በአንዳንድ ምሁራን በሰፊው የታመነበት ቢሆንም፤ እነዚህ ሕግጋት በበቂ ሁኔታ ቦታ አልተሰጣቸውም ነበር። ይህም ሊሆን የቻለው ልማዳዊ ሕግጋት እምብዛም በጽሑፍ ባለመስፈራቸው፤ የወቅቱ የሀገሪቱ ልሂቃን የዘመናዊነት አስተሳሰብ አራማጆች ስለነበሩና (ይህም አስተሳሰብ ልማዳዊ ሕግጋት ለአንድ ታዳጊ አገር አንድነትና ልማት አይበጁም የሚል ስለነበረ)፤ በተለይ ፕሮፌሰር ሬኔ ዳቪድና ሌሎች የሕግ አርቃቂዎች በጽንሰ-ሓሳብ ደረጃም ቢሆን ልማድ እንጂ ባሕላዊ ሕግጋት የሚባል ነገር እንደሌለ ያምኑ ስለነበር ነው። የኢትዮጵያን የፍትሐ ብሔር ሕግ አርቃቂ አቋም በተመለከተ ፕሮፌሰር ኖርማን ሲንገር እንዲህ ይላሉ፡-

> በፍትሐ ብሔር ሕግ እውቂያ ያገኘው ኦፊሴላዊ ሕግ በኢትዮጵያ ውስጥ ብቸኛው ሕግ እንደሆነ ነው [ሬኔ ዴቪድ] የተሰማው። እንዲያውም ሕጋዊ እውቅና ከተሰጠው የሕብረ-ሕግጋት ሥርዓት ውጭ የነበሩት ሥርዓቶች እንደ ልማድ

[28] Gebre Yntiso *et al (eds)*, 2011, cited above

> ብቻ የሚታዩ እንደነበሩ በተደጋጋሚ ገልጧል። ... በኢትዮጵያ ትይዩ ለሆነ የሕግ ሥርዓት እውቂያ አልነበረም።... [ነገር ግን] አሁንም እንደማምነው፣ በኢትዮጵያ ውስጥ አብዛኛዎቹ ባህላዊ የአለመግባባት መፍቻ ሥርዓቶች የሕግ ኃይል ሊሰጣቸው የሚያስችሉ ክፍለነገሮች አሏቸው።
>
> "[René David] felt that the official law recognized in the Civil Code was the only law in Ethiopia. In fact, he repeated a number of times that the systems that existed outside of the officially recognized Code system were just custom… In the case of Ethiopia … there was no recognition of the parallel system …, I still believe that most of the systems of traditional dispute settlement in Ethiopia possess the elements which give them the force of law."[29]

ልማዳዊ ሕግጋትና ተቋማት በመንግሥት ሕግ ሳይካተቱ ራሳቸውን ችለው ሥራ ላይ እንዲውሉ ማድረግ ሌላው አካሄድ ነው። ይህም በተራው የመንግሥት የፍትሕ አካላትን ያግዛል፤ ጫናቸውን ይቀንሳል፤ የፍትሕ ተደራሽነትን ያሰፋል። ልማዳዊ ሕግጋት በሕዝቡ ዘንድ ተመራጭ የሚሆኑበት ሁኔታ ሊኖር ይችላል። ለምሳሌ፣ ድብቅ የሆኑና በመደበኛው የሕግ ሥርዓት ሊታወቁ የማይችሉ ወንጀሎችን የመመርመሪያ ፍቱን ዘዴ አላቸው፤ እንዲሁም ልማትን በማምጣት በኩል ባህላዊ ሕጎችና ተቋማት አስተዋጽዖ ሊያበረክቱ ይችላሉ። ይህ የሚሆነው ግን ለልማት አስተዋጽዖ የሚያደርገው የመንግሥት ሕግ ብቻ እንደሆነ የመመልከት እሳቤ ሲቀየር ብቻ ነው። ይህ አስተሳሰብ ሕግና ልማት (law and development) ከሚለው እሳቤ ጋር የተቆራኘ ሲሆን፤ ሕግና የሕግ ተቋማት ማለት ከመንግሥት የሚመነጩት ብቻ ናቸው፤ ስለዚህ ልማት ለማምጣትና ልማትን ለማራመድ ዋናው ጉዳይ የመንግሥት ሕግጋትና ተቋማትን የበለጠ ተደራሽ፤ ምሉዕ እና ውጤታማ በማድረግ ማጠናከር ነው ከሚል እይታ ጋር የተያያዘ ነው።

ከዚህ በላይ እንደተብራራው እኤአ በ1960ዎቹ ገናና የነበረው የሕግና ልማት እይታ ባህላዊ ሕግጋትና ተማቋት ልማትን ማምጣትና ዘላቂ እንዲሆን ለማድረግ ሊረዱ ይቀርና እንቅፋቶች እንደሆኑ የሚቆጥር አስተሳሰብ ነበር። በተመሳሳይ ሁኔታ፣ በሊጋል ፖዚቲቪዝም አስተምህሮት ውስጥ ለሕግ የበላይነት የተሰጠው ትርጓሜ ባህላዊ ሕግጋትና ተቋማት የሚጫወቱትን ሚና ከግምት ያስገባ አይደለም። በፖዚቲቪዝም አስተሳሰብ የመንግሥት ተቋማትና ባለሥልጣናት ሕግን እንዲያከብሩ፤ ከሕግ በታች ሆነው ተግባራቸውን እንዲያከናውኑ መደረግ ያለበት የመንግሥትን የሕግ ሥርዓት ብቻ በመጠቀም እንደሆነ ይገመታል። እነዚህ የሕግና ልማት እንዲሁም ፖዚቲቪዝም አስተሳሰቦች የባህላዊ የሕግ ሥርዓትን አስተዋጽዖ ከግምት ውስጥ አያስገቡም፤ የግለሰቦችን፣ የባህላዊ አመራሮች እና የተቋማትን ስምረትና ይህም ሕግን የተከተለ እና ተገማች የዜጎች ሕይወትን በተመለከተ ባህላዊ ሕግ የሚኖረውን ሚና አይገነዘቡም።

በአጠቃላይ እነዚህ ከላይ የተጠቀሱት እውነታዎች የባህላዊ ሕግጋትና ተቋማትን እንደ መሣሪያ ከመመልከት ጋር የተያያዙ ናቸው። ከዚህ ባለፈ ይህ መሣሪያዊ አመለካከት በአብዛኛዎቹ በዚህ ጽሁፍ በተዳሰሱ ምርምሮች ገኖ ይታያል። እንዲሁም ጥናቶቹ በቂ ፍተሻ ሳያደርጉ ልማዳዊ የሕግ ሥርዓቶች ተደራሽና አሳታፊ ናቸው፤ ፍትሐዊና ወጪ

[29] Norman Singer, January 2008, cited above, pp. 144-145.

ቆጣቢ ናቸው፤ እንዲሁም የሰፋ ተቀባይነት አላቸው፤ ከሙስና የፀዱ ናቸው የሚሉ ድምዳሜዎች ላይ ሲደርሱ ይስተዋላል። እኤአ ከ1990ዎቹ በኋላ ከታተሙት ምርምሮች የተወሰኑት በልማዳዊ የሕግ ሥርዓቶችና በሕግ የበላይነት መካከል መጣጣም መኖሩንና ልማዳዊ የሕግ ሥርዓቶች ለልማት የሚያበረክቱት አዎንታዊ አስተዋጽኦ መኖር ብቻ ሳይሆን እነሱን ሳይጠቀሙ ልማት ማምጣት አዳጋች እንደሆነ ይጠቁማሉ። ልማዳዊ ሕግጋትን ተጠቅመን የሕግ የበላይነትና ልማት እንዴት ማምጣት እንችላለን የሚለው ጭብጥም ላይ ተጨማሪ ፍተሻ ሊደረግበት ይገባል።

ለ) *ባህላዊ ሕግጋትና ተቋማት ከመሣሪያነት የዘለለ ጠቀሜታ ያላቸው ስለመሆኑ*

ከላይ እንደተመለከተው ባህላዊ ሕግጋትና ተቋማት ከማንነት ጋር ተያያዥነት አላቸው። በአንድ አገር ውስጥ የሚኖር ማኅበረሰብን ባህል ለመጠበቅ፤ ለማሳደግ፤ ለመንከባከብና ለማሻሻል ይረዳሉ። ይህ ፋይዳ የሚመነጨው ባህል የማኅበረሰብ ማንነት አሻራ አካልና መገለጫ በመሆኑ ነው። በዚህ ረገድ በስዋሂሊ ቋንቋ ተናጋሪ ሕዝቦች ዘንድ ጥልቅ የሆነ ትርጉም ያዘለውንና ኡቡንቱ (ubuntu) በመባል የሚታወቀውን ጽንሰ ሓሳብ ማስተዋል ይቻላል። የጽንሰ ሓሳቡ ትርጉም፤ "I am, because you are, because we are" ማለት ሲሆን፣ ይህም በግርድፉ "እኔ እኔን የሆንኩት፣ በአንተ/አንቺ፤ በእኛ ምክንያት ነው" በሚል ሊገለፅ ይችላል። ይህም የልማዳዊ ሕግጋትና ተቋማትን ጠቀሜታ ከማሳየት ባሻገር፤ የትውልድና የሰው ልጆችን ጥልቅ ቁርኝት፤ እንዲሁም ትናንት ከዛሬና ከነገ ጋር ያላቸውን ትስስር ይነግረናል። ከያዝነው ጉዳይ ጋር በተያያዘ ይህ የኡቡንቱ መልዕክት የባህላዊ የሕግ ሥርዓትን በቅጡ እንድናውቀው፤ እንድንወርሰው እና እንድናወርሰው ዓይነተኛ ሚና ይኖረዋል። ሰፋ አድርገን ስናስተውለው ይህ ጎዳና አንድ ማኅበረሰብ "ማንነቱ ይከበር፤ እራሴን በራሴ ላስተዳድር፤ በራሴ ሕግና ተቋማት የመጠቀም መብትን ልጎናጸፍ" የሚሉ ጥያቄዎች እንዲያነሳ በር ይከፍትለታል።

የባህላዊ ሕግን አስፈላጊነት ከመሣሪያነቱ ወይም ከማንነት መገለጫነቱ አኳያ በመመልከት መካከል ያለውን ግንኙነት በተመለከተ ተጨማሪ ነጥቦች ሊነሱ ይችላሉ። ባህላዊ የሕግ ሥርዓትን እንደ መሣሪያ መቁጠር ይህንን ሥርዓት እንደ አንድ ሕዝብ መለያ ምልክት መውሰድን ላያመለክት ይችላል። በአንፃሩ ግን የተገላቢጦሹ ትክክል ሊሆን ይችላል። ይህም ማለት ለምሳሌ ባህላዊ የሕግ ሥርዓት ማንነቱን ከማክበር ጋር በተገናኘ አንድ ሕዝብ እውቅና ሲሰጠው ባህላዊ ሥርዓቱ በመሣሪያነት የሚሰጠውን ጥቅም ሕዝቡ ይቋደሳል ማለት ነው። በሌላ በኩል ግን ባህላዊ የሕግ ተቋማት እንደ መሣሪያ ብቻ ከታዩ ከእነሱ የሚገኘው ጥቅም ሲቀንስ ወይም ቀሪ ሲሆን (ለምሳሌ ዘመናዊውን የሕግ ሥርዓት የበለጠ ተደራሽና ውጤታማ በማድረግ) ችል ሊባሉ ወይም ጭራሹኑ ሊተዉ ይችላሉ። በዚህም የተነሳ ሁለተኛው ምክንያት በመርህ ላይ የተመሠረተና የበለጠ መሠረታዊ ይመስላል። በአንፃሩ የመጀመሪያው በፕራግማቲዝም እሳቤ ላይ የተመሠረተ ሲሆን ለባህላዊ የሕግ ሥርዓት ቦታ ሊሰጥ የሚችለው "እንደ ሁኔታው" ነው።

4.4.6 ባህላዊ የሕግ ሥርዓት ራሱን ችሎ በጥልቀት እንዲጠና ስለማድረግ

በምርምሮቹ የታየው *ሰደሰተኛ* ገኛር ሓሳብ በዘርፉ ወደ ፊት የሚጠብቁንን ሰፊና ጠለቅ ያሉ ምርምሮች በምናካሂድበት ወቅት ሁለት ጉዳዮች ከግምት መውሰድ እንደሚገባን መገንዘብ ነው። አንደኛ ባህላዊ የሕግ ሥርዓትን ከመንግሥት የሕግ ሥርዓት ጋር ሳንቀላቅል ለብቻው በጥልቀት ማጥናት ይገባናል። ከመንግሥት የሕግ ሥርዓት ጋር የሚደረገው ንጽጽር በኋላ ቢመጣ ይመረጣል። ምክንያቶቱም ሁለቱ የሕግ ዓለማት ለምሳሌ በእይታ ልዩነት የተነሳ በዋና ዋና ጎዳዮች ላይ በአንድ የጋራ ልኬት የማይነፃፀሩ

(incommensurable) ሊሆኑ ይችላሉ። የአጥኝው ትኩረት ወደ ንጽጽር ሊሳብ ስለሚችል በባህላዊ ሕጉ ላይ የሚደረገው ምርምር ሊሳሳ ይችላል። የተጠናው ባህላዊ ሕግ ሕልውና የሚያገኝው ከዘመናዊው ሕግ ጋር በተመሳሰለ መጠን ነው የሚል እንደምታ ሊፈጥርም ይችላል።

በዚህ ፀሐፊ እምነት በተቻለ መጠን የጥናቱ መሠረት በሆነው ማኅበረሰብ ቦታ ሆነን (putting ourselves in their shoes) የባህላዊ ሕጎችንና ተቋማትን ማየት አስፈላጊ ነው። እዚህ ላይ ነጥቡ ይህ ሕግና የሕግ ሥርዓት በምን ምክንያት ተፈጠረ የሚለውን መፈተሽ ነው። ጥናቱ በእነሱ አተያይ መሠረት ከተከናወነ የሕጋቸውንና ሥርዓታቸውን መንፈስ በቅጡ እንረዳለን፤ ሌላውም እንዲረዳው መንገድ እንከፍታለን ማለት ነው። ሥርዓቱን በተገቢው መንገድ መረዳት ዓለም አሁን ከደረሰችበት ደረጃ ጋር የማይሄደውንና መቅረት ያለበትን በመረዳት ደካማ ገጽታዎችን ማስወገድ ያስችላል። ከባህል ሕጎችና ተቋማት መካከል ሊቀጥሉና ሊጠበቁ የሚችሉ ገፅታችዎችንም በተመሳሳይ መገንዘብ ይቻላል። ይህ ማለት ግን ባህላዊ የሕግ ሥርዓትን ያለበቂ ምክንያት ማወደስ አለብን ማለት አይደለም። ጀምስ ስኮት እንዳስገነዘቡት፡-

> [አካባቢያዊ፣ ባህላዊ እና ልማዳዊ ለሆኑ እውነታዎች ምክንያታዊ የሆነ አድናቆት አግባብነት አለው፤ ምክንያቱም] "አንዳንድ ሊበራሎች ለማጣጣል እንደሚሞክሩት ሳይሆን ከተግባራዊ እውቀት አንዳንድ ሥርወ ነገሮች ውጭ የመደበኛው የሥርዓት ፈለጎች ሊፀኑ አይችሉም። [ነገር ግን] ለአካባቢያዊ፣ ባህላዊ እና ልማዳዊ [ሥርዓቶች የሚደረግ ሂስ-አልባ አድናቆት] ሊጸና የማይችል ነው፤ ምክንያቱም ይህ አካሄድ ከዘመናዊው የሊበራል አስተሳሰብ ጋር ከማይጣጣሙ የጫና፣ የጠቅላይነትና የማግለል ተግባራት በአብዛኛው የማይለይ ነው።
>
> [A reasonable admiration of the local, the traditional, and the customary is sensible because] "formal schemes of order are untenable without some elements of the practical knowledge that the liberals tend to dismiss." [But uncritical admiration of] "the local, the traditional, and the customary" is untenable because it "is often inseparable from the practices of domination, monopoly, and exclusion that offend the modern liberal sensibility.[30]

በዚህ ረገድ በጋናና በአካባቢዋ የሚኖሩት የአካን ሕዝቦች ትምህርት ይሰጡናል፤ ባህላቸውን ሳንኮፋ በምትባል ወደኋላ እያየች ወደ ፊት በምትራመድ ምናባዊ ወፍ ይመስሉታል። ከመልዕክቱ የምንገነዘበው ባህላችን ወደፊት ከመሄድ ወይም ለውጥ ከመቀባል ማለትም አንዳንድ የባህላችንን ገጽታዎች ከመተው ሊገታን እንደማይገባ፤ እንዲሁም የመጣንበትን መርሳት እንደሌለብን ነው። በአንባሩ፣ በዚህ ጽሁፍ በተቃኙት አንዳንድ ምርምሮች ልማዳዊ ሕግጋትን በዘመናዊው ሕግ መነጽር የማየት ዝንባሌ ተስተውሏል።

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[30] James Scott, 1998, *Seeing Like A State: How Certain Schemes to Improve the Human Condition Have Failed*, (New Haven and London, Yale University Press), p. 7.

4.4.7 የባህላዊ ሕግ ሥርዓት አድማስ ከግጭት አፈታት የሰፋ ስለመሆኑ

በምርምር ጽሑፎች ይዘት ረገድ ሊነሳ የሚገባው *ሰባተኛ* ነጥብ ጽሁፎቹ ልማዳዊ የሕግ ሥርዓቶችን እንደግጭት መፍቻ መሣሪያ ብቻ አድርጎ የማቅረብ ሰፊ ዝንባሌ የሚታይባቸው መሆኑ ነው። ይህም ማለት ግጭት በመከላከል ረገድ ባላቸው ፋይዳ ላይ ተገቢውን ትኩርት አልሰጡም። ሕልው ሕግጋት

4.4.8 የባህላዊ ሕግ ሥርዓት እየተለወጠ የሚሄድ ስለመሆኑ

ልማዳዊ የሕግ ሥርዓቶች እየተለወጡ መሆናቸውና እንደነበሩ ሊቀጥሉ እንደማይችሉ ምርምሮቹ የሚያስረዱ መሆኑ ከጽሑፎቹ የምንገነዘበው ስምንነተኛ ነጥብ ነው። ማለትም ልማዳዊ ሕግ ማህበራዊ ተግባራዊነት ያለው ሕግ ("living law") መሆኑን ያስገነዘባሉ። ይህም ጥያቄ ባህል ምንድነው ወደሚለው ነጥብ ይወስደናል። ባህል የማይለውጥ ባለበት የሚረግጥ አለመሆኑን እንረዳለን። ለምሳሌ በትግራይ ክልል ሴቶች በማህበራዊ ፍርድ ቤቶች እንዲሳተፉ መደረጉ እንዲሁም በኦሮሚያ ክልል ገጠሮች ሴትን የደፈረ በሽማግሌዎች ለመንግሥት አሳልፎ የመስጠት ልማድ ባህል በበጎ መልኩ ሊለወጥ እንደሚችል ያሳየናል። ይህ ለውጥ በጎ ያልሆነ ገጽታም ሊያመጣ ይችላል፤ ለምሳሌ አቅምን ያላገናዘበ የአገልግሎት ክፍያ መጠየቅ፤ ለጎሳ አባል ማዳላት፣ ወዘተ ባህላዊ የፍትሕ ሥርዓቶች ተአማኒነትን ሊሸረሽሩ የሚችሉ ናቸው። ጽሁፎቹ ከዚህ አኳያ ባህል ምን እንደሆነ አልተነተኑም፤ በዚህ ረገድ የደቡብ አፍሪካ ተመራማሪዎች ያደረጉት ጥረት ተጠቃሽ በመሆኑ ልንማርበት ይገባል።

4.4.9 በግለሰብና ቤተሰብ ጉዳዮች ተግባራዊ እየሆነ ያለው የሸሪአ ሕግ ሥርዓት

በፌዴራል ሕገ መንግሥቱ ለሸሪአ ፍትሕ ሥርዓት እውቅና ከመሰጠቱ አንፃር በሀገራችን የሕግና ፍርድ ቤቶች የአሠራር መስተጋብር ረገድ ሊያጋጥሙ ስለሚችሉ ተግዳሮቶች በምርምሮቹ እጥረት የሚታይ መሆኑ የምርምር ጽሑፎቹን የሚመለከት *ዘጠነኛ* ነጥብ ነው። በአገራችን በተለያዩ ቦታዎች በግለሰብና ቤተሰብ ጉዳዮች ተግባራዊ እየሆነ ያለው የሸሪአ ሕግ ሥርዓት ከልማዳዊ ሕግ ሙሉ በሙሉ የተላቀቀና ኃይማኖታዊ ይዘት የተላበሰ ነው የሚል በከፊል የተሳሳተ ግምት የዚህ ጉድለት መንስኤ ይመስላል። ነገር ግን በተግባር ሁለቱ የቅልቅል ይዘት አላቸው።

በመሆኑም ስለልማዳዊ የሕግ ሥርዓት ስንመራመር ኃይማኖታዊ የሕግ ሥርዓቶችን ወደ ጎን ገሸሽ ማድረግ ተገቢ አይመስልም። በሀገሪቱ ውጤታማ የሆነ የጋራ የሕግ ሥርዓት ለማረጋገጥ፣ አንደኛ ከሸሪአ ፍርድ ቤት ዳኞች አቅም በተለይም የሸሪአ ሕግና ዘመናዊ ሕግ ከማወቅና ፍርድ ቤቶቹ ከመንግሥት ፍርድ ቤቶች ካላቸው ነፃነት አንፃር የሸሪአ ፍትሕ ሥርዓት ምን ያህል ባህሪውን ጠብቆ እየሄደ መሆኑን በየጊዜው ምን ያህል እየፈተሸን ነው የሚለው ጭብጥ ትኩረት ይሻል። ሁለተኛ የሸሪአ ፍትሕ ሥርዓት በተግባር ሕገ መንግሥታዊ ስታንዳርዶችን በመጠበቅ ረገድ እንዴት ይታያል የሚል ጥያቄ ማንሳት ተገቢ ነው። ይህ መነሻ መስፈርት (minimum standard) መሟላቱ ሊረጋገጥ የሚችለው እነዚህ ፍርድ ቤቶች የሚሰጧቸው ውሳኔዎች ከሕገ መንግሥቱ ጋር የተጣጣሙ መሆን አለመሆናቸውን በመፈተሽ ነው። የሕገ መንግሥትን ጉዳይ የሚመለከቱ ተቋማት ምን ያህል ይህንን ሥራ ለማከናወን የሚያስችል አቅም ገንብተዋል

የሚል ተያያዥ ጭብጥም ይነሳል።[31] እንዲሁም የሸሪአ ፍርድ ቤቶች የሥልጣን ወሰናቸውን በተግባር እንዴት እየተረዱት ነው?[32] ከዚህም በተጨማሪ፣ ተከራካሪ ወገኖች በተለይም ሴት ተከራካሪዎች የሸሪአ ፍርድ ቤቶችን የመጠቀም አዝማሚያ ምን ይመስላል? እና በፍርድ ቤቶቹ የተከራካሪ ወገኖች የመሰማት መብት አተገባበር ምን ያህል ደረጃውን የጠበቀ ነው የሚሉ ጥያቄዎችን መፈተሽ ይገባል።[33]

4.4.10 ልማዳዊ የሕግ ሥርዓቶች ተፈላጊነታቸው የመጨመሩ ምክንያት

ልማዳዊ የሕግ ሥርዓቶች እኤአ ከ1990ዎቹ ጀምሮ ተፈላጊነታቸው ለምን ጨመረ ለሚለው ጥያቄ ምላሽ ከመስጠት አንፃር ጥናቶቹ አህጉራዊና ዓለም አቀፋዊ ሁኔታዎችን በተገቢው ሁኔታ ፈትሸው አልተገኙም። በአሁኑ ወቅት የማንነት ፖለቲካ መንገስ (የሕዝቦች የራስን እድል በራስ መወሰን መብት ማንሰራራት)፤ ይህን ተከትሎ የግጭቶች መባባስና እነዚህን ግጭቶች ለመፍታት ልማዳዊ የሕግ ሥርዓቶችን የመጠቀም አዝማሚያ መታየት፤ የታዳጊ አገሮችን የመንግሥት ሕግ ሥርዓቶች ለማጎልበት የዓለም አቀፍ የልማት ድርጅቶች ለበርካታ አሥርተ አመታት በቢሊዮን ዶላር የሚቆጠር ገንዘብ ቢመድቡም ለልማት ያበረከተው አስተዋጽኦ ውስን ሆኖ መገኘቱ፤ ልማዳዊ የሕግ ሥርዓቶች ለልማት ሊያግዙ ይችላሉ በማለት ፊታቸውን ወደ እነሱ ማዞራቸው፤ እኤአ በ1990ዎቹ የሰብአዊ መብት እንቅስቃሴ መንገሥን ተከትሎ ልማዳዊ የሕግ ሥርዓቶች የሰብአዊ መብት ጥሰት ምንጮች ተደርገው መቆጠራቸው ፍተሻ የተደረገባቸው የምርምር ነጥቦች ናቸው።[34] በዳሰሳው የተካተቱት ምርምሮች ሰብአዊ መብቶች ለልማዳዊ ሕግጋት ያላቸውን አንድምታ ቢመለከቱም፣ የማንነት ፖለቲካንና በቅርቡ የዓለም አቀፍ ልማት ድርጅቶች እየሰጡ ያሉትን ትኩረት በበቂ አልተመለከቱም።

5. መደምደሚያና ምክረ-ሓሳብ

ልማዳዊ የሕግ ሥርዓቶች ያልተጻፉ፤ ከቦታ ቦታ የሚለያዩ፤ ኋላ ቀር፤ ለሀገር ልማትና አንድነት እንቅፋት ስለሆኑ መወገድ ያለባቸው ናቸው የሚለው አስተሳሰብ እየተዳከመ ነው። የመብት ጥሰቶች የማያስከትሉ ልማዳዊ ሕግ ሥርዓቶች ፍትሕን ተደራሽ በማድረግ፤ ልማት በማምጣትና የሕግ የበላይነትን በማስፈን በኩል ጠቃሚ መሆናቸውን የሚገልፀውና፣ መወገድ ያለባቸው የመብት ጥሰት የሚያደርሱት ልማዳዊ የሕግ ሥርዓቶች ብቻ ናቸው የሚለው አስተሳሰብ የላቀ ተቀባይነት እያገኘ ነው።

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[31] Girmachew Alemu, 2015, "Legal and judicial plurality and the incorporation of traditional dispute resolution mechanisms within the state justice system" in *Non-state justice institutions and the law*, Springer pp. 20-22

[32] Federal Courts of Sharia Consolidation Proclamation 188/1999

[33] Mohammed Abdo, 2020, "Federal Sharia Courts in Addis Ababa their administration and the application of law in the light of recent developments" in Epple, S., & Getachew Assefa (eds) *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions* (Culture and Social Practice). Bielefeld: transcript Verlag. https://doi.org/10.14361/9783839450215, p. 159.

[34] Caroline Sage and Michael Woolcock (eds), 2006, *The World Bank Legal Review Law, Equity, and Development*, vol. 2, The World Bank

በዚህ ጽሁፍ የተቃኙት ምርምሮች የአንድ ሕዝብ ባህላዊ የሕግ ሥርዓት ከዚያ ሕዝብ ባህል ይቀዳል፤ እሱን ማወቅ አገርንና ሕዝብን ለማወቅ በር ይከፍታል የሚል ሓሳብ ያራምዳሉ ሊባል ይችላል። ይህ ሓሳብ በሌላ አገላለጽ ምኒልክ በተሰኘው ታሪካዊ ተውኔቱ ሎሬት ጸጋዬ ገብረ መድኅን አፄ ምኒልክን ተመስሎ ለልጅ እያሱ ከሚለግሰው ከሚከተለው ምክር ጋር ይመሳሰላል፦

> ሰው በተለይም የመንግሥት ኃላፊነት ያለው ሰው ባለው ነገር ላይ እንጂ፤ በተጨባጭ በሚዳሰሰውና በሚጨበጠው ነገር ላይ እንጂ፤ በሚመኘውና በሚያልመው የሓሳብ እስትንፋስ ላይ ዓላማውን ሊያዋቅርና ሊገነባው አይችልም። ... ባህልህን አጠንክረህ ካላወቅህ አገርህም አያውቅህ! ሕዝብህንም አታውቅ! ሕዝብህን ማወቅ ማለት የሕዝብህን ባህል ብልት ጠንቅቀህ መገንዘብ ነው። ሕዝብህን ማወቅ ደግሞ አገርህን ማወቅ ነው። ማንነቱን ያላጤንክለትን ሕዝብ ነገ ማስተዳደሩ ያቅተሃል- እያሱ።...[35]

ልማዳዊ የሕግ ሥርዓቶች እውቅና ሊሰጣቸው የሚገባው በመሣሪያነታቸው ነው ወይንስ የማህበረሰብ ማንነት መገለጫ በመሆናቸው የሚለው ጥያቄ አልተጤነም። በልማዳዊ ሕግ ሥርዓትና በመንግሥት ሕግ ሥርዓት መካከል ያለውን ተግባራዊ መስተጋብርም ጥናቶቹ በበቂ አልፈተሹም። ለሕግ ማሻሻያ ግብዓት እንዲሆኑ፤ አሁን ያለው ትውልድ እንዲጠቀምባቸው፤ ለመጪው ትውልድም ተጠብቀው እንዲተላለፉ በሚል መንግሥት እራሱ የመራው፣ ፋይናንስ ያደረገውና በጉዳዩ ላይ የተከናወነ የምርምር ሥራ አልታየም።

አንትሮፖሎጂስቶች፤ ሶሺያል ዎርከርስ፤ የታሪክና ፖለቲካ ሳይንስ ባለሙያዎች በልማዳዊ ሕግ ሥርዓቶች ላይ ያካሄዷቸው ምርምሮች በዚህ ጽሁፍ ስላልታዩ ሊፈተሹ ይገባል። ያልተጠኑ ልማዳዊ የሕግ ሥርዓቶች፤ እንዲሁም ተጠንተውም በጥልቀት ያልተኬደባቸው ስላሉ በእነዚህም ላይ ምርምር ሊደረግ ይገባል። በተለያዩ የውጭ ተቋማት የገንዘብ ድጋፍ የሚሠሩ ጥናቶች እንደተጠበቁ ሆኖ፣ መንግሥት እራሱ የሚመራውና በገንዘብ የሚደግፈው በልማዳዊ ተቋማት ላይ የሚደረግ ምርምር እንዲኖር ያስፈልጋል። ይንንም የሚያከናውን ተቋም ሊኖር ይገባል። በኢፌዴሪ ሕገ መንግሥት፤ በአዋጆችና በፖሊሲዎች ለልማዳዊ ሕግጋት የተሰጠው እውቅና በቅጡ ሊፈተሽ ይገባል። ልማዳዊ ሕግ ሥርዓቶችን የሚመለከት ፖሊሲና ዝርዝር የሕግ ማዕቀፍ መቅረጽ እንደሚያስፈልግ ጥናቶቹ ያቀረቡት ምክረ-ሓሳብ ተገቢ ነው።

የኢፌዴሪ ሕገ መንግሥት ከመግቢያው ጀምሮ ለባህላዊና ኃይማኖታዊ የሕግ ሥርዓቶች እውቅና የሚሰጡ በርካታ ድንጋጌዎችን ማካተቱ ይታወቃል።[36] ስለዚህ ይህ ሕገ መንግሥት የሕግ ብዝሀነትን የተቀበለ ሰነድ ነው። ይህ እንደ ጥንካሬ የሚታይ ቢሆንም፣ ከዚህ የሕግ ብዝሀነት እሳቤ ጋር በተያያዘ ሊፈተሹ የሚገቡ ነጥቦች አሉ። አንደኛ ከሕገ መንግሥቱ መርሆዎች የማይቃረኑ ልማዳዊ ወይም ኃይማኖታዊ ድንጋጌዎች በተዋረድ በሚወጡ የፌዴራልም ይሁን የክልል ሕጎች ሊሻሩ ይገባል ወይ? ሁለተኛ ሕገ መንግሥቱ ለልማዳዊ የሕግ ሥርዓቶች የሰጠው የእውቅና ወሰን ውስንነት የለበትም ወይ? ሦስተኛ ሕገ መንግሥቱ ከልማዳዊ የሕግ ሥርዓቶች ጋር በተቆራኘ የፌዴራልና የክልልን ሥልጣን በሚገባ ለይቶ አስቀምጧል ወይ? አራተኛ ከልማዳዊ የሕግ ሥርዓቶች ጋር በተገናኘ ሕገ መንግሥቱ እስከምን ድረስ ለአንድ የማህበረሰብ

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[35] ጸጋዬ ገብረ መድኅን፣ 2003፣ *ታሪካዊ ተውኔቶች*፣ (አዲስ አበባ፣ አዲስ አበባ ዩኒቨርስቲ ፕሬስ) ገጽ 273

[36] የኢፌዴሪ ሕገ መንግሥት መግቢያ፣ አንቀጽ 9፣ 34፣ 35፣ 39፣ 78 እና 91

አባል ባህላዊ ወይም ኃይማኖታዊ የሕግ ሥርዓቱን የመተው ወይም የመቀበል ነፃነት ሊሰጠው ይገባል? በመጨረሻም ሕገ መንግሥቱ ከፀደቀ ጀምሮ የፌዴራል መንግሥት አዎንታዊ ባህላዊና ኃይማኖታዊ የሕግ ሥርዓቶችን በማጎልበት ረገድ ምን ያህል ሠርቷል? አሉታዊ የሆኑትስ ቀሪ እንዲሆኑ የተከናወኑ ሥራዎች ጥንካሬና ክፍተት ምን ይመስላል? የሚሉት ዐበይት ጭብጦች ምርምር ይሻሉ።[37]

ትልቁን ሥዕል ለማየት ስንሞክር በዚህ ጽሁፍ ዳሰሳ የተደረገባቸው ምርምሮች በንጉሡ ጊዜ ኢትዮጵያ የፖለቲካ አንድነቷ ማስጠበቂያ እንዲሁም የኢኮኖሚና የማኅበራዊ እድገቷ የማዕዘን ድንጋይ ሆኖ የሚያገለግለው የሕግ አንድነቷ ነው የሚል እሳቤ እናገኛለን። የሕግ አንድነት ሲባል ከምዕራቡ ዓለም የተቀዱ ዘመናዊ ሕግጋትን ታሳቢ ያደረገ ነበር። ይህም በከፊል ካፒታሊዝም ከፊል ፊውዳሊዝም እሳቤ ላይ ተመሥርቶ፣ ሀገሪቱ ወደ ካፒታሊዝም ጎዳና እንድታመራ የፈለገ ይመስላል። በደርግ ዘመንም የፖለቲካና የሕግ አንድነት ለሀገር ልማት ወሳኝ መሆኑ ተቀባይነት አግኝቶ ቀጥሎ ነበር። የፖለቲካ አንድነት ግራ ዘመም፣ የሕግ አንድነቱ ደግሞ ሶሻሊስታዊ የሕግ ሥርዓት ላይ ያነጣጠረ ነበር። በዘመነ ኢሕአዴግ የነበረው ሕገ መንግሥትና ሕግን አሳምሮ በመግለጽ ደረጃ (constitutional and legal rhetoric)፣ ያልተማከለ የፖለቲካና የሕገ ሥርዓት በአጠቃላይ የሕግ ብዝሀነት በተለይ ለልማት መሠረት ነው በሚል እሳቤ ላይ የተንጠለጠለ ነበር። በዚህ ትርክት መሠረት የንጉሡና የደርግ ዘመነ መንግሥታት የዘመናዊነት ትርክት ተከታዮች ሲሆኑ፣ ዘመነ ኢሕአዴግ ደግሞ የድህረ ዘመናዊነት ቲዎሪ ገጽታዎች ማለትም የልዩነት፣ ብዝሀነት፣ የተካታችነትና አካታችነት (difference, heterogeneity, multiplicity, inclusion and exclusion) ባህሪያትን የተላበሰ ነበር ያሰኝዋል።[38] ይህ ልዩነት ወደ ኃይል፣ ሁከትና ብጥብጥ ሳያመራ ማኅበረሰቦች በሠለጠነ መንገድ ሊጠቀሙበት ይችሉ ዘንድ አንድ-ዓለማዊ (cosmopolitan) አመለካከትን በማስረፅ ተቻችሎ መኖር እንዴት ይቻላል የሚለው እንደ ዐብይ ተግዳሮት ሊታይ የሚገባ ይመስላል።

[37] የኦሮሚያ ክልል የባህል ፍርድ ቤቶችን ለማቋቋምና እውቅና ለመስጠት የወጣ አዋጅ ቁጥር 240/2013 ይዘትና አፈጻጸሙን መገምገም ጠቃሚ ሊሆን ይችላል።

[38] Ronald Bleiker, 2015, "Posmodernism" in Richard Devetak *et al (eds) An Introduction to International Relations*, Cambridge University Press

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COMMENT

On Ethiopia's Digital ID Bill, Data Privacy, Warts and All

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Kinfe Yilma ♣

Abstract

Ethiopia has been considering a Digital Identification legislation in the past few years. This comment offers a critical analysis of the legislative proposal with a focus on three aspects of the Bill. First, it analyzes the extent to which the Draft Digital Identification Proclamation attends to data privacy concerns associated with digital identification systems. Second, it considers the Bill's approach to the risks of digital exclusion or discrimination that are common in systems of digital identification. Finally, the comment discusses major areas of normative ambiguities that would undermine the effective implementation of the Bill upon its enactment. The submission is that the Bill requires substantial revision before adoption by the legislature.

Key terms

Digital ID · Data privacy · Digital exclusion · Legal drafting · Ethiopia

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Contents

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[1] This comment is based on the English version of the Digital ID Bill published on the website of the National ID Program available at: https://id.gov.et/digital-draft-id-law-english-translation-2/

1. Introduction

Ethiopia's most recent 'digital' legislative initiative is the Draft Digital Identification Proclamation (hereinafter, Digital ID Bill or Bill) which has recently been presented to the federal Parliament for consideration. In late October 2022, the Parliament referred the Bill to the relevant standing committees for closer scrutiny.[2] The Bill seeks to achieve a series of objectives, including enabling efficient provision of public services, effective national development planning, and combating crimes committed with the help of multiple identities. Upon its enactment as a proclamation by the House of Peoples' Representatives, the Bill will displace parts of the Registration of Vital Events and National Identity Card Proclamation (hereinafter Proclamation No 760/2012 or ID Card Law).

A notable departure from the existing legislation –i.e., Proclamation No 760/2012– is that the Digital ID Bill envisions identification of individuals as a matter of *right*: a 'right to identity' or a 'right to be identified' [See Art 6 *cum* Preamble]. Indeed, provision of Digital ID is envisioned as a solemn duty of the Ethiopian Digital Identification Institute, a body responsible for the administration of the identification system [hereinafter, the Institute; see, e.g., Art 5)].

In contrast, obtaining a national ID is a duty under the ID Card Law, and failing to do so may lead to liability [See Art 56]. The Bill states that upholding the right of Ethiopian citizens and residents is one of its *raison d'etre*. But this is negated by another provision in the Bill which provides that government or private entities may condition provision of services on possession of digital identity [See Art 11(2) *cum* Art 18(13)]. Moreover, if the provision of a public or private service relies on biometric verification, possession of digital identity will be mandatory.

With digitization of more and more services, possession of digital identity will be more of a duty than a right. In that sense, the notion of a right to identity appears to be an empty promise. As shall be noted later in this comment, the statutory requirements for acquiring a digital ID may be cumbersome or downright impossible to fulfil for certain individuals.

Perhaps another notable departure concerns *scope*. Proclamation No 760/2012 applies only to Ethiopian citizens [See Art 3]. That means aliens but lawfully residing in the country are exempted from the duty to obtain a national ID card. But this changes in the Digital ID Bill which will apply to

[2] Ethiopian Digital ID Draft Law Tabled in Parliament (Ethiopian Monitor, 21 October 2022) <https://bit.ly/3jAb4Gv>.

'anyone residing in Ethiopia' –i.e., to both citizens and residents [See Art 3]. This commentary discusses aspects of the Bill with a particular focus on issues relating to data privacy, digital exclusion and drafting missteps.

2. Data Privacy-protective Provisions in the Bill

Digital identification raises privacy concerns as the procedure involves the routine collection, processing, retention –and at times, sharing– of personal data. One can thus readily see that data privacy has been a concern for the drafters of the Digital ID Bill. Yet, the concern does not seem to be adequate. Part V of the Bill –captioned 'Digital Identification, Data Security and Protection of Personal Information'– has provisions offering some baseline data privacy safeguards. At the highest level, the Bill mandates that Digital ID-related data should be kept in secure systems, protected from loss or damage. To that effect, the Institute is required to put in place technical and procedural safeguards [See Art 17].

One should note here, however, the rather vague duty of the Institute to employ a 'strong' information management system, while what makes a system 'strong' [in Art 13(1)] remains unclear. An interesting clause is the requirement that technical protection measures should be commensurate with the legal safeguards [See Art 17(4)]. However, it is not entirely clear what those legal safeguards are –is it a reference to a future data protection law which would embody data privacy principles, data subject rights and governance norms? The clause appears to mandate the so-called 'privacy by design' by which privacy safeguards are baked into technical designs. But there is still a need to bring more clarity to the provision to ease its future application.

Furthermore, the Digital ID Bill provides specific privacy-protective standards highlighted below.

2.1 Data minimization: Data necessary to identify an individual

Reflective of the principle of data minimization, it requires that only data needed for the functioning of the identification system –i.e., data necessary to identify an individual digitally– should be collected [See Art 18(2)]. The Bill further enumerates the type of personal data that should be furnished in the process of registration in the ID system: name(s), data of birth, gender, place of residence, nationality –and in certain cases, phone number and email address of registrants [See Art 7].

Data minimization means that the Institute would not be able to collect other types of personal data, including sensitive personal data like a registrant's religion and ethnicity. Not only are the latter types of sensitive

personal data required in the current legislation –i.e., Proclamation No 760/2016, but also that the ID issuing federal entity can require 'other necessary information' if need be [Art 57(2)]. In current practice, local administrative units in Addis Ababa collect such data which, although not printed in the ID card issued to individuals, are recorded in databases.

Perhaps, this is one area where the Bill moves away from the rather problematic provision of existing law. But there is another provision in the Digital ID Bill where this progressive standard appears to be reversed. Article 16 indicates information that would be displayed in the physical ID cards to be issued to registrants, which may include 'any other information that shall be collected in accordance with subsequent directives' [See also Art 22(M)]. What this clause suggests is that the Institute could by a Directive expand the type of personal data that may be collected and processed in the course of Digital ID registration.

If such a future Directive were to allow registration in the database –and then in the ID card– sensitive personal data like religion and ethnicity, it will not just be reinforcement of current practice but also even worse. As alluded to above, ID cards issued by local administrative units, at least in Addis Ababa, involve collection of religion and ethnicity but those data will not appear in the physical ID cards.

2.2 Prohibition of sharing personal data

The Bill prohibits sharing of personal data to other entities without the 'permission' of the data subject [See Art 18(5) cum Art 18(14)]. Earlier versions of the Bill used the rather common notion of 'consent'. The term 'permission' is defined in the Bill as 'consent given by an individual for their information to be processed for known purposes solely based on the individual's own will' [See Art 2(16)]. In that sense, permission somehow represents consent for purposes of the Bill.

Third parties such as law enforcement and intelligence agencies are also prohibited from collecting, disclosing, distributing, printing, using or transferring data without the permission of the data subject [See Art 18(4)]. However, the framing of this clause is quite vague, and a question can arise whether it means that law enforcement agencies are totally banned, even with court warrant, to seek access to personal data stored in the digital ID system. But this is not necessarily a privacy-protective approach. We return to this point later.

An earlier version of the Bill even banned onward sharing or storage by those entities to whom the data has been transferred with the permission of the data subject [See Art 22(7)]. Existing law prohibits onward transfer of the data to third parties or its repurposing, but it does not prohibit storage by

entities to whom the data was shared [Art 64(2)]. It appears that the Bill is prohibiting third parties such as the Police who secured the data with the permission of the data subject from further disclosing it to other parties. In that sense, the Bill has another progressive privacy-protective clause.

2.3 Anonymized personal data and access upon court order

Personal data of (un)consenting individuals may be shared with other entities only where it has been anonymised and that the entities are legally allowed to seek or receive the data [See Art 18(6)]. One notes in this regard how the 'consent' of the data subject is given higher weight in the Bill. Other common legitimate bases of data personal processing –including sharing of personal data, for example, to law enforcement and intelligence agencies– without the consent of data subjects, are not recognized in the Digital ID Bill.

This stands in stark contrast with Proclamation No 760/2012 which not only allows sharing for purposes of law enforcement, intelligence, administrative and social services as well as 'implementation of risk management systems of financial institutions' but also that data may be shared with third parties upon court order [Art 64(1), Art 64(3)]. That simply means a court will not, under the Digital ID Bill, be able to order disclosure or sharing of de-anonymized and de-aggregated personal data needed, for instance, to investigate crimes.

This may be taken to be a privacy-oriented policy choice on the part of the drafters, but it is not necessarily the right choice. There should be a mechanism by which relevant authorities such as the Police may be able to obtain data based on a duly obtained judicial warrant. That way, courts will be incumbent upon to properly balance privacy and other competing values before issuing or denying warrants.

In the absence of such mechanisms, law enforcement and intelligence agencies may resort to other extra-legal or illegal means of obtaining the data. An extra-legal avenue may be efforts by heads of law enforcement and intelligence agencies to force or persuade the heads of the future Institute –who would be appointed by, accountable to and be removed by the Prime Minister–to furnish the data without any independent oversight [See Draft Council of Ministers Regulation Establishing the Ethiopian Digital Identification Commission,[3] now renamed as Institute].

Alternatively, intelligence agencies may resort to hacking –which would generally be unlawful– to secure the data. To prevent such counter-productive outcomes, relevant authorities should be allowed to seek court order for the production of data held in ID databases where data subjects deny permission.

[3] Available at <https://bit.ly/3idTuaX>.

As alluded to above, the Bill purports to repeal the ID Card Law rather vaguely. Article 64 of the Proclamation, which sets out circumstances of disclosure to third parties, including law enforcement and intelligence agencies, is not explicitly revoked. If that is the case, the above highlighted concern might be mitigated as Article 64 would continue to apply. But of course, there is the need for clarity in this regard. How a confidentiality exemption clause in the Bill may be interpreted to allow disclosure is further discussed below.

3. Some Observations on the Bill's Data Privacy Clauses

What have been highlighted (in Section 2 above) are the main privacy-protective provisions in the Bill. But the relationship between the Bill's privacy clauses and a future data protection law is not quite straightforward. An earlier version of the Bill had a provision which stated that once Ethiopia adopts a data protection law proper, the privacy rules in the Bill would cease to apply [See Art 22(9)]. Ethiopia has no data protection legislation, but several Bills have emerged in the past decade including the latest Bill drafted in 2020. And, there is no certainty when the Parliament will adopt data protection legislation. But the concern was that the privacy provisions in that version of the Bill did not provide much safeguards. Hypothetically speaking, protection of data privacy would have remained circumscribed until the data protection bill is enacted.

With this clause now removed from the current version of the Bill, the interplay between a future data protection legislation and Bill's privacy clause becomes even more unclear. In the provision where the Digital ID Bill addresses 'revoked laws', Article Art 21(2) reads: 'any law or procedure or practice shall not prevail over the affairs covered by this Proclamation'. Perhaps, what the drafters hoped to convey in this clause concerns current legislation, but will it apply to future legislation which comes into force before or after the Digital ID Bill? If so, would it mean a future data protection law will not apply when it comes to processing of personal data relating to digital ID? If the answer is in the affirmative, it can be problematic. That is mainly because the Digital ID Bill does not offer much data privacy safeguards, as alluded to above. Indeed, it embodies privacy notions that do not exist in Proclamation No 760/2012. For instance, it offers a definition of key terms

such as 'permission' –albeit, in a slightly vague manner[4]– which is missing in the existing ID legislation.

The current law speaks of 'information specific to an individual' –which might be taken to mean 'personal data'– but no formal definition of personal or biometric data is provided [See Art 64(3-4)]. Moreover, the Bill falls sharply short when it comes to embodying central aspects of data protection legislation. One example is that it does not offer a definition of 'personal data' or 'sensitive personal data'. Although it defines aspects of personal data, particularly 'biometric data', this is not adequate as acquiring Digital ID would require the collection and process of other types of personal data. That said, what the Bill calls 'enrollee information' –i.e., information recorded in the digital ID system, including biometric data– essentially captures the notion of personal data [See Art 2(15)]. However, there appears to be no reason to introduce a rather odd concept in lieu of using the rather common terminology of personal data.

A problematic provision embodied in the Digital ID Bill concerns the notion that data subjects 'own' their personal data collected and used as part of the digital ID system. The current English version of the Bill does not, as such, use the term ownership, which explicitly was mentioned in its earlier version [See Art 22(3)]. But the Amharic text in the latest version still adopts the notion of data ownership. The English and Amharic versions of Article 18(3) read:

> *The subject of the information* collected for the Digital Identification System is the individual themselves; therefore, any verification processes should be done under the permission of the individual. [Emphasis Added]
>
> **በዲጂታል መታወቂያ ሥርዓት የተሰበሰበ ማንኛውም የተመዘጋቢ ግላዊ መረጃ <u>ባለቤት</u> ተመዘጋቢው በመሆኑ፣ በማንኛውም የዲጂታል መታወቂያ አሠራር ሥርዓት ውስጥ አገልግሎቶችን ለማግኘት የሚደረጉ የማረጋገጥ ተግባራት በተመዘጋቢው ፈቃድ ብቻ ሊደረጉ ይችላሉ።** [Emphasis Added]

The word 'subject' is used as '**ባለቤት**' in Amharic. It is to be noted that the Amharic word '**ባለቤት**' may mean 'owner' or 'subject' depending of context of its usage. The word '**ባለቤት**' in Article 18(3) of the Digital ID Bill means 'referred to/what it is about' as in the case of the grammatical reference to 'subject/**ባለቤት**' and object/ **ተሳቢ**'. There is thus the need for clarity in the

[4] The definition of permission does not, for instance, mention whether the consent is one that could be withdrawn at a later stage nor is it clear what one's 'own good will' means. See Id, Art 2(16).

definition of '**ባለቤት**' to avoid the idea of 'data ownership' based on the literal reading of the words which can be a cause for concern.

This should be considered in the light of how –as alluded to above– the Bill envisions consent, or rather 'permission', as the sole basis of processing of personal data. It is now widely accepted that ownership, which inherently carries the right to alienate the data for consideration or otherwise, is a deeply flawed concept in data privacy discourse. At its core, not only that it would lead to loss of control or autonomy over personal data in exchange for meagre 'data price' which often comes in the façade of 'free' services. What data protection legislation essentially does is enable data subjects control their personal data through bureaucratic regulatory processes. That is an area where Proclamation No 760/2012 perhaps embodies a sensible provision which is sharply opposed to the notion of data ownership, and it refers to consent as the sole basis for the lawful processing of personal data.

Article 64(5) of the ID Card Law provides that disclosure of personal data to third parties may be denied even when there is the consent of the data subject where the impugned disclosure would undermine 'public interest'. While data privacy is an individual right, there is arguably a sound public interest in its protection. That 'permission' or consent is defined so ambiguously means data subjects are likely to give permission for disclosure of their personal data, be it under deception or duress. That makes disclosure prohibitions grounded on public interest, questions of what public interest and according to whom regardless sensible. More so, in countries like Ethiopia where digital literacy is too low and state-sanctioned coercion is too common.

Finally, a rather generic rule in the Digital ID Bill envisages an exception to the requirement that data collected and processed as part of registration should be kept confidentially [Art 18(1)]. Under circumstances prescribed in the Ethiopian Constitution and international instruments ratified by Ethiopia, data held in the system may be disclosed to third parties regardless of data subject consent. One way to make sense of this clause is from the perspective of permissible restrictions under the right to privacy. Article 26 of the Ethiopian Constitution guarantees the right to privacy which may be restricted when the requirements of legality, necessity and legitimacy are met.

The same principle applies in international human rights instruments such as the International Covenant on Civil and political Rights (ICCPR). Should data retained in the Digital ID system be needed for purposes of, say, criminal investigation, the Police could rely upon a law that authorizes disclosure for such purposes to seek disclosure through formal court process. In such cases, the consent or permission of the data subject will not be necessary. Such

plausible interpretations aside, there is a need for clear rules governing lawful disclosure of personal data.

4. Digital Discrimination/Exclusion

A common concern associated with Digital ID systems is the risk of exclusion and discrimination. Individuals who are unable to furnish information or documentation to prove their identity may be denied Digital ID and hence access to key public services. The Bill provides a hint of basic identification tools that would be used for the issuance of Digital ID. Article 7(1) reads:

> [The Ethiopian Digital Identification Institute] shall […] register the individual based on documents that verify individual identification, residence, address, or based on other legally accepted documents, or by human testimonials.

Beside documentation supporting the claimed identity of the individual, testimonials may be used to obtain digital ID. That means individuals without other ID documents such as passports would be able to obtain Digital ID. In that sense, it may reduce the risk of excluding such individuals. But the proviso is framed in a form of discretion to the Institute in that it may be able to deny digital ID where, for instance, the person fails to adduce enough number of witnesses/testimonials or the testimonials appear to be suspicious.

Considering that Digital ID is envisioned as a basis for other types of identification [See Art 6(8)], the discretionary power of the Institute may result in an exclusionary digital ID regime. In a way, this concern is partly addressed by a provision tucked away in parts of the Bill dealing with 'information required in special cases' [See Art 5(B)] where it is provided that presenting one witness who already possesses a Digital ID would suffice when adducing other documentation is impossible. A persistent concern, however, is when the person is unable to present a witness with a digital ID. Similar concern arises regarding the requirement that a minor cannot be registered except through a parent or guardian who already possesses a digital ID [See Art 5(A)]. What if the minor is a child of a migrant, refugee or stateless person who has no Ethiopian Digital ID?

Not entirely clear is also whether the Institute or the body to which its functions may be delegated could reject witnesses present, and under what circumstances. Such points require clarification. Another related concern is that the task of running the Digital ID system may be delegated by the Institute to third parties through a licensing regime [See, e.g., Art 6(9)]. With privatization of a public service, the risk of discrimination and exclusion could be even more pronounced. What this, then, calls for is clarity in subsidiary legislation, especially regarding the circumstances where human testimonials

are permitted and how, thereby circumscribing the discretion of the Institute or its delegate.

5. Drafting Missteps

The question of whether the Bill is necessary or will it ever be effective in practice aside, a closer look at the Bill reveals a myriad of drafting missteps. One relates to the ambiguous way in which the Bill repeals Proclamation No 760/2012. Article 21 of the Bill provides that Arts 55-62 and 'other provisions that pertain to national identification and covered under this proclamation are revoked'. It is not clear whether the latter limb of the provision refers to Articles 63-66 of Proclamation No 760/2012 which deal with themes directly related to data collected in the course of issuing a national ID. Article 64, for instance, sets forth an illustrative list of circumstances justifying disclosure of data to 'other organs' –which might include private as well as public organs. Article 65 requires ID-related information to be protected from breaches or other forms of loss whereas a series of punitive provisions are provided in Article 66. Would the Bill repeal the latter provisions as well once it enters into force?[5]

Other aspects of the drafting oversight concern the way in which certain notions are thrown in with little clarity. This relates particularly to certain bodies envisaged in the Bill: relying parties, client bodies and collaborating entities. What regulatory role that these bodies assume is not entirely clear. Nowhere in the Bill is the meaning and nature of 'collaborating entities' explained. In a provision where they are referred to –i.e., Art 6(5)– they appear to be entities that may run digital ID systems. It is not clear whether these bodies include employers who often have internal systems by which IDs are provided to employees.

Regarding 'relying parties' for instance, it is not straightforward whether these entities are envisioned as providers of identity verification services. Article 12(3) states that they 'need to get permission from the Institute before they *receive* verification services' while preceding sub-articles suggest that these bodies indeed are verification service providers. Yet 'consumer bodies' are defined in Article 2 as entities licensed by the Institute to provide identity verification services [See also Art 18(9) where 'client bodies' are alluded to as verification service providers; Cf Art 15(1)]. It is also confusing as to

[5] Note also that by mandating the registration of first name, father's and grandfather's names as opposed to last names of Ethiopian nationals, the Bill also essentially repeals the Ethiopian law of names regulated by the Ethiopian Civil Code of 1960 Arts 32-46. See Art 7(3(A)) of the Bill.

whether consumer and client bodies are different entities. Even if they are the same bodies named mistakenly, it remains unclear whether they are different from relying parties. Such glaring drafting missteps should be corrected.

Ambiguities of other types can also be observed in the Digital ID Bill. One relates to the powers of the Institute to take "legal measures". The Institute may take such measures, for instance, when digital IDs are acquired through fraudulent means or when registrants attempt to register twice [See Arts 8(9) cum Art 14(1)]. But what such legal measures constitute is not clear –are these references to fines, cancellation of digital ID or referral to criminal prosecution? In the absence of clarity on the discretion of the future Institute, it may open the door for measures that may be cumbersome or undermine individual rights.

Another problem in the Digital ID Bill is that it relegates a great deal of legislative matters to subsidiary legislation, i.e., Directives to be issued by the Institute [See Art 22(2)]. The concern is that the legislative power of the Parliament will be usurped thereby abrogating democratic principles. Left with broad legislative discretion, the unelected officials of the Institute will be able to wield unaccountable powers. Such tendencies of relegating major and substantive matters to subsidiary laws of regulators is becoming commonplace in Ethiopia. A good case in point is the Communication Services Proclamation No 1148/2019 which reserves significant legislative power to the Ethiopian Communication Authority. The Digital ID Draft Proclamation, which is slated to be adopted by the House of Peoples Representatives soon, should not go down that undemocratic path.

6. Final Words

A few months have passed since the federal Parliament forwarded the Digital ID Bill to its standing committees. Chances are that the Bill might soon be presented before the plenary for final deliberation and enactment. But it is vital that due consideration be given to issues flagged in this comment before it enters the statute book. In particular, it should not be adopted before the data protection bill and the establishment of a robust national data protection authority. The Parliament had held a forum to seek public comment on the Bill in mid-November 2022. Media reports indicate that neither of the concerns flagged in this comment, particularly those relating to data privacy, appeared to have drawn enough attention.[6] The overall apathy towards privacy

[6] See ብሔራዊ ዲጂታል መታወቂያ (EBS TV, 15 November 2022): <https://www.youtube.com/watch?v=IUR2u2tDBNY>.

and data protection in the country may partly be liable for this state of affairs.[7] But with the growing digitization of public services and the inevitable use of digital ID in the process, it is imperative that the data privacy implications of digital identification systems are taken seriously.

List of legislation

1. Draft Digital Identification Proclamation (English Version 1.0, 2021).
2. Draft Digital Identification Proclamation (English Version 2.0, 2022).
3. Registration of Vital Events and National Identity Card Proclamation (hereinafter Proclamation No 760/2012, *Federal Negarit Gazeta*.
4. Civil Code Proclamation No 165/1960, *Negarit Gazeta*.
5. Draft Council of Ministers Regulation Establishing the Ethiopian Digital Identification Commission (Amharic Version, 2022).
6. Communication Services Proclamation No 1148/2019, *Federal Negarit Gazeta*.
7. Draft Digital Identification Proclamation (Amharic Version, 2022)

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[7] For more on this *se*e, Kinfe Yilma, 'Data Privacy Law and Practice in Ethiopia' (2015). 5 *International Data Privacy Law*.

MIZAN LAW REVIEW

ST. MARY'S UNIVERSITY

Cultural Problems in Research and Publications

Source:
Reform Document on Legal Education and Training in Ethiopia (2006) § 2.4.1/A

1. [R]esearch, reading, and writing culture
   - Complacence with our work merely as teachers.
   - [The need for] sense of urgency ... to engage in research and turn up research products.
   - [The need for] '*publish or perish*' attitude.
   - [Working] beyond the positive laws.
2. [I]nstitutional Commitment
   - In terms of budget, time, and resource allocation for R&P
   - In terms of reduction of teaching load or granting (Research Leave).
3. [T]eam spirit for Research and Publications
   - Among staff members;
   - Between staff and students;
   - [The need for] collaboration among institutions.
4. [I]nnovation in diversification of publications, and problems regarding spheres of focus in research.
5. Raising the stakes too high in assessing the quality of publishable manuscripts (despite) shortage of (such) manuscripts.
6. [T]radition of salvaging "distressed" manuscripts through sympathetic editing without compromising quality.
7. Weak consumption of research products in the legal professional community and in government institutions, and poor state of constructive feedback.
8. Inadequate attention to relevance of research to the real life or actual problems of the society.

Vision of law schools

Law schools shall have vision towards elevating the standard and quality of legal education to the level of leading law schools in other countries, and towards preparing graduates who will have optimum impact in Ethiopia's development, democracy, good governance and social justice.

Mission of law schools

Law schools shall promote the intellectual and social conditions of Ethiopia by providing equitably accessible quality legal education and training programs through teaching, research and service to prepare competent and responsible members of the legal profession who actively contribute towards rule of law, democracy, human rights, good governance, social justice, equality, tolerance and development.

Source: **Ethiopian Legal Education and Training Reform Document (June 2006)**

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