



Diagnostic Study of the Ethiopian Criminal Justice System



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Legal and Justice Affairs Advisory Council
Federal Attorney General

Criminal Justice System Working Group

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Foreword and Introduction

It was in July 2018. Professor Tilahun Teshome, who was then in charge of putting together various law reform working groups, approached me to assume coordination of the affairs of the Criminal Justice Reform Working Group (WG) under formation. The first question I asked him was to mention names of experts who assented to join the WG. He mentioned names. I realized that everybody else would be an expert in the field in one way or another. I would be the only soul in the team who would not be a specialist in criminal justice. The only acquaintance I had with criminal law was courses that I did close to twenty years ago at the Law School, leaving me with only a faint memory of the area. My professional passion lies in elsewhere. Yet, Professor Tilahun presented the matter in a way that would give little chance for me to decline even if I convinced him that I did not know criminal justice. I focused largely on the governance side of the WG, leaving my discomfort zone of criminal justice to my good colleagues. Even after working with the WG for well over two years, I still remain adamant about my smatter of knowledge of criminal justice. At any rate I have been honored to serve the country in this capacity. The experience served me as a fine occasion to make new friends and acquaintances. That remains close to my heart forever.

This foreword/introduction discusses activities undertaken by the WG under the auspices of the Legal and Justice Affairs Advisory Council (AC). It covers the period between 17 August 2018 and 1 January 2021. The foreword/introduction highlights factors calling for reform of Ethiopia's criminal justice, institutional arrangement for the ongoing legal and justice reform in Ethiopia and three principal tasks carried out by the WG. It ends with issues of concern. Expression of gratitude is also in order.

1. Need for Reforming Criminal Justice System in Brief

Dr. Abiy Ahmed, upon swearing in as a prime minister in April 2018, initiated a spate of reform measures dubbed broadly as opening up the political, economic and justice arenas. His administration characterized the justice reform endeavors of its predecessor as a fiasco due primarily to lack of genuine participation of the public and pertinent professionals, vowing to rectify these alignments. Issues in Ethiopia's criminal justice system, and violent and repressive recent past went far beyond absence of public and expert participation preexisting reform process. There have also been outcries regarding major defects in design, compliance and implementation of the substantive, procedural and institutional components of criminal justice of the nation as a whole with a material impact on the rule of law, institution building, human rights, democracy and federalism.



2. Place and Mandate of the WG

As an endeavor to overhaul the justice sector, the Federal Attorney General (AG) set up the AC composed of academicians and lawyers in June 2018. The overall responsibility of the AC is to advise the Government of Ethiopia both on the design and implementation of legal and justice sector reform. In order to discharge this responsibility effectively, apart from a secretariat, the AC has formed several working groups composed of professionals drawn from law and kindred fields.

The WG is one of such working groups. The WG is presently composed of 23 independent academicians and practitioners drawn from law and other disciplines to provide pro bono service.¹ Former judges and prosecutors, law teachers, researchers, human rights advocates, consultants, practicing lawyers, social work experts, and lawyers cum criminologists form part of the WG. Its formation was formally announced on August 17, 2018 with the mandate to work on assignments including initiating or reviewing draft laws which the AC might refer to it and undertaking diagnostic studies in the area of criminal justice system with a focus on the police, prosecution, judiciary and penitentiary system taking into account constitutional and international standards, state policy objectives and global good practices². The WG set itself to actual work forthwith with a work plan which helped divide itself up into sub-working groups, expand and strengthen its membership and volunteer base³, fix a date and regular venue for regular bi-weekly meetings and share resources among members, reach a shared understanding of the mandate of the WG as embodied in the TOR and finding modalities of creating institutional linkages and reform alignments.⁴

¹ At present the members of the WG are: Ato Abraham Ayalew, Ms. Bieza Nigussie, Ato Cherinet Hordofa, Dr. Dagnachew Assefa, Ato Eyob Awash, the late Major Fekadu Tolera, Dr. Meseret K. Desta, Dr. Muradu Abdo, Ato Nuru Seid, Ato Shebru Belete, Dr. Simeneh Kiros, Ms. Tedenekialesh Tesfa, Dr. Wondemagegn Tadesse, Ato Yoseph Amero, Dr. Marshet Tadesse, Ms. Akilile Solomon, Ms. Eyerusalem Teshome, Ato Worku Yaze, Dr. Alemu Meheretu, Ato Betemariam Alemayehu, Ato Abdulkader Mohammed, Ato Kelemework Mideksa and Ato Daniel Aregawi while the volunteers are Dr. Wondowssen Demissie, Dr. Elias Nour, Ato Adi Dekebo, Dr. Abdi Jibril, Dr. Commander Demelash Kassaye, Ato Tibeso Bezabeh and Ato Desalegn Kebede.

² As per the TOR, the specifics of the tasks of the WG are to: adopt evaluative frameworks, which means constitutional and international standards, policy objectives and best practices relevant to its thematic area; undertake diagnostic studies on the basis of the evaluative frameworks; conduct public consultations on the findings and recommendations of the diagnostic studies; prepare draft laws (where necessary) based on recommendations emanating from the diagnostic studies and prepare background document where drafting new or revised law is thought necessary.

³ The WG's membership expansion initiative brought on board Dr. Marshet Tadesse, Ms. Akilile Solomon, Ms. Eyerusalem Teshome, Ato Worku Yaze, Dr. Alemu Meheretu, Ato Kelemework Mideksa, Ato Betemariam Alemayehu, Ato Abdulkader Mohammed and Ato Daniel Aregawi.

⁴ Personal observations, experience and quick scanning of Ethiopia's criminal justice sector helped members of the WG learn the existence of ongoing reform initiatives in institutions such as the federal correctional administration. The WG also realized that the existence out there of vital documents (e.g., draft laws, reform reports, codes of conduct for and organizational structures) in possession of pertinent government institutions but might be difficult for the WG to get access those documents. Hence in order to avoid duplicity of efforts, to obtain relevant documents and information timely and to pave the way for smooth implementation of reform measures and efficient discharge of its responsibilities, the WG needed to have some kind of working relation with these institutions. This included creating mechanisms of reaching out to regional law enforcement institutions as well as pertinent professionals based in the regions. The working relation forged assumed different forms. The first form involved just writing a letter of cooperation to the institution concerned. This in particular involved in the Secretariat writing standing letters of cooperation, for instance, to most relevant federal criminal law enforcement institutions to provide information and pertinent documents. The second method was identifying and designating a focal contact person in each key institution to generally facilitate communication of the WG with that



3. Three Core Activities and *modus operandi* of the WG

The WG has so far made three contributions to the reform of criminal justice system of Ethiopia.

- a) **Reviewing a Draft Prison Proclamation:** The WG's first contribution was to overhaul a draft Prison Proclamation prepared by experts of then Federal Prison Administration (FPA) meant to revise about fifteen years old prison law. Upon receiving the draft prison bill, the WG set up an ad hoc sub-working group to look into it.⁵ The sub-working group's cursory reading of the draft proclamation revealed it was much to be desired in terms of protecting the dignity and human rights of prisoners as well as their rehabilitation and reintegration. It was way short of contemporary constitutional, continental and global standards and good practices regarding the treatment of prisoners and rearrangement of prison as an institution. Notably, the sub-working group realized that even if the draft presented by the FPA contained innovative ideas concerning operational and financial autonomy of the institution it nevertheless was crafted from the perspective of easing the functions of the prison administration through custodian approach rather than building on an approach which ensures the human rights of prisoners, rehabilitation and reintegration.

The WG had to bring the experts and leadership at the FPA onboard in the course of changing the orientation of the draft law. Yet, that had to be accomplished cautiously without antagonizing them because it would be them who would defend the draft law in relevant higher echelons and implement it upon ratification. The WG was able to bring them on board asking them to rewrite the draft jointly. Fortunately, they were quite willing and receptive of key changes. Thus, exchange of views with the experts and top leadership of the FPA ensued quickly. In the shortest possible time the draft was transformed beyond recognition.

The WG convened two meetings to deliberate on the draft legislation. Those members of the WG who were unable to attend such meetings turned in written comments. The WG also held a consultation with the AC to enrich the draft statute. The joint deliberations made between the WG, and FPA experts and officials, between the WG and AC validated and considerably improved the draft law. Hence, those exchanges of thoughts helped the draft bill sail through the ratification ladder – from the AG all the way to the House of Peoples Representatives. In the end, the law has been proclaimed in the Federal *Negarit Gazette* as the Federal Prison Proclamation 1174 of 2019.

institution and particularly to provide it with information. The third modality, which the WG thought to be the preferred one, was creating workable institutional relation that should go beyond getting data. It envisaged a kind of relationship characterized by embedded independence - making a relevant person formally part of the WG from the outset without compromising the independence of the WG. This should perhaps be preceded by a formal briefing of the mandates of the AC and the working groups set up under it to a set of main government institutions. The WG used this last method to some degree. This method further entailed mapping stakeholders both within and outside government institutions to help align the reform initiatives in the criminal justice sector with the works of the WG and identify available resources.

⁵ The main movers of this assignment were: Ato Cherninet Hordofa, Ato Abdulkader Mohammed and Ato Yalelet Teshome.



It is hoped that this prison legislation would serve as a steppingstone of overhauling regulations, directives and rearranging institutional structures of the federal penitentiary system. It is also hoped that regional correctional administrations would emulate it. Above all, the bill would hopefully help the entrenchment of the dignity of prisoners, their rehabilitation and reintegration.

b) *Reviewing a Draft Criminal Procedure and Evidence Code:* The second task of the WG was to rework the draft Criminal Procedure and Evidence Code (CPEC) which is intended to revise well over half a century old Criminal Procedure Code. This time around the WG also created an ad hoc sub-working group consisting of some of its highly knowledgeable and experienced members to revisit the draft CPEC.⁶ Even if such a sub-working group took upon itself primary responsibility every other member of the WG was tasked to go through the document for suggestions. The sub-working group members rose to the occasion. The sub-working group as well as the rest of membership reviewed the draft CPEC to check whether it has:

- i. reflected constitutional principles including federalism,
- ii. integrated into one coherent whole the various criminal procedure related statutes passed for the last several decades,
- iii. included principles and rules of evidence relevant to criminal proceedings and provisions meant to humanize the death penalty,
- iv. conformed with continental and international human rights standards and good practices,
- v. incorporated issues such as reconciliation, customary criminal rules and institutions and plea bargaining to ease court burdens and ensure the efficacy and legitimacy of criminal proceedings,
- vi. taken into account the need to abolish practices observed at the various stages of criminal proceedings with the effect of hampering the rights of the suspects, accused and convicted,
- vii. eliminated outdated provisions and
- viii. ensured completeness and clarity.

Having undertaken a preliminary review of the draft document in light of the preceding points, the WG organized a two-day workshop in Addis Ababa for an in-depth review. The event focused broadly on the document's conformity to international and constitutional standards, contextualization, completeness, clarity and simplicity of arrangement. The findings of this WG level workshop were incorporated in the draft document.

The in-house scrutiny was followed by another two-day Bishoftu workshop at which members of the WG, those of the AC and experts drawn from the federal police, prosecution, judiciary and

⁶ Dr. Alemu Meheretu, Ato Cherinet Hordofa, Dr. Simeneh Kiros, Ato Kelemework Midkesa and Ato Yalelet Teshome were part of the special team.



penitentiary, scholars and practicing lawyers attended. Quality feedback was obtained from the event. Again the special sub-working group reflected the findings and recommendations of the Bushoftu consultation in the draft bill.⁷ This was followed by the WG's formal submission of the reworked draft CPEC to the AG⁸ which in turn passed it to the Council of Ministers after conducting final in-house review. The Council of Ministers, which apparently deliberated on an Explanatory Note rather than on the actual CPEC in its entirety, sent it to the House of Peoples' Representatives (HPR) in the summer of 2020. The first reading of the HPR led on October 8, 2020 to refer it to the Legal, Justice and Democracy Affairs Standing Committee for further scrutiny; the HPR will hopefully give it a nod in one of the upcoming 2020/2011 sessions. In addition to HPR's standing committee level review, it is hoped that this last leg of the legislative process would trigger public consultations, both public and institution based, as well as provide some opportunity for the WG to further improve the document which is hoped to serve the nation for the coming many decades.

c) Conducting a diagnostic study: Undertaking a diagnostic study is the third core accomplishment of the WG. Despite tight involvement in the above two bill making processes, the WG was adamant on returning to and completing the criminal justice system assessment study. To this effect, the WG developed terms of references.

The WG thought that the assessment study is called for good reasons, which are articulated in the terms of references. Some highlights here of the terms of reference for the diagnostic studies would be sensible. Firstly, the WG is concluded that the ongoing reform should build on an inventory of criminal justice system reforms attempted so far - what has worked well, what has not, and why. That kind of comprehensive inventory dedicated exclusively to past reform initiatives as well as assessing the present state of the criminal justice system of Ethiopia is lacking. Literature review conducted by the WG reveals that past reforms and studies in the area remain piecemeal, outdated, and fragmentary and hence unable to provide a full picture of the criminal justice system of Ethiopia.

Secondly, it is necessary to identify major reform issues, their nature and scope methodically. Thus, rather than rushing to utilize one or another reform tool, the study helped identify whether

⁷ In the course of the revision, the WG took into account feedback generated during our March 16 retreat at Jupiter International Hotel, inputs gathered from the joint discussions the WG had with the AC (12-14 April) in Bushoftu, comments and suggestions forwarded to the WG by Setaweet on May 22 and those forwarded subsequently from representative of the Ethiopian Women Lawyers Association as well as the Women and Children Affairs Department of the Office of the Federal Attorney General. The team also consulted a specialist in and long-time serving federal court judge with regard to juvenile offenders' treatment chapter of the CPC. Needless to say that the draft benefited immensely from the mix of knowledge and experiences of members of the focal group - judicial, teaching, research, prosecutorial, court practice and legal drafting. The several expert presentations organized by the WG on the different dimensions of the criminal justice system of our country also played no fewer roles in the revision process. Hence, the synthesis of all this was injected into the latest rendition of the document meant to serve the country for the coming several decades. Such synthesis has served to produce a better document in terms of inclusiveness of multifarious interests and voices, contemporary thinking in criminal procedure, and putting together fragmented rules and principles coherently in a single document and drafting technicalities.

⁸ The WG received the Draft CPEC from the AG on 23 February 2019, and the WG submitted its final revised draft to the AG on June 22, 2019.



a problem relates to law design, compliance with the law and court decisions or quality implementation of the law or a combination thereof to make recommendations accordingly.

Thirdly, there is a need to come up with basis for prioritizing the principal reform issues - which should come first in the order of things.

Fourthly, it is suggested to identify reform matters which can go for implementation in the form of quick wins or those needing legislation or administrative measure or those warranting in-depth study.

Finally, as international experience tells, opting for a diagnostic study of this sort is a wise course of action to kick-off informed law or institutional reform initiative.

The above reasons in essence boil down to the need to base the reform of the criminal justice system on empirical data, a systematic and methodologically sound analysis of its strengths and shortcomings, and a comparatively and theoretically informed decision-making with regards to what needs to be done.

The diagnostic study falls under the rubric of ‘Reforming the Criminal Justice of Ethiopia’. It has covered the following seven topics. While the ultimate responsibility of the integrity of each diagnostic study lies in and credit goes to the WG as a whole, it is customary to mention the principal researchers for each topic, which is indicated in the parenthesis against each topic.

- i. Evaluating the Existing Criminal Law: Proposed Subjects and Manners of Revision (Dr. Simeneh Kiros),
- ii. Ethiopian Federal Police Reform in the Context of Criminal Justice (Dr. Alemu Meheretu),
- iii. Assessment of the Prosecutorial Role and Functions in Ethiopia (Ato Adi Dekebo),
- iv. Prison Reform in Ethiopia: Normative Gaps, Challenges in Practice, and Recommendations (Dr. Wondemagegn Tadesse),
- v. Assessment of the Ethiopian Judiciary (Ato Yalelet Teshome),
- vi. Dealing with the Legacies of Repressive Past: Transitional Justice in ‘Transitional’ Ethiopia (Dr. Marshet Tadesse) and
- vii. Compensation for Human Rights Violations in Criminal Proceedings in Ethiopia: Legal and Institutional Framework (Dr. Abdi Jibril).

More than two years of data gathering ensued. The WG collected data by:

- i. inviting around eight experts⁹ to its different sessions to learn from their knowledge, experience and expertise as captured through documentation of their presentations and deliberations that ensued;

⁹ The names of and dates of presentations by the experts are as follows: Ato Mandefrot Belay (22 December 2018) spoke on the intricacies of the 2005 comprehensive justice sector reform; Dr. Elias Nour (8 December 2018) talked about findings of recent research evaluation of the comprehensive justice sector reform; Ato Worku Yaze (16 February 2019) briefed the WG the criminal law practices and processes regarding police, prosecution and courts in the Ethiopian setting; Ato Abraham Ayalew (12 October 2019) presented on recent reform initiatives in respect of juvenile justice, crime prevention



- ii. receiving written comments from professionals¹⁰;
- iii. gathering pertinent legislation, documents, reports and literature in the field which culminated in literature review workshop and proceedings thereof¹¹;
- iv. gathering empirical evidence through focus group discussions with key informants drawn from different criminal justice institutions¹²;
- v. getting information obtained from officials and criminal justice experts during revisions of the Prison Proclamation and the CPEC mapped out above;
- vi. conducting internal WG level virtual consultations on the first drafts of each of the studies¹³ and
- vii. convening public consultation.¹⁴

Having collected data and materials needed to draft the diagnostic study using methods enumerated (i - v) above, the WG moved to data analysis and write-phase. The write-up part of the work was carried out by seven selected members, as indicated above, drawn from the WG based on their especial expertise and exceptional dedication to the success of the reform enterprise.¹⁵

The special team embarked upon drafting an assessment report which covers the entire criminal justice system of Ethiopia including national and international substantive, procedural criminal laws, pertinent institutions and their practices. Institutionally the study covers the police, the prosecution, the judiciary, the prison system; it has also included such kindred areas as core issues of compensation for violation of human rights in criminal proceedings and translational justice. Thus, the team analyzed, synthesized and interpreted the data listed above and collected supplementary data and identified major problems in Ethiopia's criminal justice system and recommended implementation modalities and indicated reform issues which require institutional capacity building, institutional rearrangement, enactment of legislation and taking administrative measure or conducting in-depth studies.

strategy, etc.; Ato Abdulfetha Abdullah (12 October 2019) focused on traditional criminal justice in Ethiopia; Ato Adi Dekebo (25 May 2019) considered the prosecution as an institution tied to human rights and police oversight function, the late Major Befekadu Tolera (2 March 2019) addressed the inner sides of police crime investigation; and Ms. Loza Tsegaye from Setawit (25 May 2019) presented on gender based violence in the context of Ethiopia's criminal justice system of today. All of these speakers shared their slides with the WG and the deliberations were recorded as minutes.

¹⁰ For instance, the WG received written comments from Dr. Wondwossen Demissie (Addis Ababa University, School of Law) and Ato Abebe Assefa (Dean, School of Law, Gondar University).

¹¹ A two-day literature review workshop was held at Getfam Hotel, August 31 and September 1, 2019.

¹² On 3 November, FGD was held at Kaleb Hotel, which brought together federal court judges, prosecutors, investigating police officers, those working at Federal Public Defenders' Office, practicing lawyers, human rights advocates and experts working at the Federal Prison Administration. The key informants were categorized into four groups and the proceedings thereof documented and used as an input for the diagnostic studies.

¹³ The in-house consultations went as follows; 10 August 2020 was dedicated to the presentation of diagnostic studies on substantive criminal law, and compensation for human rights violations which occur during criminal proceedings; on 18 August 2020 two presentations prosecution and transitional justice were organized; on 29 September, 2020 a presentation on prison reform was conducted; on October 19, 2020 a presentation on Federal Police was made and on October 26, 2020 assessment research on Ethiopia's judiciary was delivered.

¹⁴ That took place on 21-22 November 2020 at Mado Hotel brought together participants from the judiciary, prosecution, prison commission, federal police, civil societies and lawyer community.

¹⁵ Dr. Simeneh Kiros, Dr. Wondemagegn Tadesse, Dr. Marshet Tadesse, Dr. Alemu Meheretu, Ato Adi Dekebo, Dr. Abdi Jibril and Ato Yalelet Teshome.



The underlying common assumption behind the seven research reports is that where a country's substantive and procedural criminal laws are designed appropriately, complied with fully and consistently and implemented as intended, the criminal justice system of such a country can meaningfully contribute to the prevalence of the rule of law, human rights and democracy. The broader finding of the research reports is that the existing criminal justice system of Ethiopia shows significant deficits in all the three counts: there are normative design defects, non-compliance with criminal principles and rules and court decisions, and implementation gaps. The combination of these shortcomings makes Ethiopia's current criminal justice system below constitutional and established international human rights standards. Thus, this calls for a concerted action on the part of relevant actors to remedy these deficits by taking legislative, administrative and institutional reform measures in line with the recommendations.

Another common thread that runs through diagnostic study is a focus on the institutional side of criminal justice. The WG assumed that identifying the ailments of the institutional dimensions of the criminal justice system of Ethiopia and forwarding appropriate strategies would be more relevant. The WG assumed that a robust institutional element, if put in place rightly, would take care of the normative side of the criminal justice system reform.

The diagnostic reports tend to be comprehensive which set them apart from past piecemeal studies. The reports are exclusively dedicated to exploring criminal justice issues without mixing them up with other justice reform questions. New topics such as reparation schemes for violations of human rights during criminal proceedings and transitional justice are made part of the diagnostic study.

The claim for comprehensiveness of the research reports should nevertheless be taken with a pinch of salt. The reports are far from being complete covering every conceivable dimension of criminal justice. They have inevitably left multitude of questions un-researched. Few of them can be mentioned here. Degree of police coercion, public trust in the criminal justice system, juvenile justice, crime prevention strategy, role of customary criminal justice practices, rules and institutions, the relationship between criminal justice and politics, etc are issues awaiting researchers.

4. Issues of Concern

- a) ***Taking implementation of law reform with a pinch of salt:*** The AC and WG are expected to have some kind of role in the implementation of legislation or research based reform measures that they suggest to the Government. This sounds good. Karl Marx has famously remarked that "The philosophers have only *interpreted* the world, in various ways. The point, however, is to *change* it." So far the Ethiopian criminal justice system has been researched including by the WG; the key point is to actually change it for the good of citizens, in ways that positively contribute to the prevalence of human rights, the rule of law and democracy. However, it appears that the modus operandi of the implementation face of the ongoing



reform arrangement has been left prominently dwarfed by preparing draft legislation and undertaking diagnostic studies. This side thus remains un-clarified.

The question of implementation is a material concerns for the WG. The Prison Proclamation is out.¹⁶ Seven diagnostic studies are finalized.¹⁷ The CPEC is on the verge of parliamentary adoption. Hence, the business of implementation looms large and clear. Undoubtedly, implementation entails mobilization of resources to ensure that relevant officials and experts have properly digested the nature and underlying assumptions of the two bills and the recommendations emanating from the diagnostic studies. Beyond being fully understood, there is a need to check that the bills and research recommendations are being actually translated into action. The actual implementation effort doubtlessly requires knowledge of and skills in substantive and procedural criminal law, and proper understanding of the workings of the pertinent institutions; equally important in the implementation schema is disposition on the part of the WG to connect with the personnel working at criminal law enforcement institutions.

However, I believe the roles of both the AC and WG in the implementation phase of the law reform are least articulated. To my understanding, a sensible starting point for implementation of the recommendations of the studies is to develop an implementation plan to be refined and endorsed by the AC and perhaps by the leadership of core criminal justice enforcement institutions. The implementation plan should cover, on the top of recommendations emanating from the studies, the two pieces of legislation mentioned above to the enactment of which the WG contributed so much. Attempting to bring the AC and these institutions on the same wavelength by organizing a platform for them to contribute to and validate the findings and recommendations of the diagnostic studies can be one of the activities to be included in the implementation plan.

In terms of approach, I think, by any standard, the role to be played by AC through its WG is not to actually implement its own reform recommendations and bills but to act as a facilitator, offer technical supports and perhaps follow up implementation of those reform ideas by the concerned institutions. A pushy approach to implementation of the reform measures would lead the AC to clash with institutions which tend to zealously guard their mandate. It would not be helpful.

¹⁶ The WG has witnessed a sign of hope in the leadership of the Federal Prison Commission, who appear to be quite receptive of changing the attitude of the prison apparatus towards prisoners and their human rights and dignity. However, it is doubtful if there is the same level of enthusiasm for reform proposals coming from the WG on the part of expert level at the institution.

¹⁷ The diagnostic study on transitional justice – started being implemented in its own way – hopefully would lead to revision of the proclamation that has established the Reconciliation Commission. The lead researcher of the WG regarding transitional justice is also leading the revision of such a proclamation.



Sticking to a loose implementation approach which is confined to organization of seminars on the laws and diagnostic studies to the relevant institution would be less effective. The reform initiative would remain at knowledge generation phase.

A middle ground could be forged which includes bringing decision makers and key experts from the relevant institutions fully onboard by making them understand and embrace the suggested policy, legal and administrative reform measures. Design of the middle ground should take the following factors into account: nature and history of the particular legislative drafting process, extent of reform receptivity of the leadership of and experts at the relevant institutions and their degree of involvement in the law reform and research process sought to be implemented. (For instance, the WG attempted to involve experts from relevant criminal justice institutions, as contributors, participants and informants, in the course of conducting the diagnostic studies. The sufficiency of this participation is to be much desired, though.)

The AC needs to give serious thought to the approach and content of implementation reform recommendations and legislation. If the implementation stage is taken lightly, some law reform measures could easily be undone through legislative amendments or selective implementation or by issuing non-compliance regulation or directives or resorting to a combination of these. In doing so, the relevant authorities can invent multitude of excuses to ultimately defeat or dilute the rigors of the reform program. The forces of inertia within government bureaucracy may be stronger and more entrenched than those of change.

- b) *Responsible consideration of law reform advice:*** Frank discussion is needed on the level of expectation of acceptance of reform proposals forwarded by the AC through its WG. The AC is there to advice, as the name suggests. The advice on a given law reform measure may be based on well considered opinions and studies. Given this, the AC expects its advice to be taken seriously and responsibly by the Government; the government is at liberty to reject or modify the advice; but that should be done with good reasons. That should also be done transparently; continued engagement with members of WG who toil on the reform proposal is advisable. But the WG should note that the service it provides is advising, not making a final decision. It should also note that there are so many actors in the decision making process on the government side; the Government is a big box; there is an implementing institution; there is the AG and HPR. The reform bill might involve other critical government institutions in multi-sectoral laws, which is often the case. Each of them might have genuinely differing perspectives on a given law reform issue.

This issue of the WG's expectation of acceptance on the part of the Government to whom advice is offered is raised here with a good reason here. The issue arose in connection with CPEC; in the AG's final round of internal review, several provisions the WG included in the draft CPEC in the form of substantive and procedural safeguards, e.g., provisions on bail and frequency of adjournments for police investigation, admissibility of evidence and plea bargaining were thought to have been made lax in favor of the police and the prosecution



implying some reform backsliding as some of these spots being very sensitive and source of public uproar in the past. However, the extent and nature of reform retraction in connection with the draft code cannot be ascertained at this stage. Now the bill is with the HPR. It is hoped that this last leg of the legislative process would not be rushed. The draft law is already triggering intense debates and consultations by various institutions within and outside the government. Some members of the WG are seen to have been involved in explaining and refining the provisions of the draft document. The HPR already conducted one public consultation. However, the broader issue considered here remains. I suspect the question of the need for responsible consideration of reform ideas may have arisen in connection with law reform proposals forwarded by other working groups as well.

- c) ***Alignment of law reform efforts:*** The WG witnessed lack of reform alignments among relevant criminal justice institutions. During the period of writing the research reports of the WG several government institutions have been conducting independent studies of their own on the very issues the WG was researching. Many non-government institutions have also ventured into a similar research activity. Multiplicity of law reform initiatives are carried out at the same time by many actors with the motive to exercise institutional mandates and competition for resources including donor funding. Non-aligned law reform efforts are driven both institutionally and externally. In the process concepts like coordination, integration and reform alignments become rhetoric. This suggests the need to carefully examine the advisability of entertaining duplicate and parallel reform initiatives. Put it straightforwardly, it seems to me sound to inquire whether it is feasible, even desirable, to centralize law reform in the setting where law reform is taking place at large scale, faster pace and with so many diverse players.
- d) ***Technocratic versus public consultation:*** in Ethiopia's ongoing reform, public consultation is made a perquisite for finalization of any law reform proposal or a diagnostic study. Public consultation is presented as a mark which sets current law reform aside from past exercise of the same kind. That is well and good. In introducing public consultation, the idea seems that law reform initiatives should move beyond institutional and professional circles to be inclusive of ordinary citizens. Citizens have the right to be consulted in matters that affect them. Meaningful consultation has an instrumental value; it is thought to aid in the implementation of law reform. The spirit of this movement away from technocratic approach to law reform is laudable. Yet, the concept of public consultation needs to be further explored. There seems to be lack of uniform understanding of public consultation. Due to ill-management of the organization of public consultation, there is a tendency to fall back to the habit of consultation among technocrats, rather than authentic involvement of citizens. Whether we have actually moved an inch from technocratic approach to law reform craft is an issue which require exploring.



- e) **Inscribing law reform memory:** Ethiopia's attempt to obtain inputs from experts pro bono cum public model is a new experiment. This paradigm has brought about a spate of foundational legislative reforms with consequential impact on human rights, democracy, democratic institutions, the rule of law and economic order. It has allowed law experts to peep the working of the government; it a potential for indigenization of law reform. It is sound to appreciate the underlying principles, values, contribution to development and legitimacy of the legal system of these law reform measures. It is high time to engage in a proper documentation of the processes of such legislative initiatives and diagnostic studies, national, regional and international actors involved therein, and objectives pursued by each of them. Inscribing of the contents of the law reform endeavor alone, thought necessary is insufficient. It is trite to say that documentation of the process and forces which took part in it is part and parcel of the legal history of the country. Memories would fade; documents might scatter; critical forces could disperse or some of them loose interest soon. It would lead to loss of a critical bit of the institutional memory of the legal system of the country as whole.
- f) **Gratitude:** The ongoing law reform initiative of Ethiopia has revealed to me that there are so many legal professionals who are on the giving end if harnessed wisely. It is a country of professionals on giving rather than receiving end. It is time to record gratitude to these kind souls. Several people and institutions cooperated with the WG in good spirits. Appreciation goes to colleagues who moderated sessions, made presentations, provided written suggestions. Credit should go to institutions that funded some of our activities and most importantly colleagues who did actual research and drafted legislation. Gratitude is extended to Lawyers for Human Rights which covered communication and transportation costs for members of the write-up as well as covering expenses attendant to the two-day public consultation on the diagnostic studies. The Ethiopian Lawyers Association that managed external funding from which our WG benefited in terms of coverage of some of its workshops should be thanked. The WG remains appreciative of all other individuals and institutions that helped the realization of its work plans. The WG is eternally thankful to you all.

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SECTION ONE

Evaluating the Existing Criminal Law: Proposed Subjects and Manners of Revision

1.1 Introduction

The criminal law is the most effective yet the most intrusive social control tool. The principle of legality requires that the criminal law be a positive law. The combination of instrumental and positive nature of the criminal law makes it malleable to abuse. This report attempts to evaluate the existing criminal law. It assesses the existing criminal law with a view to establish the legitimate end of criminal law and to identify possible areas of intervention for reform.

In order to make an effective evaluation of the existing criminal law, and to identify potential areas of intervention, the report first attempts to define the scope of the existing primary criminal law as an object of evaluation. It then establishes a standard of evaluation, which is also a standard of criminalisation of conduct. After evaluating the existing criminal law against such standards, the report finds that there is overuse of criminal law and punishment in order to achieve state objectives that are not in the realm of the traditional legitimate ends of criminal law.

The report then goes on to discuss the causes of such overuse of criminal law and punishment. Because it is those causes that require intervention, the report also includes areas of reform with a view to limit the criminal law to its legitimate ends. Thus, section one defines the scope of the existing primary criminal law; section two sets the standard of evaluation (and of criminalisation) and determination of punishment; section three dwells on the causes of excessive use of the criminal law and punishment; and section four dwells on areas of intervention in order to have a reasonable criminal law.

This report is drawn up based on the review of the existing criminal law, the legislative records including explanatory memoranda to draft bills, several rounds of hearings conducted by the Criminal Justice Working Group of different individuals both experts (judges, prosecutors, college teachers) and interest groups, and review of court decisions and appropriate literature. The Report was presented first presented to a sub-working group and

then to the Working Group after which it was presented at a validation workshop where stakeholders were in attendance.

1.2 Defining the Scope of the Existing Criminal Law

The criminal law in Ethiopia is classified into primary and secondary criminal law. The primary criminal law includes those rules adopted by the House of Peoples' Representatives or those other rules sanctioned by rules adopted by the House. The consequence for violation of primary criminal law is imprisonment and fine; but in not few cases, there is also the death penalty. It is because of such serious consequences on the rights of the individual that primary criminal law is adopted by the lawmaker. The alleged violation of primary criminal law is dealt with through the regular criminal process affording the accused different constitutional guarantees.

Secondary criminal law are contraventions, those rules adopted and enforced by administrative agencies whose consequence is mere fine. The decisions process does not follow the regular criminal process. Because of its significant ramifications on the rights of the individual, this report exclusively focuses on primary criminal law. In order to make the evaluation, the proper determination of the scope of the primary criminal law is important. However, because there are countless legislation adopted by the House of Peoples' Representatives, it is not possible to clearly define the scope of the criminal law in Ethiopia. There are more than 120 proclamations containing penal provisions. In practice, those materials enforced as forming part of the criminal law also include directives adopted by administrative agencies whose scope is far too difficult to define. The report examines those criminal rules that are routinely prosecuted before the court. For mere convenience, they are put under different categories.

1.2.1 The Criminal Code and Special Criminal Laws

The first category of Criminal Code includes the criminal law and other special penal legislation. It needs no explanation that the Criminal Code is an exclusively criminal regulation. Those special laws are also put along with the Criminal Code because they are exclusively dedicated to criminal matters, albeit they are focusing on different subject matters.

(1) The Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation No

414/2004;

- (2) Prevention and Suppression of Terrorism Crimes Proclamation No 1176/2020, replacing the Anti-Terrorism Proclamation No 652/2009;
- (3) Prevention and Suppression of Money Laundering and Financing of Terrorism Proclamation No 657/2009;
- (4) Telecom Fraud Offences Proclamation No 761/2012;
- (5) Corruption Crimes Proclamation No 881/2015;
- (6) Prevention and Suppression of Trafficking in Persons and Smuggling of Persons Proclamation No 1178/2015;
- (7) Computer Crimes Proclamation No 958/2016;
- (8) Vagrancy Control Proclamation No 384/2004.

1.2.2 Criminal Rules Contained in Administrative Regulatory Legislation

The Second Category of criminal law includes extensive penal provisions included in administrative regulatory legislation. Those legislation are principally meant for regulation of certain activities. However, such legislation also contain penal rules entailing severe punishment, both imprisonment and fine. They are classified under different categories for intelligible discussion. The lawmaker continuously makes laws and the repeal and replace of certain rules is vague; it is not possible to fully ascertain all those legislation are still in force. However, the great majority of them certainly are.

Government Revenue Regulation

- (1) Federal Tax Administration Proclamation No 983/2016; also subsuming the penal provisions of the Stamp Duty Proclamation 110/1998;
- (2) Excise Tax Proclamation No 307/2002;
- (3) Income Tax Proclamation No 979/2016, replacing the Income Tax Proclamation No 286/2002;
- (4) Value Added Tax Proclamation No 285/2002

(5) Turn Over Tax Proclamation No 308/2002;

(6) Customs Proclamation No 859/2014 replacing Customs Proclamation No 622/2009.

Finance Related Regulation

(1) Federal Government of Ethiopia Financial Administration Proclamation No 648/2009;

(2) The National Bank of Ethiopia Establishment (as Amended) Proclamation No 591/2008, replacing the Monetary and Banking Proclamation No 83/1994;

(3) Banking Business Proclamation No 592/2008;

(4) Micro-Financing Business Proclamation No 626/2009;

(5) Insurance Business Proclamation No 764/2012, replacing The Licencing and Supervision of Insurance Business Proclamation No 86/1994.

Trade and Commodity Transaction Regulations

(1) Commercial Registration and Business Licensing Proclamation No 980/2016, replacing Commercial Registration and Business Licensing Proclamation No 686/2010 and Commercial Registration and Business Licensing Proclamation No 67/1997, respectively. It is worth noting that Domestic Trade Proclamation 1971 was the original legislation with minimal penal provisions. Subsequently, in the Regulation of Domestic Trade Proclamation No 335/1987 the conduct was decriminalised.

(2) Trade Practice and Consumers' Protection Proclamation No 685/2010;

(3) Ethiopian Commodity Exchange Proclamation No 550/2007;

(4) Coffee Quality Control and Marketing Proclamations No 1051/2017, replacing Coffee Quality Control and Marketing Proclamations No 602/2008.

Health, Food and Environment and Related Regulation

1 Apiculture Resources Development and Protection Proclamation No 660/2009;

2 Bio-safety Proclamation No 655/2009;

3 Development, Conservation and Utilisation of Wildlife Proclamation No 541/2007;

4 Food, Medicine and Healthcare Administration Proclamation No 661/2009;

- 5 Forest Development, Conservation and Utilisation Proclamation No 542/2007;
- 6 Radiation Protection Proclamation No 571/2008;
- 7 Research and Conservation Proclamation No 209/2000;
- 8 Environmental Pollution Control Proclamation No 300/2002;
- 9 Mineral Resources Proclamation No 678/2010.

Broadcasting and Media Regulations

- (1) Freedom of Mass Media and Access to Information Proclamation No 590/2008;
- (2) Broadcasting Services Proclamation No 533/2007, replacing Broadcasting Proclamation No 178/1999;
- (3) Copyright and Neighbouring Rights Protection Proclamation No 410/2004.

Miscellaneous Legislation

- (1) Ethiopian Federal Government Procurement and Property Administration Proclamation No 649/2009;
- (2) Census Proclamation No 449/2005;
- (3) Central Statistics Authority Establishment Proclamation No 442/2005;
- (4) Transport Proclamation No 468/2005;
- (5) Immigration Proclamation No 354/2003;
- (6) Urban Planning Proclamation No 574/2008;
- (7) Urban Lands Lease Holding Proclamation No 721/2011;
- (8) Rural Land Administration and Use Proclamation No 456/2005.

1.2.3 Criminal Rules adopted by the Executive¹

The third category of criminal law includes rules included in regulations adopted by the Council of Ministers as applied by the court. They either define the prohibited conduct or the punishment.

- (1) Ethiopian Seed Council of Ministers Regulation No 16/1997;
- (2) Federal Government Commercial Registration and Licensing Council of Ministers Regulation No 13/1997;
- (3) Addis Ababa/ Dire Dawa Administration Commercial Registration and Licensing Council of Ministers Regulations No 14/1997;
- (4) Council of Ministers Financial Regulations No 17/1997;
- (5) Film Shooting Permit Council of Ministers Regulations No 66/2000;
- (6) Council of Ministers Income Tax Regulations No 78/2002;
- (7) Council of Ministers Value Added Tax Regulations No 79/2002;
- (8) Customs Warehouse Licence Issuance Council of Ministers Regulations No 24/1997;
- (9) Customs Clearing Agents Council of Ministers Regulation No 108/2004;
- (10) Electricity Operations Council of Ministers Regulations No 49/1999;
- (11) Tax Withholding Scheme Application Council of Ministers Regulations No 75/2001;
- (12) Telecommunication Services Council of Ministers Regulations No 47/1999.

1.2.4 Directives of Administrative Agencies

Administrative agencies are routinely granted the power to adopt directives. Such agencies adopt such directives for the enforcement of the enabling proclamation and regulations; they are not meant to be criminal rules. However, the Federal Supreme Court Cassation Division rendered a binding interpretative decision that they could be enforced as a criminal rule providing for the prohibited conduct. A case in point is directives adopted by the National Bank of Ethiopia for the enforcement of foreign currency regulations the violation of which is prosecuted as a contraband.²

¹ Whether the Regulations listed here are still valid, repealed, or replaced is not established.

² *ERCA v Daniel Mekonnen* (21 July 2010 Cass File No 43781, 10 Decisions of the Cassation Division of the Federal Supreme Court); *Samson Mengistu v ERCA* (7 February 2013, Cass File No 80296, 14 Decisions of the Cassation

1.2.5 Prominent Repealed Criminal Laws

The last category includes repealed criminal laws but for their historical significance they are reproduced here in order to make the record straight. They have in one way or another influenced the criminal justice to date. They give perspective on the state's activities relating to criminal law. There were several penal legislation; however, only the prominent ones are listed here.

1. The *Fiteha Negest*;
2. The 1930 Penal Code;
3. Federal Crimes Proclamation No 138/1953;
4. The Penal Code Proclamation of 1957;
5. The Revised Special Penal Code of Ethiopia Proclamation No 214/1981; and
6. The Special Penal Code Proclamation No 8 of 1974.

1.3 Standards of Evaluation

Once the scope of the existing criminal law is reasonably defined, this section is dedicated to the evaluation of the 'legitimacy' of such criminal rules. This is done in two ways. The criminal law is first evaluated based on the internal (normative) standard of the criminal law itself, based on the doctrine of legal good. In the second aspect, the external (formal) aspect of the criminal law is seen, from the point of view of legislative theory.

Both the criminal law doctrine of legal good and the legislative theory are standards of criminalisation the legislator would have to follow. A criminal rule has both a condition, which is a prohibition, and a consequence, which is the punishment. It is both the prohibition and the consequence that are evaluated. It has been alluded already that the consequence of a violation of a criminal rule is punishment – incarceration, fine and death – each of which are implicating individual rights. Such implication to individual rights calls for the application of the rules of proportionality, this is particularly so in the determination of punishment.

Division of the Federal Supreme Court); *Public Prosecutor v Zelalem Shiferaw* (8 November 2017, File No 256759, Federal First Instance Court).

Therefore, the external or formal assessment is to be made on two levels by applying the law of proportionality and of legislation rules.

1.3.1 The Criminal Law Doctrine of Legal (Common) Good

Legal good is an interest that is (requires to be) protected by law. In this sense, legal good is very broad as it covers the law in general. Thus, a distinction is made between those legal goods which are protected by law in general and those legal goods that are protected or need the protection of the criminal law. Further, central to the present discussion, there is a distinction made between the formal or positive aspect and the substantive or normative aspect of the theory of legal good. The positive notion of legal good refers to interests that are protected by law, that is, a legal good is one that is protected by criminal law. This is a circular statement that it does not help in the discussion on the limitation on criminalising power of the state. Thus, resort is made to the normative (substantive) aspect of the theory.

The normative aspect of the theory of legal good helps the lawmaker determine what interests need the protection of the criminal law; stated otherwise, it helps in the determination of what conducts should be criminalised. There are positive and negative requirements to be complied with.

The first part of the provisions of Criminal Code, article 1 provides that '[t]he purpose of the Criminal Code [] is to ensure order, peace and the security of the State and its inhabitants for the *public good*'. The criminal law endeavours to maintain 'order, peace and security' of the institution of the state and its inhabitants. It does so not for the ends of order and peace for its own sake but for the public good which Philip Graven refers to as 'human collectivity'. The primary concern of the criminal law is maintenance of the collective existence of the society and regulating individual conduct as 'members of the group'. Thus, it protects private interests and punishes harm to the individual 'to the extent that, in addition to causing individual harm, they are a source of public disturbance and destroy or call in question the peace of the collectivity'. It is for this reason Graven further maintains that, the penal law is 'purely utilitarian'; and the Ethiopian criminal law adopts 'reformatory justice in all respects preferable to punitive justice'.

However, there has never been any court decision wherein the content of the provision is litigated or found to be relevant for any form of decision or ruling. Because such doctrine is

considered mere legislative promise, and there is no developed jurisprudence, it gives a wrong impression that the lawmaker is at liberty to adopt legislation that violates this doctrine, provided it expressly states such view in the new legislation.

The Positive Requirements of the Theory of Legal (Common) Good

To get the protection of criminal law, a legal interest needs to be one deserving of such protection. The basic purpose of the criminal law is the protection of the legal good which is important for the social existence of the individual. And those legal goods are ‘life goods’ coming in two forms. The first category includes ‘elementary life goods’, such as life, limb, property, freedom, and institutional and operational integrity (incorruptibility) of public offices. The second category of ‘life goods’ include ‘deeply rooted ethical convictions of society’, such as, ‘prohibition of animal cruelty’ and blasphemy.

Regarding the positive aspect of the concept of legal good, the illustration may be good enough. In its normative aspect, however, those illustrations raise more questions than they answer, because it is not what is defined as a legal good that is challenging to define. It through this normative aspect of legal good that guides the legislature in criminalisation of conduct.

To address the issue, a few requirements are put forward for a legal interest to be protected by criminal law. The first subject that is worth considering is ‘the social importance of the good’. The end of criminal law is the protection of interests that are essential to the social existence of the individual. Therefore, it is assumed that the criminal law is to be used to enforce such important interests, not trivial violations. Thus, the interest must be determined to be ‘fundamental to social life’.

The other requirements relates to the importance of the interest and the seriousness of the harm caused to such interest, i.e., whether the interest is guaranteed by the constitution, including those interests that are illustrated above – life, liberty, property, the integrity of the public office, and such other interests that make the individual personal development possible. But the harm to such interest must also be substantial. This takes us to the issue of inchoate crimes, such as attempt, conspiracy to commit crime, and preparation, where harm did not occur but a threat of harm exists. Thus, in such situation, the interest must be

substantial and the threat of harm must be substantial and concrete to help achieve the basic object of the criminal law – protection of legal good.

The protection of the legal good is discussed in the context of a liberal society that desires to adopt a liberal criminal law. Collective interest cannot be protected in the abstract which is a manifestation of authoritarian society. Thus, in a liberal society, the collective interest may be protected by the criminal law if it has direct and serious consequences to the individual. If there is no ‘concrete amount of [or threat of] harm caused to the individual’, it is not an interest worthy of the protection of criminal law. To constitute a legal good that deserves the protection of the criminal law, the importance of a collective interest needs to be seen in the light of whether it is relevant to the social existence of the individual and whether harm to such interest substantially affects the individual. An important point that is worth mentioning is, political ideologies are not interests to be protected by the criminal law, because they only limit public choices rather than promote the social existence of the individual.

This discussion must also be seen in the light of the already established fundamental principles of the criminal law: the principle of legality, the principle of conduct, the principle of culpability and the principle of personal responsibility. Those principles are based on the fundamental assumption that the individual is a rational being making choices. Therefore, those conducts that are criminalised should also be personally committed with the required moral element. Stated otherwise, there can be no criminal liability in the absence of violation of prohibited conduct, nor can there be strict criminal liability.

The Negative Requirement (Subsidiarity) of Criminal Law

Unlike the positive requirements of criminalisation, the negative requirement of criminalisation is relatively straight forward; that is, criminal law may be used only if other less intrusive measures are proved ineffective for the protection of the legal interest. This presupposes there are alternative measures to be considered before resorting to criminal punishment. Only when such administrative measures or civil actions, for instance, are found to be ineffective for the protection of such legal interest, that resort to criminalisation may be made. This principle of *ultima ratio* is also an embodiment of the rule of law, the state restraint in using such harsh measures. This principle may, therefore, be seen in the context of

constitutional principles, such as the principles of proportionality, necessity, and the prohibition of excess.

The violation of this principle would certainly result in over-criminalisation. This is because, such a principle can only work with the specific purpose of criminal law, prevention. If the criminal law is used for other purposes, such principle does not work effectively in limiting the criminalising power of the state.

1.3.2 Efficacy of Legal Good Doctrine in Ethiopian Criminal Law

The efficacy of the doctrine may be seen by the extent it puts a limitation on criminalisation power of the state. The doctrine is an internal limitation of criminalisation by requiring that legal good be one that requires protection of the criminal law and that other less intrusive means fail to afford protection of such good as discussed above. A substantial part of the Criminal Code is meant to protect legal goods that are traditionally protected through criminal law, such as life, limb, liberty, property, the integrity of government institutions and their functioning. However, there are penal provisions that do not meet such liberal principles and standards as set forth in article 1 of the Criminal Code, which rather reflects the authoritarian nature of the criminal law. This may be seen in light of those provisions that were meant for the maintenance of political power, maximizing state revenue and creating administrative convenience.

1.3.3 Testing the Application of the Principle of Ultima Ratio

The negative requirement in the doctrine of legal good is that criminal law may be used as a last resort measure. Such may be the case only when the alternative state measures are shown to have failed to effectively protect the legal good. In the adoption of those legislation, such alternatives were not discussed at all. This may be seen in respect of those legislation that were revised and replaced, for instance, in the tax laws, the commercial registration, and license regulation matters. Those penal provisions in other legislation were included criminalizing conducts for the first time, as in the case of trading without a business licence, or while there were a penal law and new conduct are criminalised or the sentences are increased. There is no background research indicating that the previous measures, such as administrative measures and/or civil actions have failed to help protect the legal good.

Criminalisation and determination of sentence are political decisions. However, the specialisation of law would help the law is fairly insulated from unreasonable content control of the law by political considerations. This does not seem to be the case in Ethiopian criminal law. For instance, the death penalty is purely retributive. In the presence of article 1, adopting a consequentialist theory of punishment, the maintenance of the death penalty only reflects how the political discourse could not be matched by the developments in legal theory. When liberal theories and authoritarian criminal law co-exist, they can only result in judicial formalism.

1.3.4 Relevance of Harm in the Criminal Law

The normative aspect of the theory of the legal (public) good guides the lawmaker whether criminalisation is an appropriate response to the protection of a given common good because other less intrusive measures fail to help protect such interest. In this sense, the doctrine of legal (public) good defines the interest protected from harm or threat of harm in prohibiting certain conducts and the consequent measure; yet, harm does not define both criminalisation and the appropriate response.

Even in the determination of the sentence, the Criminal Code does not mention harm at all. At the sentencing phase, however, two provisions are invariably invoked. The Criminal Code provides that, in the determination of sentence, the court must be guided by ‘the spirit of [...the] Code and so as to achieve the purpose it has in view’. Further, it is the duty of the court, based on the facts and the evidence, to determine guilt. Such determination is made ‘taking into account the dangerous disposition of the criminal, his antecedents, motive and purpose, his personal circumstances and his standard of education, as well as the gravity of his crime and the circumstances of its commission.’

These provisions should be understood as intended to maintain a judicial determination of guilt taking into account the personal circumstances of the accused. The law further provides for the determination of sentence ‘in conformity with the provisions of the General Part of [...the] Code and the special provisions defining offences and their punishments’. The Special Part of the Code, however, constituting the crime determines liability based on the harm caused. For instance, for corruption crimes, the law provides that degree of harm is used as a ground of aggravation of sentence. On the other hand, crimes relating to murder and

bodily injury are seen in the light of the means used to cause the harm, the circumstances of the harm, which reflects the degree of harm that is translated into the consequent punishment.

In those provisions, harm is used for the simple reason of convenience in the determination of the marginal utility (deterrence) of the sentence. Harm as a justification for criminalisation and harm for determination of sentence have different utility.

The Criminal Code is organised in the manner that shows public interest in the nature of harm threatened or caused – from the most serious to the less serious crimes. Seen otherwise, the principle of proportionality requires that the punishment must be measured against the degree of harm caused (threatened) to the legal good. Even though there is no naturally fixed amount of punishment for every specific conduct criminalised, crimes based on the *in rem* and *in personam* circumstances should certainly be of different consequences. The *in rem* qualities of crimes relates to the allocation of specific punishment for each crime which some referred to it as, cardinal proportionality. Such determination of punishment is based on the gravity of the harm caused (or threatened) to the legal good to determine effective marginal deterrence for each crime. Once the court finds the defendant guilty of a crime, it determines the sentence based on the *in personam* qualities of the defendant which is referred to as ordinal proportionality. There is one fundamental caveat that, harm as a ground of determination of sentence does not necessarily help achieve the ends of criminal law.

Despite the criminal law provides that the ‘penalties and measures shall always be in keeping with the respect due to human dignity’, it is conspicuously absent in the practice of determination of sentence.

1.3.5 Criminalisation and the Law of Proportionality

Where a public policy implicates a fundamental right, the principle theory of rights requires that the law of proportionality should be applied. The weighing process is not an empirical judgment but a normative judgment. Therefore, it follows a certain formal methodical process. The two-step analysis is a near-universal methodology applied in constitutional adjudication. However, this is also the same interpretative method in the legislation process, except where the legislation process fails, the enforcement of rights falls back onto the adjudication process.

In the determination of the scope of the right implicated, there are two types of limitations to such rights: internal limitations and external (general) imitations. The Ethiopian bill of rights has only internal limitations. Thus, as part of the definition of a given right, the first step in the determination of the scope of the right is, therefore, limited to the consideration of internal limitations of the right.

External limitation, on the other hand, as it involves weighing of some sort, forms a part of the second step analysis, which is the evaluation of the legitimacy and justifiability of the state's public policy. Intrinsic in the first step analysis, it must be determined that such state actions are proper state purpose authorised by the constitution. The second step, thus, involves three-step evaluation of proportionality; that is, the means employed is appropriate to such state objective; that the measure is necessary such state objective cannot be obtained by other means; and that the harm to such right by adopting such state measure is proportional (not excessive) to the benefits to be achieved by the public.

Decades after its adoption, despite the jurisprudence on the bill of rights is virtually inexistent, the Explanatory Memorandum to the Draft FDRE Constitution on article 13(2) states that fundamental rights incorporated into Chapter III were taken from international instruments and principles. It, thus, holds that the interpretation of the provisions of the bill of rights should be in conformity with the international bill of rights. Further, resort to the international jurisprudence both for interpretation and methods of weighing of conflicting interests is imbedded in the Constitution itself for those international instruments form the corpus of the domestic law.

The law of proportionality is invoked in the 'Brief Explanatory Memorandum on Freedom of the Media and Access to Information Bill (later adopted into law as *Protection of the Media and Access to Information Proclamation No 590/2008*) in order to justify limitation to the right access to information as provided for under article 29 of the Constitution. Thus, the adoption of the law of proportionality in criminal law making is justified.

However, as a criminal rule has both operative facts and consequences, the evaluation of the appropriateness of criminal prohibition, its necessity, and proportionality, as well as the appropriateness of a particular criminal punishment, its necessity and proportionality have to be examined separate from each other. For mere purpose of intelligibility, the determination

of punishment is discussed only under the section dealing with the proportionality in the strict sense.

Appropriateness of Criminalisation

Appropriateness or ‘goal rationality’ in criminalisation relates to whether the adoption of a criminal norm is one that would help realise the end sought, prevention of crime. Legislation are adopted to be applied in the future. There are natural limitations to the decisions of the lawmaker in the determination of future circumstances because things change both naturally and as a result of the intended rule. However, appropriateness is determined based on three enquiries. The first enquiry relates to the determination of ‘quantitatively’ whether the means (intended to be) employed would help more or less number of results in the end sought in relative to the other available alternatives; ‘qualitatively’ whether the means (intended to be) employed would help a less or better quality of the ends sought relative to available alternatives; and ‘probability’ whether (intended to be) means is more or less certain in achieving the ends sought from among the available alternatives. Therefore, the lawmaker needs to decide the strength of the means-end relationship based on those matrices. However, the decision is only based on the available information regarding the quantity, quality, and probability of the means-end relationship. Thus, the lawmaker may not be choosing the most appropriate means but only ‘satisfying solutions’.

From the existing criminal rules, the lawmaker does not appear to have chosen the appropriate means for the protection of a legal good. For instance, the *Vagrancy Control Proclamation* states that the Proclamation is adopted ‘to permanently dispel [the] threat’ of ‘an increasing and wide-spreading’ vagrancy. Whether vagrancy is a legal problem distinct from social and economic issues is difficult to establish.

Likewise, seen in conjunction with other regulatory legislation, such as the *Commercial Registration and Business License Proclamation*, the principal end of the tax laws is to maximise state revenue. These are not legal goods that need the protection of the criminal law. Nor has the legislature, in the determination of criminal protection of the interest as appropriate means, looked at evidence that show other means failed to help achieve the intended results are connected.

The second enquiry relates to how the relationship between the means and end is to be analysed in three dimensions. The first dimension is the abstract/concrete dimension is whether the purpose ‘can be *possibly* relied upon by adopting’ such measure or the adopting of such measure ‘would be appropriate only if the purpose is indeed realised in actuality’. The second dimension general/particular is whether the lawmaker may adopt a measure that is ‘generally appropriate to advance the purpose’ or the ‘measure would be appropriate only if the purpose is realised in every particular case’. In criminalisation of conduct, every criminal prohibition and every punishment need to advance the objective of the state. The third dimension is previous/subsequent refers to whether the measure is ‘appropriate when it is adopted’ or ‘at the time of judgment’.

Some opine that legislative action may be abstract and general, unlike administrative measures which have to be concrete and effective in every individual case. Because criminal prohibitions and punishments are the most intrusive state measure, criminal norms have to be concrete in achieving the ends sought, even though they are general in a statement and the measure must be determined appropriate both at the time of the adoption of the rule and its application. It is to maintain such rationality and efficacy, that legislation are under potential revision, because they have to justify their continued existence.

The subject of enquiry is made clear seen in the context of penal provisions contained in the administrative legislation. For instance, the three main justifications for the adoption of the Commercial Registration and Business License are: to put in place a fair, modern, fast and accessible system of commercial registration system thereby increasing societal satisfaction in the service, to support commercial registration activities with modern technology in order to combat illegality, and to maintain transparency and accountability and good governance in the commercial registration. The several provisions in the statute may be justified by those objectives; but those objectives are not sufficient justifications for incorporating such severe criminal punishments.

The third question relates to ‘the degree of control over governmental decision’ which is analysed on two models as ‘strong control’ and ‘weak control’. In some instances, the state has strong control over matters; thus, where there is an already established strong control, the appropriateness of additional measures must be seen only based on the efficacy of such existing control as in the principle of *ultima ratio*.

One such example is tax laws. The government has a wide range of regulations regarding tax matters both through the tax legislation based on powers given to the tax office and other related agencies. For business registration, an applicant is required to obtain a tax identification number and a specific address of the potential business, which, in the event of the address change, is to be notified to such office. The renewal of such commercial registration and business license also requires tax clearance which is made a requirement to maximise government revenue. In the event such a trader fails to pay taxes by declaring his annual income, he would be liable to pay a hefty administrative fine (principal, interest, and penalty).

Further, tax duties have priority over other claims and, the tax office is given the power to freeze such tax payer's bank accounts, and garnish his property, including barring individuals from leaving the country before paying their tax dues. It is worth noting that this is done by shifting the burden of proving error in the decision of the tax office to the taxpayer. Such strong control mechanisms would help the state achieve its objectives – maximizing its revenue. In the face of such strong control by the state regarding tax matters, criminalising trivial matters, shifting the administrative burdens to the citizen under pain of criminal responsibility with hefty fines and long jail time is not appropriate measure; it is rather unreasonable.

The Necessity of Criminalisation

A particular measure may be held necessary where after having considered all the available alternative measures are found to be the least intrusive but the most effective measure helps to achieve the intended end, without which it is difficult or impossible to achieve. This requirement is in harmony with the principle of *ultima ratio*, helping to narrowly tailor the measure to the state's objective.

Likewise, once criminal liability is determined to be necessary, the nature of the punishment is to be evaluated progressively starting from the least intrusive to the severe one. Therefore, criminal punishment should be avoided; where punishment is found to be necessary, fine should be of the first choice. Incarceration is the last resort action and the death penalty cannot be necessary. The Criminal Code also provides that the calculation of punishment is to be made in that order, progressively 'from the lightest punishment to the most severe ones'.

Proportionality in a Narrow Sense

Proportionality in the strict sense refers to the balancing of the ‘marginal social benefit’ achieving the law’s end and the ‘marginal social harm’ of limiting the constitutional right of the individual. The comparison is not between the right and the state objective of prevention of crime, as politicians attempt to present it, rather it is a counterweight between the marginal social benefit and the marginal social harm of the two conflicting values; such as whether criminalisation of a particular conduct and the consequent criminal punishment as limitations to the right of the individual is proportional to the intended marginal maximization of state revenue.

A criminal rule has two elements – the operative part (prohibition of certain conduct) and the consequence (punishments). Because such a decision of criminalisation and determination of punishment implicates different interests, they have to be assessed separately. For instance, assuming it passes all other requirements of criminal law making, if in blanket prohibition it is doubtful whether the marginal social benefit of protecting the rights of the individual is outweighed by the marginal social benefit of the state’s objective, such state action is not justified.

As there is an element of discretion in proportionality in the narrow sense, it is a subject where normative judgment comes into play. Thus, other postulates, such as reasonableness and the prohibition of excess help such normative judgment.

Assessing the Determination of Punishment

Various factors come into play in the determination of criminal punishment. The 1957 Penal Code adopted the consequentialist purpose of criminal law. Thus, punishment is imposed for the ‘reform of offenders and measures to prevent the commission of further offences’. There is no statistical evidence criminal punishment deters would-be offenders. However, the punishment needs to be imposed because it is a promise to be fulfilled so that the law may be complied with. Thus, Beccaria argues for the parsimony of punishment, i.e., the most effective on society and less intrusive on the person who undergoes the punishment because, he further argues, ‘men are moved more by the desire to avoid pain rather than by the pursuit

of pleasure’. There is also no evidence that compliance with criminal law is not because of the punishment imposed on offenders either.

The Criminal Code makes a fine modification in that punishment may be imposed ‘in order to deter [...the offender] from committing another crime and *make them a lesson to others*’. This is both specific and general deterrence. However, a person can only be punished for his conduct and imposition and enforcement of punishment to teach others raises question of legitimacy of the punishment and it is even treated as ‘degrading’. Further, the principle of *ultima ratio* requires that the criminal punishment must be considered as a last resort measure.

Punishment is rather the criminal law embodiment of the principle of proportionality in the narrow sense. Contrary to this approach, there is an excessive use of criminal punishment. Those cases where criminalisation is not justified need no further discussion. However, there are cases where the lawmaker exceeded all manners of common sense. First, the lawmaker has expressly stated its preference to a higher punishment – contrary to the principle of lenity. In administrative proclamations containing penal provisions, the lawmaker is consistent in making preference to the harshest punishment. Thus, it provides that the penal provisions of those administrative regulations are applied ‘unless the act entails higher penalty under the provision of the Criminal Code’ or ‘unless punishable by greater penalty as per any other relevant law’. However, it is only recently that the Council of Ministers adopted ‘Legislative Drafting Manual’ which prohibits the insertion of such rules.

Some are contrary to the prohibition of excess, and they appear to be intended to destroy the offender. For instance, the *Commercial Registration and Business License Proclamation No 980/2016*, article 49(2) provides that where a person is engaged in commercial activity without a valid license (not having a license at all or not having it renewed), or beyond the scope of his license, in addition to any administrative measures against him, the ‘merchandise, service provision and manufacturing equipment’ would be confiscated, and such person would ‘be punished with fine from Birr 150,000 [] to Birr 300,000 [] and with rigorous imprisonment from 7 [] to 15 [] years’.

Trade Practice and Consumer Protection Proclamation No 685/2010, article 8 prohibit ‘acts of abuse of dominance’. Accordingly, article 35(1) provides that the Authority may ‘impose

administrative and civil sanctions, and gets complainants compensated for damages they sustained’. In addition to those measures, the business person ‘shall be punished with a fine of 15% [] of his annual income or where it is impossible to determine the amount of his annual income with fine from birr 500,000 [] to birr 1,000,000 [] and with rigours imprisonment from 5 [] to 15 [] years.’

Ideally, punishments should have been kept to the minimum, but legally they are kept at a high level. There appears to be a belief that the graver the punishment, it would deter more would be offenders, a theory which is not scientifically proven. One would rather find these punishments unreasonable and excessive.

1.3.6 Regulated Legislation Process

The principal duty of the legislature is enacting laws and supervising the executive to ensure that the laws are properly implemented. In enacting such laws, the lawmaker is bound by legislation rules, such as those enshrined in *The Federal Democratic Republic of Ethiopia Constitution Proclamation No 1/1995* (‘FDRE Constitution’) and its law making rules. The Constitution provides for a formal and material source of legislative power. As such, the federal lawmaker makes laws on matters that are reserved for the Federal Government and it is specifically authorised to adopt ‘a penal code’. The current rules of law making are the *Federal Democratic Republic of Ethiopia House of Peoples’ Representatives Working Procedure and Members’ Code of Conduct (Amendment) Proclamation No 470/2005*, *The House of Peoples’ Representatives Rules of Procedure and Members’ Code of Conduct Regulations No 6/2015*. The other and most important rule is the *Council of Ministers Working Directive 1996 EC* (in Amharic, ‘CM Working Directive’) governing policy and bill initiation and adoption procedure in the Council of Ministers. A Legislative Drafting Manual is also adopted in late 2010 EC.

Complying with the requirements of these rules is the internal view of the legislature. As is evident from the readings of those rules and the working of the lawmaker, the latter is adopting laws not for the law’s good but as a means to achieve certain social, economic and political ends. Because the law making process is also guided by principles in other disciplines the law is meant to address, those principles are used for the evaluation of the substantive validity of such law which constitute ‘hermeneutic view of the legislature’.

The nature of the law making process defines the content of the outcome legislation. Even though there could not be disagreement that the lawmaker should adopt ‘good law’, the content of such ‘good law’ is a point where there is very little ideological and theory-neutral agreement. Thus, the procedure helps the lawmaker to come up with a reasonably agreeable result. Those processes also include taking into account important interests in a fair and participatory manner. The process fairly guarantees the quality of the outcome. It is possible to make good normative judgments only after a proper debate. However, the process needs to be complied with for its own sake which is referred to as a ‘process value’. This is rather what may be referred to as the ‘good law’ making process.

Pre-Legislative Phase Duties of the Legislature

A. The Criminal Law - making Power and Rules of Legislation

The pre-legislative phase first relates to the power and responsibilities of the government regarding law making. The powers of the Federal Government are listed under FDRE Constitution, article 51. The rest of the powers are given to the States. Based on this allocation of power, the law making power of the House of Peoples’ Representatives (the HoPR) is provided for under article 55. The House is expressly vested with the power to ‘enact a penal code’. This is the immediate justification for the existence of such law.

The proper reading of this provision may be, the House has the power to adopt a criminal law but its authority springs from the provisions of FDRE Constitution, article 55(5) and it shall enact such criminal law in a code form. Should it find it necessary to criminalise further conducts, it may do so by amending such code. A constitutional power of a government cannot spring from two different constitutional provisions, based on the nature of the constitutional economy of words.

However, the provisions of FDRE Constitution, article 55(1) is considered a catch-all basket to be invoked whether there is a provision authorising particular legislation or not. Several special penal legislation and administrative regulatory legislation containing penal provisions were adopted invoking the provisions of article 55(1). See, for instance, *Anti-Terrorism Proclamation No 652/2009*, *Banking Business Proclamation No 592/2008*, *Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 434/2005*, and *Prevention and Suppression of Money Laundering and the Financing of Terrorism*

Proclamation No 657/2009. Even when there is specific provision authorising a particular type of legislation, article 55(1) is invoked as a justification for the adoption of such legislation. Thus, while the provisions of article 55(11) authorise the House to legislate on tax matters, *Value Added Tax Proclamation No 285/2002*, *Income Tax Proclamation No 286/2002* and the *Stamp Duty Proclamation No 110/1998* were adopted invoking the provisions of articles 55(1) and 55(11). Likewise, *Corruption Crimes Proclamation No 881/2015* invoked article 55(1) and (5).

The provisions of article 51 concern public administrative matters vested on the Federal Government. Thus, the provisions of article 55(5) authorising to adopt a penal code is not, ideally, an unlimited power, but limited by their purpose as provided for under article 51. The provisions of article 55(1) should be understood to helping the Federal Government discharge its obligations and achieve its objectives as provided for under article 51. Therefore, article 55(1) does not authorise the adoption of penal provisions in every administrative bill. Even *Corruption Crimes Proclamation 881/2015* could only be justified by article 55(5) as an amendment to the Criminal Code.

The principle of legality requires that the law be ‘declared’. In defining the legislative power of the HoPR, the Constitution provides that the HoPR may adopt a penal code. Article 71(2) of the Constitution provides that the President of the Republic ‘shall proclaim in the Negarit Gazeta laws and international agreements approved by the House of Peoples’ Representatives’. The Federal Negarit Gazeta Establishment Proclamation No 3/1995, article 2(2) provides that ‘[a]ll laws of the Federal Government shall be published in the Federal Negarit Gazeta’. Therefore, such code is adopted in the form of a proclamation and is published in the official Negarit Gazeta. Even when a breach is said to be committed against ‘legislation issued by an authorised public organ’ it must be on that is ‘duly published in the Federal Negarit Gazeta’. This is not a definition of what law is in the country, but how the criminal law should be published as notice to the public, short of which does not constitute a criminal norm.

B. Institutions Initiating Criminal Bills

The legislative rules authorise government agencies to initiate a bill in the area of their competence. However, the CM Working Directive requires that when a criminal provision is

introduced in a bill, the (then) Ministry of Justice would have to be consulted. The designation of institutions to participate in a particular subject matter is for reasons of specialisation. Almost all legislation containing penal provision including several special penal legislation are initiated by organs other than the Ministry of Justice. Yet, the Ministry of Justice, the legal advisor of the Federal Government, did not participate in the preparation of several of those bills.

C. The Lawmaker's Duty to Investigate into Facts

The most important pre-legislative activity is an investigation into the failed social interaction and contextualisation of the problem. When the hermeneutic view of the legislature is argued for, it is a quintessential instrumentalist view of law; the law is used to address specific social, political and economic objectives in want of legislative intervention. It is to find a proper link between legislation and the value it is intended to pursue that the investigation into the facts is required.

The background study of a given legislation needs to contain several things, including identifying the failed social interaction, the alternative measures available to the legislature, and whether legislative intervention is warranted. If there was a norm governing the social relation, it should also show how such norm fails and, in the instant case, if a criminal norm is sought, in conformity with the principle of *ultima ratio*, it should also indicate that those identified alternative measures have failed to achieve the intended purpose and criminalisation is necessary.

The Council of Ministers Working Directive requires that proposal and research documents submitted to the Council must be based on sufficient understanding of the subject matter, and include all information necessary to decide in the public interest. The decision of the Council should reflect 'all government policies and procedures are thoroughly examined or looked into'. Likewise, the HoPR Regulations require that the explanatory memorandum should state 'the necessity of the draft law' and 'the object of the bill'.

The various bills were drawn up by different government agencies, and their knowledge of the rules on legislation and legislative expertise are of varying degrees. Thus, the practice of compliance with those requirements is not consistent. Several bills were adopted since the adoption of modern legislation rules in 2002. However, several of these formal requirements

of law making are not complied with. There is a brief explanatory memorandum, and the draft bill in Amharic and English version. Even when a bill proposes the modification of the existing rules, such as tax and trade regulation regimes, the reason for the revision of the existing criminal rules is not explained at all.

D. Rationality of the Lawmaker and the Duty to Maintain Coherence

In the law making process, the insider view of law making is following rules as the judge does – the rules of legislation. The outsider view of law making is addressing specific social, economic and political objectives which is hermeneutic view. The lawmaker, as a rational decision maker is believed to aspire to make ‘good laws’, which is depicted in the organisation, structure, and presentation of the positive law. Consequently, the law is also deemed to be rational which would be seen both in the substantive and the formal requirements of the law making process. It is all about the coherence of the legal system, legal doctrines, principles and rules, and making sense in the application.

It is based on such assumption that the criminal rules are expected to cohere both within the legal system as well as with the reality. It is with a view to maintaining this coherence and rationality of the lawmaker that the rules of interpretation are adopted by the courts. The report focuses on what is a ‘good’ law making process. This is principally done by examining the legislative duties of the legislature in enquiring into the facts demanding legislative intervention, in the preparation of a bill and in the law making debate in the pre-legislation, and reviewing the law made in post-legislation. This is done based on the existing legislation rules, the nature of law making and the practice of law making.

E. Coherence within the Legal System (Internal Coherence)

The principle of unity of the legal system requires that the norms in a legal system need to cohere with one another, irrespective of the category they fall under. Thus, in making or amending such law, the lawmaker is required to comply with the existing system of norms. The CM Working Directive specifically requires that a bill be accompanied with a certification that it does not contradict with the Constitution. The bill should also be shown that it conforms with other legal doctrines, principles, the existing law, and international obligations. To ensure such coherence, other agencies are also consulted, and if

criminalization or punishment is included, the Ministry of Justice (Federal Attorney General) would be consulted to make sure that the bill does not contradict the Criminal Code. Before the bill is presented to the Council for discussion, it is presented to the legal team to ensure that it conforms with the policy and technical requirements.

F. Coherence of Norms with Reality (External Coherence)

The coherence of the legal system fairly relates to the validity of laws and the coherent co-existence of norms. However, formal validity is not sufficient for the continued existence of norms. Formal validity is a reason for the initial existence of a norm; its continued existence is justified by its coherence with reality. The law must be reasonably complied with by the public and it must be able to be enforced by law enforcement authorities. This may also be referred to as ‘social rationality’ and ‘goal rationality’. The law adopted must be accepted and complied with by society and it must be one that helps achieve its intended goal.

G. Legislative Impact Assessment

The Explanatory Memorandum to the Draft Constitution states that the criminal law has to be reasonably stable. As rules of conduct, legislations are of prospective application. The investigation into the facts also reviews the impacts of the legislation when applied in the future. This is the normative, social, institutional, and economic impact of the legislation. The legislature needs to take into consideration not only the existing circumstances but also future circumstances so that the rules may remain valid for a reasonably longer period depending on the nature of the law.

The lawmaker has to; thus, consider several things which are called ‘contingencies’. First, it is in the nature of social facts that they change overtime which require the legislature to consider such possible future changes. Second, such changes may also be the result of the legislation itself, therefore, the impact of such legislation or conduct of individuals should be reasonably predicted to have efficient rules.

Criminal legislation has an impact on the right of the individual. The CM Working Directive requires certification that the intended legislation does not contradict the Constitution is one of the most pertinent aspects of the impact assessment, because the lawmaker needs to make

sure such a bill does not unjustifiably impact the rights of the individual. The other important aspect of the enquiry is the effect of the rules on other interests, such as social consequences, institutional and other resource demands. The CM Working Directive requires that the bill presented to the Council decision should not be one that would demand reform before or soon after its adoption into law. As an aspect of the investigation, there are different consultations required to be conducted by the proposing agency. Thus, before a matter is tabled in the Council for discussion the agency is required to conduct consultation with relevant organs and consider their opinion.

The consultation is principally within governmental institutions; but it may also be with the public and professional associations. It is specifically provided for in the CM Working Directive that if a draft bill has an impact on other institutions' powers or has financial implications, other institutions, or for financial matters, the Ministry of Finance need to be consulted. Likewise, for penal provisions, the Ministry of Justice be consulted.

H. The Duty to Deliberate and to Give Reason

Legislation are normative judgments and they require good justifications. Such justifications may be developed only through the process of deliberation. Cognizant of such fact, deliberations are recognised in the rules of legislation. Such deliberation is even proper because there are conflicting interests and a mutually agreeable solution could be achieved by such deliberation and voting. However, deliberation is a method of obtaining both formal validity and political legitimacy because it is central to democratic law making.

The deliberation is one aspect of the process of justifying the norm; there are enquiry researches made based on proposals, policy documents, explanatory memorandum, expert recommendations, public discussions, etc. Thus, the deliberation is put under two general categories. The pre-legislative deliberation is arguably the longest deliberation that helps the bill to get the final shape as it is presented to the House. The legislative deliberation is conducted by the Committees and in the House.

Pre-Legislation Deliberation

Every agency has the competence to draw up a bill in its area of competence. To get into the legislative drafting venture, however, such agency needs to have included in the annual

legislative program to be scheduled in the Council of Ministers and to be communicated by the President of the Republic at the first session in a joint session of both Houses. It is imperative that prior consultations should be conducted and the reports should demonstrate that such consultations with other public agencies, professional associations and stakeholders and members of the public were made.

The findings of the discussion would be presented to the Council of Ministers. Where the Council finds it essential that the subject requires an in-depth study before the matter is tabled in the Council, it may refer the matter to a standing or *ad hoc* committee. Once such deliberations were made, ‘a Green Paper’ (policy discussion paper marked as ‘only for discussion’) will be drawn up by the proposing agency. ‘A White Paper’ (a policy document indicating government policy direction) may be drawn up by the proposing agency and needs to be approved by the Prime Minister before tabled for the Council discussion. The report of the discussion on the Green and White Papers would be presented to the Council for decision and every effort should be exerted to obtain a proposal on which there is a consensus by every government agency participated in the consultation.

The CM Working Directive requires specific consultations as compulsory. For instance, if the proposal has budgetary and financial implications, the Ministry of Finance and Economic Development should mandatorily be consulted. Before drawing up a new bill or create a new institution or introduce fundamental changes in the already existing legislation or institutional structure, the Prime Minister has to be consulted. If the bill relates to a contentious issue or affects the powers and responsibilities of an agency, that agency should be consulted and such an agency should provide a written confirmation that the consultation was conducted. If the bill contains penal provisions, consultations should be made with the Ministry of Justice to determine the propriety and to avoid contradiction with the Penal Code.

Once a policy opinion is accepted, a policy document will be drawn up and discussions will be conducted. The complexity of the bill to be drawn up will be determined. The deliberations will be conducted to develop a guideline for the drafters of the bill. Once the bill is drawn up, it will be submitted to the legal affairs team regarding its presentation to the Council.

The agency proposing the bill submits the draft to the legal affairs team certifying that the bill does not contradict the Constitution, other laws and doctrines, and international obligations or expressly state where those laws and doctrines are implicated. After making sure that the bill conforms with the policy adopted and meets the technical and quality requirements provided for in article 9, the bill is presented to the Council for a final decision.

The Council may deliberate on the bill or may refer it to the appropriate standing committee after the first reading for further examination and research. Decisions are to be made after deliberations. The deliberation may be made on line-item, or words and phrases, or in general. Where the matter is one that requires expertise, the Council may be assisted by experts and resource persons. At the end of the deliberation, decisions are made by consensus; where consensus is not possible or a member requests for voting, decisions may be made by voting. The decision may be to adopt the bill, to send it back to the agency for further study, to suspend its hearing for a specific period, or to conduct the debate some other time.

Because the deliberations in the Council of Ministers is classified, it is not possible to verify those procedures were complied with in the process of adoption of a bill before it is sent to the House for adoption into law. However, a few observations may be made. First, no policy documents are coming to the House along with the draft bills which gives the impression that the rules of lawmaking are not complied with. Often, bills are coming to the House with short explanatory memorandum, the bill drawn up in Amharic and English languages.

Legislation Deliberation

The criminal norms discussed in this report have passed through the pre-legislation deliberation in the Council of Ministers with no exception. The bill is passed to the House for deliberation and adoption into law. There are two phases of deliberation in the House. The bill is presented to the House through the Speaker for first reading. The first reading is ‘the reading and discussion process held on a draft bill to be endorsed by the House, before referring it to the pertinent Standing Committee for further inspection’. The first reading is a simple reading of the bill followed by ‘deliberations on the spirit of the draft bill in general’.

Where the House, by a two-thirds majority, decides to see the bill in its regular meeting, the bill would be deliberated on for adoption into law. But none of those bills discussed here

were seen in this manner. All of those bills discussed in this report have passed through the regular process. There was the first reading, presumably, because the records do not show anything; the bill is referred to a Committee or joint Committees.

The Committee(s) conduct a public hearing which is the presentation of the bill to the ‘public’ by the resource person(s) from the proposing agency. Even though it is not provided for in the law, in a few instances, the Committees conduct ‘closed’ hearing probably to educate themselves. The practice of the House regarding a public hearing is that individuals from invited institutions discuss on a bill. With no or little change to such bill based on such public hearings, the Committee routinely recommends the bill to the House to be adopted into law. In some instances, such as in the case of *Anti-Terrorism Proclamation No 652/2009*, there is no public hearing at all.

When the bill comes back to the House, there is a second reading. The second reading is ‘the discussion on the recommendation and suggestions of the Standing Committee, to which the draft bill was referred for thorough inspection after the first reading’. The House is not delving into the content of the bill for deliberation; it evaluates only the recommendations and suggestions by the Committee and the House is limited to an up or down vote only.

More or less the same provisions are contained in *Proclamation No 470/2005*. However, *Regulations No 6/2015*, article 4 gives a different impression. Thus, article 4(1) provides that ‘the draft law shall be deliberated upon in detail.’ However, sub-article (2) provides that ‘the report and recommendation on the draft law prepared by the committee or committees concerned shall be caused to be read to the House.’ Sub-article (3) further provides that the deliberation shall be made ‘in detail based on the report and the recommendations.’ These provisions are equivocal in that, on the one hand, they appear to provide for detailed deliberations on the provisions of the bills; on the other hand, they give the impression that the deliberations, as they are based on the reports and recommendations, are limited to such reports and recommendations.

There are various legislation containing penal provisions adopted both after the adoption of the legislation rules in 2005 and the adoption of the legislative regulations in 2015. The practice continued in the same manner. Therefore, the equivocation could be interpreted conforming to the established deliberation practice of the House – deliberating on the reports

and recommendations of the Committee and entering an up or down vote for the bill. This is very restricted deliberation that does not help to enrich the bill.

Post-Legislation Duties of the Legislature

A. Continuous Assessment of Criminal Rules and Revision

Once a bill is adopted in to law and as time goes by, facts change as they always do by themselves as well as because of the bill adopted into law. It is also stated that a norm remains valid if it continues conforming to the social reality. To ensure that a norm continues conforming to social reality, each norm is evaluated continuously. If such a norm is in want of revision, it would possibly be the investigation stage of the next bill. However, if a criminal norm in place, to justify its revision, its application must be seen in various forms, one of which is some criminal statistics.

There are several penal provisions revised over the years both expanding criminalisation and increasing sentence. For instance, when the tax laws containing severe penal provisions were adopted, there was already the Penal Code punishing certain conducts relating to tax. There was no evidence presented against the provisions in the Penal Code and in support of the penal provisions of the tax laws. Likewise, when the Commercial Registration and Business License Proclamation was revised repeatedly expanding its scope, there was no evidence presented as a justification. In simple terms, there was no any background research in support of those legislative actions.

One might argue, if the House is not debating the bills, it cannot demand evidence of the social reality and it does not have the quality control mechanism at its disposal, the laws are of questionable nature. In the fact-finding stage, it was asserted that those laws adopted without proper investigation, or those rules which turn out to contradict reality should have been revised soon after their adoption. For instance, the tax statutes included unjustified criminalisation of conduct, such as strict liability and imputation of criminal liability. It is to avoid the threat of such ‘unjustified criminal responsibility’ that individuals obtain a business license and commercial registration through another person. For instance, the Coffee Export Audit Report made in 2007 EC by the Ministry of Trade shows that several of those coffee exporters were doing business under a commercial license obtained through another person who is not financially able to undertake such business. The lawmaker addressed the issue

differently – it criminalises transferring one’s commercial license to someone else, which entails severe imprisonment. Even though there is no evidence regarding the causal connection, the number of commercial registration that were returned to the Ministry of Trade increased dramatically.

1.4 Causes of Excessive Use of Criminal Law and Punishment

The state of the existing criminal law shows that there is a legitimate end of criminal law, prevention of crime. Such crime intended to be prevented by the criminal law has to be one that is properly defined. However, the report depicts that there is also an overuse of criminal law and punishment. It is referred to as ‘overuse’ because it goes beyond the legitimate end of the criminal law. This section of the report examines the reasons for such overuse of the criminal law. Several reasons could be stated; but those reasons that are stated here as causes of over use of the criminal law are the prominent ones that can easily be established from the state of the criminal law assessed against the standards of criminalisation seen in historical context.

1.4.1 Fragmented Bill Initiation

All legislative rules authorise government agencies to initiate a bill in the area of their competence. However, the CM Working Directive requires that when a criminal provision is introduced in a bill, the (then) Ministry of Justice would have to be consulted. The designation of institutions to participate in a particular subject matter is for reasons of specialisation. Thus, the Ministry of Justice is the Federal Government advisor on legal matters. However, the Ministry of Justice did not participate in several regulatory legislative preparations. For instance, in those tax legislation that adopted in 2002 containing serious penal provisions, such as the VAT and Income Tax Proclamations, the principal actors were the Ministry of Finance and Economic Development (‘MoFED’) and the Ministry of Revenue, respectively. The Government Finance and Property Administration Proclamations were drawn up by MoFED. The drafters and resources persons for the 2009 Anti-Terrorism Proclamation were only from the National Intelligence and Security Services, the Federal Police and the Prime Minister’s Office. Likewise, Money Laundering and Financing of Terrorism Proclamation No 657/2009 was drafted by the National Bank of Ethiopia, and

Corruption Crimes Proclamation 881/2015 was drafted by the Federal Ethics and Anti-Corruption Commission.

For the most part, each of the penal provisions contained in those piecemeal legislation are redundant, and in some instances, significant modifications to those provisions in the Criminal Code. The Ministry of Justice (Attorney General's Office) is most suitable to revise the penal provisions and to see to it that they are rationally integrated to the Code or help achieve the intended objective, and most importantly, to better assess the social and political impact of such provisions. The institution that is most suitable to address the matter is not made a part of the process. If there is no sufficient investigation conducted to establish the facts regarding the failed social interactions, no rational solution can be suggested. Therefore, those penal provisions lack both epistemic and object rationality.

1.4.2 Significant Overlap between Law and Politics

The practice of lawyers and the study of legal theorists very much takes on the positive law as a paradigm. This engendered a 'strong legalism' view of the law. Further, the positivists' distinction between law and non-legal matters appears to have dominated the internal view of lawyers which hold up for such tight distinction between the two disciplines. Thus, some even consign criminalisation to the realm of politics as 'not subject to a rational discussion'.

However, the two disciplines are not as separate as they appear to be; politics is the social element and law is the technical element. The argument is ranging between the specialisation of law and politicisation of the law. The institutional thought of positivism sees the law as an instrument which shows a significant overlap between law and politics creating the unavoidable relationship between law and politics on a static and a dynamic aspect as well as epistemologically.³

However, the government appears to have politicised the law by using it as part of the 'political machinery' to achieve any end it has in mind. It is a matter of fact that the nature of criminal law reflects the political realities; thus, in a liberal political culture, often, a liberal

³ The static aspect of the relation relates to the law as it exists in relation to politics; the dynamic aspect is 'how the law making relates to the political order'; and the epistemological aspect relates to the degree to which the law uses the political material.

criminal law could be adopted. Likewise, in authoritarian regimes such as ours, authoritarian criminal law is adopted.

The court could have made use of the specialised nature of the law and legal method in the interpretation and application of the law using those principles and legal doctrines, such as the principle of legality and the rule of law, which would help put a limit to the power of the state. Yet, in certain instances, even judges take political material into consideration in the interpretation of positive norms.

Criminal Rules for the Maintenance of Political Power

The criminal law is the most effective social control tool and the state is aware of such nature of the criminal law. Some of the provisions of the Code do not follow the fundamental principles of the criminal law. For instance, the special protection afforded to the Monarch and his family in the Penal Code cannot be held legal (public) good. Graven justifies this not on the theory of legal good but on the tradition of Ethiopia that the king is the sovereign and elect of God. Other special penal legislation appear to be manifestations of such authoritarian nature of the criminal law. For instance, article 249 provides that a person who ‘attempts to overthrow the Emperor or to break or modify the order of succession to the Throne, by violence, threats, conspiracy or other unlawful means, is punishable with rigorous imprisonment from five years to life, or in cases of exceptional gravity, with death.’

The stability of the government and its institutions is a legal (public) good that requires protection of the criminal law. However, it needs no comment that a nation ruled under a single family, by the time the Penal Code was adopted, that such system of government is not a legal good because it is maintaining or promoting a particular political ideology. The Imperial family had also been protected by a penal provision. This is an extension of the constitutional provision that maintains the dynasty. The 1955 Revised Constitution article 2 provides that ‘[t]he Imperial dignity shall remain perpetually attached to the line of Haile Selassie I.’ Article 3 further provides that ‘succession to the Throne and Crown of the Empire by the descendants of the Emperor and the exercise of power of the Regency’ is according to what is provided for in the said Constitution.

This also continued in the post-Imperial period for the protection of the *Provisional Military Administration Council* (‘PMAC’). The Special Penal Code of 1974 contained provisions that

were meant to protect the members of the PMAC and their family similar to the protection afforded to the Imperial family, whose violations is punishable by death.

Going further, the criminal law was also used to maintain a particular political ideology. The Special Penal Code of 1974 protects the so-called popular Motto ‘Ethiopia Tikidem’ which is later, by amendment, replaced with the protection of the ‘Revolution’. When the PDRE Constitution was adopted the protection was extended to the Workers’ Party of Ethiopia and Marxist-Leninist political ideology.

A single party system or a particular political ideology can never be a legal good deserving of the protection of criminal law. This is because a political ideology or any belief system is not ontologically true. Second, such a political structure denies citizens alternative political platforms in exercising their democratic right to self-governance, rather than enhancing the social existence of the individual. Several of those provisions are still in force. Some of them appear to be meant for the protection of legal good, but it is manifested through the excessive punishment those conducts carry.

Criminal Rules Maximizing Government Revenue

The protection of the integrity of the state and its functions are legal good that need the protection of the criminal law. However, authoritarian criminal law goes beyond, under the guise of maintaining the state. In a similar fashion as discussed above, the content of those provisions meant for the protection of authoritarian regime are maintained in the Criminal Code after the necessary adjustments are made regarding phraseology and references. The present regime, however, does something more with the criminal law, treating it as part of administrative law. Criminal law is used to maximise government revenue by creating the sought administrative convenience by shifting the state’s responsibility of regulation onto the individual making it a duty to comply with such regulations at the pain of criminal punishment. These are areas frequently reformed as part of the macro-economic reform for loan conditionality; however, as it is found to be successful in enhancing the collection of revenue, it continues to date.

The 1957 Penal Code had contained tax related penal provisions. For instance, article 360 punishes unlawful refusal to pay taxes and dues; article 362 punishes incitement to refuse to pay taxes. Likewise, article 362 punishes knowingly providing false information to save

money to oneself or by fraud or concealment, or for knowingly misleading authorities. Those provisions of the Penal Code are directly adopted by the Criminal Code verbatim. See, articles 343 - 345, 349 – 351, and 352.

Despite those penal provisions, however, when the tax statutes were revised as part of the macro-economic reform of the country as a loan conditionality package, they are made to include penal provisions. The *Value Added Tax Proclamation No 285/2002* has articles 49, 50 and 56; the *Income Tax Proclamation No 286/2002*, had articles 96, 97, and 102, as most frequently prosecuted provisions. The routinely drawn up tax crime charges allege the violation of those provisions and business owners and managers are held criminally liable for mere being owners or managers.

Likewise, the *Excise Tax Proclamation No 307/2002*, the *Turn Over Tax Proclamation No 308/2002* and other tax statutes contain penal provisions. When the *Federal Tax Administration Proclamation No 983/2016* is adopted, it created a mini-encyclopaedia of tax crimes.

One would see criminalisation in those legislation on several levels. It is not shown that those provisions are meant to protect legal good; nor was it shown that the legal good could not be protected effectively by other less intrusive means. Even if we agree that both requirements are complied with, the design of provisions those tax statutes violate the basic principles of criminal law, for instance, by imputing criminal responsibility to business managers or owners in the absence of conduct. Further, the aggressive prosecution of those provisions before a special bench in the Federal First Instance Court also made the violation of the principle of lenity possible, because all those provisions contain severe criminal penalty while the provisions of the Criminal Code with milder punishment, adopted after those statutes, are still in force.

Regulation of business is also a part of the macro-economic reform in the country. In the face of a comprehensive Penal Code, trading without a license was criminalised in *Commercial Registration and Business Licensing Proclamation No 67/1997* punishable with fine equal to double the revenue the trader earned, and with imprisonment from 3 to 5 years. The sentence was significantly increased when it was replaced by *Proclamation No 686/2002*. It was made

punishable with rigorous imprisonment from 7 to 15 years, fine from Birr 150,000 to 300,000, and confiscation of production or service delivery equipment.

The government stated both in the explanatory memorandum to such bills and in Committee hearings that such strict regulation is required for the purpose of maximizing government revenue. Yet, while there is a specific provision governing license in the Criminal Code adopted in 2004, the same punishment was maintained even when the law was revised in 2016.

The criminal punishment is aggravated in that it goes beyond the aggravation process in the Criminal Code. For instance, Criminal Code article 184(1)(e) provides that ‘where the court orders the forfeiture of the criminal’s property in case of one of the concurrent crimes, it may not impose fine on account of the other crimes.’ Those who get convicted for engaging in business activities without a valid (renewed) license are sentenced to a term of imprisonment and fine.

The new statute also criminally punishes transfer of business license which is a normal social and economic practice making it punishable with ‘fine from Birr 50,000 [] to Birr 100,000 [] and with rigorous imprisonment from 5 [] years to 10 [] years’. If the transfer is made to ‘a foreign national the fine shall be from Birr 200,000 [] to Birr 300,000 [] and the imprisonment shall be from 7 [] years to 15 [] years.’⁴

The records do not show the reason for the inclusion of such a provision. However, the Ethiopian Coffee and Tea Development and Marketing Authority under the Ministry of Trade had conducted an internal audit of coffee purchased through the Ethiopian Commodities’ Exchange and whether the coffee was exported. The audit shows two facts: first, the coffee that were purchased for export was not actually exported; it is believed the coffee was sold at home because it fetches a better profit. Second, those who obtained the coffee export license are not actually those individuals whose name appears on paper. The Government believes there are behind the curtain coffee traders who evade regulation. Thus, at least some of those who were standing trial for economic crimes contrary to Criminal Code, article 454 are those whose name does not appear on the license. It can be reasonably argued that it is with a view to control such conduct that transfer of commercial license is prohibited.

⁴ Article 49(4), Commercial Registration and Business License Proclamation No 980/2016.

The trial of some of the cases for trading without a valid license does not show there is a legal good to be protected by the criminal law. For instance, in *Mehibuba Abdella*⁵ defendant was apprehended while selling *injera* and bread without securing the required commercial license contrary to the *Proclamation No 980/2016*, article 22(1) and 49(2). In her defence, defendant presented that she already obtained a Tax Identification Number, was paying her taxes, and was in the process of obtaining a trade licence. She was convicted for violating the said provisions of the law on the ground that by the time she was apprehended selling *injera* and bread, she actually did not have a trade license. She was handed a suspended 4 years and 5 months rigorous imprisonment and a fine of Birr 2,000.⁶

Likewise, in *Bederu Negash*⁷ defendant had a license for merchandise but was selling small varieties of cosmetics for which he is charged not having a commercial license. He was just opening his shop, and there is no evidence he actually sold those cosmetics. His defence was that, other traders in the vicinity also do carry small varieties of cosmetics on the side, but he was in the process obtaining certificate of competence which appears to be a requirement for trading in the cosmetics business. He was convicted and sentenced to 4 years of rigorous imprisonment to be served and a fine Birr 1,000.

In *Anteneh*, defendant was an on-off broker.⁸ He related an individual providing transport services with another trader who desires to transport his goods from Addis Ababa to Semera for which defendant admitted receiving Birr 8,600. He also admitted he did not have a commercial license. He was then convicted on his admission and sentenced to 4 years rigorous imprisonment to be served.

While in *Mehibuba* the court imposed a suspended sentence, in both cases the fines are inconsiderable in view of what is provided for in the law (Birr 150,000 – 300,000) and the

⁵ Federal Public Prosecutor v Mehibuba Abdella (19 April 2019, Crim File No 003716, Federal High Court).

⁶ Addis Ababa/ Dire Dawa Administration Commercial Registration and Licensing Council of Ministers Regulations No 14/1997, art 20(1) sets the threshold capital requirement of Birr 5,000 in order to make such commercial registration compulsory. In the above cases there is no evidence defendants did have more than Birr 5,000 working capital. The provisions of Proc No 686/2010 were, of course, intended to do just that. Brief Minutes of the Public Hearing Organised by the Commerce and Industry Affairs Standing Committee on Competition and Consumers' Protection, and Commercial Registration Bills, June 23, 2010 (later adopted into law as Proc Nos 685/2010 and 686/2010, respectively) 60.

⁷ Federal Public Prosecutor v Bedru Negash (29 April 2019, Crim File No 003287, Federal High Court).

⁸ Public Prosecutor v Anteneh Getye Abebe (26 March 2012, File No 114155, Federal High Court).

court did not order the confiscation of the property which is a part of the punishment provided for in the law.

Non-Compliance with Legislation Rules

Legislation without Investigating Facts Demanding Criminal Rules – The lawmaker has various duties at different levels of the legislative process. For instance, the lawmaker has the duty to investigate into the facts whether the required social interaction requires legislative intervention and whether it is criminal legislation. However, records do not show that any of those bills proposed and adopted into law had such investigation, nor was there a hearing on this subject. For instance, when the tax bills introduced imputed and non-fault liability, their effect on the business, on the government revenue, on individual freedom, is not discussed at all. When corruption offences were made non-bail able, their potential negative consequences were not foreseen.

The Lack of Internal Coherence of Criminal Rules – The lawmaker has the duty to maintain both internal and external coherence. There are, however, several rules that violate this basic requirement of coherence within the legal system. For instance, there are penal rules that contradict the constitutional principle of presumption of innocence by establishing guilt by presumption or shifting the burden of proof on to the defendant. *Corruption Crimes Proclamation No 881/2015*, article 3 presumes ‘intent to obtain an advantage or to injure’ and requires the defendant to prove otherwise. Likewise, the crime of ‘unexplained property’ provided for under article 15 of *Suppression and Prevention of Money Laundering and Financing of Terrorism Proclamation No 657/2009* is based on a presumption of guilt.

The provisions of FDRE Constitution, article 20(4) enshrines two fundamental procedural rights. The first part provides that ‘accused persons have the right to full access to any evidence presented against them, [and] to examine witness testifying against them’. The *Anti-Terrorism Proclamation No 652/2009*, article 23 provides that ‘intelligence report prepared in relation to terrorism, even if the report does not disclose the source or the method it was gathered; [and] hearsay evidence’ is admissible. This provision is repealed in the recently adopted *Prevention and Suppression of Terrorism Crimes Proclamation No 1176/2020*. However, the *Protection of Witnesses and Whistle-blowers of Criminal Offences Proclamation No 699/2010* is still in force regarding witness anonymity.

The second part of article 20(4) of the Constitution provides that defendants have the right ‘to adduce or to have evidence produced in their defence, and to obtain the attendance of and examination of witnesses on their behalf before the court.’ In the face of such fundamental right, the Criminal Code, article 43(5) provides that for crimes committed through the mass media ‘the content of the matter shall be deemed to have been inserted, published or disseminated with [] full knowledge and consent’ of the editor-in-chief, the printer, the author, editor, and publisher. It is further provided that ‘[n]o proof to the contrary may be admitted in such a case’.

The criminal law is based on four fundamental principles which are also incorporated in the Criminal Code – the principle of legality, the principle of conduct, the principle of guilt and the principle of personal responsibility. In not a few cases, contrary to the principle of legality, the criminalised conduct is just not clear. For instance, the *Suppression of Money Laundering and Financing of Terrorism Proclamation No 675/2009*, article 17(5) provides that ‘whosoever contravenes any other provisions of this Proclamation shall be punished under the provisions of the Criminal Code.’ The *Banking Business Proclamation No 592/2009*, article 58(7) provides that ‘[a]ny person who contravenes or obstructs the provisions of [the] Proclamation or regulations or directives issued to implement [the] Proclamation shall be punished with a fine up to Birr 10,000 and with imprisonment up to three years.’ There are similar provisions in several other legislation.

Those provisions violate the principle of legality in different levels; as a rule of conduct for the individual, the conducts criminalised are vague and cannot be complied with. The conducts are not predefined, and they are (would be) defined by the Executive which has no criminal law making power. In some instances, where the violation is against a directive, the criminal norms (the prohibited conducts and/or the punishment) are not published in the official *Negarit Gazeta*.

Contrary to the principle of conduct, the *Value Added Tax Proclamation No 285/2002*, article 56(1) provide that if a company is found guilty of tax crimes as defined in the respective proclamations, ‘the manager of that entity at the time of the commission of the offence is treated as having committed the same offence and is liable to a fine and imprisonment’ fixed for the company. Those provisions are also contradicting the principle of guilt.

Finally, the principle of lenity is an important principle of criminal law enshrined both in the Constitution and the Criminal Code. The penal provisions in those administrative regulatory legislation are drawn in a consistent manner preferring for a graver penalty. For instance, the *Broadcasting Services Proclamation No 533/2007*, article 45 provides for specific jail term punishment and fine to be imposed for persons violating the provisions of the Proclamation ‘[u]nless punishable with more severe penalty under the Criminal Code’.

Therefore, the system of norms is not coherent within itself, and some rules even contradict the basic doctrine of criminal law.

Lack of Coherence of Criminal Rules with Reality – There are rules that contradict the principle of external coherence, or the social reality. For instance, the commercial registration and business license proclamation requires that a trader need to have a valid (renewed) license to conduct his business. When such a rule is violated a certain punishment may be imposed. The punishment is, among others, a fine between 150,000 and 300,000 Birr. If a person has an initial capital of less than 150,000 which is often the case, and his entire asset is less than 150,000 which happened, the punishment cannot be enforced at all. Such law is mere nonsense.

The cardinal purpose of the tax law is to maximise state revenue. There are various ways of obtaining such revenue. The tax laws incorporate penal provisions. Their sole justification is to strictly enforce the revenue collection activity. Further, in the discussion for the commercial registration and business license proclamation, the requirement of a license is to maximise state revenue. The license requirement is enforced by a severe penalty. If a person is punished twice for the same purpose, each of which, in their own right, is disproportionately severe punishment, their combination is even excessive.

For instance, all of those who (were alleged to have) engage(d) in trade without a valid (renewed) commercial license were sentenced to a term of imprisonment, some of which are suspended ones, irrespective of their personal predicaments. Yet, the court is not imposing the legally provided for punishments. The law determines fine between Birr 150,000 and 300,000. The court consistently imposes a fine averaging four thousand birr only. Records do not show there has ever been a case where property confiscation is ordered. On the other hand, after the provision criminalising transfer of commercial license was adopted, 737,930

business licenses were deactivated in the year 2018 of which 708,306 was in Addis Ababa. It appears the law causes more harm than help to the government revenue.

Lack of Continuous Evaluation of Criminal Rules – The criminal law is adopted to stay for a reasonably longer period than other branches of law. However, the lawmaker is required to make continuous assessment of the continued validity of the laws it enacted to see to it that the rules still cohere within the system of rules and with reality. There are revisions of some criminal rules but only to further include conducts criminalised or to increase punishments. Even then, such revision is not made based on assessment of evidence of enforcement of the existing rules. Those provisions discussed above are still in force because there is no continuous assessment of criminal rules.

1.5 Proposed Revisions

This report depicted there are clear instances where there is excessive use of the criminal law and punishment. Such use of criminal law and punishment is contrary to both the Constitution and basic doctrine of the criminal law. Such overuse of criminal law and punishment is not particular to any branch of the Government. However, the principal responsibility lies with the lawmaker. It makes the rules; it creates the institutions and it dictates the application of those rules. However, the courts could have mitigating the negative effects of such criminal law by choosing the appropriate legal theory and method, which they do not.

The report identifies specific shortcomings in the criminal rules and the causes. Those revisions into the criminal rules or their legislation are aligned with those shortcomings already identified. Thus, in order to address problem of over-use of the criminal law at each stage, the following recommendations are made.

1.5.1 Bill Initiation or Review

One of the causes of over criminalisation, at least in the current legislative process, is the fragmented bill initiation method. Every Ministry is empowered to initiate a bill in its area of competence. Because those criminal rules are included in principally administrative regulatory statute, the explanatory notes exclusively focus on administrative matters than on the penal matters, which skips both Committee and public hearings.

As legal advisor of the Federal Government, all bills should pass through the office of the federal attorney General for review. The Federal Attorney General should, based on proper investigation into the facts, establish that such criminal rule is warranted. Where it deems such criminal rule is justified, it and should also endeavour to have every penal provision included in the Criminal Code as an amendment thereof. Should any special penal rule is justified by any measure; it should still make sure that such criminal rules conform to the General Part of the Criminal Code.

1.5.2 Having a Reasonable Criminal Law

Criminal law making power is the sovereign power of the state. The doctrine of sovereignty requires that such power needs to be exercised legitimately. It is said to be legitimate if it is exercised by the organ that has power and for the common good. The notion of common good is given effect through the criminal law doctrine of legal good. The doctrine requires that a criminal rule is adopted for the protection of such legal good. This doctrine of legal good has both the positive and negative aspects.

The positive requirement is that in order for a legal interest to be protected by the criminal law, such interest must be an essential life good or deeply rooted ethical conviction of the society, the harm or threat of harm makes the social existence of the individual difficult or impossible. Collective interests, however, may not be protected by criminal law unless they have direct and substantial negative bearing on the individual.

Only where the lawmaker is able to affirmatively answer this question that, it may consider the negative aspect of the doctrine. The negative aspect of the doctrine requires that the criminal law may be used as a last resort measure to protect the interest provided other means, such as administrative measure and civil actions, are found to be ineffective to achieve the intended protection of the legal interest.

In criminalising conduct, the lawmaker needs to seriously consider complying with the requirements of the doctrine of legal good. This should be reflected in initial policy documents presented to the Council of Ministers and in the explanatory memorandum to the bill that the proposed criminal rule is meant to protect a legal good and there is no less intrusive means to achieve the intended state objective. This can be shown by a properly undertaken research not by mere assertion.

1.5.3 Meeting Substantive Requirements of Criminalisation

The doctrine of legal good is an indispensable substantive limitation on the criminalisation power of the lawmaker. In this report, the doctrine of legal good is discussed as a postulate that is both normative and applicative. Seen on its own, it is a normative postulate defining the nature of criminal law. The other substantive limitation on criminalisation is the bill of rights; it is given effect through the doctrine of legal good. In this context, legal good becomes normative applicative postulate because it helps in the application of other norms – the bill of rights.

It has been alluded earlier that a criminal rule has both the operative and the consequence parts. Both are restrictions to individual freedom. The reason for adopting a given criminal rule needs to have equally valid policy justification. The validity of such justification may be measured against the individual freedom. Therefore, the drafters (and the Federal Attorney General) should be able to make the balancing act. More like the doctrine of legal good, in the balancing process, criminalisation should be established to be the appropriate response to the failed social interaction, it must be necessary and it must be proportional in the strict sense.

Such assessment must be made both in the fact finding stage and be included in the explanatory memorandum to the bill. It is part of the certification that the bill does not contradict individual rights and freedoms, and it coheres with the existing rules and international obligations of the country.

1.5.4 Complying with the Formal Requirements of Criminalisation

Where the exposition on the doctrine of legal good, because it is normative, may be arguable, the undebatable approach likely to produce a more agreeable result is the legislative process. Therefore, the lawmaker needs to comply with its law making responsibilities.

Legislature's Duty to Make Coherent Criminal Law

While the Constitution vests the law making power on HoPR, it also imposes the duty to make a 'good law'. The content of a good law may be subject to debate but the process is clear as it is provided for in the law. Thus, the lawmaker makes laws that conform with the Constitution both normatively and structurally. The principle of unity of legal system requires

that the lawmaker makes laws that cohere within the system of rules. Further the requirement of means-object rationality requires that the rules must cohere with reality not only for their efficacy but also for their continued validity. In order to do this, the lawmaker needs to faithfully comply with the laws of legislation.

If sufficient investigations into the facts are made, the lawmaker can justify the criminalisation of certain conducts; it can avoid redundancies and irrationalities; it can minimize unreasonableness both in the scope of conducts criminalised as well as in the degermination of punishment.

The criminal law is a body of law that is very much sophisticated with doctrines and principles. The criminal law making cannot be guided by political fiat; it is scaffold by those doctrines and principles that define the application of the criminal rule. Therefore, when it encroaches those doctrines, it is also unreasonably pressuring the court to go off-track. When a criminal rule is a suspect for unconstitutionality, the practice of the court is that it does not address the issue of unconstitutionality because it believes it does not have the authority to interpret the constitution. The court rather opts to applying the criminal rule as it is. Thus, the lawmaker needs to have a proper understanding of the consequences of its decisions to criminalise a particular conduct.

Criminal law making power is vested in the House. Such power that easily encroach on the fundamental rights of citizens cannot be delegated to the executive. Those criminal rules adopted by the executive are contrary to several criminal law doctrines.

Legislative Impact Assessment and Continuous Revision of the Law

The lawmaker makes laws presumably complying with the rules of law making. The justification and legitimacy of such criminal rule is dependent on the objective of protection of legal good. The decision is made based on the available information and resources. The law is adopted to be applied prospectively; both in the natural course of things and as a result of the rules adopted, circumstances may change. The initial validity of the law may change over time as a result of such changes in circumstances. In order to maintain the continued validity of the rule, the propriety, the necessity and the proportionality of criminalisation and punishment needs continuous evaluation.

Stated otherwise, the legal good may no more be in want of protection of the criminal law either because it loses its importance and consequently not a legal good or other less intrusive effective measure may be available, or the punishment may turn out to be ‘unreasonable’. As the lawmaker is not the ideal institution to undertake such post legislation responsibility of on-going review of such laws, the Attorney General, as the legal advisor of the Federal Government, should see to it that the existing laws are coherent within the legal system and with reality. When a law is found to be non-conforming either to other rules or the reality, the Attorney General conducts study and present to the lawmaker for the revision and amendment of such laws, including proposing their repeal if they are not repealed already by non-application, which is rare in criminal rules.

1.5.5 Determining Proportional Punishment

The consequence of violation of the rule is more consequential to the individual than the prohibition. Thus, once a certain conduct is justifiably criminalised, in the determination of punishment, the lawmaker needs to see in rem and in personam proportionality. However, what is most important under the circumstances is the in rem proportionality. This may be seen from two points of view. First, taking the law of proportionality, the lawmaker needs to balance the marginal social benefit against the marginal social harm of the punishment of the individual.

Second, the lawmaker should determine where, in the continuum of punishments, this conduct falls relative to other offences. One who is convicted of aggravated homicide and one convicted of bodily injury would not suffer the same pain of punishment. Likewise, one who caused aggravated bodily injury and trading without a valid commercial license do not cause the same social harm. Because there is no magical way of determination of punishment for each crime, the lawmaker needs to be careful.

1.6 Conclusions

The report identified a wide range of problems associated with the criminal law both in the state of the rules, their making and application. The principal problem identified the over-use of the criminal law and punishment. This is because of fragmented bill initiation and a weak

criminal law making process which does not meet both the formal and substantive requirements.

It recommends that the bill initiation may remain as it is now where unavoidable, but all bills should pass through the Office of the Attorney General. As legal advisor of the Federal Government, it should make both the show that sufficient inquiry is made to the failed social interaction that required legislative intervention, it should show that criminal rule is appropriate and necessary measure and the punishment is proportional. The explanatory memorandum should also indicate the conducted legislative impact assessment.

The lawmaker can make those criminal rules itself and it cannot delegate such power to the executive. Those criminal rules should be made complete and clear. Further, it should have such criminal rules published in the Negarit Gazeta.

Once a criminal rule is adopted there has to be a continuous evaluation of the criminal rules as it continues to be enforced by the courts in order to maintain coherence with reality. It is the only source of social legitimacy.

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SECTION TWO

Ethiopian Federal Police Reform in the Context of Criminal Justice

2.1 Introduction

One writer notes “A police force whose primary business is serving the disaggregate public ... enhances the legitimacy of government by demonstrating that the authority of the state will be used practically and on a daily basis in the interests of the people. In most countries today, this sort of responsive, service-oriented policing would be a revolutionary departure from traditional behaviour. It would, however, do more for the legitimacy of government than any other reform program, and its effects would immediately be felt.”(David H. Bayley, 2006).

Unfortunately, in Ethiopia the prevailing tradition has been just the opposite. Historically police has been often viewed as a political tool. There appeared a marriage between police and the executive; the former serving political ends of the executive, as opposed to ends of rule of law and citizen`s interest.

Thus, reforming police is essential to foster a stable democracy, where police uphold rule of law, prevent crimes, protect and respect the rights and freedoms of all persons and provide service and assistance to the public. This may require transforming the values, culture, policies and practices of police organizations so that police can perform their duties with respect for democratic values, human rights and the rule of law (DCAFSSR backgrounder, Police Reform). It seems with this understanding that Ethiopia has embarked up on massive legal reforms including reforms on the justice sector, police being one of them.

This short report assesses selected Federal police reform areas connected to the criminal justice system focusing on major police mandates and accountability and oversight mechanisms. The report is essentially based on analysis of laws relating to federal police, international standards and document reviews including best practices and literature. It has also benefited from personal observations and inputs from series of discussions held with members of the Criminal Justice Working Group. The report is structured as follows. It begins with a brief introduction followed by a review of organizing principles of policing and a short analysis of the legal framework governing federal police respectively. The fourth

section outlines some organizational and structural issues that need intervention. The fifth section identifies possible reform areas in the two major mandates of the police namely crime prevention and investigation. The sixth section handles police accountability and oversight mechanisms. The last section forwards recommendations.

2.2 Organizing Principles of Police

Generally speaking, there are two organizing principles of police, namely democratic principle of policing and bureaucratization or bureaucratic principle of policing. Bureaucratization is a government through technical experts. It is professionalization at its extreme. It adheres to instrumental rationality. Bureaucratization is a rule by office holder and hence reduces the role of the lay people in the criminal justice administration and increases the role of officials and experts. Thus, bureaucratization leaves the criminal justice system in the hands of officials and experts and provides little or no room for public participation.

Democratic principle of organizing police as the name suggests calls for public participation and is anchored on fundamental democratic principles. The police in such case are transparent and accountable, serve the public not the government (community centric) and adopt fundamental values of the public (congruence).

From the two organizing principles, democratic principle of organizing police appears the relevant organizing principle for Ethiopian federal police. The examination of FDRE constitution, the federal police enabling proclamation and regulation suggest that federal police are largely organized along democratic principles. Pursuant to Art. 88 of the Federal Democratic Republic of Ethiopia the government shall be guided by democratic principles and promote the people's self-rule at all levels and strengthen ties of equality, unity and fraternity among them. The constitution is designed to engineer a democratic government. It accordingly, requires the government institution to organize themselves on the basis of democratic principles. The police being the most important government institution have to comply with the constitutional requirements.

The preamble of the enabling law Proc. 720/2004 of the federal police provides that the police shall play its part in the national effort to build democratic system, maintain peace and enhance development. The police shall also respect the constitution and laws issued under the constitution, be impartial towards political parties, serve the public equally, maintain strict

discipline and deliver efficient and effective service. Art. 5 of the proclamation provides that the police shall execute its duties by ensuring public participation. Similar provisions are also embodied in Reg. No. 268/2005, which provides for the administration of federal police.

Thus, exploring at least some and pertinent democratic principles to which the police should comply with is imperative. There is no universally accepted model of democratic principle of policing. There are several legitimate model of democratic policing. Organizations evolve in organic manner and it is simply unrealistic to expect a sudden and complete shift from one model to another in a period of few years. Whatever model is chosen (or parts of differing models) it must be heavily adapted to the culture, experience and expectation of the transitioning organization if there is any hope of success.

FDRE constitution has adopted principles such as popular sovereignty, supremacy of the constitution, respect for human and democratic rights, transparency and accountability of the government (Art. 8-12 of the constitution). Among the various models of democratic principles found in the literature the following three principles stand out: (A) Accountability; (B) Congruence and (C) Community centric (Joshua, 2017; John, 2017). These principles as part of a reform process must be translated in to real qualities that characterize every aspect of the police organization. Its governing legislation, mission, organizational priorities and objectives, staffing structure, recruitment and promotion systems, operating procedures, practices and outputs must conform to the three democratic principles. The three principles of democratic policing do not operate independently but overlap and coalesce organically as governing qualities in each aspect and at every level of the organization.

2.2.1 Accountability

Accountability refers to the degree to which the organization subordinates itself to the authority of the law and society.

Accountability relates to the *modus operandi* of the police or the manner in which the police organization operates. It results from a relationship of subordination of one person, group or organization to another. The relationship should be based on legal obligation and characterized by an attitude or duty. It demands that the subordinate entity furnishes an account of its activities to the other entity. And when required justifies the manner in which certain activities are conducted.

Accountability demands that the police organization – at the individual, group and organization levels - subordinates itself to the authority of:

- (a) The law,
- (b) The society and
- (c) Those institutions that have oversight responsibility.

Policing in democracy necessitates that a police organization bound by a legal obligation and imbued with corresponding attitude towards the rule of law and society in general. The principle of accountability challenges the culture and working practices of every police organization. It requires that the organization demonstrates that it is *law abiding, disciplined, transparent and autonomous*.

Law abiding: A democratic and accountable police organization will not only seek to enforce the law but operate in total compliance with the law. Police officers, just like any citizen, must be personally accountable for their own actions and dully comply with the provision of the law. Respect for human right and the presumption of innocence are corner stones of an impartial and fair criminal justice system.

Disciplined: Police need to have an open and impartial approach to complaints of mistreatment by the police. It should command public trust and confidence. This is achieved by developing an independent institution with far reaching power to investigate supported by procedures that are clear and impartial. Professional disciplinary procedures must be in place to insure:

- (a) A fair and impartial hearing for victims of police abuse;
- (b) Which also protects the police officers from false allegations; and
- (c) The procedure should carefully balance the right of the police and the citizens.

Transparent: Readiness to disclose information to the public about police activities is crucial for securing public confidence. It relates to how the police organization conducts its business and informs the public about its activities. This depends on how the police works with the media in keeping the public informed and provides citizens with advice to increase their sense of security and safety. The media is the window in to the inner workings of the government administration in democratic societies. What is required is a culture of openness

in which the police media office coordinated all press statements through clear guidelines. Media training for officers and clearly defined role for police spokes persons.

Openness should be balanced by respect for confidentiality in areas that compromise:

- investigation
- Police effectiveness
- The presumption of innocence.

Autonomous: A central tenet of the principle of accountability requires that control and responsibility should rest with an independent and Professional police organization. In executing the executive order the police should follow the law in a manner that is free of any instructions of a political nature. Operational independence is an important feature of rule of law. It is aimed at guarantying that the police operate in accordance with the law and in way that makes the police fully accountable for their actions. A police organization cannot be a political tool. In order to respond to public needs and expectations the police must have full operational independence.

2.2.2 Congruence

Congruence relates to the degree to which the organization's values correspond to those of the society. It denotes the desirability of a close correspondence between the values of the police organization and the society in which it operates. At the heart of this congruence stands the necessity for the police to establish a mutual understanding and co-operation with the public. Policing is best carried out with the consent of the populations. Police confidence and trust should be won through:

- (1) Organizational structure that promote confidence building;
- (2) A high level of professionalism; and
- (3) Congruence describes an essential quality of the police officers and the community they serve namely, their ability to defend and demonstrate the values of the community in those areas of policing. The principle envisages the representative nature of the police, civilian image and the extent to which it is free of – corruption, political influence and has a merit based promotion system and sound ethics.

Representative: The police should reflect or mirror the society it serves. The composition of police staff both uniform and support - must reflect as perfectly as possible the composition of the society. This demands a fully representative police service in terms of Geographical deployment, Percentage of population and distribution throughout the ranks and social functions. This feature of congruence is absolutely essential in a multi –ethnic society.

Civilian image: A police service must reflect in its ranks the society it serves. The police must be the people. A democratic police service must project a total image of being a ‘civilian’ rather than military organization. Its uniform, emblems, badges, equipment, rank structure, and rank titles should all eschew military over tones and values.

This philosophy allows the police officers to become approachable and close to the public they seek to serve.

Non-political: The principle of congruence demands that the police organization should be free of political association and interface. Police independence is an important feature of rule of law. It should be politically insulated in order to impartially implement/enforce the law for the benefit of all citizens.

Merit based: Congruence demands fair and impartial promotion policies that are based on merits and allow the organization to have the right officers in the right ranks and functions. Such approach equally excludes the system in which officers advance in rank automatically solely on the basis of seniority in the ranks. Promotion will be made on the basis of objective evaluation - one that uses – exemplary service records, examinations and selection interviews as a means of selecting the best candidate.

Ethical: More than any other feature of the process it is the visible changes in the policing culture that represents the critical test of reform for the public. A policing culture denotes the prevailing values, attitudes and corporate image of the organization. This relates to the operational and ethical behaviour of police officers. Police officers reveal their values in the way they carry out their duties and for their performance represents an important indicator of change in the organization. Congruence demands that the organizations culture is closely aligned to public values. It seeks to bring officers close to the society they serve. Shared attitude and professional values of police officers though difficult could be addressed through: Capacity-building; and Code of ethics and an efficient disciplinary regime.

2.2.3 Community Centric

The notion community centric refers to the degree to which the organization's achievements correspond to and meet the needs of the society. It relates to the extent to which the police organization is centred on the need of the community. It contrasts with the 'state centric' model of policing that is found in communist and totalitarian regimes. Police measures its success by the extent to which its achievements and outcomes satisfy the needs of the community. This principle require that the police organization is:

- *Service oriented*
- *Decentralized*
- *Empowering, and*
- *In transition states focused on organized crime.*

Service oriented: This quality changes the role of the police from that of being a police force that intervenes in areas of society in to a police service that attends to certain needs of the society. This gives the police the status of public service rather than pure law enforcer. It is mindful of that sense of obligation to the taxpaying public and identifies a member of the public as customer whose needs must be met and listening, attempts to act on public expectation. The organization must actively seek out the views of the public through public perception surveys and other methods of formal and informal consultation.

Decentralization: Police should not be highly centralized. Decision-making should not be concentrated at the top of pyramidal structure. Decision-making and resources should be decentralized in order to effectively serve the public. Moving greater management responsibility to the local level, which at the same time maintains unified organizational structure, is important.

Empowering: The police organization should empower the community to actively engage in the issues that relate to their sense of safety and security. Police needs to work with the community in preventing crime. The police need to get the input of the community as to how the neighbourhood is policed and what issues are important to their safety.

Focused against organized crimes: For money transition states organized crime represents a significant menace. Corrupt regimes, conflict and disorientation that immediately follow the peace will create lacunae in the system, which are actively exploited by determined and

resourceful criminals. Their methods and successes threaten the very fabric of the society by undermining public confidence in the rule of law and eroding the basis of economic development. Police organizations must enforce the law with total commitment whilst upholding human rights if the numerous gaps to be exploited by organized criminals to be closed. This requires for the police to have clean hands and fully purged off those officers who collaborate or assist such criminals. The police service should be free from corruption and in a position to objectively tackle this problem.

2.3 Legal Framework

The FDRE Constitution aspires to build a political community founded on rule of law, human rights, lasting peace, democratic order, social and economic development (the preamble). It is axiomatic to say that police plays essential role in the realization of such ideals of the Constitution, and other laws. As such, although it does not directly establish police, the Constitution mandates the Federal and State governments to organize and administer their respective police forces (Articles 51(6), 51(7) and 52(2)). Both the Federal and State Administrations established police through proclamations. Since the focus of this report is on the Federal police, a brief overview of its establishment and powers and duties is in order below.

Federal police was formally established for the first time through Proclamation No. 207/2000 - A Proclamation to Provide for the Organization and Administration of the Federal Police. This proclamation aims at creating civil police institution, well trained and competent police that ensures pace and security of the public; and respects human and democratic rights and freedoms. (The preamble). This law was later repealed with a new proclamation—Federal Police Proclamation, Proclamation No. 313/2003, which introduced among others Police Commissions of Addis Ababa and Dire Dawa City Administrations.

The Ethiopian federal police was re-organized under the Ethiopian Federal Police Commission Establishment Proclamation No 720/2011(Herein after Federal Police Proclamation). The preamble captures the need for re-organizing federal police as: with a view to “enhance its [police’s] capability of fulfilling its mission of ensuring the observance of the Constitution of the Federal Democratic Republic of Ethiopia and laws enacted in accordance with the Constitution, and thereby play its part in the national efforts to build democratic system, maintain peace and enhance development; ... to ensure that the federal

police institution maintains its impartiality towards political parties, serve the public equally, maintain strict police discipline and deliver efficient and quality services.”

In 2016, Proclamation No. 944/2016 was issued to amend the Ethiopian Federal Police Commission Establishment Proclamation, Proclamation No. 720/2011. Notable from the amendments include its subjection of the federal police to be directly accountable to the Prime Minister; which was rightly removed in 2018 to give way to the Ministry of Peace by Proclamation No. 1097/2018 - A Proclamation to Provide for the Definition of the Powers and Duties of the Executive Organs of the Federal Democratic Republic. Currently Federal police is accountable to the Ministry of Peace.

The existing Federal Police Proclamation 720/2011 established Federal police with a mandate “to maintain and ensure peace and security of the public and the state by respecting and ensuring the observance of the Constitution, the constitutional order and other laws of the country and by preventing and investigating crime through the participation of the public.” The proclamation further tasks the latter with a long list of detailed powers and duties. Those that relate to criminal justice include the following:

1. prevent and investigate any threat and acts of crime against the Constitution and the constitutional order, security of the government and the state and human rights;
2. work in collaboration with the Ministry of Justice and other relevant organs with respect to crime investigation;
3. execute orders and decisions given by courts;
4. without prejudice to the powers and duties conferred on other federal government organs by other laws, prevent and investigate crimes falling under the jurisdiction of federal courts;
5. without prejudice to the provisions of sub-article (4) of this Article: prevent and investigate crimes relating to counterfeiting currencies and payment instruments; investigate crimes relating to information network and computer system; prevent and investigate crimes relating to human trafficking, abduction, trafficking in narcotic and psychotropic substances, hijacking of aircraft or ship, organized robbery, terrorism and violence;

6. delegate, where necessary, regional police commissions to prevent and investigate crimes falling under the jurisdiction of federal courts and receive reports on the execution of the delegated power;
7. safeguard institutions of the federal government; provide security protection to higher officials of the federal government and dignitaries and diplomats of foreign countries;
8. install CCTV cameras at appropriate places to facilitate the prevention and investigation of crime;
9. discharge the responsibilities stipulated under Article 18 of Proclamation No. 587/2008 with respect to the prevention of criminal offences relating to the violation of customs and tax laws;
10. investigate crimes committed in foreign countries against the interests of the country based on mutual agreements entered into between the states;
11. centrally organize and keep criminal records of individuals, and issue certificates to individuals with no criminal record;
12. conduct forensic investigation and submit its findings and provide expert witness to court or the requesting organ;
13. work in collaboration with regional police commissions on matters relating to forensic investigation;
14. dispose, in cooperation with the National Archives and Documentation Agency, investigation files, finger prints and other related documents that have lost their evidentiary values
15. where there is sufficient ground to suspect the likely commission of terrorist act and where it is believed that surprise search is necessary to prevent such acts, stop and search vehicles and pedestrians found in the suspected area; arrest suspects and seize materials and carry out investigation;
16. require any person to furnish information or evidence believed to be necessary for preventing and conducting investigation of crimes related to terrorist act that endangers the national security;
17. conduct and implement studies that may contribute for the proper accomplishment of its mission and for improving the professional competence and services of the Police;

18. in cooperation with regional police commissions, develop national policies, strategies and uniform standards on the prevention and investigation of crime and ensure their implementation upon approval by the government;
19. maintain law and order in regions based on intervention orders given by the federal government;
20. collect, analyze and disseminate to the concerned organs country wide information on causes of crimes and traffic accidents;

The above powers and duties of the police lack systematization and some of them exhibit overlaps. Thus, they need restructuring along thematic lines reflecting the mandates of the police ranging from *crime prevention and investigation*, and *ensuring law and order to provision of different services* as well as *administrative duties*.

A quick review of the relevant legal framework on federal police reveals the following gaps that need intervention:

- 1) **Defective law making process:** the law making process, in general and in the context of police, in particular, exhibits among others the following limitations: it is not informed by scientific research; there has been no meaningful participation of the stakeholders in the process. Where there is one, it is less participatory if not nominal, which does not consider feedback and needs of society seriously. Public access to the draft laws is severely limited. Strikingly, draft laws are protected as though they were classified documents. However, one noticeable development is emerging very recently: the Legal and Justice Affairs Advisory Council has installed a platform, which makes draft legislations accessible online.
- 2) **Fundamental Principles:** Fundamental principles that guide police operation are not comprehensive enough. The Federal Police Proclamation under Art 21 provides for fundamental principles that guide police operation and its interaction with the public namely participation, accountability, transparency and impartiality. However, the list is incomplete for such relevant principles as the principle of equality / non-discrimination, independence, respect for rule of law, and human dignity are missing.
- 3) **Victim support and protection system:** protection of victims and witnesses is vital in the effective operation of the criminal justice machinery. However, apart from some limited protections envisaged by specific penal legislations, there are no rules on victim support

and protection in general and to vulnerable victims such as children and women, in particular (particularly when sexual crimes are involved).

- 4) ***Long list and overlapping powers:*** The Federal Police Proclamation contains a long list and overlapping powers of the Federal Police Commission (40 listed powers under the Proclamation). These need systematization along major mandates of the police.
- 5) ***Cumbersome police ranks:*** The Federal Police Proclamation contains too long and cumbersome police ranks and requirements for promotion that could discourage career advancement. There are 16 ranks from the bottom “constable” to the highest “commissioner general”, albeit the commissioner general and his deputies are by appointment; whereas sergeant and inspector have four levels each. In particular the number of year of experience required is too long so much so that it could backfire against human development policy. For example in principle (putting other accelerated procedures aside) to attain a status of a commander a constable, the lower rank in the career structure, needs a total 30 years of experience. This is virtually unattainable for one may retire (given the retirement age for police officers is lower than that of civil servants) before reaching this year of experience. Further the merit of some eligibility criterion for promotion such as the one which limits promotion rights of officers, should they left one or less year for retirement, is unclear. Apparently, this seems to give undue precedence to services of such officers over their right to develop their career and drawing the benefits attached there to. The above gaps need intervention having regard to best experiences and the Ethiopian context so that it positively impacts police career.
- 6) ***Special investigative techniques:*** Although the Draft Criminal Procedure and Evidence Code envisions and provides for special investigation techniques for some selected crimes, there is a need to regulate the details on how police makes use of such techniques, the extent of its use, the specific conditions and accountability mechanisms (in addition to the general standards set forth by the draft code).
- 7) ***Delegation of police power:*** Delegation of police power to government offices and civil servants is vague and open to misuse. The law employs a general language to make police power delegable in matters that require “special skill” and “to the extent necessary”. The relevant provision simply provides the following:
“Delegation of Police Powers

- a. Police powers may be delegated to government offices and civil servants administered under the federal civil service laws and other relevant laws with respect to cases that require special skill.
- b. The police power to be delegated pursuant to sub-article (1) of this Article shall only be to the extent necessary to handle the case in question.”

Although it is not clear which power of the police and under what safeguards /conditions can be delegated, it could refer to delegation to some government officers and authorities such as customs, anti-corruption commission, customer protection authority, etc.

8) ***Police Code of Conduct and Code of Ethics:*** The police establishment proclamation and Regulation 268/2005 set for some standards that regulate federal police. These are not enough to regulate police routine exercise of its powers and duties in practice. Thus there is a need to adopt detailed police code of conduct and ethics that regulate the actual exercise of police powers and duties. For example take search and seizure by the police. The criminal procedure code simply sets general rules. Detail guidelines and standards are needed for the operation of search and seizure on matters relating to the detail procedures to be followed; the use of force; the fate of piece of item located but not listed in the search warrant; the duration of the search; the rights of third parties, details of exhibit keeping etc.

9) ***Performance evaluation system:*** There is no comprehensive police performance standard with a corresponding performance evaluation system having regard to reform priorities and targets and international standards. The existing practice focuses on efficiency. For instance, investigation is measured based on timeliness without considering case weightings: nature & complexity of investigations. Thus, there is a need for comprehensive and reliable performance standards and measures that cover all police competencies, balance quality and efficiency standards.

There is a need for standardization of rules on recruitment, promotion and professional development of police offers.

2.4 Structure and Organization

Structurally Federal Police has been one of the most unstable institutions of the country. In was made accountable to several institutions including but not limited to the Ministry of

Interior, the office of the Prime Minister. Currently, Federal Police is accountable to the Ministry of Peace. Such structure is inherently prone to compromising the functional independence of police. The older proclamation (Proclamation No. 207/2000) seems to recognize this when it provides for the following clause under Art.3: *without prejudice to its legal and professional independence, the Commission shall be accountable to the Ministry of Justice*. In addition to concrete actions that ensure police independence on the ground, such clauses help protect operational independence of the police and hence is worth upholding in the upcoming police proclamation.

Internally Federal Police is organized in terms of a Commissioner, deputy commissioners, and management committee. Article 7 of the existing police proclamation provides:

“The Commission shall have:

- 1/ a Commissioner General and Deputy Commissioner Generals to be appointed by the government upon the recommendation of the Minister;
- 2/ Management Committee;
- 3/ police officers; and
- 4/ the necessary support staff.”

However, there are no clear criteria for appointments of these key figures; the process of appointment is not transparent either, inviting the perception that they are political appointees (M. Downes *et al*, 2019).

Federal Police are further organized into operational directorates and departments along the lines of crime prevention, crime investigation, etc. The operational directorates within Crime Prevention include: Operations, Law Enforcement, Anti-Terrorism/Organised Crime, Rapid Reaction Force. While those within the investigative wing include : Crime Intelligence, Analysis and Enforcement; Organised Crime & Other Crimes; Corruption Investigation ; Counter Terrorism Investigation; Tax Evasion and Customs Crime; Co-ordination of Regional Branches; Information Gathering and Exhibits; Unlawfully Accumulated Wealth; Security & Suspects; INTERPOL unit; and Forensic Science. (M. Downes *et al*, 2019).

Although a comprehensive examination of the structure, organization and capacity of Federal police is beyond the ambit of this short report, the following observations can be made.

Structural Instability: As noted in the first paragraph of this section, structurally federal police along with the executive has been one of the most unstable institutions of the country. Leaving stories of distant past aside, in the past two decades alone federal police was made accountable to: the Ministry of interior, Ministry of Federal Affairs, Ministry of Justice, the Prime Minister's office and currently to the Ministry of peace. This oscillation of reshuffling mixed with other police factors impacted negatively on the building of the most needed independent and democratic police institution in Ethiopia. Protuberant among such restructuring was the one, which left federal police accountable to Prime Minister (Proclamation No 943/2016), which was conducive to sustain the entrenched tradition of *police politicization* to the detriment of its *professional independence*. i.e., police functions and roles including investigations often overshadowed by unwarranted political interference.

The problem of structural instability can be addressed preferably by affording Federal police a constitutional protection as some jurisdictions such as Kenya do (Inspector General National Police Service of Kenya is established by its Constitution). This helps protect police from restructurings that could undermine its independence.

Absence of Criteria for appointing Commissioner General and Deputy Commissioner Generals: The appointment and removal of the Commissioner General and Deputy Commissioner Generals is not regulated. Nor is the procedure transparent. This is prone to politicization of the process and risks the independence of the federal police. There is a need to develop a merit-based criteria and apply transparent procedure in the process. On top of promoting competence this serves as an additional layer of controlling the executive in the appointment process.

Poor data recording and keeping on crime and criminals: Neither documented national crime recording standards nor computer system for crime recording are available (M. Downes *et al*, 2019). At federal level keeping crime statistics started late 2014 and yet remain confidential (Simeneh, 2018). Such poor crime data handling severely hampers measurement of police performance in terms of effectiveness, efficiency and accountability and the much-needed improvements arising there from. There is a need to improve criminal justice

information systems and integrated technologies and ensure that the collection and flow of reliable information about the performance of the criminal justice system including police (M. Downes *et al*, 2019).

Accessibility and fairness: Federal police has the following accessibility issues: limited accessibility of its services (low police /population ratio), limited availability of information relating to police services and procedures, programs, and performances; problems of access to persons with special needs eg. Access to victims with disabilities (absence of sign language, braille interpretation at police stations); issues on the degree of sensitivity gender, young offenders, children, persons with HIV, etc.

Lack of human and material resources: Federal police lack of adequate number of police officers and budget to enable to respond to all demands from the public remains a challenge. The lack of well-trained and adequate number of professionals especially in the area of investigation and forensics is apparent. Nor are there the required infrastructures including equipped laboratories.

2.5 Crime Prevention and Investigation

Police is charged with the responsibility of maintaining peace and order, preventing and investigating crimes.

2.5.1 Crime Prevention

Crime prevention demands a holistic approach, which includes addressing the environmental conditions that promote and sustain crime; eliminating risk factors and enhancing protective factors to reduce the likelihood that individuals will engage in offending behaviour; strengthening communities by addressing social exclusion and promoting community cohesiveness; and enhancing the capacity of criminal justice agencies to prevent crime and reoffending (Police crime prevention framework; Tonry, Michael and Farrington, 1995). This requires a concerted action from all stakeholders including government agencies, civil societies, the public, and so on.

In Ethiopia, absent data/information on the details of most of these pillars of crime prevention and how they are translated into action, a brief overview of crime prevention focusing on some of them will be made.

Crime prevention policy and strategy: apart from some attempts made so far including under the criminal justice policy and initiatives to develop a national crime prevention strategy; until recently there has been no crime prevention strategy in Ethiopia that addresses crime risk factors in a systematic and holistic manner. A noticeable development is the issuing of National crime prevention strategy very recently in 2020. This strategy is anchored on four pillars of crime prevention: prevention through law enforcement, community prevention, developmental prevention, and situational prevention. This is yet to translated into action in a systematic and holistic manner involving all stakeholders.

Community policing: Federal Police is required by law to ensure public participation in prevention of crimes. This can be the legal basis for community policing, which helps prevent crime by improving police-community relationships and community perceptions of police; community capacity to deal with issues; change officers' attitudes and behaviours; increasing perceptions of safety; and reducing crime, disorder and anti-social behaviour. In Ethiopia reports indicate that in practice community policing serves multiple purposes including "sharing state's burden of policing with customary actors, reducing crime, involving communities in security provisions and contributing to national development"(Lisa Denny and Demelash kassaye, 2013). The "approach to date has been to train officers in community policing principles and then embed these officers within the various operational units across Ethiopia. Their role is to engage with local communities and community leaders, offering briefings on operational priorities and providing feedback on reported crimes."(M. Downes *et al*, 2019).

In practice community policing is compounded with a numbers of challenges including: low public participation and trust, lack of public ownership due to top-bottom approach of community policing, lack of awareness on the concept of community policing, reluctance from leaders, limited resources, its use a means to "police"/ spy on the community, unproductive strategies that disturb community /family relations (demanding families report

one another; using trade unions and professions as police informants) (Lisa Denny and Demelash kassaye, 2013; Marco Di Ninzo, 2014).

Effective criminal justice system: the effective and efficient functioning of the criminal justice system namely effective crime detection and investigation, prosecution, adjudication, and correction has the effect of deterring criminals and reducing re-offending. In this regard, the performance of the justice system needs significant improvement; the capability of justice institutions to effectively discharge their mandate is compounded with a variety of problems (see the report on prosecution, the judiciary and prisons). This hampers the prevention of crimes.

2.5.2 Crime Investigation

Human rights documents require that investigations are competent, lawful, thorough, and prompt and impartial; and serve the purpose of identifying victims; recover evidence; discover witnesses; discover cause, manner, location and time of crime; and identify and apprehend perpetrators (Human right standards and practice for the police).

This requires enabling legal, and institutional framework and proper compliance with it. This section presents some of the gaps relating to investigation in the context of Ethiopian federal police.

Legal Gaps on Investigation

Structure of investigation: The structure of investigation adopted by Ethiopia lacks clarity. It is unclear whether partisan and dual (party based) or non-partisan and unilateral (state based) line investigation of is preferred. Apparently, defense investigation is not formally recognized. Nor is there exists any scope for investigation by the police to include evidence in favor of the defense i.e., exculpating evidence. In short, there is no law requiring impartial investigation; it is not impartial in practice, either. Defense investigation is not legally recognized. While police/prosecution enjoys coercive powers of the state to collect any evidence, the defense lacks this opportunity. Thus, the law of criminal procedure should clearly outline the structure along which criminal investigation is organized (party driven/partisan or state controlled/impartial).

Interrogation: Although the Draft Criminal Procedure and Evidence Code attempts regulate interrogation, considerable gaps still remain. There are no rules and standards that sufficiently regulate interrogation: such matters as how long interrogation lasts, the suspect's right to have his lawyer present/right to consult his legal counsel before and during interrogation and so on remain unregulated.

The right to silence and the privilege against self incrimination: the rules on the right to silence and the privilege against self-incrimination are inadequate both under the FDRE Constitution, existing criminal procedure code and the proposed criminal procedure code. The scope of the right to silence seems be narrowly defined in two senses. First a component of the right which prohibits adverse inference by reason of the suspect's silence is not regulated thereby leaving the possibility of adverse inference wide open. Second, the FDRE constitution appears to limit the right to silence to the earlier stage of the criminal process as it guarantees the right only to arrested persons. However, under international human rights law the right is available to any criminal proceeding including to defendants. Further under the latest draft procedure code, the right is not guaranteed during the carrying out of arrest; police is simply required to administer warnings on the right to remain silent during interrogation.

The same holds true for the privilege against self-incrimination. The FDRE constitution seems to adopt the limited version of the privilege. It protects an accused person from any compulsion to testify against himself/herself, hence arguably limiting the scope of the privilege to testimonial communications as against any real or physical evidence.

Another gap relating to the above rights has to do with enforcement mechanisms. The effect of evidence obtained in disregard of the right to silence /privilege is not clearly regulated under the existing/outgoing law. Unfortunately compared with its earlier version (the one developed by Criminal justice working group), the latest draft procedure code (as was valid in Oct 2020) seems to regress on this. By omitting from the list of inadmissible evidence and by prescribing that any relevant evidence is admissible unless expressly excluded by law, it seems to make such evidence admissible; thereby losing one of the most effective means of enforcing the right to silence (Arts 259 & 260). Further, the draft code seems to embrace the presumption of "adverse inference" where the suspect refuses to cooperate in sample taking

(blood, urine, etc); a presumption difficult to refute and which runs to counter with defense rights. This falls under the law of search and seizure and can be limited with proper safeguards in place, including judicial authorization of serious intrusions to the right to privacy.

Remand: Remand pending investigation has not been adequately regulated thereby inviting prolonged detention. Indeed in practice it is common to grant unwarranted (long and repeated) remands. The draft procedure code (as was valid in Oct. 2020) attempts to address some of the issues; yet fails to set forth robust standards and effective enforcement mechanisms that protect suspects from unwarranted remands and prolonged detention. For example it still tolerates prolonged detention by allowing a suspect to remain under custody for about 4 months (plus more 20 days for charge preparation) without a charge being levied.

Search and seizure: the law on search and seizure is by and large defective in terms of providing for adequate legal framework regarding warrantless searches, personal searches, search of computers, and interception of communications. While search without warrant should be conducted exceptionally, the existing law appears to reverse this. Admittedly, the draft procedure code attempts to address this partly.

Nonetheless, there are no rules to guide search of computers. There are no rules to regulate the seizure of an item in respect of which there are reasonable grounds for believing that it is evidence of an offence or has been obtained in consequence of the commission of an offence. The degree of proof/suspicion required to issue search warrant, and to conduct search without warrant remains within the court's discretion.

The record of search envisaged under the criminal procedure code is incomplete. It simply requires general information. Such details are missing: the duration of the search, whether force was used, whether materials other than listed were seized etc.

Further, the effect of illegal search and seizure is not well regulated. This is the case with illegally searched and sized item /piece of evidence. The latest version draft criminal procedure code (October, 2020) suggests that such evidence could be admissible where it provides that any relevant evidence is admissible unless it is expressly excluded by law and

omits such piece of evidence from the list of inadmissible evidence provided therein (see Arts. 259 and 260).

Special investigative techniques: there are no adequate standards for using special investigation techniques. Interestingly the draft criminal procedure code attempts to regulate it. Two points abound, however. First, the outright exclusion of evidence obtained in violation of the standards regulating special investigative techniques implies that mere technical irregularities would lead to exclusion. This needs to be balanced with the purpose of using such special methods as this approach impacts truth finding. Second, the rule embodied under draft code need detail guidelines so that it is effectively implemented without much (disproportionate) intrusion into the rights of citizens.

Exhibits: Under the law it is not clear who is in charge of administering exhibits pending trial. What are the liabilities for unsafe keeping or any damage resulting thereof? These matters need regulation and clarity so that the right to property remains protected.

The Practice of Investigation

Non-proactive investigation techniques: Reports indicate that investigation rely very much on witnesses and confessions: “Once a complaint is received the suspect is identified, detained and a retrospective investigation commences to identify evidence for prosecution. There is an acceptance of an over-reliance on witness testimony and confession evidence within the criminal justice system.” (M. Downes *et al*, 2019). The practice of reliance on the suspect not only undermines the right to silence but also invites extraction of forced confession, which is not uncommon in Ethiopia. Insistence on witness testimony, which is overshadowed by perception, communication, recollection and credibility issues, is not reliable. This calls for building of the capacity of federal police in pro-active and modern investigation methods, evidence gathering from sources independent of the suspect.

Arrest: There are reports of unlawful and arbitrary arrest and detentions. The rules on arrest are not designed in such away to discourage arbitrary arrests and detentions. There is broad leeway for police to arrest persons without establishing the requirement of *reasonable suspicion*. Apart from lack of guidelines on what constitutes *reasonable suspicion*, courts’ reluctant to review the legality of arrest could reinforce arbitrary arrests.

Unauthorized warrantless Searches: Unauthorized warrantless searches, general searches and other forms of unlawful searches and seizures are reported; leaving the right to privacy compromised.

“Yedereja miskir”: The practice of “yedereja miskir” is prone to abuse and misrepresentation. Indeed there are reports that confessions from innocents were supported by these pieces of evidence. The mandatory recording of the statements of the suspect before the police (at least the feasible audio recording, if not video) helps prevent possible disputes; and should replace the practice of *yedereja miskir*, which is often prone to massive abuse. Further, other safeguards against forced confession including reverse of burden of proof to the prosecution regarding challenges on the legality of confession, the requirement of corroboration, etc should be considered.

Reluctance to open investigation: The Criminal Procedure Code requires police to open investigation upon receiving information even if it is open to doubt. However, there are reports that police are reluctant to open investigation unless the victim or the complainant produces evidence. This is partly due to the performance evaluation system in place, which counts against them should the investigation fall apart owing to lack of evidence.

Joint investigation: The new criminal justice policy has clearly spelt out the respective roles of the prosecutor and the police in investigations- allowing the police to initiate investigation of its own motion or when so ordered by the prosecution, introducing the possibility of joint investigations (police–prosecutor), requiring the prosecutor to ensure that police investigations are carried out lawfully and properly and finally deciding the sufficiency of evidence having regard to the public interest(the 2011 criminal justice policy).

This new initiative may improve efficiency and quality investigations and transfer of knowledge and experience between the police and the prosecutor. Nonetheless, it is not without concerns- there are indeed concerns over the impartiality and objectivity of prosecutors in guiding investigations and exercising prosecutorial discretions. Concerns on absence of check and balance and the propensity for arbitrariness and abuse could be a challenge.

Rudimentary forensic capacity and capabilities: The forensics department is organized into the following divisions: document examination, firearms examination, arson investigation, explosives examination, photographic division, biology/chemistry examination, trace examination, fingerprints, and toxicology divisions.

Although the forensics department is organized along thematic lines, it is not equipped with modern technology, sufficient budget, and well-trained and adequate number of professionals. It is simply staffed with police officers as opposed to expertise and scientists in the area. Even worse, there are reports that sometimes investigators are selected not because of their competence but simply based on their legible handwriting. Partly due this and poor management, the department is burdened with caseloads.

While there are limited capacity and capability in such divisions as firearms examination and ballistics, and explosives, there is no capacity and capability at all to conduct DNA analysis: “There is currently no ability within EFP to undertake DNA analysis and the operational effectiveness of the EFP Forensic service is limited by the absence of digital technology for fingerprints analysis and storage. There is also a lack of knowledge and expertise or due to the absence of staff and materials. Equipment is under-utilized due to a lack of expertise regarding its operation or because equipment and software licenses have not been updated.” (M. Downes *et al*, 2019).

No Information to victims and suspects: investigators are accused of not informing victims of the progress the investigation and decisions made in the process, as well as suspects of their rights. (An assessment of the Ethiopian Justice System, Prime Minister’s Office, February 2018).

Problems in witness management: reports indicate difficulties in getting witnesses before police and court (An assessment of the Ethiopian Justice System, Prime Minister’s Office, February 2018). There is lack of protection centres to keep child victims of trafficking in persons; which often resulted in the collapse of cases against suspects of human trafficking.

Excessive Caseload: there are reports of excessive caseload among investigators that are triggered by lack of capability and capacity, namely shortage of competent investigators, poor management of caseload and lack of technology.

Unrealistic performance standards that can stifle quality investigation: ‘performance measures and standards for police investigators tend to be unrealistic, punitive and framed in counter-productive ways (such as time taken to complete an investigation, irrespective of the complexity of the case)’(M. Downes *et al*, 2019; An assessment of the Ethiopian Justice System, Prime Minister’s Office, February 2018).

2.5.3 Coordination and Cooperation

A problem characteristic to the Ethiopian criminal justice system is the weak co-ordination among the various institutions responsible for the administration of justice: investigative, prosecution and enforcement organs. One government report regards the coordination between police and prosecution poor and this results in delays of cases. (An assessment of the Ethiopian Justice System, Prime Minister’s Office, February 2018). Even worse, sometimes there are reports of antagonism between justice institutions. This lack of cohesion negatively impacts the smooth operation of criminal justice system.

The Federal Police Proclamation provides for cooperation between the federal police and its regional counterparts, and establishes a joint council to spearhead their relationship. The Council is mandated among others to: facilitate the building of a modern police institution; follow up the application of uniform standards on recruitment, training, employment and administration of police officers in all the regions; create enabling conditions for the conducting of joint operations involving matters having national significance; devise ways and means of reducing threats of crimes and criminal offences; facilitate collaboration and mutual assistance in crime prevention and investigation; facilitate the establishment and enhancement of information exchange system between the Commission and regional police commissions. However, most of these are not translated into action. For instance, there is no strategy in place to facilitate effective operational coordination between regional and federal police structures.

2.5.4 Compliance with Human Rights

Under international and national human rights laws police assumes the obligation to *respect* and *protect* human rights of all persons including suspected and accused persons. The FDRE Constitution under Chapter Three affords protection to fundamental rights and freedoms. In particular, the Constitution guarantees everyone the right to life, liberty and security and

protects everyone from inhuman and degrading treatment. The Constitution provides protection for rights of persons arrested and persons accused. Article 19 provides:

Article 19
Right of Persons Arrested

1. *Persons arrested have the right to be informed promptly, in a language they understand, of the reasons for their arrest and of any charge against them.*
2. *Persons, arrested have the right to remain silent. Upon arrest, they have the right to be informed promptly, in a language they understand, that any statement they make may be used as evidence against them in court.*
3. *Persons arrested have the right to be brought before a court within 48 hours of their arrest. Such time shall not include the time reasonably required for the journey from the place of arrest to the court. On appearing before a court, they have the right to be given prompt and specific explanation of the reasons for their arrest due to the alleged crime committed.*
4. *All persons have an inalienable right to petition the court to order their physical release where the arresting police officer or the law enforcer fails to bring them before a court within the prescribed time and to provide reasons for their arrest. Where the interest of justice requires, the court may order the arrested person to remain in custody or, when requested, remand him for a time strictly required to carry out the necessary investigation. In determining the additional time necessary for investigation, the court shall ensure that the responsible law enforcement authorities carry out the investigation respecting the arrested person's right to a speedy trial.*
5. *Persons arrested shall not be compelled to make confessions or admissions which could be used in evidence against them. Any evidence obtained under coercion shall not be admissible.*
6. *Persons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person.*

The Constitution demands all state organs, including the executive to respect and enforce human rights provisions of the Constitution. However, Ethiopian police have no good reputation in terms of protecting and respecting human rights (see Reports by human rights bodies). Although there are some positive developments post-2018, there still remains a lot to be done to break with the past and ensure that policing in general and in the context of

criminal justice in particular complies with human rights standards. There are still reports of illegal arrest and detention, use of excessive force, unlawful interference with the right to privacy, harsh and life threatening prison conditions and improper methods of investigation. (US State Department, 2019).

2.6 Police Oversight Mechanisms

“In order to function even-handedly and in service of all, the police must be able to do their work free from extraneous pressures while at the same time being accountable in various forums for individual actions, overall performance and any misdeed. This requires that the police be given clear direction and role, and then be allowed to perform without fear or favour.” (CHRI, 2007).

As an organ symbolizing and enforcing the power of the state and law policing involves discretion and decision-making, which is amenable to abuse and violations. To ensure that police uses its power properly and is held accountable for its conduct, jurisdictions devise holistic oversight and accountability mechanisms which generally take the form of *internal oversight mechanisms* and *external oversight mechanisms*. Unlike the traditional accountability mechanisms that focus on individuals such holistic accountability mechanisms help address systemic issues within police.

Such accountability and oversight mechanisms are essential in promoting: the highest standards in policing; respect for the rule of law and human rights in all policing activities; greater public confidence in policing; proper systems of accountability for police officers and other law enforcement officials; effective redress for those who are victims of police misconduct; greater openness and understanding of policing by citizens; systems to ensure that lessons are learnt from incidents and errors; and, greater respect for the law, policing and as a consequence reductions in criminality and disorder.(European Partners Against Corruption(EPAC) Setting Standards for Europe Handbook cited in Report on Police Oversight Mechanism in the Council of European Countries , 2017).

2.6.1 Internal Accountability Systems

The internal accountability system within the police includes developing comprehensive professional standards and code of ethics and following its enforcement; putting in place

internal supervision and monitoring and installing effective complaint handling mechanisms, and disciplinary procedures (UNODC, 2019).

Apart from scattered rules notably those found in the Federal Police Regulation, there is no comprehensive code of conduct governing the actual exercise of federal police powers and duties. Nor are there adequate complaint procedures. For instance there is no legal framework that allows and regulates citizen complaint against police misconduct (rights of complainants /victims to confidentiality, right to information, right to produce evidence, right to lodge appeal on any unfavourable decisions remain unregulated).

One report observes, “Complaint procedures are inadequate and are not used by citizens. The low reporting rates is likely to be due in part to the design of the system and practical difficulties in making a complaint, but will more likely be influenced by a lack of public confidence in policing, fear of recrimination and citizens having no faith in complaints being properly investigated and action taken. It is essential for any modern and accountable police service to have an accessible complaint system with a level of independent oversight and scrutiny” (M. Downes *et al* , 2019).

The responsibility of putting in place effective internal control mechanisms rests on the federal police commission and the Ministry to which it reports to, the Ministry of peace. Thus, these institutions need to devise and enforce a comprehensive police code of conduct and code of ethics; internal supervision and monitoring (such as recording and reporting procedures; internal audit/reviewing of activities; inspections); and effective complaint handling mechanisms, and disciplinary procedures, which ensure the independence, thoroughness and promptness of the investigation, and the provision of appropriate corrective measures and relief.

Nonetheless, it is important to note that internal oversight mechanisms alone are not reliable unless augmented by external oversight mechanisms. “Without external oversight, police are essentially left to police themselves. Victims are often reluctant even to report abuse directly to police, for fear of reprisals, or simply because they do not believe a serious investigation will result.” (Police Oversight, AI, 2015).

2.6.2 External Accountability Systems

This relates to an independent review of police actions and includes oversight by the prosecution, the judiciary, the parliament, and other oversight bodies.

Oversight by the FRDE Attorney General (AG)

The existing criminal procedure code authorizes the office of prosecution to give orders and instructions to the police and ensure that the police carry out their duties in accordance with law. However, this power has been met by inaction. As suggested by some studies this is responsible for abuses, lower conviction rates and backlogs (Linn Hemergreen, 2009). A number of conferencing factors could possibly explain this: lack of clarity on the method of supervision, cultural problems and, political factors /commitment.

Such handicaps relating to clarity and lack of institutionalization of mandate appear to have been addressed by the Attorney General Establishment Proclamation (Proclamation 1097/2018). This Proclamation provides for accountability system for the police by mandating the former to *“(i) lead, supervise, follow up and coordinate the criminal investigation function of the Federal Police; (ii) assign investigators and ‘lead-investigators’ with work assignments; supervise the same; cause progress report to be submitted to it.* While this a noticeable development, it is yet to be translated into action. This needs detailed guidelines /standards on such matters as what constitutes leading investigation? How the chain of command within the police commission interplays with instructions and orders from the AG? How the AG ensures police compliance with the law?

Parliamentary Oversight

In most jurisdictions parliament wields investigative, budgetary and other monitoring functions over the police. It has the responsibility to see to it that the legal framework on policing embodies defined police powers with the necessary accountability mechanisms in place; that it is in line with human rights standards. The parliament possess essential police oversight functions through for instance setting up parliamentary oversight committee mandated to oversee the actions of the police and establishing parliamentary inquiry commission in the event of serious police blunders that draw public attention (UNODC, 2019).

In Ethiopia, the parliament has no good track record in discharging its oversight functions over the police. It has been enacting laws that bestow police with broad powers leaving individual autonomy at risk. The parliament or the executive through delegation (as appropriate) is yet to set forth a comprehensive legal framework that provides or authorizes the provision of standards on such matters as use of force, code of conduct, performance evaluation, effective and independent police accountability mechanisms, among others.

In some occasions, the parliament had established Inquiry Commissions to investigate reports of excessive use of force by the police, a case in point being the one established to investigate the post- 2005 Parliamentary election violence. This could serve as a means to hold police directly accountable for its actions. However, the lack of independence of such commissions or lack of commitment on the part of the government means they never served such purposes.

Moreover, a parliamentary committee has been established to monitor the executive. Currently, police oversight is generally left to the *Legal, Justice and democracy Standing Committee*. The powers of the committee, which relate to the police, include overseeing: the organization of police is based on the FDRE constitution; police respects rights and freedoms guaranteed under the constitution; activities relating to prevention of crime; the implementation of policies, laws, strategies and plans related to the police; and budget utilization of the police.

Yet, the committee has vague mandates in terms of monitoring the police; notably the use of the cliché expression: police oversees this and that “implemented appropriately” leaves its mandate unclear. For instance, it is not clear what does the phrase ... “task of prevention of crime is performed appropriately” means.

Moreover, it is not clear whether members of the standing committee possess the necessary expertise in law to effectively oversee the police. Nor does the committee have visible impact in shaping and making police accountable.

Judicial Oversight

Judicial oversight can be exercised before the power exercises its power (authorization) or after police action/exercise of power (review of its action). Such police powers as search and seizure, arrest, the use of special investigative techniques are subject to prior judicial authorization while other police actions, including violation of the law (suspects rights) could

be reviewed ex-post. Apart from the generality of the law, the passive nature of courts in terms of checking the executive including the police needs to change. For instance reviewing the legality of arrest is a power courts often relinquish. When a suspect appears before them, courts generally determine whether the suspect should be remanded or be released on bail without reviewing the legality of the arrest itself.

Another example of the judicial oversight of policing could be exercised by way of exclusion of improperly obtained evidence at trial. This together with civil lawsuits or criminal prosecutions could serve deterrence of police irregularities. Yet, partly due to lack of clear rules on the fate of unlawfully obtained evidence (other than forced confession) and largely due to their passive nature, courts do not generally exclude improperly obtained evidence. Another worrying development is the fact that courts are still struggling to ensure that the police observe their orders/decisions. The practice of defying grant of bail by the court and the continued detention of suspects remains troubling; which Ethiopian Human Rights Commission also condemns.

Independent Police Oversight Bodies

With a view to ensure effective investigation of police misconduct and thus its accountability, many jurisdictions set up independent police oversight bodies. Such bodies are established independent of the executive and law enforcement agencies and often are accountable to the parliament. Their mandate varies across jurisdictions with some vested with the power to investigate any complaint against police, others only serious complaints against police, leaving less serious ones for internal complaint handling mechanisms. For example the UK's Independent Office for Police Conduct (IOPC) is mandated to investigate serious complaints and allegations of misconduct against police leaving less serious ones to the police. Moreover, it has the competence to hear appeals from police handling of complaints of less serious nature and to set standards by which police handles complaints. On the other hand the Kenya's Independent policing oversight authority (IPOA) is mandated to investigate any complaint relating to both disciplinary and criminal matters and make recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief. Although the IPOA of Kenya has been accused of being a "toothless dog", such oversight mechanisms are effective in the UK. Whether this type of oversight body could be installed for Ethiopia requires further study.

Generally it is recommended that effective police oversight bodies should be guided by the following principles (Report on Police Oversight Mechanism in the Council of European Countries, 2017):

- ✓ *The body should be sufficiently separated from the hierarchy of the police that are subject to its remit;*
- ✓ *it should be governed and controlled by persons who are not current serving police officers;*
- ✓ *it should in general have the power and competence to, at its own discretion, address the general public and the media about aspects of its work;*
- ✓ *to perform its functions effectively it should be provided with adequate finance and resources, and should be funded by the state;*
- ✓ *its mandate shall be clearly set out in a constitutional, legislative or other formal text, specifying its composition, its powers and its sphere of competence;*
- ✓ *its investigators must be provided with the full range of police powers to enable them to conduct fair, independent and effective investigations, in particular the power to obtain all the information necessary to conduct an effective investigation;*
- ✓ *police oversight bodies and the police should proactively ensure that members of the general public are made aware of the role and functioning of the oversight body, and their right to make a complaint;*
- ✓ *the police oversight body shall have adequate powers to carry out its functions and where necessary should have the powers to investigate, to require an investigation or to supervise or monitor the investigation of: serious incidents resulting from the actions of police officers; the use of lethal force by police officers or law enforcement officials and deaths in custody; allegations that police officers or law enforcement officials have used torture or cruel, inhuman or degrading treatment or punishment; or allegations or complaints about the misconduct of police officers or law enforcement officials.*

Other Oversight Bodies

These include human rights commissions, ombudsman, NGOs, and Media. It is worth noting the encouraging role of the Ethiopia Human Rights Commission plays in condemning human rights violations by the police and calling for corrective measures.

2.7 Recommendations for Reform

Police reforms should address issues on capacity and capability, accountability, integrity, professionalism, and trust so much so that federal police mandates are effectively enforced.

Legal and Policy Reforms:

- a) Install police performance standards with corresponding performance evaluation system having regard to reform priorities and targets and international standards. This should embrace all police competencies and mandates; combine quality and efficiency criteria having regard to case weightings, whenever appropriate. The experience at the federal courts could be illuminating in this regard.
- b) There is a need to enact comprehensive code of conduct and code of ethics for the police and enforce it vigorously. For instance, use of force; the conducting of search and seizure, are not well regulated. Use of proportionate force in investigation of crimes including arrest, search and seizure should be guided by some defined standards. (Indicative standards for arrest include: the degree of resistance by the arrestee, the imminence of threat to the police or to others, the availability of other non-coercive measures, etc. Deadly force shall be clearly outlawed. Further, where use of proportionate force is contested, the onus shall rest on the police.
- c) Ensure meaningful participation of all stakeholders in the law making process
- d) Install comprehensive and participatory crime prevention policy and strategy
- e) There should clear legal framework on Inter-regional/Federal police cooperation in the prevention and investigation of crimes.
- f) Consolidating/reforming the existing police establishment proclamation and other relevant laws among others in the following areas:
 - Fundamental principles that guide police operation should embrace such cherished such principles: independence, equality / non-discrimination, rule of law and Human rights /dignity.
 - There is a need to have rules on victim support and protection including the vulnerable having regard to their specific needs (children, and women victims).
 - Long list and overlapping powers and duties of the Federal police commission (40 listed powers under the proclamation) needs systematization along defined

thematic lines following major mandates of the police: prevention, investigation, service provision, administration, etc.

- The ranks of police are simply too long and cumbersome (16 ranks; with the number of year of experience too long). This needs revisiting having regard to best experiences and Ethiopian context.
- The effect of illegal search and seizure should be properly regulated. Where police illegally searched and sized item /piece of evidence it should be sanctioned with the exclusion of such evidence.
- The right to silence and the privilege against self-incrimination should be fully guaranteed under the law embracing all their components and with effective enforcement mechanisms put in place should a violation occur.
- The rules on arrest should be designed in such away to discourage arbitrary arrests and detentions. The broad leeway, which could invite police to arrest persons without establishing the requirement of reasonable suspicion, needs to be regulated.
- The practice of *yedereja misikir*, which is prone to extracting forced confession should be abolished and the reliability of confession should be checked with adequate guarantees in place including mandatory audio preferably video recording of police interrogation; onus reversal to the prosecution should the defence challenge the confession; the requirement of corroboration, etc.

Institutional Reforms

- a) Structural stability: By making it answerable to several Ministries in succession, police has been one of the most unstable institutions of the country. This needs to change and police should be structurally stable. This could be achieved using a Proclamation or preferably by affording it a constitutional protection. For example in Kenya police is organized at a constitutional level under *Inspector General National Police Service*. This addresses problems of institutional instability and helps protect the independence of the police.
- b) Structure of the criminal investigation: while the trial stage is largely organized along adversarial lines, the criminal investigation is neither adversarial (partisan and dual investigation by the parties) nor inquisitorial (unilateral and impartial investigation by the

state). This needs clear restructuring with the power of actors in the process distinctly defined.

- c) Independence of the Federal Police Commission: There should be clear merit-based criteria and transparent procedure for appointment of Police Commissioner Generals (including deputy generals). Their removal from office should be clearly regulated. Despite some improvements, there remains a lot to be done in terms of ensuring the operational independence of the police.
- d) Cooperation and coordination with justice actors: police cooperation with the prosecutor including in the investigation of crimes needs to improve with a view to achieving institutional goals. The sense of mistrust and antagonism between the two institutions should be resolved.
- e) Addressing Capacity issues
 - Training and recruitment: standards need to be revisited to focus on quality and competence. For instance investigators could be recruited from law graduates then provide them with special tailored training on investigation. This could start by piloting on serious crimes.
 - Provide police training programs on legal standards and effective scientific techniques for investigation.
 - Overhaul and enforce comprehensive community policing strategies so that crimes are effectively prevented and detected with the active participation of the community.
 - Establish policies that limit reliance on witnesses and confessions as sources of evidence. And build the capacity of federal police in pro-active and scientific investigation methods, evidence gathering from sources independent of the suspect.
 - Enhancing forensic capacity and capability. It is imperative to re-organize and consolidate the forensic department with well-trained professionals and experts, adequate budget and resources, and modern technology such as DNA technology, up-to-date explosives examination capacity.
 - Enhance police accessibility in terms of ensuring standard police-population ratio, and accessibility to the venerable persons women, children and persons with disabilities.

- Put in place crime information data system.

f) Overhauling police accountability systems

Internal accountability systems should be reinforced through developing:

- Comprehensive professional standards and code of conduct addressing the role of police in criminal justice, accountability and control mechanisms, guiding principles for police actions including protection and respect for human rights, the principle of legality, impartiality, etc.
- Effective Internal supervision and monitoring mechanisms: This include establishing rigorous record keeping and reporting procedures; internal audit mechanisms on requirement, promotion, and resource management etc. (UNODC, 2019).
- Effective complaint handling mechanisms and disciplinary procedures: this include establishing safe channels of reporting police misconduct; putting in place effective mechanisms and procedures for receiving, handling and investigating complaints from the public (UNODC, 2019).
- It is incumbent on the Federal Police Commission and the Ministry to which it reports to, the Ministry of Peace, to devise and enforce a comprehensive police code of conduct and code of ethics; internal supervision and monitoring (such as recording and reporting procedures; internal audit/reviewing of activities; inspections); and effective complaint handling mechanisms, and disciplinary procedures, which ensure the independence, thoroughness and promptness of the investigation, and the provision of appropriate corrective measures and relief.

Legal and institutional framework should be consolidated so that:

- External oversight bodies such as the parliament should use their legislative, budgetary and monitoring functions to effectively oversee the police.
- The Attorney discharges its supervisory roles over the police.
- The judiciary adopts more active role in reviewing police decisions and actions.
- Oversight bodies have the power to review policies, trainings and systemic issues of police proactively so that problems are addressed pre-emptively.

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SECTION THREE

Assessment of the Prosecutorial Role and Functions in Ethiopia

3.1 Introduction

The existence of a strong criminal justice system based on the rule of law and accountability is critical to human rights and democratic culture the country aspires to achieve. To that end, the role and function of prosecution service are estimable. The criminal justice system in general and prosecution department, in particular, have remained rubber stamps for political abuse. With the legal and institutional reform undertaking currently, the former and present state of the prosecution organ must be studied. This report, therefore, assesses the prosecutorial role and function in Ethiopia. Intending to steer a reform, this report focuses on identifying the problems concerning the criminal justice administrations without emphasizing the positive trends. In doing so, it, among others, examines the role and organization of the office of the Attorney General, selection, appointment and removal of the public prosecutors, and independence and accountability of prosecution offices. Furthermore, it scrutinizes the problems concerning the role in the protection of human rights, a criminal investigation, institution of proceedings, exercising prosecutorial discretion, criminal trial, inter-agency cooperation, and corruption. Please note that the facts stated in this report are gathered from experiences of different professionals who have made a presentation to the Criminal Justice Working Group, focus group discussions held, observations, scholarly writings and reports.

3.2 The Role and Organization of the Office of Federal Attorney General

3.2.1 The Fusion of the Offices of the Attorney General and Minister Of Justice

The criminal justice system is troubled for a lack of independent prosecution organs.⁹ Considering the trouble, the criminal justice system is facing, it is of paramount importance

⁹ Solomon Goshu. (2015). *Establishing the Attorney-General: Reconstructing the justice system or heralding a new one?*.[Online]
<https://www.thereporterethiopia.com/content/establishing-attorney-general-reconstructing-justice-system-or-heralding-new-one>. Available at:
<https://www.thereporterethiopia.com/content/establishing-attorney-general-reconstructing-justice-system-or-heralding-new-one> [Accessed 10 Aug. 2019]. See also Adem Kassie (2019). *What Ethiopia needs is an independent prosecution*. [online] Aljazeera.com. Available at:
<https://www.aljazeera.com/indepth/opinion/ethiopia-independent-prosecution-190717140328127.html> [Accessed 10 Aug. 2019].

to examine what is at the center of the trouble. It is mostly agreed that the criminal justice system remained ineffective, used as a *modus operandi* for human rights violations and harassment of political opponents.¹⁰ With the view of the realization of human rights in Ethiopia and to rectify the defects in the criminal justice administrations, the establishment of an independent prosecution organ is vital. Unfortunately, considering the dual role the Attorney General plays, it is deemed as impracticable.

The FDRE Constitution is silent on the establishment of the prosecution organ. Thus, it remained unstable. With the establishment of the Attorney General, the Ministry of Justice ceased to exist.¹¹ Thus, the power and duties which were assigned to the Ministry of Justice are reassigned to the Office of the Attorney General.

The Attorney General exercises both advisory functions to the government as well as prosecutorial functions. The first function is what one might regard as a political function. Those functions, *inter alia*, include acting as an advisor to the federal government on matters of law, legal drafting, creating legal awareness, licensing and supervising advocates practicing before federal courts, and international cooperation. The prosecutorial functions of the Attorney General includes crime prevention, involving in the investigations of criminals, plea-bargain, discontinuance of investigations, institution and withdrawals of criminal charges, follow up the execution of decisions of the courts, establish information systems relating to criminal justice, and provide support to the concerned organs of justice, institute civil suit on behalf of federal government offices and public enterprises or intervene at any stage of the proceedings and assist in the amicable resolution of disputes arising between them, represent citizens, in particular women and children, who are unable to institute and pursue their civil suits before the federal courts, and ensure that whistleblowers and witnesses of criminal offenses are accorded protection as per the law.¹²

¹⁰See generally Albin-Lackey, C. (2005). Ethiopia, Suppressing Dissent: Human Rights Abuses and Political Repression in Ethiopia's Oromia region (Vol. 17, No. 7). Human Rights Watch. Aalen, L., & Tronvoll, K. (2009). The End of Democracy? Curtailing Political and Civil Rights in Ethiopia. *Review of African Political Economy*, 36(120), 193-207.

¹¹ See Federal Attorney General Establishment Proclamation No. 943/2016 Art. 3., Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010 Art. 16.

¹² Ibid.

The extent of mandates the AG assumed is way beyond its capacity.¹³ Former baseline study conducted on the justice sector before the establishment of the Attorney General indicates that bestowing judicial and executive powers in the Ministry of Justice is a serious problem. Thus, the study recommends the political/executive and judicial powers of the Minister of Justice should be separated. According to the report of the baseline study;

“An Office of the Prosecutor General, which has a judicial rather than executive relationship, should be established. The Minister of Justice should not be making day-to-day operational decisions in the Public Prosecution Service, nor should s/he be reviewing or changing decisions taken by line prosecutors,”¹⁴

Regrettably, although the Attorney General is established, if not for the change in nomenclature, the change from the Ministry of Justice to the Attorney General remained symbolic. Whether Ethiopia should consider solving the fusion of prosecutorial power and executive (political) power into the same organ remain an issue for a discussion. It has to be noted, however, that there are merits into splitting the roles of Attorney General from the role the Ministry of Justice could have played. The later could have acted as a political executive which is accountable to the prime minister with advisory and legal drafting responsibilities. The Office of the Attorney General on its part should only exercise independent prosecutorial tasks. Such separation of political and prosecutorial tasks could address concerns of political interference. This in turn also means that change in government will not affect the prosecutorial arm of government. This is also self-evident that it would augment the lost public confidence in the independence of the criminal justice system.

With PM Abiy's coming to power, in comparison to other democratic institutions like the judiciary and the National Electoral Board of Ethiopia, the prosecution service remained the same.¹⁵ Lack of independent prosecutorial service would, therefore, influence the pursuit of justice. Thus, the current reform may remain incomplete without the establishment of an independent prosecution service.¹⁶ In this regard, critics argue that;

¹³Supra note 1.

¹⁴Ministry of Capacity Building conducted in consultation with the Center for International Legal Cooperation “Comprehensive Justice System Reform Programme” 2005. p25-26.

¹⁵Supra note 1, Adem Kassie (2019).

¹⁶ Ibid.

“While such reform may not automatically liberate the prosecution service and mark the end of frivolous prosecutions, it would provide the foundations for an autonomous institution capable of serving the general public interest rather than the transient needs of the government of the day. It would also proactively preclude accusations of politicized prosecution.”

It is, therefore, vital to consider the separation of political function and prosecutorial service of the Attorney General. Furthermore, it is of vital importance to the criminal justice system to establish an independent prosecutorial service.

3.2.2 Independence and Accountability of Prosecution Office

Independence

Prosecutors are vital to the administration of the criminal justice system. To that effect, strong, independent, and accountable prosecution service is required. In this regard, the UN Guide on the subject matter requires member states to establish an objective and impartial prosecution service. Unlike judges, the international law does not require the establishment of independent prosecution as in some jurisdiction prosecutors are appointed by the executive organ of the government. The contemporary development in the field indicates, however, that independent prosecutorial service is preferable and in some instances, required. For instance, some regional human rights organizations like the Inter-American Commission on Human Rights have indicated that;

“the Office of the Public Prosecutor must be an organ independent of the executive branch and must have the attributes of irremovability and other constitutional guarantees afforded to members of the judicial branch”¹⁷

It must be indicated that the proper function of the prosecutorial responsibility depends on such arrangements.¹⁸ Otherwise, it will be difficult for them to account the executive organ of the government when they belong to one. The UN has issued a guideline on the Role of

¹⁷ Inter-American Commission of Human Rights, *Report on the Situation of Human Rights in Mexico*, OEA/ Ser.L/V/II.100, doc. 7 rev. 1, para. 372.

¹⁸ Inter-American Commission of Human Rights, *Report on the Situation of Human Rights in Mexico*, doc.cit., para. 381.

Prosecutors. According to this document, states are required to ensure that prosecutors perform their responsibility “without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.”¹⁹

The FDRE Constitution is silent as to how the prosecution office is to be set-up. The enabling proclamation of the Attorney General mentions that the office discharges its power and duties independently without any interference.²⁰ The establishment proclamation dictates that service delivery must be conducted in accordance with the law.²¹ It also protects prosecutors against accountability for damages caused as a result of performing their power and duty as per the law.²² Prosecutors are also protected against direct and indirect harm as a result of conducting their work.²³

Prosecutorial independence has objective and subjective independence. The components that address objective impartiality includes, independence from politicians. In Ethiopia, the Attorney General is to be appointed by the House of Peoples Representatives. The removal of the Attorney General, however, is to be made by the Prime Minister. Furthermore, both appointment and removal of deputy Attorney General are to be made by the Prime Minister. The Prime Minister may be consulted by the Attorney General regarding the withdrawal of cases having national interest.²⁴ In practice, the Attorney General remained as an extension of political institutions.²⁵ For instance, to date, the AG is accountable to the Prime Minister and sits in the cabinet. In theory, the Prime Minister and other political appointees should not influence the Attorney General.

To withstand the influence of executive organs of the government, the establishment of a Council for Prosecutors is advisable. Such a council may be formed composed of

¹⁹UN *Guidelines On The Role Of Prosecutors*. [online] Available at: <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>> [Accessed 28 July 2020]. Guideline no. 4.

²⁰Supra note 3 Art. 16 of Proclamation No. 943/2016.

²¹Ibid, Art. 16/2/.

²²Ibid, Art. 16/2/.

²³Ibid, Art. 11/3/h.

²⁴Ibid, Art. 6/3/e.

²⁵Supra note 1, Adem Kassie (2019).

professional body of prosecutors and must include members of civil society. In Ethiopia, the Federal Public Prosecutors Administration Council is established under proclamation no. 943/2016. For the most part, specially before the conversion of the Ministry of justice to the Attorney General, the members were not directly elected by the prosecutors. It is rather an appointment made by the Minister of Justice. Even currently, it does not have members from civil societies.

The Attorney General should be selected based on objective criteria which include professional competence, leadership, integrity and experience; without political interference. In due course of the management of the prosecutorial service, external influence from the executive organ must be avoided. In the focus group discussion undertaken, informants have indicated that for several years, the head of the prosecution department was not elected based on professional competence, leadership, integrity, and experience. Rather, the only criteria applied were a political affiliation. Thus, political interferences are inevitable.

Prosecutors must also have the freedom to initiate an investigation against the most powerful individuals. In reality, even when publicly known high level corruption allegations are ongoing, the public has not seen prosecutorial investigations into the matter. For the most powerful officials, a party line of reprimand appears to have been sufficient when lower-level workers are seriously prosecuted. Very recently former high officials are indicted for alleged corruption crimes. Justice against high officials should not merely be set in motion during the transition. Rather, it must always be in motion like in the case of ordinary citizens. To that effect, prosecutors must be free to initiate investigation against high officials. In this regard, it must be indicated that the government may prioritize some prosecutorial functions. To that effect, the government may require the prosecution service to implement government policies without, however, influencing individual prosecutorial decisions.

Prosecutors must not also be pressured from within the Attorney General Office. The authority to decide whether to close the investigation or to institute a proceeding must solely depend on the merits of the case. In due course of the focus group discussion held, prosecutors have indicated that on numerous occasions, prosecutors are ordered to institute a proceeding when the merit of the case indicates insufficiency of evidence to institute a proceeding. Furthermore, prosecutors should be able to withdraw any charges that turn out on

the law and the evidence to be groundless, without any interference from their superiors. In conclusion, the prosecution must be independent internally and from external interference. The reality, however, is far from the realization of such independence.

In addition to the objective prosecutorial independence, prosecutors should also avoid subjective impartiality. That is to say that they should also have subjective independence. To that effect, they should not engage in any other public or private functions which could distress the good faith performance of their duties. The government must also endeavour to create better working conditions within the office.

Accountability

The prosecutorial independence should not exist to the detriment of accountability. Regarding this, the Special Rapporteur has indicated that “the fair, independent and impartial administration of justice also requires prosecutors to be held to account should they not fulfill their functions under their professional duties.”²⁶ To that effect, the prosecution service is accountable to the executive and legislative branches of government, to the public, and an extent the judiciary.

Unfortunately, the culture of accountability in the prosecution office is minimal. Prosecutors are not dismissed or subjected to disciplinary action for inefficiencies and abuses of authority. In the country where the government admitted political prisoners used to be rampant, accountability of those who are involved in the prosecution of political prisoners should have followed. Unfortunately, even with the current reform initiatives, prosecutorial accountability has not been ensured. As a promise of never again, the Office of Attorney General could have implemented vetting procedures for prosecutors involved in the prosecution of political prisoners.

As a form of accountability through the judiciary, judicial review of the decision of the Attorney General is not allowed in criminal cases. Thus, the decision not to prosecute a

²⁶UN Human Rights Council, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul* : *Addendum, Mission to Turkey*, 4 May 2012, A/HRC/20/19/Add.3, available at: <https://www.refworld.org/docid/501658292.html> [accessed 28 July 2020] para. 82

particular individual is not subjected to judicial scrutiny. This could have eased and crafted a mechanism for accountability of prosecutorial service.

3.3 Administration of Federal Prosecutors

The Federal Attorney-General Establishment Proclamation No. 943/2016 incorporates issues relating to an administration of federal prosecutors.²⁷ It also deals with various issues ranging from the organization, powers, and duties of the Attorney General through the establishment of the Federal Public Prosecutor's Administration Council to methods of bringing about accountability and transparency to this institution. The selection, appointment, and removal of public prosecutors are discussed in the following sections.

3.3.1 Selection, Appointment, and Removal

Selection, Appointment, and Removal of Attorney General and Vice Attorney General

Article 7(1) of Proclamation No. 943/2016 states that the Attorney General is appointed by the House of Peoples Representatives upon recommendation by the Prime Minister. It further states that the Deputy is directly appointed by the Prime Minister. While the proclamation stipulates the basic criteria for the selection of the public prosecutors, the law has intentionally omitted the basic criteria for the selection of the Attorney General and the Deputy.

Given a wide range of functions and duties of the Office of the Attorney General, a person to be appointed as the Attorney General and Deputy General should have exceptional expertise and academic excellence in the field of law in general and the criminal justice system of the country in particular. This excellence should be complemented by practical judicial experience. The person to be appointed as Attorney General should have high professional integrity and must pass through the career structure starting from the bottom up. So far, the heads of the prosecution department are not selected based on the above qualities. Mere political loyalty than integrity and excellence to the post is given more emphasis.

²⁷Supra note 3, Proclamation No. 943/2016.

Under the current state of politics and as per proclamation 943/2016, the Attorney General is a member of the Council of Ministers. This means the Attorney General also serves as a political instrument. The above-mentioned criteria are required for the functions of the office of the Attorney General since they require direct legal knowledge and experience.

As far as dismissal is concerned the Attorney General and the Deputy Attorney Generals may be removed from their position by the decision of the Prime Minister.²⁸ There are no stated conditions for removal. This indicates that even in an instance where the prosecution department initiates investigation against the political interest of the Prime Minister, she/he can remove her/him from her/his post without stating the reasons to do. Thus, the security of tenure of the attorney general is based on the political will of the prime minister. This, in turn, results in the instability of the prosecutor general.

Selection, Appointment, and Removal of Federal Public Prosecutors

According to UN Guideline, “persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.”²⁹ Furthermore, the guideline states as follows as to the selection criteria's to be applied.

“Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned.”³⁰

The Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors adopted by the International Association of Prosecutors' states that prosecutors must be recruited and promoted based on objective criteria to safeguard prosecutors against arbitrary action by governments. These criteria must concern

²⁸Ibid, Art 10 of Proclamation no. 943/2016

²⁹Supra note 11, *UN Guidelines on the Role of Prosecutors*, op. cit., Guideline 1.

³⁰Supra note 11, *UN Guidelines on the Role of Prosecutors*, op. cit., Guideline 2(a).

“professional qualifications, ability, integrity, performance, and experience, and decided upon by fair and impartial procedures.”³¹

Issues of selection, appointment, and removal of the federal public prosecutors are mainly governed by proclamation number 943/2008 and regulation number 443/2008.³² As per this regulation, the basic principles for the selection of public prosecutors are the following. The first one is obedience to and belief in the Constitution, constitutional order, and rule of law.³³ The law is not clear when it says “obedience to and belief in the constitution”. Everyone is expected to respect and uphold the law. Any democratic society should adhere to the rule of law. Beyond respecting the law a belief in the Constitution is not necessary.

Reference to belief in the constitution is not correct for two reasons. First, anyone can be a public prosecutor even while having a different view of the Constitution. Second, it is difficult to know in advance one's belief in the Constitution, constitutional order, and rule of law. Understanding of belief in the Constitution depends on the belief of a selection committee that the candidate believes in the Constitution by examining the political stance.

Previously, the selection process of prosecutors was based on party membership scrutinized at the university level, and after graduation, those who are the member of the ruling political party were being appointed as prosecutors and those who are not party members were excluded from joining the staff of prosecution.³⁴ It must be noted that being a member of a ruling party was considered as an ‘obedience to and belief in the Constitution, constitutional order, and rule of law’. Presently, a certificate or written attestation as to the ethical character of an applicant is required to be brought from the police station or woreda/city administration office of where an applicant resides. The certificate or written evidence is being used to examine the political viewpoint of an applicant.

³¹ IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of prosecutors, Guideline 6(e). Available at: [https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-\(1\)/English.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-(1)/English.pdf.aspx) [Accessed 28 July 2020].

³² Federal Public Prosecutors’ Administration Council of Ministers Regulation number 443/2018.

³³ Supra note 3, Art 11(2)a of Proclamation no. 943/2008.

³⁴ Ibid 3, page 84 and 85

The other requirements are being an Ethiopian national and live in Ethiopia.³⁵ Further, the law takes into account the ethical considerations of the applicant.³⁶ Accordingly, the ethical state of the candidate prosecutor shall be based on respect for the law, impartiality, and accountability.³⁷ In addition to the above, having law education and the skill necessary for prosecution work is required.³⁸ According to the regulation, the necessary law education and skill are to be a graduate in law with a degree or above from a recognized higher educational institution.³⁹ Besides having a law degree, passing the university exit exam and entrance exam for the specified grade is necessary.⁴⁰ Any public prosecutor to be employed or appointed at any grade shall fulfil the requirement for the grade namely, educational qualification and work experience and, as appropriate, special training.⁴¹

Other requirements include successful completion of pre-service training given for the sector,⁴² commitment to undertaking the responsibility that public prosecution demands,⁴³ impartiality from conditions that may influence decision making of public prosecutors,⁴⁴ give volunteer service,⁴⁵ and be able to practice the federal working language.⁴⁶

The other requirement is a need for a balanced representation of nations, nationalities, and peoples. Ethiopia is a land of nation, nationalities, and peoples. The founding pillar of our federal system is the existence of plurality based on ethnicity. Each nation, nationalities, and peoples shall have fair representation at the federal level. In principle, ethnicity is not a basis

³⁵Supra note, Art 11(2) d of Proclamation number 943/2008. See also Supra note 24, Art 4(1)A)Federal Public Prosecutors' Administration Council of Ministers Regulation number 443/2018.

³⁶Supra note 3, Art 11(2) e of Proclamation number 943/2008.

³⁷ Ibid, Art 11(3) c.

³⁸Ibid Art 11(2) f.

³⁹ Supra note 24, art 4(1)B

⁴⁰ Ibid, art 4(1) f.

⁴¹ Ibid, art 4(2).

⁴² Supra note 3, art 11(2)G

⁴³Ibid, Art 11(2) h.

⁴⁴Ibid, Art 11(2) i.

⁴⁵ Supra note 24, Art 4(1) d.

⁴⁶Ibid, Art 4(1) e.

for the selection and appointment of Public prosecutors.⁴⁷ Thus, balancing the representation of nations, nationalities, and peoples is applicable only when there is an *equal or nearly equal result*.⁴⁸ In this case, preference shall be given to members of nationalities comparatively less represented in the Office, having equal or close scores to that other candidates.⁴⁹

Based on the above requirements, the Office shall examine the candidates who seem fit and shall select the one with the best results.⁵⁰ The requirements, however, must be revised to ensure qualified prosecutors who can assess the evidence in accordance with the law and protect the defendant's rights and the rights of the victim and enforce the rule of law. If prosecutors are selected based on professional qualifications, ability, integrity, performance, and experience, and decided upon following fair and impartial procedures, the prevailing problems observed in the criminal justice administration could have been minimized.

3.4 Basic Issues in Prosecutorial Roles and Functions

3.4.1 Role in the Protection of Human Rights

The Attorney General in general and prosecutors in particular are duty-bound to respect and enforce the Constitution.⁵¹ The UN Guideline on the Role of Prosecutors provides that;

“Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.”⁵²

Unfortunately, human rights are not properly mainstreamed into the functions of the prosecutors. In this regard, it must be noted that the Ethiopian government is known for violations of human rights. Reports indicate that the victims of human rights abuse sustained

⁴⁷ Supra note 24, Art 5(2).

⁴⁸ Ibid, Art 5(7)

⁴⁹ Ibid, Art 5(7) a.

⁵⁰ Ibid, Art. 5(5).

⁵¹ Constitution of the Federal Democratic Republic of Ethiopia, Proc. No 1, 1995. Art, 9.

⁵² Supra note 11, *UN Guidelines on the Role of Prosecutors*, doc. cit., Guideline 12.

torture, extra-judicial killing, enforced disappearances, and arbitrary detention.⁵³ For years, the security force has engaged in brutal repressions. In due course of criminal investigations, confessions and other evidence were obtained through illegal means including torture. From among illegal interrogations, police use of force, threatening or intimidation, lengthy incommunicado interrogation, promises, and deprivations are claimed in due course of trial proceedings. Illegally obtained confessions are utilized by prosecutors and in such cases, inability or unwillingness to exclude such evidence are also observed on the part of the judges.

Suspects are immediately arrested without the investigations being completed or even without collecting any evidence to reasonably and legally justify their arrest. Unfortunately, in such cases, excessive remands are given without a prima-facie case. Although the law allows for release on bond at the police station level, it is either not utilized and/or improperly utilized. It has become a culture that almost in all cases, police objects to release on bail pending investigation.

The rights to speedy trials are almost disregarded. Investigation and decision to prosecute or not take excessive time. Upon trial, the evidence is not presented in due time, and repeated adjournments are given. Inability or unwillingness to fulfill court order in time and as ordered are also among the problems observed. Sometimes, witnesses are also arrested and testify as the police want in exchange for their freedom.

In general, human rights issues are disregarded, and there is a loose mainstreaming of human rights into the criminal justice system. In due course of a criminal investigation, human rights violations are ignored or covered-up. The UN Guideline on the Role of Prosecutors provides as follows. When the prosecutors;

“know or believe on reasonable grounds [the evidence adduced before the court] was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights, especially

⁵³ Human Rights Watch Report 2016: Events of 2015 p. 241.

involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights”⁵⁴ (emphasis added).

Thus, they are expected to take all necessary steps to ensure that those responsible for using such methods are brought to justice. It must be restated here that the prosecutors must respect and enforce human rights according to the Constitution. In practice, it is widely known that the police prohibit prosecutors from paying a visit to those arrested without police accompanying them. Those who tried to challenge human rights violations might face the consequences of their action.

The committee composed of the judiciary, prosecutors, and police also have an impact on human rights as well. The committee ought to enhance the cooperation between criminal justice administrators. Instead, in the name of this committee, the independence of the judges and human rights is compromised. This is because, among the issues they discuss were bail issues, amount of bond, discontinuity of charges, and issues surrounding prolonging adjournment are some.

For the most part, the Ethiopian government denied the existence of human rights violations. It is only with the coming to power of PM Abiy Ahmed that the government admitted to the existence of such abuses.⁵⁵ Prosecution of those who allegedly committed such abuse is undergoing as many more human rights violations remain covered up.

It has to be noted that the FDRE Constitution is very explicit when it provides that all organs of the government including the Attorney General office are duty-bound to respect and enforce the Constitution. As indicated above, however, all of the above human rights violations were perpetrated either with the participation prosecutors or without the Attorney General taking action against such abuse. Thus, in due course of criminal justice administrations, human rights are not sufficiently mainstreamed into prosecutorial tasks.

⁵⁴Supra note 11, *UN Guidelines on the Role of Prosecutors*, doc. cit., Guideline no. 16.

⁵⁵Allo, A. K. (2018, June 23). Torture, state terrorism and Ethiopia’s transformation. Africa | Al Jazeera. <https://www.aljazeera.com/indepth/opinion/abiy-ahmed-transforming-ethiopia-face-adversity-180622112645741.html>. Gardner, T. (2020, May 29). *Ethiopia’s security forces accused of torture, evictions and killings – report*. The Guardian. <https://www.theguardian.com/global-development/2020/may/29/ethiopias-security-forces-accused-of-torture-evictions-and-killings-report>

3.4.2 The Role in Criminal Investigation

Attorney General Establishment Proclamation 943 Article 6 mandates OAG to cause a criminal investigation to be started, follow up report to be submitted on an ongoing criminal investigation, the investigation to be completed appropriately, orders discontinuation or restart of discontinued investigation based on public interest or when it is known that there could be no criminal liability, ensures that investigation is conducted in accordance with the law, and gives the necessary instruction. The essential questions to ask are whether the OAG is capable and willing to lead investigations. Whether there is an actual practice of leading investigation.

Concerning investigation, it appears that there is an overlap of power between the Attorney General and the police. The power to investigate is given to police under Article 6 of the Ethiopian Federal Police Commission Establishment Proclamation No. 720/2011⁵⁶ and Article 6 of Addis Ababa City Police Commission Establishment Council of Ministers' Regulation No. 96/2003.⁵⁷

The above power assigned to Attorney General and Police Commissions confuses roles that the two organs play. It also opens a door for disagreement between prosecutors and police. According to the focus group discussion participants, the relationship between police and prosecutor was very antagonistic, confrontational, and mostly were to the advantage of police. What worsens the problem is the involvement of the intelligence personnel's in the investigative tasks. Although the law aspires prosecution led investigations, the practice is confusing. Thus, there needs to be a law showing clearly the differences in power between these entities.

Prosecutors are trained lawyers by profession and they are expected to know the elements constituting a crime. Thus, they should engage and lead the investigation with the view of bringing about the rule of law contributing to a successful prosecution. In this regard, the *UN Guidelines on the Role of Prosecutors* states that;

⁵⁶The Ethiopian Federal Police Commission Establishment Proclamation No. 720/2011, Art. 6.

⁵⁷Addis Ababa City Police Commission Establishment Council of Ministers' Regulation No. 96/2003, Art. 6.

“Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.”⁵⁸

From observation and focus group discussion undertaken, the practices of leading investigation are different from stations to police stations. It has to be noted that at Central Prosecution department levels, the tasks of leading prosecution are very poor. In such cases, the role of public prosecutors only begins after the completion of the investigation and the police send the investigation file to them for consideration to prosecute or not prosecute.

The problem in this regard is aggravated by an unwillingness to address prosecutorial orders for further investigations under Art. 38 of the Criminal Procedure Code. This gives the prosecutors no chance to verify the truth or otherwise of the evidence presented alleging criminal conduct. This problem compiled with inadequate cooperation among police and prosecutors leads to an ineffective investigation and poor prosecution. A high level of prosecutorial involvement in criminal investigation contributes to the effectiveness of prosecution. It might also protect suspects against abuse of power by police. Adopting effective prosecution led investigation helps ensure checking mechanisms to ensure the legality and truthfulness of the criminal allegations.

At times, there seems to be an unwillingness to adhere to the decisions of prosecutors closing cases for lack of sufficient evidence. As an example, there was an incident where a person who is under arrest is ordered to be released by the prosecutor, and the police decided to remand him for forty extra days following the decision of prosecutor closing the case for insufficiency of evidence. Those who challenge, such illegal acts of police and human rights violations are also constructively dismissed from their jobs.

Furthermore, it has been noted that prosecutors are not willing to go to the crime scene. Thus, the inability or unwillingness of prosecutors to participate in the investigation rendered the police to claim that prosecutors cannot lead the investigation.

⁵⁸Supra note 11, *UN Guidelines on the Role of Prosecutors*, doc. cit., Guideline no. 11.

According to responses in the focus group discussion, the lack of special investigation skills is another serious problem. It is doubtful whether police officers involved in the investigation are there to record a statement as they are not mostly involved in investigative tasks. It is self-evident that most of the investigators are not also trained investigators. The selection of the investigator's position follows handwriting skills unrelated to investigation skills. Once they are selected for this position as well, they are not given proper criminal investigation training. This lack of investigation skills leads to imperfect investigative works. As such, the prosecutorial works are much reliant upon the evidence submitted from the victim and the accused through confession.

According to the Criminal Procedure Code, police have a duty to investigate crimes.⁵⁹ Upon receipt of the report, as regards the commission of crimes, the police must undergo investigation even if the information they have received is open to doubt.⁶⁰ In practice, however, this duty of the police to investigate seems to be somehow disregarded and so are the prosecutors to lead such investigations. Information is communicated to the police through either accusation or complaint. Unfortunately, the police investigators are unwilling to commence investigations without the victim adducing evidence. Ideally, prosecutors and police investigate together. Unfortunately, they mostly do not rely on information communicated to them unless the case appears to have sufficient evidence, and there is a docket opened. The problems in this regard relate to the performance evaluation of prosecutors and police officers. If the case is closed for lack of sufficient evidence, it was regarded as a failure of those involved in the investigation. Thus, they do not want to appear as such and want to make sure that the cases they admit will have sufficient evidence supporting the prosecution.

The focus of federal prosecutors remained in an ordinary crime mostly important to the victims. To date, federal prosecutors are prosecuting insult and other minor crimes instead of focusing on more important issues. In this regard, the *UN Guidelines* provides that prosecutors

⁵⁹Criminal Procedure Code of the Empire of Ethiopia, 1961, Proclamation no 185, Neg. Gaz., No 1. Art. Art 11 and 12.

⁶⁰Ibid, Art 12

“shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.”⁶¹

In reality, investigation and prosecution of high officials in Ethiopia require the decision of the politicians before action. At times party-line simple reprimand or relocation of the office to a different post may suffice for the high official's apparent engagement in corruption. If the rule of law is to prevail, Attorney General in general and prosecutors, in particular, must be free to initiate and lead investigations against anyone including high officials.

3.4.3 Institution of Proceedings

The major task of the Attorney General is deciding whether to institute proceedings. In doing so, there is no explicit law providing for evidentiary standards to open a criminal charge by prosecutors. The problem, however, is the fact that there is no explicit provision providing for burden and standard of proof for criminal conviction in Ethiopia. It is argued that prosecutors are expected to prove the case beyond a reasonable doubt.⁶² In practice, however, prosecutorial burden varies and some legislations also shift the burden.⁶³

Prosecutors are duty-bound not to initiate or halt prosecutions when the charges are unfounded.⁶⁴ Doing so is a violation of the human rights of suspects. Thus, in the case of insufficiency of evidence, the prosecutors will have to close the investigation files.⁶⁵ In this regard, issuing a non-prosecution order has been problematic for two reasons. First, cases that

⁶¹Supra note 11, *UN Guidelines on the Role of Prosecutors*, doc. cit., Guideline 15.

⁶² Simeneh Kiros (2012). The Principle of the Presumption of Innocence and its Challenges in the Ethiopian Criminal Process. *Mizan Law Review*, 6(2), 273-310.296. Hanna Arayaselassie (2014). The Standard of Proof in Criminal Proceedings: the Threshold to Prove Guilt Under Ethiopian Law. *Mizan Law Review*, 8(1), 84-116. Worku Yaze (2014). Note: Burdens of Proof, Presumptions and Standards of Proof in Criminal Cases. *Mizan Law Review*, 8(1), 252-270. Hanna Arayaselassie (2014). Vol 8. No 1 The Standard of Proof in Criminal Proceedings: the Threshold to Prove Guilt under Ethiopian Law. Worku Yaze (2010) “Presumption of Innocence and the Requirement of Proof Beyond Reasonable Doubt: Reflections on Meaning, Scope and their Place under Ethiopian Law” in *Ethiopian Human Rights Law Series Vol. III*.

⁶³Ibid, Simeneh Kiros (2012). 296.

⁶⁴Supra note 11, *UN Guidelines on the Role of Prosecutors*, doc. cit., Guidelines 14, 13 paras. (b) to (d) and 20.

⁶⁵Supra note 51, Art. 42/1/a of Crim. Pro. Code.

are closed for the insufficiency of evidence may be illegally closed. Second, cases that are supposed to be closed at the investigation level end up being charged.

In the first case, cases that are closed for insufficiency of evidence may not be challenged in the court. Art 43 and 44 of Criminal Procedure Code allows for a possibility that the concerned person can institute a private prosecution if the case is brought upon private complaint while it allows the concerned person to challenge the decision in the court in the case of accusations. In practice, there is so limited private prosecution which took place, and thus, either it is unutilized or underutilized.

The provision which allows challenging prosecution at the court for inappropriately closing investigation file has been amended by a Proclamation to Provide for the Establishment of the Office of the Central Attorney General of the Transitional Government of Ethiopia Proclamation No. 39/1993. Thus, an opportunity to challenge prosecutorial miss-conduct closing the case at the pre-text of insufficiency of evidence is loosened. The only recourse available is to submit a complaint to the Attorney General office following a hierarchical itinerary.

In second instances, cases that are supposed to be closed at the investigation level end up being charged. In some cases, a professionally decided case to be closed might end up being opened at the court by those who lead the prosecutorial departments. This is mostly the case insensitive and mostly political cases. It has to be noted also that special prosecutors are appointed for politically sensitive cases as well. Furthermore, those who lead the prosecution departments at different levels are not more qualified than subordinate prosecutors. They are political appointees.

The quality of decisions based on Art 42(1) (a) has been poor. It has to be also recognized that cases that should have been closed under this provision end up being prosecuted. Police may also prefer to give the docket to selected prosecutors whom they believe will always prosecute irrespective of how loose the evidence appears. In terms of citing a proper provision based on the facts and evidence supporting the facts, there is a major problem.

A good deal of problems also relates to improper concurrence charges resulting in a denial of bail. The problem goes to the extent that the prosecutor's charge contains none existing

provisions. They might also add facts the witnesses could not testify or the docket does not indicate. They also open criminal cases without accurately identifying criminal participation of co-perpetrators or charging persons who do not have criminal participation at all. Furthermore, the problems also relate to evidence. They may attach evidence having no relevance at all, or not attaching the relevant ones, and charges with insufficient evidence.

It is self-evident that prosecutors are expected to carry out their responsibilities professionally.⁶⁶ To do so, protection must be afforded to them against arbitrary action by governments. They should not be subjected to unlawful order⁶⁷ to institute criminal proceedings. Prosecutors on their part have a duty to refuse orders from superiors that are unlawful.⁶⁸

According to informants, there were instances that prosecutors received an order to prosecute without them agreeing to it as the facts do not suggest. Other times, oral orders were given to close cases without any legal grounds. The Special Rapporteur on the Independence of Judges and Lawyers recommends that prosecutors may request the orders be made in writing, formally recorded and carefully circumscribed to avoid undue interference or pressure.⁶⁹ Whenever the order given to prosecute is incompatible with his/her professional opinion, they should be asking for an exemption from participating in the case.⁷⁰

Instead of the institution of proceedings, in many jurisdictions, prosecutors engage in a plea bargain after or before the institution of proceedings. This system is adopted both in adversarial and inquisitorial systems.⁷¹ Some questions the effect plea bargain might have on the integrity of the criminal process, the presumption of innocence, protection against self-incrimination, and the right to remain silent.⁷² It has impacted the process of seeking the

⁶⁶ Supra note 23, IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors 6.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Knaul, G. (2013). Report of the Special Rapporteur on the Independence of Judges and Lawyers. *General Assembly. United Nations: Human Rights Council. Accessed April, 10, 2016.*

⁷⁰ In this regard, Hungary is the best example in which prosecutors can ask for an exemption from participating in a case whenever the order given to prosecute is incompatible with his/her professional opinion.

⁷¹ Ross, J. E., & Thaman, S. C. (Eds.). (2016). *Comparative criminal procedure*. Edward Elgar Publishing. ⁷⁴ Rauxloh, R. (2012). *Plea bargaining in national and international law*. Routledge.5.

⁷² Abebe Assefa (2014). Appraisal of Plea-Bargaining in the Criminal Justice Policy of Ethiopia. *Bahir Dar UJL*, 5, 266. 429

truth for the victims of the crime.⁷³ Although plea bargain has such problems, it is no doubt that it helps reduce the case backlog.⁷⁴ In Ethiopia, the concept was first introduced in 2011 with the adoption of the Criminal Justice Policy.⁷⁵ Following the policy, the former Ministry of Justice or the current Attorney General office is allowed to engage in plea bargain under the establishment proclamation.⁷⁶ So far, however, no such practice is adopted for a lack of detailed legislation on the matter.⁷⁷ The Ethiopian law adopts an unrestricted model of a plea bargain.⁷⁸ It has been suggested that Ethiopia should adopt a model like in Italy, Germany, and Russia in which case the model adopted is restricted or limited. According to this model, there exists a “statutorily fixed discounts, the ban of charge and fact bargains, and rigorous judicial scrutiny.”⁷⁹ Should it be a case that Ethiopia puts to function this system of a plea bargain, it would better than the latter model be adopted to deal with the negative impacts of a plea bargain.⁸⁰

3.4.4 Prosecutorial Discretion

The decision to prosecute is taken either through the principle of opportunity or the principle of legality.⁸¹ In the country where the principle of legality is used prosecutors are required to prosecute as long as the evidence is sufficient. In the case of the principle of opportunity, prosecutors exercise discretion concerning whether or not to institute criminal proceedings or withdraw.

The Criminal Procedure Code provides that except for instances in which the law provides that instituting charges are prohibited, the public prosecutor may not refuse to institute

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Supra note 3, Art. 6/3/d of Proc. 943/2016.

⁷⁷ Alemu Meheretu (2017). The Proposed Plea Bargaining in Ethiopia: How it Fares with Fundamental Principles of Criminal law and Procedure. *Mizan Law Review*, 10(2), 401. <https://doi.org/10.4314/mlr.v10i2.5>

⁷⁸ Supra note 24, Abebe Alemu(2014). 429.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Supra note 11, *UN Guidelines on the Role of Prosecutors*, doc. cit., Guideline 8.

proceedings.⁸² However, the law allows prosecutors to exercise discretion not to institute proceedings against any offender even if there exists sufficient evidence to prove his guilt in court in some circumstances. Among these circumstances is the discretion the Attorney General exercises concerning discontinuation or restart of discontinued investigation based on public interest.⁸³ They are also given the mandate to withdraw charge when found necessary in the interest of the public or resumes withdrew the charge.⁸⁴ Other special legislations have also bestowed discretionary power on prosecutors. For instance, under the Revised Special Anti-Corruption Procedure and Rules of Evidence Proclamation, the prosecutors can decide to give immunity to cooperating suspects.⁸⁵ In such cases, the suspects will not be indicted for the crimes they have committed.⁸⁶

It must be noted that no proclamation so far defined what constitutes public interest. Very recently the prosecutor's manual prepared by the Attorney General tries to define what constitutes 'public interest.'⁸⁷ The Manual provides that in deciding whether the requirement of 'public interest' is fulfilled or not, the economic, political, and social aspects will be taken into considerations. Furthermore, it indicates that if the suspect is elderly or seriously ill or the special expertise of the suspect will be taken into account.

In practice, the power of the prosecutor to withdraw or discontinue investigation or charge is abused. In the name of serving public interest investigations and charges were discontinued. If we see the kind of cases discontinued in the name of serving the public interest, it has no connection with serving the public interest. Rather, it only fetches impunity and appears misconduct. For instance, discontinuing rape cases or discontinuing cases of perjury against churches for the reason of public interest.

The prosecutors must be cautious in exercising the discretion not to institute proceedings or to withdraw. In such cases, the *UN Guidelines* provide that;

⁸²Supra note 51, Art. 42/2/ of Crim. Proc. Code.

⁸³Supra note 3, Art. 6/3/a of Proclamation 943/2016.

⁸⁴Ibid, Art. 6/3/e.

⁸⁵The Revised Special Anti-Corruption Procedure and Rules of Evidence Proclamation No. 434/2005 Art. 43.

⁸⁶ Ibid.

⁸⁷The FDRE Attorney General, Prosecutorial Manual, Art 33.

“the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution”⁸⁸

It might be important to re-assess cases that are discontinued in the name of public interest to see if there exists prosecutorial misconduct. Assessment needs to be made to verify whether the public interest in punishing the suspect outweighed the criminal conduct perpetrated. Moreover, adopting guideline which addresses what fully amounts to public interest protects against such abuse.

3.4.5 Role in Criminal Trial

Theoretically, prosecutors must be impartial throughout the criminal trial. In this regard, the aim of the prosecution in Ethiopia is not clear whether it is to seek the truth rather than merely seek a conviction. From the practice of prosecutors, some seek truth while others aim at winning per se. Still, others feel like they are representing the law or while others put themselves as representing the victims. Thus, the very question of what guides prosecutorial tasks is unclear.

Human rights issues are not mainstreamed in due course of criminal justice administration. The criminal trial in Ethiopia is characterized as impairing the rights to a speedy trial. For that among the actors involved in the criminal justice administration, prosecutors also take the blame. The system heavily relies upon witnesses to prove or disprove the criminal cases. Thus, the production of evidence on the day of the appointment is of paramount importance. Unfortunately, one of the reasons why trial in criminal cases are delayed is because of the inability or unwillingness to produce witnesses duly with full commitment. There are two problems relating to this issue. The first one relates to the right of the accused while the second one relates to the crime control aspect.

As to the first one, the trial session appointment is once or twice a month. Some cases take one or two years or more to complete. As a result, for some innocent defendants, if unable to be granted bail, such a long period of trial aggravates their suffering and tragedy. A

⁸⁸Supra note 11, *UN Guidelines on the Role of Prosecutors*, doc. cit., Guideline 17.

compensation scheme for those innocent defendants as a result of the miscarriage of justice could have reimbursed their sufferings.

Secondly, since oral evidence is relied upon, cases are discontinued for absences of witnesses after excessive adjournments are given. In the focus group discussion undertaken, prosecutors have indicated that close to one-third of cases are being discontinued for inability or unwillingness to produce witnesses. The reasons for inability relates to institutional lack of capacity and commitment while unwillingness relates to the prevailing corruption in the country.

The public prosecutors have to prove beyond a reasonable doubt that the defendant is guilty as charged. In this regard, public prosecutors usually have different views on the standard required of them to prove their cases. Some view it as requiring clear and convincing while others claim beyond reasonable doubt standard. Among those who claim that they are required to prove the case beyond a reasonable doubt, there is a divergence in the very meaning of what constitutes this standard.

As indicated above, prosecutors are duty-bound to observe and enforce the accused person's human rights. Although this requires a standard, they have been using the accused's confessions obtained through threat, deception, promise, or other wrongful means. Some do not even have a perception that prosecutors are duty-bound to prove the legality of confessions obtained more than adducing confession document, which self-announces legality of how confession is obtained.

The following problems also need a major intervention. The committee composed of the judiciary, prosecutors, and police can have an impact on human rights. First, in the name of this committee, the independence of the judges is compromised. Among the issues they discuss are bail issues, amount of bond, discontinuity of charges, issues of prolonging adjournment are some.

Further to the above problems, prosecutors' lack of dressing code has compromised the respect necessary for the court decorum. In addition to how they dress in the courtroom, lack of readiness on the part prosecutors is a self-evident an insignificant number of cases coupled with a lack of confidence and communication skills for oral arguments. Inability or

unwillingness on the part of the judges to challenge the prosecutors have resulted in a lack of inspiration for readiness. The other reason has to do with a lack of end to end approach for prosecutors. This further results in unsuccessful prosecution and delay of proceedings as well.

The trial system is highly influenced by very mechanical and/or traditional trial proceedings. The criminal justice system is heavily reliant on how the victim or witness was dressed up during the commission of the offense or sequencing of events. The question of who testifies on what fact is not disclosed and even the identity of those appearing to testify is known on the day of presentation of witnesses. Prosecutors can see witnesses only on the day of the presentation of defence and goes to cross-examination without any background information about the witnesses.

3.4.6 Cooperation Among Criminal Justice Agencies

Corruption requires cooperative effort from all involved in the criminal justice administration. Accordingly, police, prosecutors, in the offices and courts must co-operate in the investigation, prosecution, and enforcement of any judgment without compromising the power and independence bestowed upon such organs.⁸⁹ Effective cooperation contributes towards successful prosecution based on the rule of law.

Building a justice system that has a clear demarcation among respective legal institutions' power and responsibility is important to have an effective criminal justice system. In most democratic countries the interrelationship among justice institutions is guided by a well established legal framework. The effective prosecution system depends partly on the level of effective cooperation that exists between actors participating in the criminal justice administration. In this regard, the Ethiopian criminal justice system is characterized as lacking adequate cooperation among criminal justice agencies. There is no provided guideline to regulate the interrelationship between the Attorney General, police, courts, and prison commission as an institution in general and as an individual employee in particular.

⁸⁹UN General Assembly, *United Nations Convention Against Corruption*, 31 October 2003, A/58/422, Articles 48-50. available at: <https://www.refworld.org/docid/4374b9524.html> [accessed 28 July 2020]

See also African Union, *African Union Convention on Preventing and Combating Corruption*, 11 July 2003, Article 18 available at: <https://www.refworld.org/docid/493fe36a2.html> [accessed 28 July 2020]

For more than ten years now investigation is being held through the joint effort of public prosecutors and police investigators as part of prosecutor lead investigation BPR document. This reform urged for the physical presence of public prosecutors at the police station. However, as to the question of how these two institutions function without one interfering with the power of another is not specified by any legal document. As such, discrepancies in approach are observed from the police station to another. The confusion starts from intake procedure from what appears to be improper competition or power overlap between police station head of investigation team and a prosecutor who is assigned to lead the investigation. Thus, for the most part, the interrelationship between police and prosecutors remained one of a challenge.

This worsened the existing problem between the two organs. Major ill-treatment of public prosecutors at the police station by police officers, refusal to accept public prosecutors guidance/order/ as to which cases should be investigated and which should not, creating an uncomfortable working environment, unwillingness to give files, snatching away files because the police officer disagrees with the public prosecutor's decision, and unwillingness to conduct the further investigation are some of the reflections of this unhealthy relationship between the two institutions. It must be noted that individual rights will be compromised in the process.

As to the relationship between prosecutors and prison administration, taking into account the fact that prisoners go free at the will of prison administrators, the prosecution office is not properly following up whether those sentenced are properly implementing the punishment against them. In the number of instances, those convicted are freed from either prison or police station before handing them over to prison. In none of those instances, prosecutors have opened an investigation against those who are involved in the illegal release of prisoners. The inability or unwillingness of prosecutors to ensure convicts have served their sentence paves a way for arbitrariness and impunity by the prison administrators. The relationship between the office of prosecution and the prison commission is no more than a casual visit of prisoners and/or informative order towards the release of criminals through pardon or amnesty. A criminal could be sentenced to serve years of imprisonment but might be seen walking freely on the next day.

As to the relationship between prosecutors, police, and judges, the principle of separation of power limits the extent of the relationship between the office of prosecution and the judiciary to the legally defined limit. However, the committee composed of the judges, prosecutors, and police could have enhanced the cooperation that must exist between these organs. Unfortunately, in practice, the existence of this committee was a problem than a solution. The interrelationship of these organs was not based on the respect to the power of another. Intrusion into the power of the judiciary is happening in the name of facilitating the criminal justice administration. In the name of this committee, the independence of the judges and human rights is compromised. As indicated above, among the issues they discuss were bail issues, amount of bond, discontinuity of charges, and issues surrounding prolonging adjournment.

3.4.7 Corruption

Prosecution service is one of the pivotal organs of government that upholds respect for the law. It ensures respect for individual rights. It is also a forum one resorts to when crimes of corruption occur for a prosecution to occur. If the prosecution institution itself is corrupt, however, the above objectives cannot be achieved. Corruption by prosecutors has tremendous damages to the socio-economic and political situation of a country.

Judicial corruption is the use of public authority by the court personnel including prosecutors for personal benefits resulting in the improper and unfair delivery of decisions.⁹⁰ It also results in an impartial adjudication of cases.⁹¹ In default, corruption by prosecutors is the abuse of prosecutorial power for private gain.⁹² The corrupt acts or omissions include *inter alia* bribery, extortion, intimidation, influence peddling, and the abuse of judicial procedures for personal gain. The prosecutorial organ is one of the major corrupt areas in the public sector.⁹³ From employees in charge of opening the file to those involved at reviewing decisions of ordinary prosecutors participate in corruption. The study by TI across the world

⁹⁰ Transparency International Global Corruption Barometer (2015). 3.

⁹¹ Transparency International Global Corruption Barometer (2007) xxi.

⁹² Okechukwu O '(2005). Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria. *Brook. J. Int'l L.*, 31, 9. 25.

⁹³ Transparency International Global Corruption Barometer (2007) 315.

indicates that almost half of the respondents perceived that the judiciary including the prosecution service is corrupt.⁹⁴ TI concluded that judicial corruption affects the right of the victims as well as the accused person's fair trial rights.

At the focus group discussion and based on information from anonymous informants, there is a high level of corruption within the Attorney General Office. Those involved include clerks, prosecutors, and officials within the Attorney General. It is indicated that corruption occurs within the organ under a number of pretexts. At a police station level, police and prosecutors collide to either aggravate the charge or mitigate the charges to be opened against the accused. In such cases, the suspect would be charged with lesser crimes than the evidence suggests. At times, the cases are closed for insufficiency of evidence when the docket indicates otherwise. It must also be indicated that at times both clerks and prosecutors may engage in corruption for a case already decided in accordance with the law. For instance, a prosecutor may decide to close the investigation file as the docket supports the same. Before doing so, they will be contacting the suspects promising to close the file in exchange for a bribe. In such cases, the suspects would be paying without otherwise knowing the already existing written decision of the prosecutor to close the investigation file. At times, this is done without writing the decisions in advance. At times, clerks are also involved in corruption promising to suspects that if they pay they would make sure their cases are closed when they knew the case has already been closed for insufficiency of evidence. This happens without the actual knowledge of the prosecutor who has given such a decision. Closely related to this is a bribe collected from the victims as well with the view of opening a case against the suspect.

Other forms of corruption by prosecutors include accepting a bribe to argue in favour of remand, agree not to object granting of bail, agree to avoiding concurrent crimes, and convert suspects to witnesses. Department heads or directors may also be closing cases when suspects submit an application by way of appeal to them. This happens in two ways. Either the heads may overrule the decision of ordinary prosecutors charging the suspect or closing the investigation file claiming the decision is not as per the law or although the decision is in

⁹⁴ Transparency International Global Corruption Barometer (2009) 5.

accordance with the law, they may close the case justifying their action based on ensuring public benefit.

The Office Attorney General is also influenced by political corruption. Political corruption happens when the executive or legislative organ of government influences the decision of the prosecutors.⁹⁵ In this case, prosecutors compromise their decision due to political pressure.⁹⁶ Such corruption results from ‘threat, intimidation, and simple bribery’.⁹⁷ Politicians or executive organs of the government might also intervene in the judicial process by exerting influence on the prosecutor's appointment process, salaries, and conditions of service.⁹⁸ Prosecutors who are thought to be unfavourable to the political climate might be transferred to other places or pressured to step down without any reason.⁹⁹

3.5 Conclusions

This report has indicated that the criminal justice system in Ethiopia is distressed for many problems. For the most part, it remained a political tool against political dissent without the establishment of a strong, independent, and effective prosecution system. The offices of the Attorney General exercises both advisory and prosecutorial and functions which have contributed to lack of independence of the prosecution service. This report have also indicated the selection, appointment and removal of public prosecutors is also problematic as much as the organisation of the Office. In due course of criminal justice administrations, human rights are not sufficiently mainstreamed into prosecutorial tasks. Furthermore, the role the prosecutors are playing in due course of crime investigation, institution of proceedings, exercising prosecutorial discretion, and trial are constitutionally suspect. This problems are further complicated by lack of adequate cooperation among criminal justice agencies and corruption.

⁹⁵ Supra note 85, TI (2007) xxi.

⁹⁶ Chen, M. (2016). Tying the Autocrat's Hands: The Rise of the Rule of Law in China by Yuhua Wang. *China Review*, 16(2), 210-212.119.

⁹⁷ Supra note 85, (2007) xxiii.

⁹⁸ Ibid, xxiii.

⁹⁹ Ibid.

Hence, the reform needs to address the following issues. Parallel to legal reform initiatives, institutional reform works need to be adopted before the reform initiatives lapse. The interrelationship between parties involved in the criminal justice administrations needs to be adequately addressed on the law and in practice. More importantly, serious training to all within the existing framework without a need to wait for a legal reform needs to be given. Whenever new legislation is adopted, it is essential to consider disseminating the intent of current drafters through training and other means. It has to be noted, however, that irrespective of how human rights are mainstreamed into the draft legislation unless the prosecutors, judges, and police adopt good faith interpretation to the legislation may not change the contemporary human rights violations. Thus, serious training needs to be given to the prosecutors, judges, and police with the view of disseminating the intention of the drafters as a new anti-terrorism culture and more.

The criteria for the recruitment of prosecutors should be established, transparent, and open to public scrutiny. These criteria should favour the appointment of skilled, impartial, and objective staff. It is also important to take measures aimed at eradicating corruption in the judicial sectors. Furthermore, it might be important to re-assess cases that are discontinued in the name of public interest to see if there exists prosecutorial misconduct. Finally, it is important to also reassess the prosecutorial guidelines so as to ensure compliance with human rights and best practices.

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SECTION FOUR

Prison Reform in Ethiopia: Normative Gaps, Challenges in Practice, and Recommendations

4.1 Prison Systems: General

4.1.1 Introduction

Owing to the federal constitutional design of two major levels of administration, there are federal and regional prison systems in Ethiopia.¹⁰⁰ As a result, apart from the Constitution and federal criminal laws applicable throughout the State,¹⁰¹ federal and regional governments have their own laws and regulations regarding prison administration. Limiting the matter to the federal government, there have been laws in the forms of Proclamations, Regulations and Directives regulating various aspects of federal prisons, including treatment of prisoners and employment and operation of prison wardens or prison police. There have also been practices observed, sometimes conforming, sometimes diverging, and sometimes contradicting laws on administration of prisons, treatment of prisoners, and so on. From the normative framework as well as practices, federal prisons have not had the best of names in the past. As various prison monitoring, investigation and research reports indicate, federal prisons have been places where human rights of prisoners are routinely violated; where rehabilitation and reintegration of prisoners have not been given much of a place; where conditions of prisons have been dilapidated, and so on. As a result the federal prison system has been one of the institutions that needed reform.

Relying on the federal prisons' normative framework and practices as well as comparative and international prison reform experience, this report will outline the state of prison reform in Ethiopia, highlighting challenges and opportunities. This brief baseline report, prepared by the Criminal Justice WG (of the Council of Legal Reform at the Attorney General), will provide the overall outline of challenges and opportunities and areas of reform for the federal prison system, which might also be relevant to regional prison administrations.

¹⁰⁰ FDRE Constitution, Article 51 (1): powers not expressly given to the federal government are reserved to the regional states.

¹⁰¹ Enactment of penal laws principally belongs to the House of Peoples' Representatives. Article 55(5) of the FDRE Constitution

This report is organized in six parts. Relying on comparative and international experience, the first part will provide general background on prison reform. The second explores global trends in prison reform, focusing on the United Nations (UNs) and African initiatives. The third explores potential areas for prison reform, useful in identification of areas for action in Ethiopian context. The fourth and fifth parts will identify normative gaps and practical challenges, respectively, in federal prison administration in Ethiopia. Part six will provide some recommendations relying on the substance of the report, followed by few paragraphs reflecting on present state of the federal prison reform.

Methodology wise, apart from the prison administration laws in Ethiopia (including the Constitution and relevant Proclamations and Regulations and Directives), this report principally relies on secondary materials. Research and regular reports from the Federal Prison Administration itself, prison reports of various organs working with prisons, and similar other reports are used. International and regional principles, standards and guidelines relating to prisons and comparative literature on prison administration and reform have all helped in preparation of the report. The report is further developed with feedback from a series of consultation within the working group as well as with stakeholders.

4.1.2 Prison Systems in General

Throughout the world, states often have their own prison systems. For example in the USA, which is infamous for its large number of prison population compared to any other single state in absolute numbers as well as per capita, they have had a number of models and approaches to prison administration, some targeting security, some aiming at correction of prisoners, some targeting hard discipline, and so on. From the long list of prison systems introduced in the USA (one might see the literature on penitentiaries and prisons there), the following might illustrate the point of varied systems of prison administration: the ‘**Separate System**’ of prison (where prisoners were kept separate, manual labour is forced, monastic life is mandated, no contamination from fellow prisoners is available, self-reflection is supposed to feature the prisoner’s life, and so on), the ‘**Congregate System**’ (where solitary cells feature the prison system with congregation for work and meals but with silence, labour, and so on), the ‘**Southern Plantation Prison**’ system (which is horribly marked by disciplined labour in plantations, oppression, starvation, disease, and death in the end), the

‘**Reformatories**’ (which are forms of penitentiaries that believe in reforming criminals and are reform oriented prison but with discipline and punishment), the **Maximum Security Prisons** (which are marked by discipline and silent and harsh routine, tight security, no correctional programs, etc but later improved with humanitarian initiatives such as avoidance of corporal punishment), and the ‘**Correctional Institution**’ (which is more accommodating and correction is the goal; although they have not been necessarily successful, they have been less intrusive and having educational and vocational and treatment programs).¹⁰²

While states might have their own peculiar systems, prisons might be organized and operated based on the various objectives of prisons. As part of criminal justice system, for example, prisons are said to potentially serve four punishment purposes: retribution, deterrence, incapacitation, and rehabilitation.¹⁰³ Aligning with these objectives, prisons might be organized in law and/or in practice to serve all or any of these purposes. The commitment and philosophy of the government and society, nature of crimes committed, characteristics of the convicted and detained, types of sentences in the criminal justice, availability of resources, and so on might play in the allocation of resources and treatment of prisoners to achieve either of these purposes.

Coming to contemporary global initiatives in prison reforms, there are roughly two prison systems any prison administration might choose to adopt. The first is the type of prison that relies on punishment and security measures, which might be called security or custodial model of prison. It believes prisons are places where judgments against prisoners are executed and nothing more; places where criminals deprived of their liberty are kept by law and society, with participation of courts, prosecutors, and police. The measures at prison are to deprive prisoners of their liberty, to confine criminals, to police security of prisons so that the convicted would not escape, to ensure there would not be gang and individual criminal activities in prison, and so on. Languages and treatments towards prisoners and the situation in prison include custody, maximum security, prison intelligence, prohibited dangerous articles, search of incoming prisoners, segregation on the basis of security, watch towers, incarceration, punishment, deterrence, prisoner as greater danger to public, and secure prison buildings and walls. There is not much thought of rights of individual prisoners. The extreme form of this security model might totally disregard individuals, impose harsh punishments

¹⁰² A Fresh Look at Understanding and Reforming the Prison, Fourth Edition, 2017

¹⁰³ Ibid

including subjecting prisoners to torture or other inhuman treatments and punishments for minor infringements, and exploit their labour.¹⁰⁴

There is the other model, which is the educational model, where focus is placed on the protection of the rights of prisoners, their proper/humane treatment, their rehabilitation and return, and reintegration to society.¹⁰⁵ This is best exemplified by the call for integration of international human rights principles and standards in the treatment of prisoners. Among the rights for the protection of prisoners include: right to life, freedom from torture and cruel, inhuman or degrading treatment or punishment, right to a fair trial, freedom from discrimination, right to equal protection of the law, right to adequate food, shelter, and clothing, and right to health;

These two models come from the two apparently competing goals of prisons, punishment and security on one side and rehabilitation on the other. According to the custodial model, punishment is the principal reason why prisoners are confined in prisons after all and they are not in prisons to get education or vocational training. Prisoners are in prison for crimes they have committed, ‘paying their debts to society,’ and they should be treated as such. According to the educational model, on the other hand, corrections and rehabilitations are important to prisoners as well as society. Prisoners will often finish their sentences and return to society, which has interest in prisoners’ later reintegration, avoiding recidivism, and prisoners becoming self-supporting members of society which are possible through sustainable reintegration.¹⁰⁶

But this is not to suggest that there is a clear distinction between these two models in a given prison system. The prison system’s laws and practices need to be closely studied to say which model a prison predominantly adopts. Moreover, as often is the case, a prison system might also be balancing the two goals, taking both security of prisons and treatment of prisoners seriously.

In this connection, one might wonder as to the possibility of assessing Ethiopia’s federal prison administration in terms of these two approaches. First, review of laws as well as practices of federal prisons need to be carefully studied to say federal prisons follow

¹⁰⁴ Andrew J. Dick , William Rich, and Tony Waters, Prison Vocational Education and Policy in the United States: A Critical Perspective on Evidence-Based Reform, 2016

¹⁰⁵ Ibid

¹⁰⁶ Ibid

punishment or educational model. While conclusive statements are not necessary here, past federal prison laws appear to have adopted educational/rehabilitation model, in their invocation of education and rehabilitation as their principal objective regarding prisons. The Criminal Code, for example, in addition to its purposes of maintaining peace and security and order and deterrence, provides for the reform of criminals.¹⁰⁷ Penalties, among others, are also required to respect human dignity.¹⁰⁸ In a provision dealing with the possibility of substitution of compulsory labour for simple imprisonment, reform and rehabilitation are considerations.¹⁰⁹ Again, although obligation to work is considered an integral part of imprisonment, the work is required to contribute to the reform, education and rehabilitation of a prisoner.¹¹⁰ The now replaced Federal Prisons Commission Establishment Proclamation of 2003 provides as objectives of the Federal Prison Commission “to admit and ward prisoners, and provide them with *reformative* and *rehabilitative* service in order to enable them make *attitudinal and behavioural changes*, and become *law abiding, peaceful* and *productive* citizens.”¹¹¹ (Emphases added!)

Despite the positive normative framework, however, practices at federal prisons might have not justified the characterization of the system as educational. As will be outlined below, there have been rampant violations of rights of prisoners in federal prisons, the educational and rehabilitation functions of the administration have not been as successful as desired and so on

4.1.3 Background to Prison Reform

Prison reforms are not new. Even in Ethiopian context, there have been initiatives of reform, ranging from shifting objectives of imprisonment from punishment to rehabilitation and correction to ordinary institutional and operational matters, including changes the names of prisons. Globally, prison reforms have been undertaken in many states for the last half a century or more. There are also international, UNs and regional, initiatives of prison reforms that try to standardize prison rules and institutions relating to punishment, security of prisons,

¹⁰⁷ The Criminal Code of the Federal Democratic Republic of Ethiopia 2004, Article 1

¹⁰⁸ Ibid, Article 87

¹⁰⁹ Ibid, Article 107

¹¹⁰ Ibid, Articles 111 and 112

¹¹¹ Federal Prisons Commission Establishment Proclamation of 2003, Article 5

correction and rehabilitation of prisoners, and protection of the rights of prisoners. While reform initiatives have taken various aspects of prisons, the principal global concerns in prison reforms have been treatment of prisoners. Looking at the UNs and African prison reform initiatives, for example, one could notice serious concerns regarding treatment of prisoners, necessitating reforms. As one could see from the extensive prison reform works of the United Nations Office on Drug and Crime (UNODC) including development of tools of reform, human rights of prisoners have been at the forefront of prison reforms.¹¹² In terms of standards in particular, the UN rules, guidelines, etc are often about the protection of prisoners. Rule 1 of the 2015 Standard Minimum Rules (SMRs), for example, reads:

“All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.”¹¹³

The Kampala Declaration, which is among landmark documents in prison reform in Africa, also begins with the recognition of the inhuman overcrowding of prisons in many African States, inadequate and poor food, lack of hygiene, difficulty of accessing medical care, lack of education, inability to keep family ties, and lack of physical activities.¹¹⁴

While human rights and the human treatment of prisoners have been driving international and national initiatives of prison reforms, there are other aspects of prisons that should be part of reform processes as well, at least supplementing and reinforcing the human rights driven reform process of prisons. In this connection, there are four aspects of prisons that should be taken into account in a comprehensive prison reform: punishment, security, prison administration, and treatment of prisoners.

The first relates to the **punishment** aspect of prisons. As briefly mentioned above, prisons are places where court sentencing judgments and orders are executed. They are places where

¹¹² See the website of UNODC for tools and other services regarding prison reform: <https://www.unodc.org/unodc/en/justice-and-prison-reform/cpcj-prison-reform.html>

¹¹³ SMRs, 2015

¹¹⁴ The Kampala Declaration

personal liberty is deprived and prisoners are incarcerated. The public, prosecution offices, courts, and other stakeholders have interest in the execution of these judgments.¹¹⁵ This aspect of prisons should not be neglected in prison reform. The second, a related one to the first, is the **security** aspect that aims to ensure that prisoners shall not escape, shall stay in prisons, and shall stay in peace among prisoners themselves. Security measures are important to this effect and the design and operation of prison buildings and premises (e.g. watch towers, security of locks and adequate guards), the employment and operation of prison staff, etc might need to take into account this interest of security. The third component is the **prison administration** itself, which relates to prisons' capacity (disbursement of crowd, search, guarding, facilities, etc), efficiency (structures and divisions), protection of the rights of prison personnel, and so on. The fourth aspect is the **human rights** aspect of prisoners, which is often the most neglected aspect, hence often advocated in prison reforms. This is the aspect that tries to make prisons places where rehabilitation takes place, by respecting the dignity and rights of prisoners.

Hence any meaningful prison reform should take all these into account, which are important in themselves as well as reinforcing one another.

4.1.4 Prison Population

According to World Prison Brief, the total number of prisoners held worldwide ("people held in penal institutions as pre-trial detainees/remand prisoners or having been convicted and sentenced") is more than 10.74 million.¹¹⁶ The United States ranks first with its 2.1 million, while China follows with 1.65 million. The US again ranks first with its highest prison population rate, namely 655 per 100,000, while El Salvador follows with 604. The world prison population rate is around 145 per 100,000. The data for Ethiopia for 2013-2014 was that there were 113,727 prisoners when the estimated population was 90 million, amounting to 127 prisoners per 100,000 people. As of 2018, Africa had 1.2 million prison population; the rate being 97 per 100,000 (compared to Americas of 376, Asia's 97, Europe's 187. and world 145). Regarding change in prison population, the number has increased in some and decreased in others in terms of percentages.¹¹⁷

¹¹⁵Roadmap for the Development of Prison-based Rehabilitation Programmes, Criminal Justice Handbook Series, 2017

¹¹⁶ WPB, World Prison Population List, 12th Ed., 2018, available at https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf

¹¹⁷Ibid

The data for pre-trial imprisonment indicates, in a majority of countries (63%), the proportion of prison population who are in pre-trial/remand imprisonment is between 10% and 40%.¹¹⁸ However, pre-trial/ remand prisoners constitute more than 40% of the prison population in about half of the countries of Africa and of Southern Asia.¹¹⁹ Based on the statistics available in 2014, around 36% of prisoners in Ethiopia were pre-trial prisoners.¹²⁰ According to sources, currently this figure has not significantly improved, pre-trial prisoners are said to constitute one-third of prison population.¹²¹

There are figures also relating to female prisoners. Female prison population are between 2-9% of the prison population in the world, around 3.4% in Africa and around 4% in Ethiopia.¹²²

4.2 International and Regional Standards and Reforms

4.2.1 International Standards

As noted in the previous section, the background to prison reform is often the need for humane treatment and protection of human rights and personal security of prisoners. This is particularly so of efforts at the United Nations, which often emphasizes on rehabilitation and the application of human rights principles and standards for rehabilitation of prisoners. This is not to say that international initiatives are not interested in punishment and security. Indeed the reforms often take into account the punishing nature of prisons and the need for security and order. Rather these punishment and security components of prison reforms are often seized and prioritized by governments and prison administrators, who often tend to overdo.

Coming to the international standards, there are two categories of UN legal norms on protection of prisoners: the first category relates to international human rights agreements ratified by states and another category is of standards, rules and principles adopted by consensus by the UNs. Bordering both, there is the Universal Declaration of Human Rights (UDHR), enshrining,

¹¹⁸Ibid

¹¹⁹Ibid

¹²⁰Ibid

¹²¹ Information supplied during consultation with stakeholders.

¹²²WPB, World Female Imprisonment List, 4th ed.,2017 available at https://www.prisonstudies.org/sites/default/files/resources/downloads/world_female_prison_4th_edn_v4_web.pdf

- ‘All human beings are born free and equal in dignity and rights.,’ irrespective of their status in the criminal justice system;
- ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,’ again irrespective of any one’s criminal conviction or anything; and
- ‘No one shall be subjected to arbitrary arrest, detention or exile.’

From the international human rights agreements, the International Covenant on Economic, Social and Cultural Rights (ICESCR) incorporates:

‘The right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions,’ despite prisoners’ confinement and loss of personal liberty;

The International Covenant on Civil and Political Rights (ICCPR), one of the important human rights instruments granting protection to prisoners directly, provides:

- ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’¹²³
- ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.’¹²⁴
- ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. ... Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; ... Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. ... The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.’¹²⁵

¹²³ Article 6 of ICCPR

¹²⁴ Article 7 of ICCPR

¹²⁵ Article 10, ICCPR

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) criminalizes torture, which means:

‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’

In addition to criminalization and other measures to prevent torture, CAT requires states to:

‘keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.’¹²⁶

Optional Protocol to CAT (OPCAT), to which Ethiopia has not yet acceded to, establishes ‘a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.’¹²⁷

In the second category, apart from the above and other international human rights agreements, there are a number of normative instruments providing for standards, rules and principles that would help in prison administration and reform. These standards and principles relate to treatment of prisoners including special categories of prisoners and non-custodial measures. Some of these instruments are the following:

- United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 2015; and Procedures for the effective implementation of the Standard Minimum Rules for the Treatment of Prisoners. 1984

¹²⁶ Article 11, CAT

¹²⁷ Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

- United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), 2010;
- Basic Principles for the Treatment of Prisoners, 1990;
- United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), 1990;
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988;
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), 1985;
- United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), 1990;
- Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment, 1982;
- Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1975;
- United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2012;
- Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2000;
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990;

These are among the most important sources for standards and rules in prison reform. Hence, the Ethiopian prison system could take a lot of lessons from these sources in its reform undertaking. For example, the rules embodied in SMRs, as long as contextualized to Ethiopia's context, are very useful. In this connection, an outline of the SMRs might be useful here. Among the ideals and standards incorporated in the SMRs, which the federal prison should aspire to incorporate and practice in prison administration, include:

- Dignity and value in human beings;
- Non-discrimination;
- Imprisonment as afflictive by itself and aggravation as often unnecessary;

- Purpose of prison as principally protecting society and preventing recidivism (hence reintegration, education, vocational training, work, sports, etc are important);
- Minimization of difference between prison life and life at liberty;
- Prisoner file management (adequate information, including complaints, injuries, disciplines, etc during custody);
- Separation of prisoners;
- Accommodation; hygiene; clothing and bedding; exercise and sport; health care services;
- Restrictions, discipline and sanctions;
- Contact with outside world;
- Selection of personnel (integrity, humanity, professional capacity, personal suitability; sufficiency of specialists such as psychiatrists, social workers, and teachers;
- Internal and external inspections;
- Rules applicable to special categories of prisoners;
- Preparations for prisoner's return to society; pre-release regime, release on trial, social rehabilitation, community engagement, social workers, individualization of treatments, flexible system of classifying prisoners, varied degree of security, open prisons, avoid large number of prisoners in closed prisons, government and private agencies providing the aftercare).

4.2.2 African Prison Reform

Like at the United Nations, there have been a number of instruments and proposal for prison reform in Africa. Among the concerns raised in Africa, include: poor nutrition and hygiene, escalating deaths in congested cells, human rights abuses and a scarcity of recreational and rehabilitative facilities. In addition to global recommendations of prison reform, suggestions from Africa include becoming self-reliant by prison administrations based on inmates' potential as well as rehabilitation and reintegration. Among landmark events in Africa has been the first Pan-African Seminar on Conditions of Detention in 1997 that took place in Kampala resulting in the Kampala Declaration.¹²⁸ The 2003 Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa was also adopted with recommendations to effect reduction of prison population, self-sufficiency in African prisons,

¹²⁸ Kampala Declaration on Prison Conditions in Africa, 1997

promotion of reintegration of offenders into society, rule of law to prison administration, encouraging best practices, and promoting the African Charter (on Human and Peoples' Rights).¹²⁹ The Robben Island Guidelines by the African Commission on Human and Peoples' Rights (ACHPR) are also important in prison reform in Africa with their elaborate guidance clauses, among others, regarding criminalization of torture, regulations for treatment of all persons deprived of their liberty, prohibition of unauthorized places of detention, standards helpful to prevent torture, conditions of detention; mechanisms of oversight, and CSOs empowerment.¹³⁰

Owing to the importance of prison reforms to Africa, the ACHPR has also established in 1996 the position of the Special Rapporteur on Prisons and Conditions of Detention in Africa, as a prison monitoring mechanism. The SR has been undertaking since then country visits and other activities regarding prison conditions in African States. Ethiopia is one of the States visited by the Special Rapporteur, who observed in her visit in 2004 that there was prison overcrowding, while there were also good practices observed by the SR at the time.¹³¹

In addition to these prison-focused declarations and standards, human rights instruments in Africa have also incorporated protective clauses that are equally applicable to prisoners. The African Charter on Human and Peoples' Rights, for example, provides 'human beings are inviolable' and 'every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'¹³²

4.3 Areas for Prison Reform

From international as well as comparative experience, areas of prison reform are widely known. In their reforms, prison systems might address issues of overcrowding, pre-trial detention, rule of law in prisons, demilitarization of prisons, prison personnel, treatment of prisoners, monitoring of prisons, women prisons, juvenile prisoners, and alternative

¹²⁹ This is the result of 'Pan-African Conference on Prison and Penal Reform'

¹³⁰ Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, October 2002

¹³¹ Report of the Mission of the Special Rapporteur on Prisons and Conditions of Detention in Africa to the Federal Democratic Republic of Ethiopia, 15 – 29 March, 2004

¹³² Articles 4 & 5 of the ACHPR

sentencing.¹³³ The current Ethiopia's prison reforms could learn from comparative experience as to which areas need action. While contextualization of standards and institutions to the country's national and local contexts is important (taking into account factors such as resources), a number of areas of reform could be identified. In the following paragraphs, the possible areas of reform are noted.

4.3.1 Access to Justice and Pre-Trial Detention

As outlined under prison population, around 35% of prisoners in Ethiopia are unconvicted.¹³⁴ Pre-trial prisoners require the enjoyment of access to lawyers and the outside world, the right to be brought before courts, presumption of innocence, speedy trial, being separated from convicted prisoners, treatment be fitting the presumption of innocence, their own food and clothing, and release on bail. For pre-trial prisoners, what are often recommended are non-custodial measures avoiding pre-trial detention and lowering the amount of bail.

4.3.2 Alternatives to Imprisonment

Although such reform measures are not limited to prison administration and as a matter of fact they require extensive reform of the whole criminal justice system, finding alternatives to imprisonment is one important area of reform. At the UNs, for example, there is normative instrument dealing with the promotion of non-custodial measures, providing for safeguards of those people subjected to non-custodial measures, i.e. the 1990 United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), covering from pre-trial to post-sentencing stages of the criminal justice administration.¹³⁵ This partly promotes 'de-penalization' and 'decriminalization'. There are a number of alternative measures to choose from at the sentencing stage as well as post sentencing. Some of the suggested measures include verbal sanctions, conditional release, economic sanctions, suspended sentence, community service, work or education release, parole, and pardon.¹³⁶

¹³³ See for example Guidance Note on Prison Reform, available at

https://www.prisonstudies.org/research-publications?shs_term_node_tid_depth=29, International Centre for Prison Studies

¹³⁴ This may not be up to date.

¹³⁵ United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) (General Assembly resolution 45/110, annex, of 14 December 1990)

¹³⁶ Ibid

4.3.3 Rights of Prisoners and Conditions of Prison

These are among the most important areas of reform to provide for the right to adequate standard of living: food, water, accommodation, clothing and bedding; avoiding prison overcrowding and so on. Prison reforms often focus on these matters owing to lacklustre by prison authorities to protect the dignity and rights of prisoners, often leading to poor conditions in prisons.

4.3.4 Imprisonment of Vulnerable Groups

One important principle useful to prisoners that are vulnerable for various reasons such as female and young prisoners is non-discrimination among prisoners. Regarding **female** prisoners, special instruments are also designed. The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) require, for example, of the taking into account of distinctive needs of women prisoners, including gender-specific treatment, gender-specific health care, safety and security, and so on, supplementing SMRs. Regarding children and young people, avoidance of detention is a priority. If detained, the protection of human rights of children, protection of the best interest of the child, separation from adults and their reintegration to society are among the considerations in the treatment of child and young detainees.¹³⁷ There are separate instruments as well including the Beijing Rules, limiting criminal responsibility of children, emphasizing on well-being in juvenile justice, protecting the rights of juveniles and diversion, recommending specialization within the police, avoiding detention pending trial, requiring least possible use of institutionalization and so on.¹³⁸

4.3.5 Engagement of Civil Societies

Civil societies play a vital role within prison systems such as highlighting and exposing human rights abuses in prisons, providing legal aid services to prisoners, and monitoring conditions and treatments inside prisons. They could also provide services and programs that are essential for prisoners' rehabilitation and reintegration into society.

Prison Security and Administration

¹³⁷ SMRs

¹³⁸ See the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), 1985 and United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990

Other areas of reform are in the use of force and the proper administration of prisons. Deployment of force might be necessary in prisons for maintenance of peace and security, for good order and control, safe prisons, and physical safety. Reform initiatives in this area might target limiting the use of force and making it proportional if necessary, the review of disciplinary measures, the introduction of civilian administration, the recruitment of personnel with professionalism and integrity and humanity and with necessary education and intelligence and having specialists as necessary including medical personnel. Measures to improve working conditions and remuneration of prison personnel could also be part of these reforms.

Contact with the Outside World

Prisoners' rights to contact the outside world including families, relatives, religious people, etc are also potential areas for action in prison reform. The protection and promotion of this right to contact the outside world often plays an essential role in rehabilitation and reintegration of prisoners.

Rehabilitation and Reintegration

There is consensus as to the importance of rehabilitation and social reintegration programs in prisons. This requires provision of education, work and vocational training opportunities, and getting skills to prisoners. These help avoid recidivism. Preparation for release/reintegration into society at the earliest time of prison sentences, including for example home leave and temporary conditional release so that prisoners are familiar with the outside world, is also crucial.

Inspection & Monitoring

This is about making complaints and being heard and obtaining remedies, safeguards against breaches of human rights. The Optional Protocol to the Convention against Torture (OPCAT) and the UN's Standard Minimum Rules for the Treatment of Prisoners provide guidance on these matters. CSOs and media might also play crucial role in inspection and monitoring.

Introduction of Technology

The importance of technology in prison reform cannot be overstated. Keeping in mind its risks of endangering privacy and safety, technology is widely used for collection of electronic

information and strengthening security. It enables prisoners to have contact with the outside world and promotes their rehabilitation and reintegration. It also helps in educational programs of prisoners. Indeed concerns from the public that prisoners are receiving ‘preferential treatment’ in their access to technologies should also be kept in mind in the introduction of technology in the prison system.

4.4 Normative Framework and Gaps in the Federal Prison System

Challenges in connection with federal prison administration in Ethiopia could be roughly categorized into two: challenges related to normative and policy framework on one side and prison administration practices on the other. The normative challenges will be outlined here; the next part will deal with challenges in practice.

4.4.1 FDRE Constitution

There are a number of constitutional clauses relevant to the protection of prisoners in Ethiopia. Owing to their constitutional status, ordinary laws and practices need to comply with these standards. Among the relevant clauses include:

- *Article 18 Prohibition against Inhuman Treatment:*
 - o *“Everyone has the right to protection against cruel, inhuman or degrading treatment or punishment.”*
- *Article 19 Right of Persons Arrested:*
 - o *“All persons have an inalienable right to petition the court to order their physical release where the arresting police officer or the law enforcer fails to bring them before a court within the prescribed time and to provide reasons for their arrest;*
 - o *“Persons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person;*
 - o *“During proceedings accused persons have the right to be presumed innocent until proved guilty according to law and not to be compelled to testify against themselves;*
 - o *“Accused persons have the right to be represented by legal counsel of their choice, and, if they do not have sufficient means to pay for it and miscarriage*

of justice would result, to be provided with legal representation at state expense;”

- *Article 21 on The Rights of Persons Held in Custody and Convicted Prisoners:*
 - o *“All persons held in custody and persons imprisoned upon conviction and sentencing have the right to treatments respecting their human dignity.*
 - o *“All persons shall have the opportunity to communicate with, and to be visited by, their spouses or partners, close relatives, friends, religious councillors, medical doctors and their legal counsel;*
- *Article 36: Rights of Children:*
 - o *“Juvenile offenders admitted to corrective or rehabilitative institutions, and juveniles who become wards of the State or who are placed in public or private orphanages, shall be kept separately from adults.”*

4.4.2 Statutory Instruments and Gaps

The Proclamation that has been used for close to 2 decades and recently repealed regarding the protection and rehabilitation of prisoners is the Federal Prisons Commission Establishment Proclamation No. 365/2003. Apart from standard clauses, the Proclamation had three parts: one dealing with the establishment of the Commission with its objectives to “admit and ward prisoners, and provide them with reformatory and rehabilitative service in order to enable them make attitudinal and behavioural changes, and become law-abiding, peaceful and productive citizens. “This part also contains clauses relating to structure of the Commission and powers and duties of the Commission. Originally accountable to the Ministry of Federal Affairs, the Prison Commission’s accountability later changed to the Federal Attorney General.¹³⁹ There is another part dealing with prison wardens, currently named prison police, dealing with their recruitment, terms of service, and their rights and duties. The other part deals with the treatment of prisoners and their discipline in general terms. The details on the treatment of prisoners were given in Regulations and Directives. For treatment of prisoners, the Treatment of Federal Prisoners Council of Ministers Regulations No. 138/ 2007 had translated the general clauses of the Proclamation by providing protective treatment for prisoners including non-discrimination, respecting dignity of prisoners, and education and rehabilitation as objectives in administration of punishment. It also regulated

¹³⁹Federal Prisons Commission Establishment (Amendment) Proclamation No. 945/2016)

many areas of prisoners life, including separate accommodation, medical services, clothing, bedding, sanitation, food, education and training, physical exercises and recreation, counselling services, and so on.¹⁴⁰

The other detailed Regulations were of the Federal Prison Wardens Administration Council of Ministers Regulations No. 137/2007 (now prison wardens are called prison police by the new Proclamation), dealing with recruitment of wardens, including on matters of recruitment criteria of having no criminal record and having good conduct. The Regulations had clauses relating to trainings aimed at creating professional wardens, administration of an oath committing to respect rights and dignity of prisoners, working conditions of prison wardens, salary and other benefits, duties and ethics of prison wardens, promotion, and other matters including termination of employment. There have been a number of Directives and the list of past Directives is given at the end in the bibliography.

While the legal regime including the Constitutional clauses has been commendable, there have been challenges in the normative aspects of the federal prison regime. Some of them have been the following:

- 1) The laws not adequately being driven by **treatment and rehabilitation** of prisoners: for example the repealed Proclamation principally focussed on the Commission as while prisoners' treatment is no less or even more important than the Commission's structure and personnel (the name of the Proclamation tells the whole story: Federal Prisons Commission Establishment, creating the impression that it was all about the institution). While relegating the treatment of prisoners to Regulations, it also emphasized on training relating to security and punishment only, instead of rehabilitation and reintegration.
- 2) **The discretionary** nature of standards given in the primary laws, allowing prison administrators to deny or limit at their discretion the rights of prisoners. For example, statutory clauses allowing separation of prisoners where circumstances *warrant* (instead of a legal obligation to ensure separation of juvenile prisoners, prisoners upon remand, high crime/recidivist prisoners, and so on.¹⁴¹ Many of the laws were not also

¹⁴⁰ Treatment of Federal Prisoners Council of Ministers Regulations No. 138/ 2007

¹⁴¹ Article 5 of the Regulations on Treatment of Prisoners dealing with separation of prisoners

as such binding and legally enforceable such as the protection of personal hygiene and the lack of obligatory health screening.

- 3) **Generality and vagueness** of standards of treatment in the primary laws: for example the Regulations refer to bed and bedding (but not exactly clear what they mean), ‘balanced and sufficient diet’, and ‘medical treatment free of charge’. These deprived any minimum standards for conditions in prisons.
- 4) **Delegation** to the Administration to issue **Directives** on some areas of treatment of prisoners, when actually the primary laws should have regulated standards of treatment. For example, in connection with prisoners’ communication with spouses, close relatives and friends, medical officers, legal counsellors and religious fathers, prisoners are given the right but the modalities were left to Directives such as. Directives on custody, discipline, and so on. As a result, disciplinary rules have had the possibility of being harsher than those envisaged and justified by the primary laws and objectives of incarceration. Standards and rules in Directives that are likely to violate rights of prisoners and frustrate the reformative and rehabilitative functions of prisons were possibilities. For example, there was a principle that did not allow prisoners to work outside prisons, although there were exceptions.¹⁴² Many directives do not comply with standards, for example allowing attendance to family’s funeral based on the nature of the crime instead of severity of the offence, the absence of clauses on conjugal visits as permitted under the Constitution. Directives relating to Prisoners include in areas of probation and pardon, family visits, transfer, association, daily allowance/compensation, discipline, and admission and segregation, which need reassessment based on constitutional and international standards in the current reform process (in addition to their compliance with the new Prison Proclamation).
- 5) Total **absence in some cases of standards** depriving certainty and predictability of treatment of prisoners: One could take for example of the case of prison transfer, where a prisoner is allowed to seek transfer to localities where relatives reside but conditions are not specified and abuses are also likely. Regarding access to

¹⁴² Article 34(2)

information, the extent prisoners are allowed to receive printed and electronic materials is not regulated. Clear examples of lack of standards include absence of rules allowing regular and unexpected visits by third parties such as CSOs and national human rights institutions (NHRIs) such as the Ethiopian Human Rights Commission; absence of review procedure against decisions by prison authorities; absence of reintegration directives/rules; absence of a requirement to checking the legality of arrest and detention at the time of admission; lack of national system of monitoring; absence of laws regarding special needs of women prisoners; no sustained treatment in the law for addicted prisoners; absence of requirement for proper file management system having information beginning from admission; absence of independent review and complaint handling procedure (which is left to directives, for example the Directive indicating complaint could be presented by the prisoner alone, not allowing families and CSOs); the absence of requirement that education and training shall go with the ordinary education system of the state.

- 6) **Lack of awareness** of the laws, the legislative process, and related matters is also another challenge in connection with the prison legal regime in the past. Inaccessibility of laws for example in a consolidated form, particularly directives, which are not widely known; lack of consultation with stakeholders in the adoption of directives; lack of information regarding the rights of prisoners both on the side of prisoners as well as prison personnel.

The new Federal Prison Proclamation No.1174/2019 has now addressed some of the legal challenges, although their implementation and compliance have yet to be tested. The Proclamation is made rights-cantered (elaborate Part V dealing with ‘Treatment of Prisoners’), many of the standards for treatment of prisoners are now included in the Proclamation (avoiding any temptation to tamper with rights of prisoners through Regulations and Directives), it has introduced important principles such as autonomy and accountability; it has included prohibition of admission of prisoners without proper and lawful order; elaborated the obligation to keep modern record with specifics on the content of the record; correction and rehabilitation is given its own section, prohibiting some disciplinary activities such as flogging; it introduced juridical review, regular monitoring, and

it has elevated some areas of protection from Directives to Regulations.¹⁴³ The Objective of the Commission has also been clearly articulated reading:

*The objectives of the Commission shall be enforcing sentences and judicial orders, respecting the rights of prisoners under its care, fulfilling their needs and upholding their human dignity; offer psychological, academic and vocational trainings to prisoners so that they are ethically as well as attitudinally rehabilitated which will in turn help in ensuring that they are law abiding, peaceful and productive citizens.*¹⁴⁴

It should be noted that regarding normative frameworks, generally there is no shortage of standards. One could simply look at international and regional instruments listed above regarding treatment of prisoners. Legislative actions could range from humane treatment of prisoners to the introduction and expansion of non-custodial measures. The UNs Minimum Standard Rules (2015) are elaborate in providing guidance, with its Preliminary Observations and 122 Rules, regarding treatment of prisoners and prison management, which would go to great length, if properly contextualized and applied, in enriching the normative framework of prison administration in Ethiopia. Fortunately some of the standards are incorporated in the new Prison Proclamation. But this is not to suggest that there is not a room for normative reform.

4.5 Challenges in Practice at Federal Prisons

When considering challenges in Ethiopia's prison administration, it should be admitted at the outset that if past prison laws were applied to their letter - from the Constitution to Directives – there would not have been so many violations of rights of prisoners, so much failure in rehabilitation, and so on as shown in the various prison monitoring and investigation reports. Prisons in practice have been places where human rights are the most violated, rule of law frequently disregarded, and where failure in the ordinary responsibility of rehabilitation and reintegration of prisoners is the norm. As a result, it should be reiterated, the current reform should place more emphasis on practical challenges. The legal reform agenda should also take into account challenges in practice, spreading in all aspects of prison administration.

¹⁴³ See for example the Proclamation's Articles 26, 27, 29, 30, and 32 & the following.

¹⁴⁴ Article 6, Prison Proclamation, 2019;

While the practical challenges are too many to present a complete list here, the following might be taken as illustrative of the numerous practical difficulties in prison administration.¹⁴⁵

1) **Direct violations of rules and regulations by prison authorities**

Most of the challenges in practice in prison administration relate to lack of observance of laws, including regulations and directives. The root causes for such violations might relate to the overall lack of respect to rule of law (for example, changing directives by a letter to suit authorities' purposes with no predictability), lack of accountability, lack of motivation, etc. From regular reports and studies, the following examples illustrate outright violations of the law relating to prison administration:

- a. Trial prisoners being treated as convicted prisoners in some cases (when actually they should be presumed innocent and treated accordingly);
- b. Admission of prisoners without legality of arrest and detention (while arrest and detention must be in compliance with the law);
- c. Violations of dignity and rights of prisoners (when actually the country's laws including the Constitution required respect for dignity and rights of prisoners);
- d. Physical violence against prisoners, beatings by order of authorities, torture, etc (while all these and similar activities are contrary to the Constitution and other laws);
- e. Detention in dark places;
- f. Uncompensated labour exploitation;
- g. Lack of translators where prisoners are unable to speak the language spoken in prison administration;
- h. Lack of proper handling of property of prisoners (such as properties of prisoners getting spoiled, getting lost, with no proper place to keep them, and so on);
- i. Denial and limiting contacts with families and visitors, visits being delayed and time taking, overcrowded and improper place for visits, no toiletry for visitors, discrimination in connection with visits, allowing entry for some goods and not for others, and denial even to give phone numbers;
- j. Retaliation against prisoners if they petition for their rights and remedies;

¹⁴⁵ Almost all these challenges are acknowledged in a recent comprehensive empirical study by the federal prison administration itself.

- k. Disciplinary measures against laws and directives; isolation for longer period than permitted; preventing seeing families as disciplinary measure; discipline/punishment without fault; discipline with vengeance; discipline with beatings, discipline without evidence, and so on;
- l. Delays in collection of release orders by courts, copies for appeals, etc;
- m. Shortage of facilities, including health facilities, shortage of water, medicine, food, and so on, which are associated with also lack of resources;
- n. Double punishment, for example denying parole, detention in the dark, and so on; harassment of prisoners, including reminding prisoners of their crimes and similar insinuations;
- o. Militaristic nature of trainings at prison administration at the cost of trainings for rehabilitation, counselling, etc;
- p. Discrimination among prisoners, corruption, etc in enforcement of justice such as in the execution of parole, probation, appeal, pardon, referrals for health reasons, and zonal distribution;
- q. Abuse of legal standards: such as abuse of rules dealing with disciplines towards prisoners for example prisoners obligations “to observe rules and directives to be issued on custody, discipline, sanitation, health care, social life and other issues”.
- r. Prisoners that are unable to pay fines being denied probation and pardon;
- s. Appeals are not answered quickly;
- t. Prisoners staying in prison beyond their sentences;
- u. Negative attitude towards prisoners;
- v. Deprivation of medical attention for various reasons;
- w. Rampant violations of rights by prisoners themselves against each other with no remedies;
- x. The situation is worse for vulnerable prisoners: women, children, etc (indeed there are efforts to accommodate vulnerable groups such as rehabilitation centre for children);

2) Problems with resources;

- a. Non-fulfilment of basic needs: shortage of food, small meal, not fulfilling the required nutrition, poor quality, no special budgets for pregnant women, not enough budget for children with imprisoned mothers, short of clothing, shelter

made of metal that is normally inhabitable; limited space/packed prison houses in which hundreds of prisoners are housed with no air and light, no proper bedding, lack of clean water, lack of water wells, no bathing, drinking water from water sewerages resulting in water-borne diseases, scarcity of water for example water being available once in a week or two, delay/denial of referral to clinics and hospitals, poor health facilities, weak disease prevention, delay to obtain medicines, lack of medical professionals, lack of medical examination, lack of prison hospitals, lack of treatment for mentally ill, non-existence of dental clinic, no medical laboratory, unhygienic living conditions, accumulated garbage, bed bugs, lack of clean water for those who could not afford to buy bottled ones, no nutrition; toilets in living rooms and so on;

- b. Prisoners being unable to obtain necessary basic and vocational training for lack of training facilities, qualified educators, etc.;
- c. Lack of physical exercises and recreation;
- d. Lack of preparation for release;
- e. Lack of counselling and rehabilitation programs; and
- f. Prison overcrowding;

3) Prison personnel, prison wardens, etc:

- a. Lack of competence/capacity of prison wardens, prison police, and so on:
 - i. Lack of education on treatment of prisoners;
 - ii. Lack of skills on rehabilitation of prisoners;
 - iii. Prison staff with bad behaviour, lack of good faith and poor attitudes towards prisoners (leading to beatings and cursing and so on);
 - iv. Lack of correctional personnel, instead relying on prison wardens or prison police;
- b. Lack of integrity and proper conduct by prison personnel in some cases despite the requirement of good conduct of prison wardens in the laws, for example;
- c. Lack of awareness of regulations and directives;
- d. Reluctance to observe rights and dignity of prisoners and make others do the same including prisoners themselves;
- e. Lack of accountability, for example, lack of disciplinary actions against prison wardens as required under regulations for violations of human rights of prisoners;

- f. Lack of chain of command among prison personnel and officers, not respecting each other; smuggling crime materials into prisons by prison personnel; not displaying exemplary behaviour; and poor working environment;

4) Lack of balancing between security and rehabilitation

- a. Prison authorities apparently prioritizing security instead of balancing security with the protection of human rights and dignity of prisoners;
- b. Few correctional and rehabilitation services; the following, for example, would demonstrate lack of efforts for rehabilitation and reintegration:
 - i. Lack of developed and quality educational, training, and reintegration programs and schemes that could prevent recidivism, enable prisoners support themselves after release, facilitate social reintegration and re-entry;
 - ii. Inadequacy in terms of type, size, availability, and quality of education; lack of enough workshop for training, irrelevant trainings(for example trainings that do not take into account the society where the prisoner reinters); lack of alternative training (i.e. providing just one vocational training and prohibiting other skills); not enough compensation for works done;
 - iii. Poor capacity of staff doing rehabilitation and reintegration;
 - iv. Lack of resources for rehabilitation and lack of recreational places;
 - v. Lack of implementation of rehabilitation manuals;
 - vi. Non-existent or ineffective counseling programs and social services;
 - vii. Negative attitudes towards prisoners;
 - viii. Lack of job opportunity, lack of networking, some prisoners with little skills during their stay in prisons;
- c. Root causes for lack of rehabilitation and reintegration might include: lack of inputs and resources; lack of standards and rules; loss of interest by prisoners; lack of integration among departments in prison administration reinforcing one another; ineffective dialogue and counselling; failure to implement rehabilitation manuals; and lack of awareness;

- d. As a result of this lack of balancing of security and rehabilitation, recidivism is becoming common and prisoners being unable to support themselves once they are released, giving them motive to commit further crimes and be re-incarcerated;

5) Lack of proper segregation and distinction

- a. Lack of separation or proper separation of casual prisoners from habitual offenders; under-trial prisoner from convicted prisoners, and so on;
- b. Not separating prisoners based on type of crime, recidivism, physical disability, etc;
- c. Confinement with recidivists, with those having committed grave crimes, imprisonment with mentally ill (resulting in some cases of a prison life with fear, for example), with prisoners taking drugs, with no law-abiding prisoners, with prisoners who wish to create havoc in prison, and with prisoners carrying around attack tools; This lack of separation is aggravated by the silence of prison guards when attacks occur by fellow prisoners;

6) Problems with prisoners themselves

- a. Lawlessness of some prisoners;
- b. Challenges with some attitudes and behaviors of prisoners (such as addicted prisoners and prisoners with no hope of reform);
- c. Prisoners using tricks to be released before completion of their sentences like insanity (creating chaos at prisons if they are not successful); bringing fictitious civil, health or other claims to get prisoners out for medical attention or civil suits;
- d. Rampant violations of rights by fellow prisoners with no remedy;

7) Lack of proper prisoner file management

- a. Lack of registration of particulars about prisoners' including their health, their properties, their complaints; lack of computers for documentation;
- b. Long period of imprisonment without trial, which should be solved if there is systematic documentation at the time of admission and follow-up;

8) Lack of awareness

- a. Lack of program of orientation to prisoners, in simplified and systematic manner;

- b. Lack of awareness by prisoners of their rights and obligations;
- c. Lack of awareness of complaints procedures;

9) Procurement, finance and property administration:

- a. Procurement, finance and property administration challenges that are common in public institutions are also challenges at the prison administration;

10) Others

- a. Lack of or inadequate integrated activities with courts, police, CSOs, and other stakeholders;
- b. Lack of adequate alternatives to imprisonment that would satisfy the objectives of punishment, particularly of rehabilitation of prisoners;
- c. Lack of consistency in execution of parole and pardon;
- d. Reluctance to petition by prisoners owing to retaliatory measures by prison personnel (i.e. vindictiveness of some prison officials, for example a petition by a prisoner resulting in denial of parole, delays in files, and so on);

4.6 Way Forward and Recommendations

As outlined in previous sections, there are four sides of prisons which any prison reform should take into account: punishment, prison security, prison administration, and, most important, prisoners. For any prison reform to be successful, actions are required in all these aspects. This is so principally because they reinforce one another. It should be noted that prison administrators/authorities are often interested in prison security and punishment, often neglecting the rehabilitation side of prison administration. But that is a wrong understanding and they should embrace rehabilitation as their principal concern. As explained above, there is no shortage of standards for the protection of prisoners. Adoption of the SMRs as required might be, for example, an important step as long as contextualized. The reform could also rely extensively on comparative experience, by adopting, contextualizing, etc. Indeed the prison reform need not conform to all international standards and institutions. Departures are necessary and are allowed even from in international instruments such as the SMRs.

But it should be noted that the urgency in prison reform (like in other areas of institutional reform being undertaken currently) is improving the **practice**. This means that the reform should principally focus on the practical challenges identified here and elsewhere in connection with the treatment of prisoners, the protection of their rights, and so on.

It should also be clear that the protection of the rights of prisoners, their dignity and so on has been the most lacking in the federal prison system in the past. As a result, most of the efforts in prison reform should be geared towards such objectives; hence, the conditions of prisoners should be improved; the dignity of human rights of prisoners should be respected; basic needs and personal security of prisoners need to be protected; segregation and distinction of prisoners need to be properly implemented; unconvicted prisoners should be treated accordingly; special categories of people deserve special consideration and treatment; pregnant and new mothers, prisoners with disability, children with prisoner-mothers, youth offenders, and generally those requiring special care need to be protected and provided the treatment they deserve. Most of all prisons should be made places of reform and rehabilitation. To accomplish these, there should be a roadmap for rehabilitation, in ensuring basic education and vocational trainings. As studies indicate, academic and vocational trainings that are useful post-prison are crucial for rehabilitation of prisoners, in order to enable prisoners to support themselves and obtain gainful employment, post imprisonment.¹⁴⁶ Accredited educational programs and programs equivalent to outside programs are crucial.

Indeed as often alluded, this is not to suggest that a prison system should be the best place to be (compared to ordinary life of the average citizen, for example). The less eligibility principle, i.e. giving decent life to prisoners when those that have never committed any crime suffer harsh world reality in some cases, might discourage prison administrators and the government from such initiatives.¹⁴⁷

As pointed out above (and as identified in the WG's other baseline reports), prison reform initiatives should be aligned and done together with reforms of the criminal justice system as a whole. This is so because some of the challenges in prison administration directly relate to the overall criminal justice system. Hence some of the challenges might be alleviated by reforms in other criminal justice institutions. Long period of imprisonment without trial, for example, is contributed more by the functioning of courts, police and prosecutors than by prison administration. Measures in this regard will be important steps in resolving some of

¹⁴⁶ Andrew J. Dick , William Rich, and Tony Waters, Prison Vocational Education and Policy in the United States: A Critical Perspective on Evidence-Based Reform, 2016

¹⁴⁷ A Fresh Look at Understanding and Reforming the Prison, Fourth Edition, 2017

the challenges in prison overcrowding. In this regard coordination among institutions of criminal justice and integrated work is crucial. CSOs, IGOs, and others need to be also part of the integrated work of prisons, particularly since these actors are able to help in capacity building of prisons and in rehabilitation and reintegration of prisoners. Moreover, this integrated work and networking would help avoid duplication of efforts in the reform process. Studies, ideas, plans, events, operations, etc exist by various stakeholders and there should be systematic ways of sharing them among all engaged.

Building the culture of rule of law at prisons is very important, particularly by prison officials and personnel. Prison administrators need to respect the law no matter what. There should not be any instances of discrimination among prisoners such in granting rights of prisoners. There should be justice served to all prisoners in all aspects including probation, amnesty, pardon, transfer, appeal, and equality.

Prison reform is not merely about rights of prisoners and their conditions of treatment, as often mistakenly thought. Even assuming the principal interest is the protection of prisoners, there are the other aspects of prison that contribute and reinforce measures of rehabilitation and reintegration of prisoners. In this connection, correctional personnel are crucial in the reform and rehabilitation of prisoners and measures are necessary to build their capacity, respect their rights, and so on. It might not be wise to expect prison personnel to respect prisoners' rights while theirs are violated. In addition to ensuring their accountability, which is crucial indeed, respecting the rights of prison personnel, such as equality, dignity, human rights, adequate earning, etc is important. In this connection, the curricula for prison staff need to be thoroughly considered. The prison training centres for prison personnel, such as the Alleltu Training Centre, should be geared towards equipping prison personnel with skills and attitudes necessary to protection of the security of prisoners and ensuring rehabilitation of the same.

As noted elsewhere in this report and as recommended in various occasions, the prison system should introduce an elaborate scheme for social **reintegration**/re-entry, including advance preparation for release.

Raising **awareness of prison laws**, ensuring accessibility of directives issued by the Prison Administration, and allowing stakeholders (including prisoners') participation in the adoption

of directives and regulations as envisaged in the new Administrative Procedure Proclamation would be helpful in the reform process.

The reform should also address challenges occurring everywhere in connection with public administration and **bureaucracy** such as issues of meritocracy, transparency, participation, efficiency, productivity, accountability and so on.

Prison File Management System should also be among the primary focus of the reform. Well-developed information system, which might benefit from comparative and international experience, that would document and analyse all pieces of information from admission to release would be extremely useful in the reform.

Resources are crucial in executing many of the reform activities such as institutionalizing rehabilitation and reintegration by introducing elaborate schemes of basic and vocational education and in fulfilling basic needs of prisoners and protection of human rights and their dignity. Resources are not just for prisoners but should also be considered as resources spent to society, which has interest in a successful reintegration of prisoners to society and in avoidance of recidivism. Apart from governmental budgets (such as parliamentary allocation) and CSOs and others contributions, as suggested in African prison reform initiatives, self-sufficiency of prisons, using resources they generate internally with oversight and accountability, should be encouraged.

Indeed overcrowding has been one of the challenges in the federal prison administration. In this connection, the improvement in prison space and structures and buildings with design options together with resources might be useful. However, this challenge might not be fully addressed by measures in connection with prison administration alone. Non-custodial measures such as alternatives to imprisonment and probationary measures envisaged in the Criminal Code might be regularly deployed by courts and other authorized organs. Again recent initiatives to increase punishment for some crimes might be closely scrutinized instead of an outright application of the common sense of increasing punishment as deterring crimes.

The prison system at this time of the reform as well as in the future should rely on science and evidence. In other words, measures being taken in all aspects of prison administration should be **evidence-based**. For that the prison system should design ways to regularly accumulate evidence and information and develop tools for regular monitoring helpful for

policy making. In this connection, for example, regular gathering and publication of statistics on the number of prison population, the rate of recidivism, the causes of recidivism, and so on are useful. The costs of imprisonment should also be assessed on regular basis. Education programs at prisons should be regularly evaluated to monitor their objectives of ensuring rehabilitation and reintegration. These could be undertaken by the prison administration as well as other stakeholders who are interested and able to enhance the system. In this connection, it is wise to institutionalize the internal monitoring system using assessment tools developed.

4.7 Few Statements on the Current State of the Federal Prison Reform

While this baseline study is being carried out, there have been reports that the federal prison administration has substantially improved from its notorious past. The treatment of prisoners has remarkably has changed for the better. This is evidenced by the various reports coming out, including investigative and monitoring reports recently undertaken by the Ethiopian Human Rights Commission. In the occasion of the celebration of the Human Rights Day (10th of December 2020), one of the federal prisons was even awarded a prize for best performance in connection with the protection of the dignity and rights of prisoners.¹⁴⁸ This is a remarkable progress. From the conversations the WG has had with prison officials, during the drafting process of the new Prison Proclamation as well as during consultations in the development of this baseline report, the commitment of the current prison officials for progress and protection of the dignity of prisoners has been exemplary. This commitment has certainly contributed for the better protection of human rights of prisoners in federal prisons.

This commitment has also contributed in the drafting of the Prison Proclamation, making the law human-rights-driven. There was almost no objection from prison officials in the incorporation of the rights of prisoners in the new Proclamation. The result is the new Proclamation, which, as pointed out above, enacted and gave meaning to the constitutional rights of prisoners, both convicted and those awaiting trial. As the preamble of the Proclamation states, reintegration of prisoners to society and respect for the dignity of prisoners are given their proper place in the new Proclamation.¹⁴⁹ The Principle in the Proclamation also declares:

¹⁴⁸ The event was a collaborative undertaking by five justice organs, namely federal courts, federal police, the federal attorney general, the federal prison and Addis Ababa city police.

¹⁴⁹ Federal Prison Proclamation No.1174/2019, Preamble

“Treatment of prisoners shall ensure prisoners are treated with human dignity they deserve, and that they are reformed to be law-abiding citizens with good conduct and become peaceful and productive members of the community they reintegrate into.”¹⁵⁰

The Prison Administration is also preparing Regulations necessary for the implementation of the Proclamation and other laws. Hopefully, the Regulations and further Directives to be issued will be participatory as required under current laws and will fully comply with the Proclamation, the FDRE Constitution and international standards.

Indeed, such kinds of positive moves to improve prison conditions, although remarkable, are not new in Ethiopia. Neither there is evidence that reforms in Ethiopia are always linear from bad to good. Again comparative experience would also show that in some cases situations in prison might regress, for example a prison system moving from rehabilitation-centered to punitive. In California (USA) for example, studies indicate that there was rehabilitation at one point, then regressing to punishment model, through increase in incarceration for drugs, life imprisonments, etc and so on and then later on when recidivism is high, back to rehabilitation as well, including name changes for example from Correctional to Correctional and Rehabilitation.¹⁵¹ In Ethiopia as well in addition to avoidance of such possibilities, there should be a system where rehabilitation is entrenched and could not be easily swayed owing to changes in prison authorities.

¹⁵⁰Federal Prison Proclamation No.1174/2019, Article 3(1)

¹⁵¹ Andrew J. Dick , William Rich, and Tony Waters, Prison Vocational Education and Policy in the United States: A Critical Perspective on Evidence-Based Reform, 2016

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7. 1997: Kampala Declaration on Prison Conditions in Africa (Economic and Social Council resolution 1997/36, annex, of 21 July 1997)
8. 1999: Arusha Declaration on Good Prison Practice (Economic and Social Council resolution 1999/27, annex, of 28 July 1999) .
9. 1990: United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) (General Assembly resolution 45/110, annex, of 14 December 1990)
10. 1998: Kadoma Declaration on Community Service and recommendations of the seminar entitled "Criminal justice: the challenge of prison overcrowding", held in San José from 3 to 7 February 1997 (Economic and Social Council resolution 1998/23, annexes I and II, of 28 July 1998)
11. 2002, Basic principles on the use of restorative justice programmes in criminal matters (Economic and Social Council resolution 2002/12, annex, of 24 July 2002)

12. 1975: Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly resolution 3452 (XXX), annex, of 9 December 1975)
13. 1982: Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment (General Assembly resolution 37/194, annex, of 18 December 1982)
14. 2000: Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly resolution 55/89, annex, of 4 December 2000)
15. 1990: United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) (General Assembly resolution 45/112, annex, of 14 December 1990) .
16. 1990: United Nations Rules for the Protection of Juveniles Deprived of their Liberty (General Assembly resolution 45/113, annex, of 14 December 1990)
17. 2012: Resolution adopted by the General Assembly on 20 December 2012, 67/187. United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems
18. 2014: The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines), 2014 (ACHPR)
19. Memeria 5/2009 EC. (Disciplinary Punishment Directive)
20. Memeria 5/2009 EC. (Admission, Categorization and Administration Directive)
21. Memeria 1/2009 EC. (Probation of Prisoners Directive)
22. Prisoners Health Referral Agreement, 2009 EC
23. Federal Prisons' Commission Establishment Proclamation No. 365/ 2003.
24. Treatment of Federal Prisoners Council of Ministers Regulations No. 138/ 2007
25. Federal Prison Wardens Administration Council of Ministers Regulations No. 137/2007

SECTION FIVE

Assessment of Ethiopian Judiciary

5.1 Introduction

The genesis of the formal judicial system in Ethiopia can be traced back to the 1940s when proclamations and orders were started to be issued with the purpose of governing the structural organization and jurisdiction of courts. The structure and organization of the judiciary during the Imperial and *Dergue* regimes mirrored the unitary form of the government.

The 1995 constitution opts for a dual court structure, in tune with the Federal arrangement of the polity. Federal and State courts of three tiers are established with their own jurisdictional space.

A judiciary organ, a third branch of the any government, assumes a unique position in the horizontal configurations of government in that it is entrusted by the society to police compliance of the other two branches with the higher norms enshrined in the higher laws, often the constitutions. Its role is vital in ensuring human rights and rule of law.

An assessment of a judiciary organ needs to be anchored on basic values identified as independence, impartiality, accountability and effectiveness. By the same token, this report tries to explore the status of the Ethiopian Judiciary in axis of each value.

In doing so, the report houses three sections. The first section tries to touch up on the conceptual analysis of these values. Identifying benchmarks or indicators to measure the entrenchment of these values of judiciary is the task assigned to section two. The third section brings the issue to home and assess the structural and practical functioning of the judiciary against the benchmarks identified by section three.

5.2 Basic Values of Judiciary

At the foundational base of a judiciary system upholding rule of law and ensuring human rights is the existence of an independent, impartial, competent, accountable and effective court or tribunal. Such are the building blocks of a judicial institution endowed with a commendable trust, respect and legitimacy from the public and furnished with all what it takes to render fair, impartial and effective justice.

Universal Declarations and Principles¹⁵², International and Regional Human Rights Instruments¹⁵³ and authoritative interpretations and recommendations by human right organs¹⁵⁴ underline the central role of these judicial values in democratic societies. All these declarations, principles, instruments and recommendations shed light on the nearly consensual conviction among the international community about intrinsic as well as instrumental significance to be attached to these values; though differ on the degree of the conviction, the nature and standards of implementing same.

Being part of the Human Rights Systems, these basic values of judiciary deserve recognition, respect and protection from all actors of the government and the public, including the judiciary itself. Secondly, these judicial values have an immense instrumental significance in helping the judiciary to meet its inherent objectives- ensuring human rights, guaranteeing rule of law, and dispensing justice in a just way. Another importance of these values lies in the fact that they provide a platform and benchmarks by virtue of which the performance, fairness and effectiveness of the judiciary can be assessed, evaluated and tested with the aim of exploring potential entry points for betterment and reform. Policy makers, court managers, decision makers, assessors and evaluators use these judicial values as standards and guidance to locate the status of the performance of the judiciary.

As a matter of fact a successful judicial reform program hinges much on the collection of accurate data about the level of independence, impartiality, accountability and effectiveness

¹⁵² Universal Declaration Of Human Rights (1948) (Art.10), The Basic Principles of the Independence of the Judiciary adopted by UN General Assembly(1985),The Bangalore Principles on Judicial Conducts endorsed by UN Social and Economic Counsel entitled as “ Strengthening the Basic Principles of Judicial Conduct(2006),the Universal Charter of judges approved by the International Association of Judges in 1999,The Beijing Principles of the Independence of THE Judiciary adopted by conference of chief justices of Asia and Pacific Region (1995) are some of the soft law basis of the judicial values of Independence, Impartiality, Accountability and Effectiveness

¹⁵³ The International Covenant on Civil and Political Rights (ICCPR) (Art.14), Convention on The Rights of Children (Art.37(D)),International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Art.18(1)),The First Protocol to the Geneva Convention (Art,75(4)),The African Charter on Human and peoples’ Rights (Art.7(1) and 26), The American Convention on Human Rights (Art.8(1)), The EUROPEAN Convention on Human Rights (Art.6) provide the hard law basis ,both at the international regional level, for the recognition of the a fair trial before an independent, impartial and competent court or Tribunal.

¹⁵⁴ The UN Human Right Committee, African Commission on Humans and Peoples Rights (*see Art. 1 of principles and guide lines on the Right to A Fair Trial and Legal Assistance in Africa adopted in2003*), *see* , The European Commission Of Human Rights on different occasions have ruled to the human rights status accorded to an “independent, Impartial and Competent Court.

of the concerned judiciary. Following is a brief account of the nature of the core judicial values, namely independence, Impartiality, Accountability and Effectiveness.

5.2.1 Independence of The Judiciary

A comprehensive explanation of the concept of judicial independence needs to address questions like independence from whom and what, whom and for what purpose?

The UN Basic principles on the Independence of the Judiciary¹⁵⁵ and the Bangalore Principles on Judicial Conduct¹⁵⁶ are useful in unpacking the concept of judicial independence, though a one-fit-for all kind of definition is not possible. The first Principle of the UN Basic Principles devotes seven paragraphs to articulate the nature and elements of judicial independence. This principle describes the elements of judicial independence by stating that the independence of the judiciary shall be granted by the state and enshrined in the constitution or the laws of the country, that the judiciary shall decide matters before them without any restrictions, improper influence, inducement, pressures, threats or interferences, direct or indirect, from any quarter or for any reason, that the judiciary has a jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide an issue submitted to its decisions within its competence as defined by law, that there shall not be any inappropriate and unwarranted interferences with the judicial process, nor shall judicial decisions by court be subjected to revision. The remaining 13 paragraphs of the UN Basic Principles illuminate the various ways by which judicial independence can be guaranteed or violated.¹⁵⁷

By the same token, the first principle of Bangalore Principles on Judicial Conducts elaborates the nature and meaning of judicial independence. It states that a judge shall exercise the judicial function independently on the basis of judges' assessment of the facts and in

¹⁵⁵ UN Basic principles on Independence of the Judiciary adopted by the 7th UN Congress on Prevention of Crimes and the Treatment of Offenders (Milan 26 August-6 September 1985). It was endorsed by The General Assembly Resolution 40/32 of 29 November 1985 and Resolution 40/146 of 13 December 1985.

¹⁵⁶ The Bangalore Principles on Judicial Conduct were emerged from series meetings of Chief and senior Justices from eight countries of Africa and Asia in 2002 under a thematic group named "Judicial Group on Strengthening Judicial Integrity". The second meeting of the Judicial Integrity Group was held in Bangalore – India, hence the name " Bangalore Principles of Judicial Conducts". Subjected to revision by chief Justices representing both the common and civil law traditions , it was endorsed by the UN Social and Economic Council on 27 July 2006 entitled as "Strengthening the Basic Principles of Judicial Conduct" by Resolution 2006/23.

¹⁵⁷ UN Basic Principles ,at n 4 ,paragraph8-20

accordance with any extraneous influences, inducements, pressure threats or interferences, direct or indirect, from any quarter or for any reason.¹⁵⁸ It further stipulates that a judge shall not only be free from inappropriate connection with, and influenced by, the executive and legislative branches of the government, but must also appear to a reasonable observer to be free there from.¹⁵⁹

The International Covenant on Civil and Political Rights, African Charter on Humans and Peoples' Rights, American Convention on Human Rights, European Convention on Human Rights, and Conventions on Children Rights are among the basic binding human rights instruments underscoring that every person has the right to be tried by an independent court.¹⁶⁰ Human Right Bodies in charge of supervising the implementation of these human right instruments recognizes that the right to an independent court is an absolute right that may suffer no exception¹⁶¹.

Unpacking the general explanation given by these declarations, principles and instruments, as to the nature and meaning of judicial independence, one can infer the following elements:

Legal Recognition of Separation of Powers

The Principle of Independent Judiciary derives from the basic principle of separation of power.¹⁶² According to this principle, the legislative, executive and judiciary constitute three separate and independent branches of government with their own exclusive and specific responsibilities.¹⁶³ The compartmentalization of power and responsibilities is not however, absolute. A check and balance mechanisms needs to be in place so that the judiciary is able to ensure that the legislations of legislative and the actions or decisions of executive are complying with the higher norms enshrined in the supreme laws, more often the constitutions of countries.

¹⁵⁸ Bangalore Principles, at n 5, Value 1.

¹⁵⁹ Ibid

¹⁶⁰ Ibid

¹⁶¹. See, for instance, UN Human Rights Committee, Miguel Gonzalez del Rio V. Peru Communication No.263/1987, UN.DOC.CCPR/C/40/D/263/1987, African Commission on Human and peoples' Right, Civil Liberation Organization V Nigeria, Communication No. 218/98, par.7

¹⁶² International Commission of Jurists (ICJ): International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors-A Practitioner Guide (2nd ed.),2007, p.18.

¹⁶³ Ibid

The separation of the three branches of the government and the recognition of the independence of the judiciary from influence of the other two shall be enshrined preferably in the constitution or other laws.

Non- Interference

All the aforementioned universal declarations principles and human right instruments call for insulating the judiciary from unwarranted interference, influence or pressures of any social, economic and political forces in its judicial functions. The encroachment to judicial independence may come not only from the other branches of the government but also from any quarter- individuals or groups, governmental or private organs, the public, the media or even from the judicial hierarchies in the judiciary itself. All kinds of undue influences or interferences coming from all these quarters should be outlawed is the norm championed by the international community.

Judicial Autonomy

This element of judicial independence is concerned with the self-administration, by the judiciary, of its internal affairs. The judiciary, as an institution, shall be placed beyond the unwarranted reach of the legislative and executive organs or any other external actors. It shall have sufficient organizational and operational independence to run its own administrative activities.

The power to recruit, select, appoint, promote, transfer, train, discipline and removal of judges or supporting staffs of the courts, the administration of case management and court scheduling, the power to allocate its resources (including participating in the preparations of annual budgets) and make decisions on financial matters(salaries and benefits of judges) are but some of the administrative and managerial activities which need to be beyond the competence of the executive or legislative organs.

The trend around the world is to entrust the task of recruiting, selection, appointment, transfer, discipline or removal of judges to an independent judicial councils or organ of similar nature, composed of members from different segments of the society with a majority of judges.¹⁶⁴ If the non judicial members of such council constitute the majority, it is a clear

¹⁶⁴ . International commission of Jurists, at n.11. p 44

trespass to the independence of judiciary. Equally true is the fact that a judiciary lacking the power to appoint, supervise and dismiss its supporting staffs cannot qualify the independence test.

Jurisdictional Monopoly

Another basic ingredient of judicial independence is the monopoly of power by the judiciary to decide disputes on all matters of a litigious nature. The judiciary shall have an exclusive competence to decide disputes of justiciable nature. This bans, particularly, the usurpation of jurisdictional power of courts and handing over such power to special tribunals. The legislative organs may enact laws establishing special tribunals with judicial or quasi-judicial power over matters of justiciable matters. Such practice of encroachment of jurisdictional power of ordinary courts is widely believed to be anathema of judicial independence. Thus, special tribunals having affinity with the executive organ shall either be avoided or equipped with the same safeguards of independents granted to ordinary courts.

A notable example of the existence of special tribunals is the case of military courts. The existence of military criminal tribunals poses a serious challenge on the right to a fair trial before an independent court. In many countries, so called “military-justice” is organizationally and operationally dependent on the executive organ and the actions of “military –justice” are all too often responsible for numerous injustices and human right violations.¹⁶⁵

The Human Right Committee, the body charged with monitoring the implementation of ICCPR, in its several observations and recommendations, condemns the practice of using military courts to try military personnel who have committed human rights violations and the criminal jurisdictions of military courts to try civilians as incompatible acts with the obligation assumed under Article 2(3) and 14 of ICCPR.¹⁶⁶ It recommends that the competence of military courts shall be limited to internal issues discipline and similar matters all members of the armed force committing human right violations shall be tried by an ordinary court.¹⁶⁷

¹⁶⁵ International Commission of Jurists : Military Jurisdiction and International Law- Military Courts Gross Human Right Violations ,Vol.1, p.3

¹⁶⁶ Id, pp 61-69

¹⁶⁷ Ibid

Another manifestation of jurisdictional monopoly is the judicial adjudication of constitutional issues or judicial review power. Judicial review can be defined as scrutiny, by the judicial branch of the government, of actions or decisions of the legislative or executive branch to police compliance with some super law or norm.¹⁶⁸ The judiciary, being the watcher of the other two branches of the government, is better positioned and equipped to evaluate the actions and decisions of latter is the underlying assumption here. A non judicial adjudication of constitutionality of laws of the legislative and the decision of the executive is now being viewed as an encroachment of the power of the judiciary. With the exception of few countries, including Ethiopia, the great majority of countries grant judicial review power ordinary courts or special constitutional courts.¹⁶⁹

Individual Independence

Judicial independence connotes both institutional and individual independence. Not only the judiciary as institution but also the individual judges need to be insulated from the influence or pressure of other social, economic and political forces in their judicial functions.

The judicial process is executed by the court of law represented by individual or group of judges. Hence, any remark of judicial independence without making reference to the protection accorded to individual judges does not do justice to for the topic. Judicial independence at the institutional level cannot be a guarantee for the existence of independent judges. In the absence of mechanisms installed to liberalize individual judges from external or internal influences, judicial independence is still at risk. Judicial independence is fully achieved only when individual judges develop a state of mind, practice and culture of acting independently free from any actual or perceived influence or fear.

Independence of individual judges can be guaranteed by a range of ways: implementing transparent, merit base and independent recruitment, appointment, promotion ,transfer, discipline and removal procedures, security of tenure, financial security, guarantee of fundamental freedoms , adequate training are among the common ones.¹⁷⁰

Objective and Subjective Independence

¹⁶⁸ Peter Cane , Understanding Judicial Review and its Impact In Mark Hertogh & Simon Halliday(ed.) “ Judicial Review and Bureaucratic Impact : International and Interdisciplinary perspective,2004,p.16

¹⁶⁹ Tom Ginsburg, Judicial Review in New Democracies, Constitutional Courts In Asian Cases,2003,p.7

¹⁷⁰ Bangalore Principles, at note 5, UN Basic Principles on Independence of Judiciary, at note 4

Judicial independence has also objective and subjective aspects. The idea is that the public at large, the court users and the judges themselves must have a perception that the judiciary, both at institutional and individual level, is acting independently of any unwarranted influence. This is very crucial in securing and maintaining public confidence in the judicial system. A judiciary failing to win public trust or confidence cannot be considered as independent, in the fullest understanding of the concept. Thus, a judiciary shall be independent in fact but also must be perceived as independent. Not only actual independence but also perception of independence matter most in the endeavour to achieve a fair, impartial and effective judicial system.

5.2.2 Impartiality of the Judiciary

Impartiality of the judiciary is another key value considered to be part of human rights system by international and regional human right instruments.¹⁷¹ The concepts of judicial independence and impartiality are very closely related, yet separate and distinct.¹⁷² The fact that the two are related concepts warrants the assertion that they are mutually reinforcing attributes of the judicial office in that independence of judiciary is the necessary precondition for attaining impartiality.

Independence of judiciary refers to the absence of undue influence, pressure or interference of any nature in the judicial process. On the contrary impartiality refers to the state of mind of a judge tribunals towards a case and parties to it.¹⁷³ It refers to the absence of bias animosity or sympathy towards either of the parties¹⁷⁴ or the outcome of the case.

The UN Human Right Committee, basing its recommendation on Article 14 of ICCPR states that impartiality of court implies that judges must not harbour preconceptions about the matter put before them, and they must not act in ways that promote the interests of one of the parties.¹⁷⁵

¹⁷¹ International Covenant on Civil and Political Rights, African Charter on Human and Peoples' Rights, American Convention on Human Rights, European Convention on Human Rights, see note 2.

¹⁷² UN Office on Drugs and Crime : Commentary on The Bangalore Principles of Judicial Conduct, 2007, p.43

¹⁷³ . International Commission of Jurists, n 11, P.21.

¹⁷⁴ Id, p.28

¹⁷⁵ Id, p.27

Partiality of judges may be of different forms. A judge may have personal, relational or political interest in the outcome of the case.¹⁷⁶ A judge may also have personal bias for or against the parties to the case.¹⁷⁷

Judicial partiality may be manifested in varieties of ways. Disregarding fair trial procedures, constant interference by the judges in the conduct of the trial, making remarks evidencing prejudgments, abuse of contempt power, ex-party communication, body language or appearance sowing bias for or against parties are but some of the common examples partiality.

As it is the case for independence, judicial impartiality must exist both as a matter of fact and perception.¹⁷⁸ This is best captured by the dictum “ justice must not only be done but also must been seen done”.

5.2.3 Accountability of Judiciary

The decades-long cry for greater independence of the judiciary has lately been joined by a demand for greater judicial accountability all over the world. The judicial processes around the world have been plagued by varieties of judicial misconduct ranging from corruption to being complicit in human rights violations. Achieving high level of judicial independence, *per se*, does not provide the required means to combat such judicial misconducts, which are also curse to a fair, impartial and effective justice. As a matter of fact, in the absence of judicial accountability, freeing the judiciary and judges from influence or pressure of outside force would be a disservice to the objective of achieving a fair, impartial and effective justice. Hence, the need for installing accountability mechanisms to the apparatus of the judiciary is the concern of most countries. Judicial accountability means application of neutral and external controls to hold judges and the judiciary accountable for their action¹⁷⁹.

The judiciary as institution and the judges as individuals must be accountable to the society, to the court users and to the other branches of the government to ensure that all judicial

¹⁷⁶ Charles Gardner Geyth , The Dimension of Judicial Impartiality, In Florida Law Review, Vol.65, Issue 2, 2014, p.

¹⁷⁷ Ibid

¹⁷⁸ United Office on Drugs and Crimes, at note 21 ,p44

¹⁷⁹ National Judicial Institute of Canada, Independence, Transparency and Accountability in the Judiciary Of Ethiopia(2008),p.9

decisions are based on legal rules and reasoning, and fact-finding based on evidence, in an independent and impartial way free from corruption and other improper influences.¹⁸⁰

Judicial accountability can be implemented by a combination of different mechanisms including having a code of conduct for judges, standards of performance evaluations, transparent procedures of internal operations and administrations including selection, promotion ,disciplinary and removal `procedures of judges, requirement of reasoned decisions, public scrutiny, academic commentary, professional associations opinion, parliamentary reporting, recusal and withdrawal procedures and in exceptional circumstances judicial vetting¹⁸¹.

The judicial accountability bodies for judicial misconducts (be they judicial councils or *ad hoc* tribunals) need to be independent and impartial.¹⁸² While most international standards do not outright preclude the possibility of other accountability mechanisms, many assert that independent judicial councils or similarly constituted bodies have the primary if not exclusive role in holding the judge accountable.¹⁸³

Another important point worth mentioning here is the quest for striking the right balance between the concepts of judicial accountability and independence. There seems to be a conceptual as well as practical tension between the two. Any effort to strengthen judicial independence makes it difficult to hold judges accountable, and that any accountability initiatives undermine judicial independence.¹⁸⁴ This makes locating the equilibrium of the judicial independence and accountability is a very intricate task.

That said, however, the two concepts are also complementing with each other, in a sense that accountability is a pre requisite for independence. A judiciary that does not want to be accountable to the society have not eye for the need of the society, will not win the trust of the society and will endanger its independence in the short or long run.¹⁸⁵

¹⁸⁰ International Commission of Jurists, at note 11

¹⁸¹ International Commission of Jurists , Judicial Accountability : A Practitioners' Guide, No. 13,2016,Pp 13,33-596,89

¹⁸² International Commission of Jurists, at note 11,p.72

¹⁸³ Pimental David , Balancing Judicial Independence and Accountability in a Transitional State: The Case of Thailand, in *Pacific Law Review*,2016,p.

¹⁸⁴ Ibid

¹⁸⁵ . European Network of Council for the Judiciary (ENCJ), Independence and Accountability of the Judiciary and the Prosecutors: performance Indicators,2014,p.15

One last point, judicial accountability, like independence and impartiality, has objective as well as subjective and individual as well as institutional aspect.¹⁸⁶

5.2.4 Effectiveness and Efficiency

Effectiveness and Efficiency are terms common in the business world. The former refers to doing or achieving the right thing or the desired result while the latter refers to doing or achieving the desired things (output) the right way in the best possible manner with the least recourse time and effort (process). In judicial parlance, the terms refer to the ability of the judiciary in achieving its overarching ends (ensuring human rights protection and rule of law) in the right and timely way. A judiciary scoring high on the spectrum of independence and impartiality with judges of high integrity and competence is yet miles away from dispensing fair and effective justice, guaranteeing human rights and ensuring the rule of law. Efficiency and quality of justice rendered are as equally important as other values of judiciary discussed so far. This is not to undermine the inherent nexus between the aforementioned values of judiciary and effectiveness. Needless to say, a judiciary which is not independent, impartial and accountable is by no means a perfect candidate for the proper administration of effective and quality justice. Efficient and quality justice is possible only when the judiciary exhibits an acceptable level of independence, impartiality and accountability. But this is not enough. There exist ranges of variables specific to efficiency and quality, determining the process and out puts of administration of justice. Proper mechanisms have to be designed and implemented to address those issues, with the aim of ensuring effectiveness of the judiciary.

The variables affecting the dispensation of effectiveness and efficiency of the judicial function of the judiciary include, but not limited to, physical and non-physical barriers of access to courts, poor infrastructures of courts, unnecessary delays, and non-observance of due process guarantees, poor leadership and factors of similar nature.

The effectiveness and efficiency of the judiciary are to be evaluated by taking in to considerations of courts' capacity to prevent the occurrence of such factors so that the justice they render meets the expectation of the stake holders. In the absence of mechanisms to fix such drawbacks, the judiciary would not be able to achieve its inherent objectives. This, in

¹⁸⁶. Ibid

turn, would lead to the erosion of trust which the general public is supposed to have on the judiciary. A judiciary having no public trust lacks legitimacy.

5.3 Benchmarks and Indicators: Measuring Judicial Values

The judicial values that we have seen so far are usually formulated in a rather generic and abstract manner. Conceptual analysis of them suffers much from lack of details needed for practical evaluations. They may give us capsular information about what and what is not required of the judiciary or the judges to be independent, impartial, accountable or effective. But they are of little help in exploring the extent to which a particular judiciary or judges are actually independent, impartial, accountable or effective. Such generic and abstract concepts need to be converted to concretized indicators or bench marks so that policy and decision makers can base their decisions on accurate and reliable analysis of the *de-facto* status of the judiciary.

The genesis of using indicators and tools to assess the performance of judicial systems was traced back to 1960s when Bar Associations in US began conducting evaluation pools for the purpose of providing information to the public for the purpose of retention election. Later on, the American Bar Association (ABA) adopted, as policy, guidelines for the evaluation of judicial performance.¹⁸⁷ Over time, countries have embarked on programs of Judicial Performance Evaluation with different aims including judicial self-improvements, enhancing public confidence, increasing transparency and accountability of judicial systems and to improve effectiveness of courts. Today, increasing numbers of countries, all over the world, have formulated formal programs for evaluating judicial performance of their respective judicial systems. The Judicial Performance Evaluations of courts has become important platform for formulating measurable and quantifiable indicators. In addition to countries running their own versions of judicial evaluation programs, increasing numbers of intergovernmental organizations and civil societies have been active calling for a better performance of judiciaries and taking the task of coordinating stakeholders in conducting researches, data collection and analysis for the purpose of introducing measurable indicators and benchmarks.¹⁸⁸

¹⁸⁷ Francis Bremson (*et'al*),Judicial Performance Evaluation, in *Law & Equality : A Journal of theory and Practice*,Vol.4,1986,p.79

¹⁸⁸ Ibid

Now, thanks to the seminal works of International and Regional organizations, experts, jurists and researchers, a wealth of indicators and benchmarks have been produced and reproduced and applied to measure the entrenchment of the judicial values in the judiciaries of countries, though the project of developing measurable indicators is admittedly in its infant stage.

The European Commission for the Efficiency of Justice (CEPEJ) has developed and implemented scores of indicators for the effectiveness of judiciaries in member states. The Commission was entrusted to assess the efficiency of judicial systems and propose practical tools and measures for working towards an increasingly efficient service to the citizens.¹⁸⁹ Since then, it has developed and implemented checklists for promoting the quality of justice and courts, handbooks for conducting satisfaction of surveys aimed at court users, questionnaires for collecting information on the functions of the judiciary.¹⁹⁰

European Network of Council for Judiciary (ENCJ), as of 2013/14, has also developed a range of indicators and benchmarks for independence and accountability of judiciaries, based on international principles, human right instruments and best practice of judiciaries.¹⁹¹ It has developed 13 indicators (with 33 sub indicators) for judicial independence and 9 indicators (with 31 sub indicators) for accountability, a total of 22 indicators and 64 sub indicators for both independence and accountability.¹⁹² ENCJ has been also developing and implementing indicators for quality of justice (effectiveness.)¹⁹³

The International Consortium for Court Excellence, established in 2007 with a declared goal of development of a framework of values, concepts and tools that courts worldwide can use to assess and improve the quality and administration of justice, has introduced actionable measures of court performance.¹⁹⁴

¹⁸⁹ European commission for the Efficiency of Justice (CEPEJ) was established by Ministries of the Council of Europe in 2002, with the main objectives of, among others, identifying and developing indicators for the efficiencies of judiciaries of member states. Its statute states that the CEPEJ must examine the results achieved by the different judicial systems by using, among other things, common statistical criteria and means of evaluation define problems and identify concrete ways to improve the measuring and functioning of the judicial systems of the member states, having regards to their specific needs.

¹⁹⁰ Council of Europe, European Judicial System : Efficiency and Quality of Justice, 2010, p.5

¹⁹¹ European Network of councils for the Judiciary (ENCJ) was established in 2004 with the objectives of ensuring cooperation between members on, among others, exchange of experience in relation to how the judiciary is organized and how it functions; issues pertaining to the independence of the judiciary and other issues of common interest; and provisions of expertise, experience and proposals to European Union institutions and other national and international organizations (see The Charter of ENCJ, Article 1).

¹⁹² ENCJ Report on Independence, Accountability, and Quality of the Judiciary-Performance Indicators 2017 adopted by the General Assembly, Paris 9 June 2017, P 15-18 .

¹⁹³ . Id, p.65-79

¹⁹⁴ The International Consortium for Court Excellence was formed by The US National Center for State Courts, The US Federal Judicial Center, The Australasian Institute for Judicial Administration, Singapore State Courts, the World Bank, European Commission for the Efficiency of Justice with the main purpose of promoting court quality and promoting

The National Judicial Institute of Canada commissioned by Canadian International Development Agency (CIDA) to provide an assessment of independence, transparency and accountability of the Ethiopian Judiciary, in 2008. The Institute used this approach of evaluating the judiciary against a total of 30 indicators for independence, accountability and transparency, though a majority of them are overlapping with each other.¹⁹⁵

Capitalizing on these informative works, universal principles, declarations, international and Regional Human right instruments and best practices of judiciaries, the working group identifies a total of 30 indicators for assessing the independence, impartiality, accountability and effectiveness of the Ethiopian Judiciary. Following is a tabularized summary of these indicators.

5.3.1 Indicators for Independence of the Judiciary

No.	List of Indicators	Brief operational definitions
1.	Constitutional Base of Judicial Independence	A Constitutionally established judiciary separated from the other branches of the government (Separation of Power.) Constitutional guarantee of the independence of the judiciary (institutional and individual)'free from undue influence, interferences or pressure of any sort from any quarter. •A constitutional recognition of the right of citizens to an independent court.
2.	Jurisdictional Monopoly	•A Constitutional guarantee for a judiciary with exclusive power over all issues of judicial nature. •Judicial Review power.

indicators and tools used for measuring performance. It has developed eleven performance measures, including Court User satisfaction, Access Fees, Case Clearance Rate, On-Time Case Proceeding, Duration of Pre-trial Custody, Court File Integrity, Case Backlog, Trial- Date Certainty, Employee Engagement ,Compliance with Court Orders & Court per case.

¹⁹⁵ National Judicial Institute; Independence, Transparency and Accountability in The Judiciary of Ethiopia, 2008, Pp15-18. The institute treats Accountability and Transparency separately, most of international principles and standards consider Transparency (openness) as one aspect of accountability. Apparently for this basic reasons, the indicators used by the National Justice Institute are overlapping with each other.

	Absence of special or ad hoc tribunal usurping the judicial power of courts
3. Judicial Autonomy	Managerial and operational autonomy of internal affairs. Power over resource allocation A minimum of majority vote representation in a body (Judicial council in charge of selecting, promoting, discipline and removing of judges.
4. Adequate Funding	Legal guarantee for allocation of adequate funding. Participation in the elaboration and approval of budgets. Administration of approved budgets.
5. Objective, merit based and transparent criteria of selection, promotion, discipline, removal of judges	Transparent procedures of recruitment, selection, promotion, discipline and removal of judges and heads of states Merit based criteria of appointment based on professional qualification integrity and ability A legally guaranteed independence of the judicial council or organ in charge of appointment-removal of judges.
6. Adequate Salary and Benefit of judges	A scheme of salaries and benefits for judges, capable of preserving their self-esteem and attracting qualified applicants.
7. Internal Independence	Ensuring absence of influences coming from the judicial hierarchy.
8. Tenure Security	A guaranteed tenure for judges and heads of courts

9. Judicial Immunity	A guaranteed immunity of judges from damage liability for judicial mistakes or misconducts.
10 Adequate working Environment and infrastructures	Conducive working environment for judges and court staffs Adequate infrastructures of courts enabling the judges and court staffs to discharge their responsibilities.
11 Fundamental Freedoms of Judges	Judges' freedom of expression and Assembly or Associations.
12 Judicial Training	Ensuring judges have both pre and in-service training aiming at upgrading their knowledge, judicial skill and integrity.
13 Perception of the general public court users and judges.	Whether the judiciary wins the trust and respect of the judiciary? How the public or court users or judges themselves perceive the judiciary?

5.3.2 Indicators for Impartiality of The Judiciary

No.	List of indicators	Brief Operational Definitions
1.	Constitutional base of impartiality	A constitutional guarantee of impartiality of the courts A constitutionally guaranteed right to be tried before an impartial court of law
2.	Status of the judiciary's independence	Whether or not the judiciary is independent. A non-independent judiciary cannot be impartial

3. Absence of social, economic and political partiality in the administration of justice	The judiciary shall be free from all forms of partiality against the parties or the outcome of the case.
4. Mechanisms to regulate partiality	Existence of recusal procedures, rules of litigations guaranteeing fair trial.
5. Perception of the public, court users and the judges.	How the general public perceives the partiality or not of the judiciary

5.3.3 Indicator for Accountability of Judiciary

No	List of Indicators	Brief Operational Definitions
1.	A code of conduct for judges	Rules regulating the integrity of the judges
2.	Complaint procedures against judges	Rights of aggrieved parties to lodge complaint against judges committing judicial misconducts. Availability of appellate review of the decisions rendered by the judicial councils Availability of disciplinary measures
3.	A legally guaranteed remedies for victims of judicial misconduct	Repatriations, restitutions, satisfaction, rehabilitations for victims of judicial misconduct
4.	External Monitoring Mechanisms	Active engagements of civil Societies, professional associations, The media, The Academia in reviewing, evaluating, commenting the works of judges

6.	Judicial performance Evaluation	Periodic evaluations of the performance of both the judiciary and individual judges Implementing multi-dimensional mechanisms of evaluation.
6.	Transparency	The internal operations, rules of procedures in conducting trial, decisions of courts shall be transparent to the public.
7.	Exceptional Mechanisms	Mechanism of removing “bad apples “of the judiciary from the judicial barrel.

5.3.4 Indicators for Effectiveness (Efficiency and Quality)

No	List of Indicators	Brief Operational Definitions
1.	Accessibility of Courts	Absence of physical and non-physical barriers of accessibility
2.	Case flow Management	Implementing a system of managing and tracking the court cases from initiation stage to disposal, setting workload and time standards to ensure that cases are disposed without delay
3.	Quality of Justice	Requirements of rendering reasoned decisions. Compliance with court decisions or orders. Court users’ satisfaction.

5.4 Appraisal of Ethiopian Judiciary

5.4.1 Historical Background

Pre 20th century

The formal structure of courts in Ethiopia is of a recent history. The pre-20th century judicial history of the country was largely known for its traditional and ecclesiastical dispute settlement mechanisms.¹⁹⁶ It was an established customary practice for two disputants to find a common arbitrator from the community to hear their cases. Anybody can be a judge, a bystander or someone who held high regard in that community or has been known to be an impartial one.¹⁹⁷ When the litigants could not settle their disputed with the help of impromptu courts headed by the ordinary people, they took their cases to the local officials, the representatives of the Emperor or the governors at the lowest level.¹⁹⁸ The methods employed to investigate the crimes or to identify the wrongdoer include *Afersata*, *Awuchachign*, *Iwus* and *Leba-shai*.¹⁹⁹

It was in 1908 that an attempt to have a formal structure, though in its rudimentary form, for the judiciary was made.²⁰⁰ This was the year when Ethiopia, for the first time in its thousands of years of history, established the executive organs of the government. One of the Ministries established by an Imperial order was the Ministry of Justice and the minister also known as (*Afe-Negus*) became the leader of the judges of the country, and charged with administration of justice in accordance with the *Fetha Negest*.²⁰¹

1931-1974

¹⁹⁶ . Abera Jembere, An Introduction to the Legal History of Ethiopia 1434-1974, p.222.

¹⁹⁷ . Beru, Tsegaye, A Brief History of the Ethiopian Legal Systems - Past and Present (January 1, 2013). International Journal of Legal Information, 2013, Duquesne University School of Law Research Paper No. 2017-07, p.365 ,Available at SSRN: <https://ssrn.com/abstract=3088643>

¹⁹⁸ .Ibid

¹⁹⁹ Stanley Z. Fisher, Traditional Criminal Procedure in Ethiopia,(Haile Sellase University)1971

²⁰⁰ .In 1908, Emperor Minilik II established the first Cabinet of Ministers in Ethiopia, consisting of Ministry of Justice, Interior, Foreign Affairs, Finance ,Agriculture and Industry, Public Works, War, Pen and Palace, .among them , Ministry of Justice was entrusted to supervise the works of judges.

²⁰¹ *Fetha Negest (Law of Kings)* is a legal code translated from its Arabic version in to GE'EZ around 1270.

The 1931 constitution, the first of its kind in Ethiopian history, established the judiciary branch of the government, mandating the judges to sit regularly and administer justice in conformity with the levels of the country.²⁰² Though the 1931 constitution envisaged that the organization and competence of the courts were to be organized by law subsequently, it did not survive long because of the Italian invasions in 1936.

After the end of Italian invasion, the Administration of Justice proclamation No 2/1942 was enacted.²⁰³ This was the first law dealing exclusively with the organization and the hierarchy of courts in their modern forms. This alone, one can argue, makes the proclamation a watershed in the country's judicial history. Neither the rudimentary attempts of the 1908 Imperial order entrusting the Ministry of Justice with the task of supervision of justice administration nor the 1931 constitution establishing the judiciary as a separate organ of the government have as equal practical significance as the 1942 Justice Administration proclamation does have. With some modifications, the basic court system in Ethiopia remained more or less as organized in this proclamation and its subsequent amendments all along to the end of the 1987 constitution.

The Justice Administration proclamation created four tiers of courts in the country: The imperial Supreme Court, The High Court, The provincial courts and the Regional or Communal courts, where the establishment of latter two levels of courts was simply envisaged.²⁰⁴ This structure of courts was somehow modified basically by four subsequent enactments. The first of which was the Local Judge Establishment proclamation No 90/1947, which introduced the appointments of local judges in the lowest localities of the ladder of the government structure.²⁰⁵ Another modification to the court structure created by the 1942 proclamation came from the enactment of an amending proclamation No 102/1948.²⁰⁶ This amending proclamation, following the changes made to the nomenclatures of the administrative structural hierarchy of the government, changes the name of the Provincial

²⁰².The 1931 constitution devotes 5 provisions (Arts.50-55) to deal with the Judiciary. These provisions stipulate that judges shall administer justice in accordance with the laws in the name of the Emperor, that judges will be chosen from men who have experience in legal matters, that judges will sit in public ,except in matters where public order and morals require the other way, that all matters relating to administrative affairs will be entertained by special courts. It also envisages issuance of laws governing the organization and jurisdictions of the courts.

²⁰³ . Justice Administration Proclamation, No. 2/1942.

²⁰⁴ . Id, Art 2

²⁰⁵ . Establishment Local Judge Proclamation No 90/1947,Art.6

²⁰⁶ . Proclamation to Amend the Justice Administration Proclamation No. 102/1948,Art.2

Courts to *Teklay Guezat* Courts and replaced the Regional or communal courts with a new arrangement of courts hierarchies named as *Awradja* Courts, *Wererda* Courts and *Miktil Wererda* Courts.²⁰⁷ The third basic re-structure of courts organization was made by proclamation No 195/1962.

The 1962 Court Establishment Proclamation revised the previous court structure of the country by introducing four levels of courts hierarchy: Supreme Imperial Court, High Court, *Awradja* court, and the *Woreda* courts.²⁰⁸ The Supreme Imperial Court was seated in Addis Ababa with its branch bench in Asmara, the High Court in the capitals of the provinces including in Asmara, the *Awradja* Court in each *Awradja guezat* and the *Wereda* court in each *Wereda guezat*. This court structure was remained intact until the 1987 Constitution.

The last major enactment in the period under discussion worth noting was the Judicial Administration Proclamation No.323/1973. This proclamation established the Judicial Administration Commission and ended the status of the General-governors and Governors from being the judges of the court at their respective administrative area.²⁰⁹

The 1955 Revised Constitution makes a reference to an independent judiciary declaring that judges are to be independent in conducting trials and giving judgments in accordance with the law and further stating that the judges were to submit to no other authority than that of the law (Art 10). Though this constitutional reference of independence of the judiciary was a radical departure in the nations judicial history, its practical significance was only symbolic. The same constitution which stipulates the independence of the judiciary also makes the Emperor at the same time the chief executive, chief legislative and the fountain of justice.²¹⁰ The Majesty's Chilot, known as "Zufan Chilot" was remained at the apex of the judiciary until the 1974²¹¹ revolution which brought the monarchical regime to an abrupt end. The judiciary as a whole was under the supervision of the executive organ (Ministry of Justice) and the appointment and removal of the judges are at the whim of the executive organ and the

²⁰⁷ .Id,Art.2

²⁰⁸ .Court Proclamation of No.195/1962,Art.3(1)

²⁰⁹ . Judicial Administration Commission Proclamation No.323/1973, Art 4&5.

²¹⁰ . The 1955 Revised Constitution of Ethiopia, Art.26.

²¹¹ .Sedler, The Chilot Jurisdiction of the Emperor of Ethiopia: A Legal Analysis in Historical and Comparative Perspective, 8J. AFR.L.59(1964)

Emperor.²¹² Thus, one can safely argue that all the ingredients of independent, impartial and accountable judiciary are lacking in the judiciary of the Imperial Regime.

1974-1991 (The Military Regime)

The judiciary during this regime was characterized by countless special tribunals or courts usurping the power of the judiciary. This in turn makes the judges of ordinary courts insignificant, having competence over petty and mundane matters of no interest to the government.²¹³

The military regime, by virtue of the Administration of Justice Proclamation 52/1975, re-established the hierarchy of courts similar to the one created by the 1962 Court Establishment proclamation: The Supreme Court, High Court, *Awradja* court and *Wereda* court.²¹⁴ In effect, the previous court structure was remained intact, except the *Zufan chilot*.

In parallel with the ordinary courts, existence of special courts was the hallmark of the judiciary during this period. The Special Court-Martial, in charge of trying high ranking officials of the Imperial Regime and presided by judges of military officers, was established by virtue of proclamation No 7/1974.²¹⁵ The Special Courts- Martial was replaced by Special Court, coming in to existence by virtue of Special Courts Establishment Proclamation No 215/1981²¹⁶, with an objective to “provide for an efficient judicial machinery to try offenses against the unity, independence and the revolution of Ethiopia and the peace and order of the people”²¹⁷

The 1987 Constitution mandates the establishment of the Supreme Court, Regional Courts (for administrative and autonomous regions) and other courts by law and it stated that The Supreme Court was with the highest judicial power of the country²¹⁸. Subsequently, the High Courts and the *Awradja* court were established by Proclamations No.24/1988.²¹⁹

²¹² . The Revised Constitution of 1955, Art.

²¹³ . National Judicial Institute; at n.44, p.103.

²¹⁴ . See Art.392) of the Proclamation No. 52 OF 1975.

²¹⁵ . Provisional Military Government Establishment Proclamation No.1 of 1974.

²¹⁶ .Special Court Establishment Proclamation No.215, 1985, Art.2.

²¹⁷ .Id, Preamble

²¹⁸ . The PDRE Constitution of 1987, Art, 100.

²¹⁹ High court and Awradja Court Establishment Proclamation No.24/1988.

Like its predecessor, the 1987 constitution makes a nominal reference to the independence of the judiciary (Art 104). Nevertheless, the general setting of the judiciary was infected with grave structural defects, not to mention the practical defects. The judges were to be appointed for a fixed term of 5 years (no tenure security), the National Shengo (the Legislative Organ) was empowered to dismiss the judges at whim and the president of the country was also empowered to appoint the judges of the Supreme Court and the heads of the courts.²²⁰ These are some of the anomalies to warrant the argument that the judiciary of the period was suffered from lack of basic norms of structural independence and was highly depend on the whim and will of the regime. The continuous usurpation of judicial power by special courts was also another indicator of the place of the judiciary in the independence spectrum.

The Transitional Government

This was a period when Ethiopia embarked on experimenting ethnicization of her politics. Following the collapse of the Dergue regime in May 1991, a conference of ethnic and political groups was held in July. The Transitional Charter and the Transitional Government of Ethiopia were emerged from that conference.²²¹ The Charter lays down the foundation for a system of federalism along ethnic line, which has continued to define the political and socio-economic space of the country to date.

The polity was restructured comprised of a central government and self-administrating units. The executive, legislative and judiciary powers were to be shared by a central government and the regional autonomous states.²²² The transitional government was mandated, by the Charter, to organize the judiciary system along the lines of the new system of government²²³. Breaking with its past, the Ethiopian judiciary was set to see a parallel court structure. It took the Transitional Government of Ethiopia a year and half to issue a proclamation²²⁴ establishing a judiciary with a dual court system: a central and regional court structures. The Proclamation defines the jurisdiction of the central government's judiciary and leaves the

²²⁰ . See The PDRE Constitution of 1987, Arts, 101 &86.

²²¹ The Transitional Charter of Ethiopia (1991)

²²² Id, Art. 2 &13.

²²³ Id, Art. 9

²²⁴ . The National /Regional Self-government Establishment Proclamation No.7/1992 establish three levels of courts at both the central and national/regional self-governments.

task of delimiting the jurisdictions of the regional courts to their respective regional governments.

In a typical reminiscent of the defining future of Ethiopian past, the collapse of the Dergue regime was immediately followed by the undoing of the legislative, executive and judicial organs of the previous regime. One consequential effects of such move to erase the institutions of the previous regimes was a judicial lapse for about a year and half.²²⁵ Until the beginning of 1993, the formal judicial organ was in recess. The lacuna was successfully covered by the customary dispute settlement mechanisms of societies all over the country. This, by itself, is a proof that the customary dispute settlement mechanisms of Ethiopians are too entrenched in the fabrics of our society and effective to be deprived of a place in the country's modern court structure.

The transitional government was also known for its nonsensical measures of a mass dismissal of experienced judges of the previous regimes. Such ill advised move of mass dismissal of judges coupled with proliferation of new courts owing to the dual system of court structures created a huge gap in the human capital of the judiciary. To address this problem, the approach following by the government was mass recruitment and appointment of judges, opening the door wide for appointments of judges affiliated with the ruling regime.²²⁶

5.4. The Current Judicial System

The 1995 Constitution of Federal Democratic Republic of Ethiopia (FDRE) officially declared the formation of the polity on a federal configuration.²²⁷ The constitution established a federal government of the centre and nine regional states governments. Legislative, executive and judicial powers are allocated to both the federal and regional governments.²²⁸

In line with the spirit of the federal configuration, the FDRE Constitutions established a dual court structure: federal and State Courts.²²⁹ At the federal level, the constitution creates a federal supreme court vested with a supreme federal judicial authority and mandates the

²²⁵ .Following the demise, by the transitional Government, of the court structures existed during the dergue regime, there were no formal court structures in Ethiopia until 1993, the time when the Central and the National/Regional self –governments took the necessary steps to institute courts in their respective jurisdiction.

²²⁶ .The National Judicial Institute; at n.44, pp.104-105.

²²⁷ . The FDRE Constitution(1995), Art.1

²²⁸ . Id, Art.50.

²²⁹ . Id, Art.78

House of Peoples Representative (HPR) by two thirds majority vote, to establish the Federal High Court and First Instance Court it deems necessary, either national wide or in some parts of the country. Absent such establishment, the constitution further states, the jurisdictions of the Federal High Court and First-Instance Court are delegated to states' supreme courts and high courts respectively (Art 78 &80). At the regional level, the constitution mandates the respective regional states to establish their own three tiers court structure: State Supreme Court, High Court and First- Instance Courts (the latter two are also known as Zone courts and *Wereda* courts).

The House of peoples representatives, based on the mandates it is given by the constitution, has established Federal High court and First –Instance courts in Addis Ababa and Dire Dawa by virtue of the Federal Courts proclamation No 25/96 and Federal High Courts in the regional states of Afar, Benshangul, Gambella, Somalia and Southern Nations Nationalities and Peoples by virtue of a Federal Court establishment proclamation No 322/2003. The regional states also created their own Supreme, High (Zonal) and *Wereda* Courts by means of their respective states constitutions.

The constitution outlaws the existence of the special or ad-hoc courts usurping the power of ordinary courts or institutions legally empowered to exercise judicial powers (Art 78 (41)). It also envisages the possible existence of religious and customary courts.

Federal Courts

As indicated above, the constitution establishes the Federal Supreme Court and goes on to empower the House of Peoples' Representatives to establish Federal High Court and First Instance Court, in a place, it deems necessary, across the country. The constitution, however, is shying away from providing the details about the structural organizations and allocation of jurisdictional powers between the federal and state courts. Such specifications are to be provided by subsequent legislative acts. The Federal Courts Proclamation No 25/96 (as amended by proc. 138/98, 321/2003, 454/2005) provides the details to fill such gap.

This proclamation, establishing Federal High Court and First Instance Court in Addis Ababa and DireDawa, details the jurisdictions of the Federal Courts. It allocates jurisdictions of the federal courts based on three principles; type of laws, parties and places. The federal courts

have jurisdiction over cases arising under the constitution, federal laws and international treaties, involving parties specified in the federal laws and place specified in the constitution or federal laws (Art 3).

The proclamation, stating the three principles on the basis of which the jurisdiction of federal courts is to be determined goes on to enumerate the criminal and civil matters falling under the competence of federal courts²³⁰. As far as the allocation of criminal jurisdiction between the federal and state courts is concerned, this proclamation does not give a clear solution. It simply lists the type of crimes over which federal courts have jurisdiction. Federal courts are said to have jurisdiction over cases arising from federal laws. One of the federal laws, as stated under Art 55 of the constitution, is the criminal law. Thus, simple logic may lead one to conclude that federal courts have inherent jurisdiction over all criminal matters.

But, the provision which enumerates the criminal matters allocated to the federal courts' jurisdiction leaves the majority portion of offences prescribed in the criminal code out of the competence of such courts. Under whose jurisdiction such offences are falling is the question not tackled by the proclamation. The constitutional delegation of federal judicial power to regional courts may provide the solution. Those offences prescribed in the criminal code but not included in the enumerated list provided in the federal court proclamations are to be considered as delegated to the regional Supreme Courts and High Courts. This way of interpretation implies that states' *Wereda* courts have neither delegated nor original jurisdiction over criminal matters. This is far from what has been practiced, though.

The Federal Supreme Court has an appellate jurisdiction over the decisions of Federal High Courts and decisions of States Supreme Courts on delegated criminal matters. The federal Supreme Court also has a cassation review power over all final decisions of courts (including decisions given by cassation divisions of the states supreme courts). The Federal High Court has both original and appellate jurisdictions. The appellate jurisdiction relates to decisions rendered by Federal First Instance Courts and states High Courts' decisions on delegated federal matters. The federal first instance court exercise original jurisdictions.

²³⁰. Federal Courts Proclamation, No.25/96, Arts. 4&5.

Presently the seat of Federal Supreme Court is in Addis Ababa. The Federal High Court and First Instance Courts have seats in Addis Ababa and DireDawa. Through the House of Peoples Representatives, by virtue of the mandate given to it by the constitution, establishes Federal High Court in five regional states of Afar, Somalia, Gambella, Benshangul and Southern Nations Nationalities and Peoples; the courts are not yet organized in the respective regions. The Federal High Court Circuit Bench has been providing the required service of handling cases falling under its jurisdiction, in these five regions.

State Courts

The FDRE constitution entitles regional states to establish Supreme Court, High courts and First Instance Courts in their respective regions. The Supreme Courts of regional states are seated in the capital city of the regions, the High Court's (Zonal courts) in cities of the Zones and *Wereda* (first instance courts) in each *Wereda* of the region. The allocation of jurisdictional powers among the Supreme, High and *Werreda* courts of the regional states are provided with the courts' establishment laws of the respective states. The States Supreme Courts have cassation divisions empowered to review final decision of state courts, the states' Supreme Courts and High Courts exercise federal judicial power based on the constitutional delegation.

As touched up on the foregoing discussion, the solution for the constitutional gap regarding the apportionment of judicial power between the Federal and the Regional states was provided by the federal parliament, by way of the Federal Court proclamation 25/96. But this proclamation leaves many more questions unanswered and causes huge practical discrepancies in the way state courts exercise jurisdictions. The problem is much glaring in the case of criminal jurisdiction.

The argument amassing wider acceptance among legal profession is that federal courts have inherent jurisdiction over cases arising under the federal laws and thus all offences prescribed in the criminal code, which is a federal law, are falling under the jurisdiction of federal courts. States Supreme and High courts are to exercise criminal jurisdiction only by way of delegation as provided in the constitution. Nevertheless, the approach taken by the Federal Courts Proclamation to come up with an exhaustive list of offences falling under the

competence of federal courts and leave a great majority of offences out of the reach of the federal courts creates more practical confusions. Today, States *Wereda* Courts all over the country exercises criminal jurisdictions. Some states allocate criminal jurisdictions among the courts in their respective regions based on the Criminal Procedure Code²³¹ and thus the *Wereda* courts of states are empowered to entertain criminal cases falling under the *Wereda* or *Awaradja* courts of the previous regimes arrangement and the High Courts (Zonal courts) entertain cases falling under the High Courts of the then regimes.

Thus, the way criminal jurisdiction has been exercised by regional courts lacks uniformity and the *Wereda* courts of regional states claims original criminal jurisdiction over offences committed in their respective localities, though this seems to contradict with what the constitution stipulates.

Municipality and Social Courts

The Ethiopian judicial system also incorporates courts named as Municipality or City Courts and Social or Kebele courts. The City Courts of Addis Ababa and Dire Dawa have First Instance, Appellate courts and a Cassation division in the Appellate courts.²³² These courts have criminal jurisdictions over petty offences, offences in connection with fiscal matters coming under the competence of the cities' administration and matters related to remand in custody and bail applications. Social courts or kebele courts of thousands are also exist in the lowest levels of administrative hierarchy of regional governments and also in Addis Ababa and DireDawa. It seems that such courts have constitutional basis in as long as they are established by law and follow legally prescribed procedures (Art 37 cum 78 (4) of the Constitution).

Military Courts

Another nomenclature of courts, in the Ethiopian judiciary, are military courts. They have far reaching ramifications in the country's criminal Justice system. Military courts exist in the majority of the countries all over the world. The question is not whether or not the existence

²³¹ Wereda courts of Oromiya and Sothorn Nation, Nationalities Regional states, for example, exercise original criminal jurisdiction based on the Criminal Procedure Code.

²³² . Addis Ababa City Government Revised Charter Proclamation No.361/2003, Arts,39,41&42, Diredawa Administration Charter Proclamation No.416/2004, Arts.31,33 &34.

of military courts is justified but whether military justice can satisfy the requirements laid down in general principles and international standards that courts should be independent, impartial and guarantee due process.²³³ In many countries, military courts are organizationally and operationally dependent on the executive organs.²³⁴

The Defence Force Proclamation No.1100/2019 establishes two tiers Military Courts: the Primary Military Court and the Appellate Military Courts²³⁵. The proclamation provides for the jurisdiction of these courts over “ persons responsible for military offences provided under Art.284-322 of the Criminal Code ,offences of murder or bodily assault resulting in bodily injury committed among members of the defence forces, any offences committed at home by a member of the defence forces while on active combat duty, any offence committed by a member of the defence forces or a civilian on mission along with a section of any army deployed a broad while on task or active combat duty, any offence committed by civilians, members of the regular police force or militia deployed along with members of the defence force on grounds of general mobilization or declaration of a state of war, offences committed by prisoners of war after being captured, offences falling under the jurisdiction of the Military Courts committed by recruits after entering in to training camps or members of national reserve force after entering in to military training camps or joining the regular defence forces”. (Art 38(1)).

The Appellate Military Court has appellate jurisdiction on cases disposed by the Primary Military Court and the final decision of the Appellate Military Court is subjected to the Cassation review of the Federal Supreme Court (Art 39 and 40). The Military courts shall apply criminal procedure code in disposing cases.

The proclamation further states that the judges of the Primary Military Courts shall be appointed by the Council of Defence Commanders up on the recommendation of the Chief of the General Staff and the judges of The Appellate Military Court by the Commander-in-Chief of the Armed forces up on the recommendation of the Minister (Art 44(2&3)). The judges are appointed for a fixed period of 5 years and subjected to disciplinary measures including removal by the organ which appointed them, on grounds of inability to

²³³ International Commission of Jurists , at n.12,p.10

²³⁴ Ibid.

²³⁵ . The Defence Force Proclamation No.1`100/2019, Arts. 28 &37.

carry out their duties due to illness or being found guilty of disciplinary or criminal offence (Art 44(5,6)).

As the reading of the lists of crimes falling under the jurisdiction of the Military courts reveals, their competence extends beyond military offences and covers a wide range of crimes committed by civilians.

5.5 Benchmarking the Ethiopian Judiciary Against the Indicators

5.5.1 Independency of the Judiciary

Under this section, we will explore the level of the independence of Ethiopian Judiciary using the indicators that we have identified under section two.

Constitutional Base of the Independence Judiciary

The FDRE Constitution establishes a judiciary separated from the two branches of the government and expressly guarantees the institutional as well as the individual aspects of the independence of the judiciary (Art78-80). One basic missing under this indicator is that the Constitution, unlike the International Human Rights Instruments and Declarations, fails to recognize citizens' right to an independent judiciary. The International and Regional Human Right Instruments ratified by Ethiopia underscore that everyone has the right to an independent court. There is no similar way of expression in the FDRE Constitution. One may not have the right to challenge the non-independence of the judiciary organ as of right.

Jurisdictional Monopoly

The FDRE Constitution bestows judicial power over Federal and State Courts and goes to the extent of banning the existence of special or *ad hoc* courts, except those legally established and follow legally prescribed procedures(Art 79(4) and 80(1)).

One of the most effective but subtle means of corroding the independence of judiciary is limitation or usurpation of judiciary power of ordinary courts. Authoritarian or oppressive regimes, fearing the risk of backlash of a direct attack on the independence of courts, usually resort to this means of silencing the judiciary. Proliferation of legislative acts usurping the judicial powers of ordinary courts is an attack on the independence of the judiciary. In light

of this fact, the stance taken by the FDRE Constitution to vest the judiciary with an exclusive jurisdiction over judicial nature seems applaud able. Nevertheless, the matter is not as plain as what it seems to be in those constitutional provisions.

First, the same constitution which is said to be clothing the ordinary judiciary with an exclusive jurisdiction over justiciable matters introduces a non-judicial constitutional review. The power to nullify the legislative acts based on constitutionality test is given to the upper House of Parliament (HOF), as per Art.83 of the Constitution. Today, the global trend is towards some form of judicial constitutional review either by way of ordinary courts or by special constitutional courts.²³⁶

The HOF is a political organ representing the political interests of ethnic groups in the country. The members of the HOF are to be elected by State Councils (Art 61). As the practice dictates, the members are usually members of the state council and sometimes the chiefs of states executive organs. The members of the state councils are also members of the ruling party running the executive organs of the federal government. In its current configuration, the legislative organ of the federation is fully controlled by the ruling party, amassing all the parliamentary votes. The perverse result of all these is of all these is that the Ethiopian Constitution devices a mechanisms whereby an organ is called upon to review the constitutionality or not of its own act.

In the apparent move of avoiding any possible grey area by which the judiciary is able to assert power to check the compliance of the executive organs with the higher norms enshrined in the constitution, the legislative organ issued Proclamations No 250 and 251/2001 to deny the judiciary of any avenue of policing the executive organ's actions. This makes Ethiopian judiciary toothless in checking the constitutionality or not of the acts or decision of the other branches of the government. It is, of course, a misconception to expect a judiciary without any power to police the actions of the other branches of the government to deliver in ensuring rule of law and protection of human rights

The practical implications of having a judiciary without a power of judicial check on the other two branches of the government are manifold. Ethiopian judiciary has developed a

²³⁶ . Elena A. Baylis, *Beyond Rights : Legal Process and Ethnic Conflicts*, 25 MICH. J.INT'L L, pp. 577-79.

culture of judicial timidity towards applying constitutional provisions. Though it is supposed to challenge the systematic human right violations perpetrated by the government, it is nowhere in that territory. Judges are not sure about their power to take measures based on the ordinary complaints of human right violations by prisoners at police stations or prison centres. If a particular case involves a constitutional provision, Ethiopian courts are in the habit of sending the case to the HOF, even if what is required is disposing the case by way of mere application of the constitutional provision. This judicial timidity in turn discourages lawyers from basing the arguments of their case on the constitution, on the fear of having their case referred to the HOF.

Another illness to the jurisdictional monopoly of Ethiopian judiciary is coming from a proliferation of legislative acts taking away the judicial power of ordinary courts.²³⁷ Since the legislative organ is enjoying an absolute immunity from the judicial oversight regarding the constitutionality of its acts, it used to issue several proclamations with the purpose of taking justice able matter from the jurisdictional competence of ordinary courts and transferring them to administrative tribunals within the executive organs. This is also another assault on the independence of Ethiopian judiciary.

Third, the military courts existing in the Defence Forces structure claims criminal jurisdiction over civilians. The organizational and operational independence of military courts is easily compromised by their very nature. The judges are often military personnel and subjected to removal by their superiors. They lack sufficient legal knowledge and judicial skills. All these make them ineligible for the test of independence, competency and impartiality. On the hand the very existence of Defence Forces necessitate military courts. That being the case, the global trend is to limit the jurisdictional scope of military courts, in terms of the types of offences and persons to be tried.

As it is the case for most countries all over the world, military Courts do exist in Ethiopian judicial system, as a separate tribunal from the ordinary courts. The list of offences falling

²³⁷.See, for instance, the Charities and Societies Proclamation No.621/2009 Art.1o, Urban Land Lease Holding Proclamation No.721/2011 Art.29,Social Security Agency Establishment Proclamation No.495/2006 Art.11, Trade Competition and Consumer Protection Proclamation No. 813/2013 Art. 39 Mortgage/Pledge Proclamations No. 97/98. All these proclamations take judicial power away from ordinary courts and transfer same to tribunals within the executive administrative hierarchy.

under the jurisdiction of Military Courts, as captured by Art 38 of the Defence Force Proclamation, brings to our attention that the jurisdiction of these courts are not limited to military offences by members of the Defence Force but extends to cover offences committed by civilians and police members. The very first type of offences appeared in the list makes reference to offences prescribed in Art 284-322 of the Criminal Code. The way this sub-article is framed makes it clear that the Military Courts can exercise jurisdiction over all persons, including civilian, implicated in the commission of crimes indicated in such provisions. This stance is against the growing trend in limiting the jurisdictions of Military Courts only to military offences (service related act or offence committed by members of the Defence while on duty). Subjecting civilians to the trial by military courts is against the right enshrined under Art 14(1) of ICCPR, the right to be tried by an independent court.

Judicial Autonomy

This indicator of judicial independence has to do with the institutional autonomy of the judiciary to run its functions. The Constitution guarantees this autonomy of Ethiopian judiciary (Art 79). Administrative and managerial tasks are to be exercised either by the judiciary itself or by a separate body named Judicial Administrative Council (both at the federal and regional level). The Federal Supreme Court is mandated to participate in the preparation and approval of federal courts budget. The Constitution also recognizes the autonomy of the Federal Supreme Court in the allocation and dispensation of the approved budget (Art 79). Despite this, the approval and allocation of the budgets of the Federal Courts remained under the whim of the Ministry of Finance, an executive organ, until recently. Perhaps for the first time in its history, the Federal Supreme Court prepared the budget of federal courts and got it approved by the HOP for the fiscal year of 2019/20.

Though the constitution, on its face value, seems to entitle the judiciary with the required managerial and administrative independence, there are also shortcomings with a great deal of practical consequences.

To begin with, the composition of Judicial Administration Council, both at the federal and state levels, is such that the recruitment-appointment- removal procedures of judges is not

sufficiently insulated from the other branches of the government. The legislative organ is represented by a number of its members in the Judicial Administrative Councils, an organ in charge of recruitment, appointing, transferring, disciplining and removing judges. So do the Ministry of Justice (currently restructured as General Prosecutor Office) of the Federal government and Justice Offices of the regional governments. At the federal level, for example, the Judicial Administration Council is composed of 12 members, of whom 3 are from the legislative organs. As the practice has it, heavy weight politicians are accorded membership status in such judicial council. That by itself may not be a problem if members from the judiciary represent majority votes in the composition. But, among 12 members of JAC at the federal level only 5 are from the judiciary. The non-judicial members outnumber the members from the judiciary. This arrangement deprives the judiciary of its right to have a final say on the recruitment- removal of judges. This is against international principles which underscores that the process of recruiting-appointment-removal of judges shall be executed either by the judiciary or an independent judicial body or similar organs.

A corollary to this deficiency is that the judiciary, both at the federal and regional states level, cannot administer supporting staffs of the Courts. They are governed by organ of executive branches in charge of civil service administrations, in accordance with civil service laws.

The problem related to the allocation of insufficient fund for the judiciary is another factor having a significance bearing on the operational and managerial autonomy of the judiciary. The international principles and standards urge states to allocate adequate resources to the judiciary organ as a matter of ensuring its independence.

Budgeting is an effective means of kneeling down the judiciary to the whim of the legislative or executive branch of government. The possibility of an attack on the independence of the judiciary looms large when these two branches of the government wield a determining influence in the allocation and administration of annual budgets of the judiciary. Unfortunately, that is often the case. Many countries try to offset this problem by introducing a legally based mechanism by which the judiciary is allowed in the elaboration and approval of its budget. The judiciary may be authorized to prepare its budget and send the same to the law making organ without the involvement of the executive organ, for approval. This process,

somehow, alleviate the influence coming from the executive organ of the government. And some Countries also try to remedy the problem by mandating the legislative organ to allocate a fixed percentage of the national budget to the judiciary, each year.²³⁸

Coming to the Ethiopian case, Ethiopian judiciary is inadequately funded, due to the constraints on the financial flexibility of the national economy. This is of course, the case for most of under developed economies. Though the budget of courts both at the federal and state level is progressively increasing every year, it is still much below the amount needed to upgrade their capacity commensurate with the level of responsibilities they have.

However, the Federal Supreme Court is entitled to prepare and directly submit the budgets of Federal Courts to the parliament for approval, the same power of drawing up and submitting the budget directly to the legislative organ is not given to State Supreme Courts. On account of that, the budgets of the state courts are submitted to the law making organs (State Council) through the Finance departments of the regional governments. This by itself may have a bearing on the actual or perceived influence of the executive on the judiciaries of the regional government.

Worst of all, following the tune of decentralization policy of the government, the budgets of *Woreda* Courts in some regional states is administered through a pool budgeting system in which the budgets of such courts' are not included in the budget of the judiciaries but in the *Wereda* Administration budget. The courts have to compete with other *Wereda* administration offices to get resource. It has been reported that *Woreda* administrations in the regional states sometimes refused to release budgets to *Woreda* Courts.²³⁹ All these make the *Wereda* courts under a complete whim of the *Woreda* administrative organs against the spirit and terms of judicial independence.

What is more, there is no constitutional or legal base in Ethiopia by which the parliament is obligated to approve a fixed rate of the national budget to the judiciary.

²³⁸ The USAID Office of Democracy and Governance, Guidance for promoting Judicial Independence and Impartiality- Revised Edition, 2002, pp.25-26.

²³⁹ In the Concluding remarks made by the Annual Meeting of Federal Supreme Court, held on 5 September, 2020, the practice of in some regional states to refuse to release budgets of *Woreda* courts is mentioned as one area of concern.

In the absence of a legally guaranteed allocation of adequate and incremental budget for courts, Ethiopian courts remains to win the will and commitment of the other branches of the government for annual budgets.

Recruitment-Appointment-Removal Procedure

This indicator of judicial independence calls for the instalment of objective, merit based and transparent criteria for the recruitment, selection, promotion of judges and heads of courts. It also underlines the importance of having transparent and objective mechanisms of evaluating, disciplining and removal of judges as well as head of courts.

The FDRE Constitution entrust the task of recruiting, selecting, promoting , transferring, disciplining and removing of judges to the Judicial Administration Councils, both at the federal and state level(Art 81). These are the most significant power capable of having a direct bearing on actual as well as perceived independence of judiciaries, the individual independence of judges. We have highlighted the problems surrounding the independence of Judicial Administration Councils and the implications on the autonomy of judiciaries in the preceding sub-section. At issue, here is the nature of the criteria and procedures employed in the recruitment-appointment-removal of judges and head of courts.

The Constitutions outlines the common rules regarding the appointments of judges and head of courts (Art 80). The Presidents and Vice-Presidents of the Federal Supreme Courts and States' Supreme Courts are to be appointed by the respective parliaments on the recommendations of the Prime Minister and Chief Executives of States respectively. All other judges , including the presidents and vice- presidents of high courts and first instance courts, both at federal and state level, are appointed by the respective parliaments on the recommendations of the federal and regional Judicial Administration Councils respectively. In the case of the federal judges, the prime minister is the one to submit the nominees to the parliament.

The mass purge of experienced judges during the Transitional Government and the corresponding move of packing the judiciary with in-experienced and non-qualified persons with no transparent and objective criteria had long lasting consequence over the judiciary for the past two and half decades. The selection criteria were not transparent, objective and merit

based. At some point, members of the armed force which dethroned the Military regime were recruited to join the judiciary with months or weeks of training. They were instrumental in co-opting the judiciary with the interest of the ruling regime, in the ensuing years. Though the Special Courts of the types existed in the Military Regimes have not featured in the EPRDF regime, there definitely were special benches presided by loyal and sympathetic judges deployed to handle cases of sensitive natures. Until very recently, it was not uncommon to see judges and heads of courts who considered themselves as vanguard of the interest of the political regime. The heads of the court were said to be involved in advising the government and drafting oppressive law denying citizens of their right of access to justice.²⁴⁰

Currently, in line with what the constitution dictates, the Judicial Administration Council controls much of the process of selection of judges except the approval which is to be executed by the parliaments. In as long as the Councils are independent organs, this is in line with the international principles. There are some who objects the involvement of the Prime Minister in the process at the stage of submitting the nominees to the Federal parliament. Considering the fact that the role of the Prime Minister is limited to the mere submission of the list of the nominees to the parliament, this is not substantial concern. Very recently the Federal and Regional Supreme Courts are starting to subject the selection process with written and oral examination. This is highly valuable in making the process more objective, merit- based and transparent.

The procedures employed in appointing the Presidents and Vice Presidents of the Supreme Courts are vulnerable to the risk of being politicized. The Judicial Councils have no say in the selection and appointment of such officials of court. The selection and appointment process is exclusively controlled by the executive and legislative organs. Having regard to the substantial power of presidents of Supreme Courts of both the federal and state courts over the lower courts in their respective sphere of competence and all the more so in the absence of transparent criteria of selection; this is a potential entry point for the other branch of the government to outreach the judiciary.

²⁴⁰ ኤርሚያስ ለገሰ ፤ “የመለስ ጉሩፋቶች” ባለቤት አልባ ከተማ ፣2006.

Concerning to the criteria of selection and appointment of judges, the courts' and the judicial councils' establishment laws of federal and regional governments set out more or less similar criteria. Albeit general, these criteria conform to standards prescribed by international principles, with one exception. One of the criteria stated in such laws is "loyalty to the Constitution". For most commentators, this is a politically crafted criterion having little bearing on the professional qualification and integrity of the nominee. This is another source of concern for compromising judicial independence. The grounds for and procedures of removal of judges for judicial misconduct are also detailed in the court laws of the federal and regional governments. But the grounds and procedures of removing presidents of courts both at the federal and regional level remains opaque, as it is the case for their appointment process.

Adequate Salary and Benefit for Judges

Though there is still a huge gap between expectation and reality, the salary of judges has witnessed improvement compared to what was the situation years back. Taking into consideration of the ever increasing inflation rate, however, there is still much to be done. The move of the Federal Supreme Court to provide transportation means for all of its judges and set to provide housing facilities for all of federal judges deserve huge appreciation, and need to be emulated by regional judiciaries. There are discrepancies between federal and regional courts, regarding salaries and benefits of judges. Recently, for example, the judges in Amhara Regional State have been engaged in confrontations with the regional government on the issue of salary incremental.²⁴¹

Internal Independence

A threat to the institutional and individual aspects of judicial independence comes not only from outside forces or actors but also from inside actors, notably from the officials assuming higher positions in the hierarchy of courts.²⁴²

²⁴¹.The judicial Council of the Amhara Regional State courts approved a new salary scale for the judges and sent it to the Regional Council for approval. The latter declines to approve the new salary schemes. The constitution of the Amhara Regional State is silent as to the power of the judicial council to decide over matters of salaries of judges.

²⁴² .in the consultative meeting which the Working Group held with judges representing the three tiers of federal courts, the threat of independence coming from the court administration organ is mentioned as one area of concern.

In Ethiopian case, the Presidents of Federal Supreme Courts of federal and regional governments hold a considerable power over the lower courts. The president of the Federal Supreme Court, for example, enjoys a very wide power over the Federal High Court and First-Instance Courts. The presidents of latter courts are fated to work under the directive and delegation of the president of the Federal Supreme Courts. The Federal High Court and First Instance Courts lack

The required managerial and administrative autonomy. They cannot administer their budget and resources. The presidents of such courts need to solicit the approval of the President of the Federal Supreme Court for every minor administrative or managerial decision. Such centralization of power in the hands of the President of Supreme Courts, especially where the executive organ is (seen to be) enjoying significant power in their appointment, would induce judges to anticipate that a “wrong” decisions in a particular cases could have career consequence and thus negatively impacting their independence.

Another source of concern in this area is the Sentencing Manuals being issued by Federal Supreme Court. The new Criminal Code of 2004 mandates the Federal Supreme Court to issue Sentencing guidelines to be followed by other courts. Subsequently, the court issued its first Sentencing Guideline in May 2010. It was amended latter. Since then, determination and imposition of Sentencing in Ethiopia has been regulated by these guidelines.

The existence of sentencing guideline, *per se*, is not a problem by itself. In fact, disparities in practice of sentencing necessitate guidelines and principles to bring uniformity in the area. The problem is where such guidelines limit the discretion given to judges by the law. The sentencing guidelines issued by the Federal Supreme Court are criticized for narrowing the discretion of judges stipulated in the Criminal Code in terms of levelling offences and determining sentencing ranges.²⁴³ This is a typical case of trespassing to the independence of judges coming from judicial hierarchy.

²⁴³. Kassahun Molla Yilma & Julian V.Roberts “ Out of Africa: Exploring the Ethiopian Sentencing Guidelines” in *Criminal Law Forum*, 2019 ,pp.331-335.

Tenure Security

Tenure insecurity impacts independence of judges. Legal guarantee of security of tenure protects judges from the risk of losing their jobs for decision detrimental to the executive or legislative organs. The FDRE Constitution guarantees the tenure of judges. It expressly bans removal Judges until the attainment of a retirement age, except for misconduct or gross incompetence or inefficiency, or incapacity to discharge judicial responsibilities by the decision of Judicial Councils and subsequent approval by the legislative organ. This is in line with the international principles and standards. Despite that, reports have been surfaced evidencing forced resignation of judges. Increasing numbers of judges who left the federal courts, for instance, were complained of systematic and forced resignation.

Though the Constitution establishes a guaranteed tenure for judges, it fails to do same for presidents of Courts. The removal or not of presidents and vice presidents of the Supreme Courts is practically subject to the whim of the Prime Minister, in case of the Federal Supreme Court and the Chief Executives of States, in case of regional supreme courts. Similarly, the removal or not of presidents of the High Courts and First-Instance Courts is also subject to the will of respective judicial councils. The perverse result has been manifested by frequent changes in the heads of courts.

Judicial Immunity

Giving a qualified immunity for judges is of paramount importance in preserving their independence. Subjecting judges to damage liability for every mistake is considered to be assault to their independence. Judges in Ethiopia are immune from damage liability for any mistake they made in the judicial function as per Art.2138 of the Civil Code. But, the scope of the immunity that judges are accorded is not extended to cover criminal liabilities and disciplinary measures.

Adequate Infrastructure and Working Conditions

Inadequate court infrastructures and poor working conditions are factors impacting the overall performance of the judiciary. They are also inversely related to the independence of the judiciary. As indicate above, the budget allocated to courts in Ethiopia is generally

incomparable to the volume of work load they are increasingly facing with. Courts in Ethiopia are generally under-resourced, which in turn leads to poor working conditions and infrastructure.

However, improvements have been made at the Supreme and High Courts level, situations at First Instance or *Wereda* courts leave much to be desired. Insufficient courts rooms, inadequate equipments, severe shortage of human resource, security risks and poor coordination are but some of the serious problems in this area. Some of the courts are forced to spend significant portion of their annual budget for leasing court buildings, often built for business purposes and unfit for court use. More often than not, judges are forced to share a small room as office. The offices are under equipped and stuffed by volume of files, which makes the working condition totally unsuitable. One can observe these conditions at the Federal Supreme Court, a court presumed to be in a far better position than the courts the lowest level of hierarchy.

It is not in common to hear news, particularly, at the regional level, that judges have been victim of physical attack by litigant parties due to absence or insufficient means of protecting their security²⁴⁴. This is against the conventional standard that the security and physical protection of judges and their families must at all times be pressured by the government.

Fundamental Freedoms of Judges

Members of the judiciary, like any citizens, are entitled to fundamental freedoms of expression, belief, association and assembly. Such freedoms of judges should not be encumbered with unwarranted limitations. There are legitimate restrictions, through. Such restrictions are emanated from the need for judges to be and to be seen independent and impartial in their judicial functions. The judges shall exercise their rights and freedoms in a manner comparable with the independence and impartiality of the judiciary and the dignity of their office.

Save these legitimate restraints, there should not be legal or practical barriers denying judges of their fundamental freedoms or rights. One among them is the freedom to form professional

²⁴⁴ Concluding Remarks of the Annual Meeting of Federal Supreme Court,n.91

association, a platform by which judges are expected to develop a sense of professionalism, promote professional values, defend their interests, and above all to challenge the intrusions by other branches of government to their independence.

Though there is no legal barrier in Ethiopia, professional associations of judges are rare. Only in Amhara regional states that judges were managed to channel their voice through such a kind of association. The Amhara regional judges association has become vocal in championing and protecting the legitimate interest of its members.

On the part of freedom of expression, the “loyal- to- the constitution” requirement has been proved to be costly. The Federal Judicial Administration Council cited this ground to dismiss a judge working in a federal court, as recently as in 2017.²⁴⁵ The alleged “crime” of the judge was expression of his opinion regarding the need of amending the constitution and ratifying the statute of International Criminal Court.

Judicial Training

Both pre-service and in-service judicial training is an essential component of judicial independence. It equips judges with the required judicial skill, knowledge and competence to defend their independence. For that end, international principles and standards call for the establishment of independent judicial training centres with the purpose of conducting sustainable training of judges.

In Ethiopia, the Federal Justice Organ Professionals Training Centre was established in 2003 with a declared objective of training judges and prosecutors. The regional governments also set up their own training centres. Since then, the centre has trained and graduated lawyers who joined the judiciary.

Originally the recruitment parameters of trainees were not clear. This left a grey area for the ruling regime to use such training centres as a bridge of packing the judiciary with politically affiliated judges. Reports have been circulated that the candidates, especially in the regional states, to these centres were required to submit recommendation letters from the lower administrative hierarchy of the government. What is more, the way the trainers were selected

²⁴⁵ . The House of Peoples’ Representatives dismissed a federal judge, named Gizachewu Mitku, in 2016 for his lack of “loyalty to the constitution “ based on the recommendation of the Federal Judicial Administration Council. His alleged “misconducts “ were critical remarks towards the government, including the suggestions that some provisions of the constitution should be amended and that Ethiopia shall adopt statute of International Criminal Court.

was not clear and transparent. The curriculum and methodologies of training are said to be incompatible with the objective of equipping the trainees with judicial skill, practice, ethics and behaviour. Trainees are required to take courses on government's political policies and strategies, which have nothing to do with judicial skill and knowledge. In the aftermath of the 2005 election crisis in the country, the government officially declared its intention of indoctrinating everyone in the state apparatus including judges with government policies. Members of the executive organs, with no legal knowledge, used to train judges about ideologies, policies and strategies. The Developmental State policy fanfare of that period was often cited to provide the underlying justification for indoctrinating judges with political policies and ideologies. There was no resistance from the judiciary to such training programs aiming at educating judges about what the executive organ is planning to do in its area of competence. This was a systematic and organized strategy of co-opting the judiciary, a project tracing its origin back to the Transitional Government's action of purging experienced judges and packing the court with loyal judicial personnel.

But, the main concern comes from the fact that these training centres are accountable to the executive organs. The Federal Justice and Legal System Research and Training System were accountable to the Federal Supreme Court, previously. But currently it is restructured as Justice and Legal Research and Training Institute (JLRT) and is made accountable to the Federal Attorney General's Office, as per Proclamation No. 1097/2018 (Art. 33(8)(d)). Thus the federal judicial centre currently is under the supervision of the executive organ. This makes the training institute non-independent. An executive organ in charge of training the future judges is an obvious threat to the independent of the judiciary. This in turn erodes the trust of the public towards the judiciary.

Perception of the Public

Formal guarantees of judicial independence are not enough to locate the status of a particular judiciary. Perception, by the public, the court user and by judges, of the way the judiciary is actually operates matters most as well. The judiciary needs to be not only independent but also be seen as independent.

Though evaluation of public perception towards the judiciary needs a comprehensive data gathering and systematic study on a periodical base, the structural and practical defects that

Ethiopian courts have been entangled with coupled with the general opinion of the court users and available reports, it has been in the domain of common knowledge that Ethiopian judiciary has never won public trust. The independence of the courts had been under severing attacks by the recently ousted executive organ of the government. The post 2005 election period has witnessed aggressive ways of outreaching the judiciary with the objectives of subduing the same. Judges, who were found to be implicated in decisions challenging the actions of the regime, were subjected to forced resignation and even physical assault.²⁴⁶ Several judges, including head of courts, have fled the country claiming government interferences. Such types of occurrences erode the confidence or perception of the general public towards the judiciary.

In the remark made by the current President of the Federal Supreme Court up on her arrival to the office, augmenting public trust of the judiciary will be a top priority for her leadership. The annual reports, to the parliament, of the judiciary often acknowledge the low level of esteem that the public accords to the judiciary.

The judiciary has been considered as a political instrument for the ruling regimes to silence opposition of any sort. The recent media unearthing of inhuman treatments and ordeals, which prisoners in Ethiopia had been suffered from, shocked the nation to its inner core. The general public is of the opinion that the judiciary is also complicit in such gross violations of human rights. The judges were generally reluctant to hear cases of mistreatment, by the police and security officials, of prisoners or detainees on a non-plausible ground that they were not mandated by law to investigate such acts, though the constitution expressly obligates them to enforce citizens' rights.

As a way of conclusion, the independence of Judiciary in Ethiopia is tainted by many structural and practical handicaps. The deficiencies in the independence of the judiciary are attributable to the low level of public trust towards courts. Public confidence of a judiciary plays a vital role in cementing legitimacy of, not only the judiciary but also of, the government as a whole.

²⁴⁶ The vice president of the Federal First Instance Court and the President of the Supreme Court of the Southern Nation Nationalities Regional State fled the country on the grounds of intimidation and threat from the government. In the same vein, increasing numbers of judges have left the judiciary citing reasons of similar nature.

5.5.2 Impartiality of the Ethiopian Judiciary

A. Constitutional Base of Impartiality

The FDRE constitution does not recognize Ethiopians right to be tried by impartial courts. The right to be tried by impartial and competent court is one of fundamental rights of persons recognized by international declarations and human right instruments which are ratified by Ethiopia. Though the constitution fails to address this issue, judicial code of conducts prescribe rules requiring judges to be impartial in their judicial functions. Observance of ethical judicial conducts on the part of the judges, however, remains still a daunting task in Ethiopia.

B. Level of Independence of the Judiciary

Though judicial independence and impartiality are technically different concepts, they are mutually re-enforcing. Independence of a judiciary is a pre-requisite for impartiality. A judiciary which is not independent cannot be impartial. All the structural and practical deficiencies that we have explored in the preceding sub-section relating to independence of the judiciary have a negative bearing on the impartiality of Ethiopian judiciary.

C. Absence of Partiality in the Administration of Justice

There is no such thing as prefect impartiality. Judges, being human beings, are subjected to bias, prejudice, inclination, sympathy and many other mental dispositions which are sources of partiality. Hence perfect impartiality is not possible in the real world. If perfect impartiality is impossible, what does the concept of impartiality of judiciary refers to? Most agree that it refers to “impartial enough” - impartial enough to give assurance to the parties in the litigation that they will get a fair trial, impartial enough to the public that the courts are guardian of human rights and rule of law, impartial enough to ensure that judges are of the required integrity.²⁴⁷ The reasonable man standard is to be employed to determine the level of impartiality needed in the contexts of different setups.

²⁴⁷.Charles Guardner Geyh ,n25,p.510

Partiality in the administration of justice may take different forms: economical, social or political interests of judges in the outcome of a particular case resulted from judicial corruption, lack of integrity on the part of the judges, political affiliation of judges and grounds of such sort inducing the judges to develop bias or prejudice towards one of the parties.

Judicial corruption is the main curse of the judiciary tainting the whole process of justice administration. It has been said that existence of few rotten apples in the judiciary has the capacity of spoiling the judicial barrel as a whole. If the institution which is supposed to take the lead in fighting corruption is found to be corrupted, even with a minimum level, the whole image of the judiciary will be subject to misconception and thus shall be avoided with great zeal.

The Ethiopian judiciary was seen by the public as the most corrupted institution of all the public institutions.²⁴⁸ That has a total destructive effect on the overall performance of the judiciary, requiring an overhaul measure to contain it. Ethiopia ranks 96 out of 180 countries in Transparency International's 2019 Corruption Perceptions index (CPI). The 2019 Trace Bribery Risk Matrix placed Ethiopia at a high risk category with a score of 71, much lower than the average global score of 51. According to this index, the country ranks 176 out of 200 countries. These data shows the high level of corruption in the country. And judicial corruption is continuing to be a challenge to the judicial system in Ethiopia.

Another source of partiality is political affiliation that the judiciary as institution or individual judges hosts towards a certain outcome of the case. In criminal justice system, this political interest is always expressed in violating due process procedures, denying accused persons of fair trial, convicting political prisoners for bogus charges. The government has been blamed for mobilizing the criminal judicial apparatus to silence its political opponents. This practice of mobilizing the judicial apparatus for political end had seen its worst form in the after math of the 2005 election. The Developmental State ideology was instrumental in transforming the courts in to another governmental apparatus to mute opposition voices. The period witnessed the worst forms of politicization of the judiciary, a mechanism by which apparatuses of courts are often deployed in achieving political ends. Following the election saga, the government

²⁴⁸ Transparency International ,2012

turned to mass arrest of members of the main opposition party and convicted them for charges dubbed as destabilizing the constitutional order, endangering the interest of the state, treason and crimes of similar serious nature.

The ever increasing ethnic polarization in the country has the potential of taking the judiciary to the uncharted territory of partiality. Judicial partiality based on ethnicity or race is common, even countries with consolidated democracies. The extent to which Ethiopian courts and judges are prone to fall in that trap is subject to further research. But, the speed by which the political, social and economical space of the nation is getting infected with ethnic stratification, it would be prudent to smell the problem ahead and devise remedial mechanisms.

Thus, partiality of the judiciary resulted from harbouring political interest in defending and protecting the political regime had been defining features of Ethiopia judiciary.

D. Adequate Mechanisms of Regulating Partiality

Judicial partiality has been regulated through different ways ranging from recusal or disqualification procedures to disciplinary measures including removal of judge. In Ethiopia there are legally guaranteed means of regulating partiality of judges including disqualification or recusal procedures, fair trial procedures, judicial codes of conducts and disciplinary measures for violations of rules related to impartiality. The courts' establishment proclamations, both at the federal and regional level, provide for the procedures of recusal by judges in case of possible existence of partiality due to conflict of interests or any other source.

The close scrutiny of the grounds for initiating recusal procedures, however, reveals that they are too limited and specific²⁴⁹. One obvious missing from the list of recusal grounds is political interest in the outcome (political dimension of impartiality) of a certain criminal case, for example. The list of grounds provided in such laws are ones related to economic and

²⁴⁹ The federal Court Proclamation No.25/96(as amended) lists five grounds: If the judge is found to be related to one of the parties by consanguinity or affinity, if the dispute is related to a matter in which the judge acted as tutor, legal representatives or advocates to one of the parties, if the judge has previous knowledge of the subject matter of the case while acted as judge or arbitrator, if the judge has a pending case with one of the parties and other reasons sufficient enough to cause perception that justice will not be done. The First four grounds are clearly related to social or economical interest that the judge may have towards the outcome of the case or to the parties. Though, the last ground seems to be general enough to include political partiality as a ground for disqualification, the practice dictates that this last ground has been simply ignored for want of clarity.

social interests. The way the grounds are enumerated makes it almost impossible in the criminal proceeding to have a successful plea for disqualification of judges on ground of partiality.

Second, the judges are generally very sensitive to request of disqualification. The general trend is that the judges always decline to disqualify themselves based on the alleged facts and often refer the file to their colleagues working in the same bench, sometimes sharing the same office. It is natural that the two judges working together in the same office exhibit a relational partiality (both actual and perceived) towards each other. Thus, what is happening in effect is that a covertly partial judge is assigned to rule over partiality case. The outcome is almost always predictable. The plea for disqualification of the judge is to be dismissed and the file is to be returned back to the previous judge, who is now more partial due to the accusatory remarks in the complaint letter. The party initiating the recusal procedures now has a lot to worry about the final outcome of the litigation. This discourages parties to resort to these procedures even if they have substantial reasons to question the actual or perceived impartiality of judges.

Third, remedial actions for disqualification of partial judges are not known for a larger segment of the court uses. Neither the grounds for nor the procedures of disqualification are transparent for the public at whole. Last, rulings entered in the recusal procedures are not subject to appellate review. The parties, including the judge facing such procedures, who are not dissatisfied by the rulings over the request of disqualification, have no means of challenging the ruling.

Proper administration of fair trial procedures can be also a guarantee for procedural impartiality. Both the FDRE constitution and the criminal procedure code provides for rules guaranteeing fair trial. However, the inquisitorial methods of conducting trial in Ethiopia, partiality which judges harbour towards the government, lack of sufficient knowledge as to the human right instruments and more importantly the timidity culture that Ethiopian courts have developed make the implementation of fair trial procedures still wanting. Improper relationship between trial judges and prosecutors, harassment of accused persons and witnesses, frequent constant interference, by judges, in the witness hearing process, reluctance to hear complaints of human right violations against prisoners are some of the factors haunting trial process in Ethiopia.

The recently introduced RTD (Real Time dispatch) system proves to be a challenge for ensuring a fair trial induced regulating mechanism of partiality. RTD is a system of speedy crime investigation prosecution and disposal technique anchored on the principle of speedy trial. In Ethiopia, the scope of application of RTD includes medium and simple offences which do not involve intricate evidences, including flagrant offences.

Countering all the robust outcomes of RTD system in terms of speedy trial and reducing workloads, there are shortcomings related to fair trial right of the accused persons. The shortcomings are mainly attached to the improper administration of the system and thus can be avoided or mitigated with simple adjustments.

Criminal defendants going through RTD system are always denied of their rights to get adequate time and facilities for the preparation of a defence. The mandatory time limit²⁵⁰ with in which the criminal cases shall be disposed of in RTD system tempts judges to ignore the plea of additional time by accused persons to get adequate time and access quality counsels.

The courts are also in the habit of denying bail rights of accused persons charged under RTD system, based on the ground that the case is to be disposed with in duration of hours or few days. Persons accused subjected to RTD system find it difficult to ensure their right to be presumed innocence, as the general perception is to regard them as criminals caught red handed while committing the alleged crime. All these shortcomings of RTD system, unless properly managed and fixed, may be translated to a miscarriage of justice as captured by the adage “justice rushed is justice crushed”.

E. Perception of Impartiality

The perception of the courts users and the public at large about the impartiality or not of the judiciary is similar to one they have related to independence of judiciary. Though, it requires a comprehensive empirical research to measure the perception of the public and court users towards the impartiality of courts, the absence of effective regulating mechanisms of partiality and anomalies encumbering the trial process along with the overt practices here and there are sufficient enough to conclude that the public does not perceive the court as partial arbiter of dispute.

²⁵⁰. The Federal Government criminal Justice Administration Business Process Re-engineering (“BPR Document”) (2002) attaches fixed time schedules for the disposal of different categories of criminal case to be handled by RTD System.

5.5.3 Accountability of the Judiciary

Judicial Code of Conduct

Judicial codes of conducts at federal and regional courts have been in place. The Federal Supreme Court has adopted a disciplinary procedure code for federal Judges. The Federal Supreme Court amended the previous version of the code of conduct, with the aim of addressing accountability issues in a more effective way.²⁵¹ But having judicial code of conducts is one thing and having judges of high integrity and propriety is another thing. It needs, *inter alia*, building a judicial culture where competency, impartiality, integrity and propriety of judges are becoming entrenched norms among the professional community. A lot has to be done in that direction. Reports of judicial misconduct are common in federal as well as state courts.

Formal Complaint Procedures

Having a formal complaint procedure against judges involved in judicial misconduct is one means of ensuring judicial accountability. The courts' proclamation laws or codes of judicial conducts set out procedures by which victims of judicial misconducts can institute a complaint against judges. The procedures of filing the complaint and the disciplinary proceedings are more or less similar in federal and regional courts. Any persons aggrieved by the judicial misconduct can lodge the complaint either to the judicial administration councils or the presidents of the courts, who are also members of the councils. Steering committees of experts investigate the merit of the case and make recommendation to the Judicial Administration Councils. If the case is found to be of merit, the judge facing the complaint is required to submit his /her defence. Then the judicial council enters decisions which it finds appropriate. The disciplinary measures include oral or written warnings, fine or in some serious cases dismissal subject to parliamentary approval.

The complaint procedures are plagued with problems related to lack of transparency of both the remedies available and procedural rule of disciplinary proceedings to the general public, absence of appellate review by the aggrieved parties and delay of the proceeding.

²⁵¹ Federal Supreme Court quarterly Report of 2019.

The perception among the court users regarding the judicial accountability are that in non-political matters the judicial councils is marred by judicial corporatism.²⁵²

External Monitoring Mechanisms

Enabling civil societies, non-governmental organizations, the media, bar associations, academic institutions, national human right institutions or individuals to monitor, assess and comment on judicial misconducts or the work of judges is also another means of ensuring accountability of the judiciary. International principles and standards recommend that the judiciary as whole and individual judges should demonstrate necessary restraint from using court contempt proceedings to mute legitimate criticisms of their work.

The general understanding is that the freedom of expression and right to get public information would enable concerned actors to monitor, assess, report and comment on judicial misconducts. But, the practice dictates that commenting on the works of the judicatory including criticizing decisions is at its rudimentary stage. This is partly due to the sensitivity of judges to tolerate critical comments on their work, as demonstrated by frequent contempt proceedings and verbal warnings against journalists. Equally true is the culture of self-restrained by the stated actors not to investigate and comment on the works of judges.

Legally Guaranteed Remedies for Judicial Misconduct

International and regional human right instruments assert that anyone who alleges to have been a victim of judicial violations have the right to get adequate and effective remedies, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.²⁵³ The state has responsibility to redress damage sustained by the victims of

²⁵² This judicial corporatism is best showcased by a ruling of the federal Judicial Council in a certain disciplinary case in which a judge(s) were accused of erasing and altering the operational part of a judgment declared in an open -public trial. In a certain family case (File No.-----),the judges officially pronounced the judgment they entered in an open trial ,on 27 December, 2017.The certified copy of the judgment was served to the parties a week after, on 2 January,2018. Two months later, it happened that the two parties presented two different versions of the same judgment as evidence in another proceeding at Federal First Instance Court. A follow up inquiry landed the facts that one of the presiding judge, for the reason only known to him, took the file back and erased a full statement of the operational part of the judgment with the effect of shifting the winning status and ordered the issuance of the amended version. The other party, who apparently lost the case by the previous version, secured another version of the judgment, making her the winner. All these facts were established and were also said to be affirmed by the judge erasing the statement, except that he insisted that it was done on the same day of the pronouncement of the original version of the judgment and that the alteration does not have substantial effect. [*both facts are not correct, though*] A disciplinary charge was lodged. The Federal Judicial Council quashed the disciplinary case for lack of merit. If this cannot be considered as judicial misconduct, what else can be?

²⁵³ . International Commission of Jurists, at n. 30, p.6

judicial conduct. The qualified immunity enjoyed by judges to ensure judicial independence does not relieve the state from its responsibility of providing effective and adequate remedies for victims of improper acts of judges. Unfortunately the Ethiopia legal system is devoid of any mechanisms by which victims of judicial misconducts can get any remedies noted above.

Judicial Performance Evaluation

Traditionally Judicial Performance Evaluation (JPE) programs were not appreciated by the judicial community. It was seen as a means of undoing what is done by the judicial independence. The judicial community has been reluctant to consider judicial function as any service capable of being evaluated against the needs and interests of customers. Starting from the mid of second half of the 20th century, a shift has been taken place in a public perception of the roles of judges²⁵⁴. Now, the judiciary as institution and judges have been increasingly regarded as accountable figures who provides service subject to measurable evaluations.

One of the mechanisms available for the society to ensure that its judiciary is up to the expectation of the public and its judges are of high integrity and competence is a periodical evaluation of their performances based on clearly defined, objectives and measurable standards.

JPE is, thus, the process of monitoring, analysing, and using organizational performance data on a regular basis for the purpose of improvements in effectiveness, transparency, accountability and accessibility.²⁵⁵

Traditionally judicial performance measures have been relied much on the machinery of court organizations, measuring the blend of inputs, such as the number of court staffs employed, and outputs, such as the number of cases processed by court staffs. They employed a single –dimensional method and approach hugely relied on survey data. Overreliance over survey data is not without problems. Data gathered on survey methods is vulnerable to inaccuracy owing to bias and prejudice of the opinion givers and also fails to capture the contextual information of the actual interface by the actors in the court rooms. That induces countries to opt for multi dimensional evaluations methods.

²⁵⁴.Medha Srivastava (*et'al*), Development and Enforcement of Performance Standard to Enhance Accountability of the High judiciary of India,2017, pp-2-10

²⁵⁵. SELEN Siringil Perker, Judicial Performance Evaluation Ethiopia: Local Reforms met Global Challenge available at [http:// www.hks.harvard.edu/criminaljustice/indicators-of-safety-and-justice](http://www.hks.harvard.edu/criminaljustice/indicators-of-safety-and-justice).

Performance evaluation of judiciaries has been integral part of justice reform in Ethiopia. As it has been the case with many other judiciaries, the performance evaluation methods employed in Ethiopia have been single dimensional solely based on computation of incoming and outgoing cases and also on survey based information²⁵⁶. Court users have been requested to fill in questionnaires prepared by the Judicial Administration Councils. The questionnaires are destined to illicit information about the legal knowledge, communication and judicial skill of the judges, clarity of rulings and decisions, trial management, treatment of parties and matters of similar nature. The results of the evaluation are not published and the public knows little about the effect of such evaluation.

Recognizing the shortcomings of the traditional single-dimensional evaluation method, the Federal Supreme Court is about to launch a multidimensional performance evaluation method.²⁵⁷ It is reported that the new evaluation method incorporates a court room observation and assessment of sampled court judgments to complement the survey based data, a measure deserves huge applauds in the effort of ensuring accountability of the judiciary.

Transparency

Transparency in the internal operation of courts (what they are?, how they operates?, what service they offer to the public?, what operational challenges they face?) plays a pivotal role in ensuring judicial accountability. Equally true is that transparency in the working of the judicial system is instrumental in boosting public confidence and accessibility of courts.

Traditionally transparency of the general operation of courts was believed to be achieved through the mechanisms of open-justice(open trial and reasoned judgments).In modern democratic system set up, the public has compelling reasons to have sufficient information as to how the third branch of the government, the judiciary, operates in its administration of justice. This justifiable need of the public requires more than open trial and reasoned judgment. On the other hand enhancing the judiciary's image in the public needs further opening up and outreach of the society.

²⁵⁶. Ibid.

²⁵⁷. Annual Report of the Federal Supreme Court of Ethiopia of 2020.

Generally, transparency in the operation of the courts can be achieved by way of granting physical access to the court (open trial), periodical reports to the parliament about courts' operation, providing full and understandable information about court procedures, performance evaluations and indicators to the public, media outreach, regular publication of court decisions, and organizing conference and seminars of judges while allowing the participation of the representatives of the society.

Great deals of efforts have been done in Federal courts of Ethiopia to enable the public access to court information. The Federal Supreme Court automates its operation and embarks on rendering e-justice to court users. Court users now are able to access information about the status of files through their smart phones. The information kiosks and data base at each federal courts are vital in helping the court users to access the required information about their case. The periodical publication of the cassation decisions has been valued high by stakeholders. The progress made by the federal courts in this area is very encouraging, though there is still a long way to achieve the objectives and make them sustainable.

But, the situation in regional courts, especially in *Wereda courts*, needs much attention. Open trial is still not the norm but the exception in most of such courts. Inadequate funding and lack of power to administer approved budgets are some of the bottleneck problems in implementing transparency projects comparable to those in federal courts.

The relationship between the judiciary and the media is hampered by the culture of mistrust and lack of professional skills.

Exceptional Mechanisms

There are times where the ordinary accountable mechanisms fail to secure the desired goals. Such is a case particularly where countries undergoing transition or reform from an authoritarian regime known for widespread and systematic violation of human rights to democratic form of government. The judiciary may be complicit in the systematic violation of human rights by authoritarian or nondemocratic regimes to such scale and depth that extra-ordinary mechanisms shall be deployed to ensure non-occurrence of such violations.

Failures of the existing accountable mechanisms to deal with problems of such magnitude require departure from the ordinary methods of holding the judicial personnel accountable for judicial misconducts. Though the presumption shall be that the ordinary mechanisms of judicial accountable shall be employed even in time of crisis and transition, the degree to which the judiciary was implicated in the oppressive apparatus of the previous regime justifies the need for exceptional mechanisms. Absent those mechanisms of screening and removing the bad apples of the judiciary would lead to collapse of the reform. The most common exceptional mechanisms implemented by countries in transition are Truth commission, Vetting and Mass removal and re-application.²⁵⁸

The new leadership of the Federal Supreme Court had considered the application of voting procedures in Ethiopia and organized a seminar of stakeholders with that end. It happened that the plan was faced by stiff objection mainly from the judges. Owing to that, it seems that the management of the court abandoned the project.

As the foregoing discussion reveals, the Ethiopian judiciary has been blamed for its involvement, whether by commission or omission, in the systematic and gross human right violations perpetrated by the recently ousted authoritarian regime. Practice of judicial corruption has been rampant in the country to the extent that it needs nothing short of overhauling measure. The wide spread impunity on the part of judges that they are not likely accountable for serious judicial misconducts justifies nothing but extraordinary mechanisms, while preserving the independence and integrity of the judiciary.

5.5.4 Effectiveness and Efficiency

Effectiveness and efficiency are concepts in the business world. The former refers to doing the right things (outcome) while the latter denotes the art of doing things or achieving ends in the right way (process). By the same vein, the two terms are employed here to denote the timely adjudication process and effective administration of justice. Cases need to be disposed without delay and the outcome (decision) of the adjudication shall meet the reasonable expectation of the public at large. In criminal justice system, these measurements can be

²⁵⁸ .International Commission of Jurists, at n. 30, pp.83-99.

explained in terms of having a system which prosecutes and punishes only perpetrators of crime in an efficient and speedy trial. Its effectiveness is measured not only with its ability of prosecuting and punishing the criminals in a timely fashion but also with its ability of screening out of innocent persons from the adjudication process and wrong conviction.

With that in mind, effective and efficient administration of justice needs beyond ensuring independence, Impartiality and accountability of courts and judges. Assurance must also be secured about the timely and quality of justice processed and rendered by the apparatus of the judiciary. Both the process and the output of justice administration are to be impacted by factors like accessibility of courts, timely disposition of cases, effective case flow management, and observance of due process procedures, quality and enforceability of remedies or decisions.

Accessibility of Courts

Accessibility of courts to the needy is an important dimension of a broader right of Access to Justice, one of the focus area appeared in the UN Sustainable Development Goals Of 2030. Access to justice is generally the process of obtaining an effective remedy from the dispute settlement mechanisms, including the judicial apparatus. Accessibility of courts is one of the many ways of ensuring access to justice to citizens.

Accessibility of courts is in turn affected by the presence or not of physical and non physical barriers to the courts. Unequal geographical distribution of courts, poor infrastructure, and limited access to legal representations are some of the main factors interfacing to make courts inaccessible, especially for poor and vulnerable groups of the society.

In Ethiopia, the judicial map mirrors the hierarchical administrative arrangement of the government. At the state level, Supreme Courts are seated in regional capital cities while High courts are seated in Zonal Seats. *Woreda* Courts exist at cities of each *Woreda*. There are about 670 rural *Werda*s in Ethiopia and thus there is equal number of courts at *Wereda* level. Based on the available date, Ethiopia houses a population of more than 110 million and 85% of it lives in rural areas. Simple computation tells us that only 670 *Wereda* courts are available for more than 93 million people. The geographical inaccessibility of the States High Courts and the Supreme Courts is worse, though these courts have been trying to alleviate the problem by implementing a circuit bench system. On the Federal level, the Federal Supreme

Court, having its seat at Addis Ababa, entertains appeal on cases disposed by the Federal High Court and delegated matters from Regional Supreme Courts. This indicates that only one Supreme Court is assigned to handle appeal coming from all over the country. The Federal Supreme Court is somehow managing to address the accessibility issue by automating its service by the help of information technologies. Its service is accessible from centres located in different parts of the country. Hence geographical remoteness of courts is one barrier for accessibility of courts in Ethiopia, needing the readjustment of judicial maps of the country.

Another acute problem making courts in Ethiopia inaccessible is the issue of legal representation. Though the constitution guarantees the right of accused persons to be represented by legal counsel and also mandates the government to provide the same for the poor, practically it is very challenging for the poor and vulnerable to get such service. At the federal level, the Public Defender's Office was established and organized under the Federal Supreme Court. But it has been suffered from insufficient funding, poor infrastructure, shortage of skilled manpower and huge workload. At the regional level, the situation is worse. Though sporadic efforts have been made to fill the gap by civil societies, professional associations and academic institutions, securing adequate representation by legal counsel is still a challenge for the poor and vulnerable, which in turn has an outsized effect on the equality of arms.

Another area of concern is the language issue. The constitution entitles accused persons the right to be informed promptly, in a language they understand, of the charges. Ethiopia is a multilingual country. Consequently, the majority of the regional states have their own working languages different from the Federal working language. More often than not, courts give little attention to as to the availability of interpreters for accused persons who do not speak the courts' working language. This is a serious problem in regional courts, where members of minority ethnic groups cannot understand the working language of the court.

Case flow Management

The notion that courts need to have mechanisms in place to actively control and manage their caseloads beyond the processing rules laid out in procedural laws is a relatively a new one.

²⁵⁹Originated in US back in 1970s, case flow management has become defining element across the globe of greater court responsibility and accountability for efficient case processing without compromising quality.²⁶⁰

Case flow management is a supervision and management of the time and events involved in the moving of a case through the court system from the point of initiation to the point of disposition, regardless of the type of disposition.²⁶¹ The main objectives of case flow management include, *inter alia*, tracking the status of cases and their position in the court process, enhancing greater processing efficiency, making the sequence and timing of the court events all along the process more predictable, support the development of case load and workload statistics and management reports, encouraging greater adherence to standardized steps, augmenting, providing the required inputs for managerial decisions to reduce delays and backlogs, and consequently augmenting the capacity of courts to render better service for the court users and the public at large²⁶²

Information system technologies are largely employed to support case flow management either manually or with advanced technologies, more commonly through automation.²⁶³ With the introduction of information technologies to Case flow management systems; it is now possible to automate the whole process of the court, from initiation of a case to disposition.

With the help of Case flow management and information technologies, detailed and aggregate information about court cases are available enabling the stake holders to identify backlogs rates, age distribution of cases, performance rate of courts and other valuable statistical data. These data in turn are instrumental in devising the correct remedial measures and policies for addressing the bottle neck problems of court, notably delay. Remedial measures include setting time standards to deal with work load and backlog issues. Standard time measurements are employed to assess the timely disposition of cases, basically aiming at preventing delay. The capacity of courts to resolve cases within a certain time frame and thus avoid workloads can be tracked by employing different indicators. Clearance rate, Disposal rate and Backlog rate are the main ones.

²⁵⁹ Dr. Heike P. Gramckow and Valerie Nussenblatt, Caseflow Management : Key Principles and the Systems to Support Them, in The Justice and Development Working Paper Series, 2013, p.1

²⁶⁰ Ibid.

²⁶¹ Id, p. 7

²⁶² Id.pp.4-5.

²⁶³ Id. P.4

Case flow management systems have been introduced and implemented in Ethiopia for the past 15 or more years. One of the shortcomings identified by the Base Line Study report of the Ethiopian Comprehensive Justice Reform Program back in 2005 was poor case management. With the purpose of curing this ailment, sporadic efforts have been made to implement the case flow management supported by information technologies. The implementation of court case management system supported by the information technologies enable federal courts to score a substantial progress has been in terms of backlog reduction, record-keeping system, digitalization of court records, accessibility of court services through video conferencing, Interactive Voice Response, electronic filing, backlog reduction, record-keeping system, terms of this area, though it is still a work in progress.

The clearance rate.²⁶⁴ of federal courts is increasingly nearing the 100% threshold. The clearance rate of 100% indicates that the court is resolving as many cases as the number of incoming cases within a given period of time. Generally a clearance rate of 100% and above is recommended to avoid or decrease backlogs. The annual report of the Federal Supreme court shows that the clearance rate of federal courts for the years 2017-2020 is 100.5%, 98.91%, 90.67 % and 98% respectively. The backlog rate for the same period is 1.4%, 1.26%, 1, 34% & respectively.²⁶⁵

Nevertheless, this picture at federal courts is not matched by the situation in regional courts. The problem identified by the base line study 15 years ago is still acute in regional courts.

Quality of Justice

The quality of service rendered by courts is capable of being assessed by taking in to considerations indicators like timely and effective adjudication of justice, effectiveness in upholding rule of law and human rights, providing public access to legal and court information, delivering quality decision, court user satisfaction.²⁶⁶

The effectiveness and efficiency of court performance is highlighted in the preceding sub section. Though the performance at federal courts level is encouraging, much has to do be done in regional courts.

²⁶⁴ *Clearance Rate* is an indicator of efficiency and productivity calculated based on the incoming and outgoing cases.

²⁶⁵ Annual Reports of Federal Supreme court, 2017,2018,2019 & 2020,

²⁶⁶ ENCJ, at n.41. See also *Evaluation of the Quality of Adjudication in Courts of Law: Principle and Proposed quality Benchmarks in the Jurisdiction of The Court of Appeal of Rovaniemi, Finland* (2006)

The role of Ethiopian courts in upholding rule of law and human rights is not matching the just expectation of the public. Its lack of jurisdictional power to demand compliance with constitution of the actions of the other branches of the government is the main cause for absence or poor human right and constitutional jurisprudence in Ethiopia.

The courts' role in upholding rule of law is also limited. The World Justice Project Rule of Law for the year 2020 ranks Ethiopia 114 out of 128 countries, with the overall score of 0.41 in a score range from 0 to 1²⁶⁷. Among the eight factors used in developing the rule of index by the World Justice Project, the eighth factor deals with criminal justice. Based on the criminal Justice factor, Ethiopia ranks 102 of the 128 countries, with a score of 0.34²⁶⁸. The criminal justice factor is in turn comprised of seven sub factors including, *inter alia*, timely and effective criminal adjudication, impartial criminal justice, and criminal justice system free of corruption, and respect for due process of law and rights of accused. The scores assigned to Ethiopia in the listed four sub-factors are 0.36%, 0.33%, 0.41 and 0.33²⁶⁹, all of which are below the global average. These data shows the minimal role of Ethiopian judiciary in upholding rule of law.

Delivering quality decision is also another indicator in assessing the quality of justice rendered by courts. Assessment of decision is not related to the correctness or merit of the case but the way it is given. Independence of judiciary justifies the exclusion of the correctness of decisions from the scope of assessment. Reasoning, predictability, clarity and enforceability of decisions are aspects of quality decisions.

The quality of decisions in terms of clarity, predictability and reasoning is not up to the public expectation. The problems that we have highlighted so far in terms of Partiality, judicial corruption, competency problems, independence, impunity and other factors daunts the quality of decisions. The Cassation Division of the Federal Supreme Court is mandated by law to render and publish decisions with a binding effect on courts throughout the country. The declared objectives are to bring uniform interpretations of laws and predictability of the decisions. But the performance of the Bench has been a disservice. It has been known for inconsistent and unpredictable decisions. Such inconsistency and contradictory decisions of

²⁶⁷ The World Justice Project Rule of Law Index 2020.

²⁶⁸ Id

²⁶⁹ Ibid

the Cassation bench judges of lower courts to give no consideration of ignore the consideration of the cassation decisions all together and to dispose the case in the way they consider appropriate. The inconsistent and contradictory of decisions along with the covert partiality of judges in the adjudication process have the effect of dissatisfaction of court users and the public at large. The low satisfaction of the court users and the public towards the judiciary's service is of crucial significance in gauging the where about of the judiciary in the performance spectrum.

The enforceability of or compliance with courts' order is also another serious concern to be tackled. It has been a recurrent feature of Ethiopian criminal justice system that the police is generally reluctant to observe orders of courts in cases of political odour.

SECTION SIX

Dealing with the Legacies of Repressive Past: Transitional Justice in 'Transitional' Ethiopia

6.1 Setting the Context

In recent past, lengthy conflicts that wreaked havoc and caused incalculable human casualties in several African countries came to an end; likewise deeply entrenched undemocratic and repressive modes of rule have given way to relatively democratic civilian governments. Most often, the displaced authoritarian regime and the conflict are characterized with gross human rights violations, tattered social fabric, social discontent and societies divided along different lines. Hence, following a transition from authoritarian regime to a relatively democratic one or from conflict to stability, the newly installed government is often faced with the herculean tasks and formidable challenges of how to confront the repressive past in order to build the future yet without upsetting the fledgling democracy and fragile peace.

Numerous countries across the globe were confronted with this formidable challenge and many others particularly in Africa are still grappling with this arduous task. It has become a burgeoning practice that addressing past gross human rights violations by charting appropriate transitional justice mechanisms is necessary in order to, *inter alia*, re-humanize the victims, replace impunity with accountability and restore rule of law, and to promote reconciliation by uncovering the comprehensive truth. However, as transition is an extraordinary and chaotic period that requires *sui generis* mechanisms, the questions of how to address and effectively come to terms with the evils of the past is a complex and daunting one yet necessary.

In recent past, Ethiopia has also experienced series of regime changes and faced the challenges of confronting the legacies of past gross human rights violations. The newly installed governments have put in place different mechanisms, albeit inadequate, as a means to come to terms with alleged violations of predecessor regimes. Nonetheless, Ethiopia's history is rife with unsettled and unprocessed egregious human rights violations and historical grievance. Since April 2018, Ethiopia is again in transitional process and grappling with transitional justice issues that often arise during 'transitional period'.

This diagnostic study is divided into three parts to address major issues surrounding Ethiopia's attempt to come to terms with the legacies of widespread and systematic human rights violations of the past. The first part briefly introduces readers to the general notion of transitional justice and mechanisms. The part that follows dwells on transitional justice in Ethiopia. To do so, this part takes stock of the major transitional justice mechanisms that the post-*Derg* regime and the incumbent Abiy government have put in place to deal with repressive past in seriatim. The last part of the study puts forth lessons that can be drawn for the current transitional process and plausible means which help rectify the blind spots of the ongoing transitional justice mechanisms and thereby restore the mechanisms.

6.2 General Account of Transitional Justice

After a transition,²⁷⁰ be it from a dictatorial regime or disastrous civil war, the nascent democracy, and newly installed government or regime, are, often faced with the complex challenges of how to confront the past. Transition is an extraordinary period that requires *sui generis* mechanisms, as the conventional approaches and conception of justice associated with ordinary period are ill suited for such context of extraordinary condition and political flux. During this period '[l]aw is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective, between the individual and the collective.'²⁷¹ Transitional justice²⁷² is a notion associated with such context and helps to tackle the thorny issues and dilemmas intrinsic to transition. Put differently, transitional justice is a field that studies how societies emerging from authoritarian rule or protracted war can deal with the legacies of repressive past. Teitel defines the concept as 'conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes'.²⁷³ For the UN, transitional justice 'comprises the full range of processes and

²⁷⁰ Transition in this sense implies 'an interval between one political regime and another. Transitions are delimited, on the one side, by the launching of the process of dissolution of an authoritarian regime and, on the other, by the installation of some form of democracy, the return of some form of authoritarian rule, or the emergence of a revolutionary alternative. The typical sign that the transition has begun comes when these authoritarian incumbents, for whatever reason, begin to modify their own rules in the direction of providing more secure guarantees for the rights of individuals and groups.' See O'Donnell G, and Schmitter Ph (eds.) *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (1986), p. 6. See also Teitel RG *Transitional Justice* (2000), pp. 5-6.

²⁷¹ Teitel (2000), p. 6.

²⁷² There is no consensus on the labelling or nomenclature of this subject. Many refer to it differently. The labels or descriptive phrases range from 'Post-conflict justice', 'post-transition justice', 'post authoritarian (or totalitarian) justice', 'retributive justice' to 'justice after transition'. The author of this paper prefers to use 'transitional justice' as this is relatively less misnomers and descriptive of the subject matter.

²⁷³ Teitel RG 'Transitional Justice Genealogy' (2003) *Harv. Hum. Rts. J.* 16, p. 69. See also, Kritz NJ *Transitional Justice: How Emerging Democracy Reckon With Former Regimes* (1995). Cf Roht-Arriaza N 'The New Landscape of

mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.'²⁷⁴

Albeit it is daunting to define a slippery notion like transitional justice due to its multidimensional and multidisciplinary nature as well contextual feature, it is possible to dissect the main issues or questions that it seeks to address. Succinctly, transitional justice deals with the following major dilemmas, questions and formidable challenges that transitioning states face: What to do to a repressive past? Is settling past accounts necessary? Is dealing with the legacies of repressive past an option to displace without risk? Can confronting repressive past run the risk of awakening the ghost of the past? Or is it inescapable yet daunting task for a newly installed government or regime to face? What are the available choices and mechanisms to confront past gross human rights violations?

Admittedly, these are complex questions, as some call them 'immensely difficult' dilemmas,²⁷⁵ for which there are no off-the-shelf and conclusive answers. However, turning a blind eye to a repressive past and trying to 'brush the past under the rug' in order to avoid grappling with the complex and difficult challenges of confronting past gross human rights violations, cannot lead to the much needed 'healing of wounds', reconciliation and democratization process.²⁷⁶ There is a growing consensus that ignoring past gross human rights violations and attempting to close the chapter of an oppressive past by saying let bygones be bygones is not anymore a viable option to start a journey on the road to a democratic future.²⁷⁷ In other words, confronting the violent conflict, repressions and other mass atrocities of the past is necessary, in fact it is the 'least worst strategy' compared to ignoring the past which is 'the worst of all bad solutions'.²⁷⁸ Because unaddressed atrocities and a sense of injustice would not only haunt a nation but also remain as embers that could

Transitional Justice' in RohtArriaz N, Mariezcurrena J (eds) *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (2006), pp. 1-2.

²⁷⁴ Report of the UN Secretary-General 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (2004), p. 4. See also the AU Transitional Justice Policy Framework (2015), pp. 14-24. Available at <http://www.legal-tools.org/doc/bcdc97/pdf/> last accessed June 2020.

²⁷⁵ O'Donnell and Schmitter (1986), p. 30.

²⁷⁶ As Lutz argues 'unmet transitional justice goals will cast a long shadow across the political landscape that will not go away until they are realized.' See Lutz, E 'Transitional Justice: Lessons Learned and the Road Ahead' in RohtArriaz and Mariezcurrena (eds) (2006), p. 327.

²⁷⁷ See Kritz (1995); Roht-Arriaza (2006), pp. 3-14 in RohtArriaz and Mariezcurrena (eds) (2006).

²⁷⁸ They stated that: 'By refusing to confront and to purge itself of its worst fears and resentments, such a society would be burying not just its past but the very ethical values it needs to make its future livable. Thus, we would argue that, despite the enormous risks it poses, the "least worst" strategy in such extreme cases is to muster the political and personal courage to impose judgment upon those accused of gross violations of human rights under the previous regime.' See, O'Donnell and Schmitter (eds.) (1986), p. 30

ignite similar conflicts in the future. It is undeniable that in some transitions, sequencing mechanisms and prioritization peace over justice is necessary so as not to provoke the ire of the defunct but powerful wrongdoers who might have the potential to destabilize the fragile democracy and foment violence.²⁷⁹

The question then is what choices are available to the newly installed government to reckon with the legacies of repressive past. Also, which or which combination of the mechanisms should be charted as a means to look back at the past and forward to the future? The following subsections shed light first on the models of transition followed by the major transitional mechanisms that help to confront a repressive past.

6.2.1 Models of Transition

Based on the foregoing discussion, transitional justice is a notion associated with periods of (political) transition. Hence, it is judicious to briefly highlight the main models that bring about transition, change of regime or government or end of war. Huntington makes tripartite classifications of transition, namely replacement, trans placement and transformation.²⁸⁰

Replacement, as the designation indicates, is a model of transition in which the change of regime resulted from complete defeat or collapse of the old regime and then ultimately replaced by the opposition group. This type of transition often occur through a protracted revolutionary struggle or civil war which consequently results the opposition gaining strength and the government losing strength until the government collapses or is overthrown.²⁸¹ Unlike in other types of transition, in the case of replacement the oppositions are the ones who take the lead to bring about change or transition. The prototypical cases of this transition include Rwanda's 1994 transition and Ethiopia's transition from *Derg* to Ethiopia's People Revolutionary Democratic Front (EPRDF). In such cases of transition, the level of criminal accountability for past gross violations is substantial as the defunct officials are often powerless hence could not cause serious threat to the peace and stability of a country.

²⁷⁹ AU Transitional Justice Framework (2015), pp. 13-14; Stan and Nedelsky (2013), pp. 58-59.

²⁸⁰ For the various cases of these transitions, see, Sriram, CL *Confronting Past Human Rights Violations: Justice vs. Peace in Times of Transition* (2004), pp. 40 *et seq.* For more discussion on other models of transition see also, Share, D 'Transactions to Democracy and Transition through Transaction', *Comparative Political Studies*, 19/4 (1987), pp. 525-548. On the models of transition, phases and paces of transition, see generally, O'Donnell and Schmitter (1986).

²⁸¹ Huntington S *The Third Wave: Democratization in the Late Twentieth Century* (1991), p. 142.

Transformation on the other is a type of transition in which ‘those in power in the authoritarian regime take the lead and play the decisive role in ending that regime and changing it into a democratic system.’²⁸² Of course, it is not to say that the opposition and /or the citizens in general do not have any role in the realization of such transition. Instead, in such model of transition, the government is stronger than the opposition. Thus, such changes are regime initiated reforms. In contrast, in the case of trans placement, the transition is a result of the joint action of both the government, on the one hand, and the oppositions and citizens, on the other. In trans placement, unlike in the cases of replacement and transformation, ‘the eyeball-to eyeball confrontation in the central square of the capital between massed protesters and serried ranks of police revealed each side’s strengths and weaknesses.’²⁸³ In such case, there is often a stalemate and is hard to foretell a definitive winner. To use the words of Huntington, ‘the political process leading to trans placement was thus often marked by a seesawing back and forth of strikes, protests, and demonstrations, on the one hand, and repression, jailing, police violence, states of siege, and martial law, on the other.’²⁸⁴ Due to this, the regime would be forced to concede change—liberalization of the political space and democratization process. In the case of transition that resulted from trans placement, the level of criminal accountability is slightly higher than transformation where accountability is minimal as in the latter case the reformers tend to be protective of the erstwhile officials.

To conclude, the nature of transition is one of the various factors that may inform the type, timing and sequencing as well as postponing of some of the transitional justice measures, especially prosecution in case of negotiated transition (or trans placement). However, whatever nature a given transition takes, it does not warrant an attempt to move forward without reckoning with the past egregious human rights violations. The newly installed government has to confront the repressive past by using appropriate transitional justice mechanisms. The question then boils down to what are the transitional justice mechanisms that are available to confront the repressive past.

²⁸² Huntington (1991), p. 124.

²⁸³ Ibid, p. 154.

²⁸⁴ Ibid, p. 153.

6.2.2 General Overview of Transitional Justice Mechanisms

This part briefly dwells on the various transitional justice mechanisms with special emphasis on criminal accountability and truth commission. Transitional justice mechanisms include wide-array of measures that help to come to terms with the legacies of past widespread and /or systematic state sponsored human rights violations. As defined in the UN Policy Framework, transitional justice mechanisms are ‘both judicial and non-judicial mechanisms with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.’²⁸⁵ The possible road map that transitioning states chart to confront past gross human rights violations can also be broadly defined to include anything that they adopt to come to terms with legacies of past violations and abuses.²⁸⁶ The above definition of the UN narrowly defines, rightly so, the universe of transitional justice mechanisms.²⁸⁷

Accordingly, the most prominent transitional justice mechanisms include criminal prosecution (or accountability), truth commission, conditional amnesty, vetting, reparation, and memorialization. Although each of these mechanisms have their respective purposes, the general shared goals of the mechanisms range from establishing accountability, truth seeking, establishing authoritative historical record, acknowledgement of the violations, promoting reconciliation, and preventing future violations.²⁸⁸

It bears mentioning that from the diverse ranges of transitional justice mechanisms, there is ‘no-one-size-fits-all’ mechanism or miracle solutions for the question of how to deal with the past.²⁸⁹ Besides, one mechanism is neither a substitute for the other nor sufficient by itself to address past wrongs. In other words, the wide-array of transitional justice mechanisms should be viewed as adjunct and mutually reinforcing than as dichotomous and mutually exclusive.

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²⁸⁵ Report of the UN Secretary-General, p. 4.

²⁸⁶ ‘At its broadest, it involves anything that a society devises to deal with a legacy of conflict and/or widespread human rights violations, from changes in criminal codes to those in high school textbooks, from creation of memorials, museums and days of mourning, to police and court reform, to tackling the distributional inequities that underlie conflict.’ See Roht-Arriaza in RohtArriaz and Mariezcurrena (eds), p. 2

²⁸⁷ As noted by RohtArriaza ‘broadening the scope of what we mean by transitional justice to encompass the building of a just as well as peaceful society may make the effort so broad as to become meaningless.’ Roht-Arriaz in RohtArriaz and Mariezcurrena (eds) , p. 2.

²⁸⁸ AU Transitional Justice Framework (2015), pp. 12-13.

²⁸⁹ Ibid, p. 13.

²⁹⁰ Ibid, p. 13 , See also, The Report of the UN Secretary-General (2004), p. 9; Hayner, *PBUnspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* 2 ed. (2011), pp. 8, 26. While commenting on the Sierra Leone experience, Schabas aptly noted that: ‘The Sierra Leone experience may help us understand that post-conflict

Based on factors, such as, the nature of transition, the scale and intensity of past gross human rights violations, and resource, it is necessary to tailor the transitional justice mechanisms to prevailing context and situation of the transitioning state. In addition, use of comprehensive transitional justice mechanisms is desirable where broader outcomes are desired.

Besides, it is worth mentioning that for the transitional justice process and mechanisms in general to be effective and successful, among other factors, there should be meaningful participation of different stakeholders starting from the decision to initiate transitional justice process to designing, opting for and implementing a specific or all ranges of transitional justice mechanisms. In addition, whatever combination is charted must be implemented in compliance and conformity with international legal norms and obligations.²⁹¹

Criminal Prosecution as Transitional Justice Mechanism

Prosecution as a criminal accountability mechanism is judicial measures which traditionally represent justice only whereas the others transitional justice mechanisms are non-judicial mechanisms which represent peace. To reiterate, the periods that precedes a transition from authoritarian regime to democracy or conflict to stability is often characterized with egregious human rights violations in the forms of extra judicial killings, torture, enforced disappearance, arbitrary arrest, abuse of power, corruption and many others. Simply put, during these periods, impunity and rule by iron fist were the order of the day which enabled state sponsored crimes. Thus, following transition, among other things, replacing impunity with accountability and re-establishing rule of law through the instrumentality of criminal prosecution is not only necessary but also a duty of transitioning states.

A case for adopting criminal prosecution as a transitional justice mechanism transcends the conventional theories of punishment—it advances other purposes peculiar to period of political change. Transitional criminal prosecution is ‘generally justified by forward-looking consequentialist purposes relating to the establishment of the rule of law and to the consolidation of democracy.’²⁹² In simple terms, transitional criminal prosecution aims to

justice requires a complex mix of complementary therapies, rather than a unique choice of one approach from a list of essentially incompatible alternatives.’ See Schabas, WA ‘The Sierra Leone Truth and Reconciliation Commission’ in RohtArriaz and Mariezcurrena (2006), pp. 21-22.

²⁹¹ United Nations Approach to Transitional Justice Processes and Mechanisms (2010), p. 2.

²⁹² Teitel (2000), p. 30.

replace impunity for rationalized state sponsored violence with accountability and thereby reinforce normative change and reconstruct rule of law.

Moreover, in most cases, the gross human rights violations perpetrated under the authoritarian rule or during conflict fulfill the necessary elements of crimes under international law such as genocide, crimes against humanity and /or war crimes for which states have a duty to investigate and prosecute alleged perpetrators or extradite.²⁹³ Thus, in such cases, transitioning states have duty to chart criminal prosecution as a means to reckon with such core crimes, at least for those who bear greatest responsibility.²⁹⁴

Admittedly, in some transitional contexts, adopting criminal prosecution as a means to deal with the crimes of defunct officials might threaten the fragile peace and foment violence. In such cases, relentless pursuit for prosecution can only exacerbate the already fragile peace and be an obstacle for the transition, hence postponing, not abandoning altogether, criminal prosecution is necessary.²⁹⁵

Transitional criminal prosecution can be carried out before courts of territorial state, third state (at least on the basis of universal jurisdiction), international courts, internationalized and/or hybrid courts. The prosecutions can be carried out on the basis of domestic law or other applicable laws.

It is worth to note that criminal accountability alone cannot help to adequately deal with repressive past and come to terms with the evils of past. In other words, ‘a piecemeal approach to the rule of law and transitional justice will not bring satisfactory results in a war-torn or atrocity-scarred nation.’²⁹⁶ Thus, depending on the context and peculiarities of the transitional state, transitional criminal accountability should be complemented with other mechanisms—where transitional justice mechanisms are required, embracing comprehensive and complementary mechanism is imperative. The reason being, criminal prosecution as a form of retributive justice is ill-fitted to achieve the goals of the other restorative transitional justice mechanisms. It is hardly possible to establish comprehensive historical record of past

²⁹³ Bassiouni MC, Wise MW *AutDedere, AutJudicare: The Duty to Extradite or Prosecute in International Law* (1995) MartinusNijhoff Publishers, London.

²⁹⁴ However, extensive or large scale prosecution of ‘all offenders for all crimes’ is impractical especially when there are numerous, which is often the case in many transitional states, perpetrators of past human rights violations. Hence, it is imperative to prioritize the perpetrators and the crimes to be investigated and prosecuted on the basis of clear strategy.

²⁹⁵ The cases of Argentina and Chile are classical instances of the need to sequence mechanisms.

²⁹⁶ The Report of the UN Secretary-General (2004), p. 9.

gross human rights violations by using criminal prosecutions. Thus, as the context of transitioning societies often demand, complementing criminal prosecutions by other responses to legacies of past abuse is crucial.

Truth Commission

After the first widely known Argentinean truth commission of 1983,²⁹⁷ truth commissions have become one of the standard ways of coming to terms with the past gross human rights violations.²⁹⁸ In Africa, Uganda in 1986 and Chad in 1991 are forerunner countries in establishing truth commissions albeit their Commissions are the least successful and popular compared to the 1995 Truth and Reconciliation Commission of South Africa.²⁹⁹

Over 40 truth commissions have been established by several countries though in different designations and for different purposes.³⁰⁰ As rightly noted:

Given the variation between these many inquiries, it is not always clear which bodies should be considered within the group for comparison. There is still no single, broadly accepted definition of what constitutes a truth commission. Thus, published lists and databases of truth commissions differ, with some researchers liberally including a broad range of inquiries, and others insisting on a more rigorous and narrow definition and thus a smaller number of commissions.³⁰¹

From the above, it is clear that there is no uniformity in the naming of truth commissions; in consequence on the list of these bodies which should be categorized as truth commissions. In fact, Hayner and the United States Institute of Peace database of truth commissions

²⁹⁷ The Commission was referred to as: 'The National Commission on the Disappeared'.

²⁹⁸ Wiebelhaus-Brahm, E *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (2010), p. 3.

²⁹⁹ Subsequently, several African countries such as Nigeria, Sierra Leone, Ghana, the DRC, Morocco, Liberia, Togo, Kenya and Côte d'Ivoire have established truth commissions. Recently, Gambia and Ethiopia have established truth commissions as means to address their repressive past.

³⁰⁰ The commissions on the disappeared" in Argentina, Uganda, and Sri Lanka; "truth and justice commissions" in Ecuador, Haiti, Mauritius, Paraguay, and Togo; a "truth, justice, and reconciliation commission" in Kenya; a "historical clarification commission" in Guatemala; and, of course, "truth and reconciliation commissions" in South Africa, Chile, Peru, and other countries. See Hayner (2011), p. 12.

³⁰¹ Hayner (2010), p. 10. Freeman also noted that: 'Despite the apparent popularity of truth commissions, their nature often remains obscure to lawmakers and laypersons alike.' See Freeman M *Truth Commissions and Procedural Fairness* (2006), p. 3.

erroneously categorized the Ethiopian Special Public Prosecution Office of 1992 as a truth commission.³⁰²

Be that as it may, truth commissions are defined as ‘official, temporary, non-judicial fact finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years.’³⁰³ From this, it is clear that truth commissions are victim-centred bodies unlike criminal prosecution which primarily focuses on the perpetrators. In addition, the subject matter jurisdiction of such truth-seeking and telling bodies is not to establish individual criminal responsibility rather to seek official, authoritative and compressive truth of what had happened.

As parameters to differentiate a truth commission from a court, administrative tribunal, human rights commission and other similar bodies with adjudicatory power, Hayner identified the following four defining characteristics or attributes of truth commissions: 1) They focus on past, rather than ongoing, events; 2) they consider pattern, causes and consequences of conflict in general terms as opposed to specific or particular events ; 3) they are ad hoc in nature and conclude with general findings; and 4) they operate under authority be it national or international auspices.³⁰⁴

As the names of truth commissions that have been established so far vary, so do their mandates,³⁰⁵ duration, the time-period that they cover, and composition.³⁰⁶ For instances, in

³⁰² Hayner, PB ‘Fifteen Truth Commissions-1974 to 1994: A Comparative Study’ (1994) 16 *Human Rights Quarterly*, pp. 634-635; and the United States Institute of Peace digital collection of truth commissions available at <http://www.usip.org/publications/truth-commission-digital-collection>. Accessed June 2020.

³⁰³ The Report of the UN Secretary-General (2004), p. 17.

³⁰⁴ Hayner, PB *Unspeakable Truth: Confronting State Terror and Atrocity* (2001), p. 14. Cf, Hayner’s revised definition in the second edition of the same book, Hayner (2011), pp. 11-12. Also for more defining attributes of truth commissions, see Freeman (2006), pp. 14-17.

³⁰⁵ Some truth commissions were vested with the mandates to grant amnesty, to list names of perpetrators or name names, power to order search and seizure, and / or to subpoena. See the detailed table on the mandates and other features of diverse truth commissions in Freeman (2006), p. 317. See also the United States Institute of Peace digital collection of truth commissions available at <http://www.usip.org/publications/truth-commission-digital-collection>. Accessed June 2020; and the Institute for Justice and Reconciliation, Truth Commissions: Comparative study available at <http://www.ijrorg.za/trc-database-themes.php>. Accessed June 2020.

³⁰⁶ For more on the various features of different truth commissions see Freeman (2006), p. 27.

terms of their nature (or composition) truth commissions can be national,³⁰⁷ mixed³⁰⁸ or international truth commissions,³⁰⁹ the organ that establishes them also varies, in some countries the executive organ, in others the legislative established truth commissions.³¹⁰ In relation to the organ that establishes truth commission, there is no one size fits all best model. As aptly noted by Freeman '[n]one of these means of establishing a truth commission is inherently preferable to the others. In one context the executive branch may be seen as more credible than the legislative branch; in other cases, the reverse may be true.'³¹¹

Although dozens of truth commission have been established only few of them are (considered) effective. Several factors determine the success or failure of truth commissions, 'some of which are determined by the body that establishes the truth commission or by the truth commission itself; other factors remain outside of a commission's control.'³¹² The major factors that determine the success or failure of a truth commission is its establishment process, the scope of its mandate, legal powers, independence, period of operation, and period under investigation.

The establishment process of a truth commission should not be a top-down and outsiders or external imposition rather it has to be the result of decision of the concerned nation itself which need to encompass the views of victim and survivors. Truth commission is 'best formed through consultative processes that incorporate public views on their mandates and on commissioner selection.'³¹³ The establishment of a truth commission and selection its commissioners which is preceded by public consultation and consultative selection process would not only help to ensure the credibility, legitimacy and the acceptance of its findings but also determines its effectiveness.

³⁰⁷ There are several national truth commissions which have been established since the first Truth Commission of Idi Amin of Uganda in 1974. See Freeman 2006, p. 317; the United States Institute of Peace digital collection of truth commissions available at <http://www.usip.org/publications/truth-commission-digital-collection>. Accessed 16 June 2016; and Institute for Justice and Reconciliation, Truth Commissions: Comparative study available at <http://www.ijr.org.za/trc-database-themes.php>. Accessed on 16 June 2014. The most prominent prototypes of national truth commissions are the Truth and Reconciliation Commission of South Africa; the National Commission on the Disappeared of Argentina, and the National Commission for Truth and Reconciliation, see Hayner 2011, pp. 28 *et seq.*

³⁰⁸ Guatemalan Historical Clarification Commission is the archetype of mixed truth commission, see Tomuschat 2001, pp. 233-258, Hayner 2002, pp. 45-49

³⁰⁹ For example Commission on the Truth for El Salvador, see Buergeth 1994, p. 497.

³¹⁰ Freeman 2006, p. 27.

³¹¹ Freeman (2006), p. 27.

³¹² AU Transitional Justice Framework (2015), p. 14.

³¹³ Report of the UN Secretary-General (2004), p. 17

The other important factor that contributes to the effectiveness of a truth commission is the scope and clarity of its mandates.³¹⁴ The enabling law of a truth commission should clearly define the types of gross human rights violations that fall under the subject matter jurisdiction of a commission. Conducting public consultation would play a significant role to determine the needs and priority of victims on what should be investigated and uncovered by a truth commission. Simply,[a] mandate too broad in scope may overwhelm a truth commission; an overly limited or unrepresentative mandate may undermine the commission's legitimacy and fail to respond to the needs of victims and their relatives.³¹⁵ Also, in view of the indivisibility nature of human rights, socio-economic violations should not be excluded from the mandates of truth commission.

Truth commission should be equipped with all the necessary powers that enable it to effectively carry its mandates. These include the powers to search premises and seize evidence, access to archives, subpoena, give conditional amnesty, name perpetrators, grant reparation and recommend reforms. The enabling law of a truth commission should also state the consequences of failure to coordinate with, or obstructing the works of a commission. The establishing law should also provide for not only ways to implement the recommendations of a commission but also follow-up mechanisms that ensure full implementation of recommendations. In addition to these factors, meaningful independence, sufficient support from civil societies (as well as other partners), enabling political context and host of other factors determine the effectiveness of a truth commission.

Although the goals of most truth commissions and factors that determine their effectiveness are similar, there is no 'one-size-fits all' truth commission model. As stated in the UN Rule of Law tools for Post-Conflict states 'it should be expected that every truth commission will be unique, responding to the national context and special opportunities present. While many technical and operational best practices from other commissions' experiences may usefully be incorporated, no one set truth commission model should be imported from elsewhere.'³¹⁶ Even though transitioning states are not expected to invent 'new truth commission' out of

³¹⁴ Mandates also referred to as 'charters' or 'terms of reference', see Freeman, (2006), p. 27.

³¹⁵ AU Transitional Justice Framework (2015), p. 15.

³¹⁶ Report of the UN Secretary-General (2004), p. 4.

nothing, in establishing a truth commission each state needs to adapt commission that fits its prevailing situation, national needs and political climate.

6.2.3 Interim Conclusion

In summary of this part of the study, it is a trite that each transitioning society has its own peculiar contexts, needs, opportunities and challenges. In fact, ‘there is little that unites any single transitional context to another; the differences are greater than the similarities’.³¹⁷ But one factor that makes most transition societies similar, if not unites them, is the legacy of widespread and systematic human rights violations albeit they may differ on the type, scale and extent of the violations.

So many transitioning societies and government are confronted with the daunting task of how to come to terms with their past in order to clear their way for the future. Of course, transitional justice issues are not the only challenging agenda on the plate of transitioning societies. Transitioning societies face host of other equally challenging non-transitional justice societal and political matters such as security issues, invigorating the shattered economy, providing basic services, and /or resettling displaced persons. Balancing those challenging demands and properly addressing the repressive past by charting appropriate transitional justice measures is herculean but necessary. Thus, transitioning states need to confront the legacies of their repressive past by adopting holistic, not piecemeal, and complementary transitional justice mechanisms. Moreover, the synergy of the various transitional justice mechanisms should be properly regulated.

6.3 Transitional Justice in Ethiopia: Criminal Prosecution and Reconciliation Commission

In recent past, Ethiopia has seen different forms of transitions which include from imperial regime to *Derg* in 1974, from *Derg* to EPRDF in 1991 and most recently, in 2018, from EPRDF to Prosperity Party (PP). Ethiopia and Ethiopians missed the opportunities to come to terms with their repressive past and thereby democratize the country not once but at least twice. Arguably, the most apposite time to kick-start the onset of democracy in Ethiopia was the post-Derg transition. After a little less than three decades, Ethiopia and Ethiopians are again on a transitional path which is undoubtedly an opportune time like no other to set the

³¹⁷ Freeman (2006), p. 5.

democratization process of the country on the right path. I only hope, of course not hope against hope, that this golden opportunity will be fully seized and not go to waste as another addition to the list of missed opportunities in the democratization process of Ethiopia.

One of the factors that positively contribute to a democratization process of transitioning state is the use of comprehensive and integrated transitional justice mechanisms. With the view to draw lessons for the on-going transitional process, this part first briefly examines the transitional justice mechanisms (mainly criminal prosecution) that were put in place as a means to come to terms with the 17 years legacy of *Derg* regime. Then, this part takes stock of the transitional justice mechanisms namely criminal prosecution and truth commission that the Ethiopian government charted following the country's transition from EPRDF-led government to PP.

6.3.1 Post-Derg Transitional Justice Mechanism: Reckoning with *Derg* Crimes

Following the replacement of the imperial regime by the totalitarian regime of Mengistu, no official criminal accountability mechanism was charted for addressing crimes of the defunct regime. Instead, instant justice or mass of summary executions followed. In fact, until 1991, almost all successor regimes in Ethiopia settled their scores with their predecessor officials by resorting to summary justice.

After the complete military defeat of *Derg* in 1991, the Transitional Government of Ethiopia adopted criminal accountability as the main transitional justice mechanism to reckon with the repressive past of the *Derg* regime. The Special Public Prosecutor's Office (SPPO) was established in 1992 to investigate and prosecute *Derg* crimes.³¹⁸ No special court was established albeit necessary; instead the cases were entertained before the newly established ordinary courts.

The Transitional Government resorted to massive criminal prosecutions as an accountability mechanism. Other promising transitional justice mechanisms such as Truth and Reconciliation were not brought into play. In other words, the government adopted incomplete, inadequate and narrow transitional justice mechanism.

³¹⁸ Proclamation 22 of 1992. For more on the SPPO, see Marshet T *Prosecution of Politicide in Ethiopia: The Red Terror Trials* (2018), pp. 148 *et seq*; Vaughan S 'The Role of the Special Prosecutor's Office' in: Tronvoll K, Schaefer Ch, Aneme GA (eds) *The Ethiopian Red Terror Trials: Transitional Justice Challenged* (2009), pp. 51 *et seq*.

In general, although the criminal prosecutions of *Derg* officials as a transitional mechanism left some contributions as their legacy, they suffer from the following limitations which the current prosecutions should consider with a view not to repeat them:³¹⁹ a) Selectivity: The post-*Derg* criminal prosecutions were solely against *Derg* officials. Crimes allegedly perpetrated by other civilian and armed groups were excluded from the mandate of the SPPO. This makes criminal prosecutions of *Derg* officials a prototype of victors' justice. However, this does not mean that the *Derg* officials are victims of the criminal accountability process and should have been spared. Rather, such narrow conception of perpetrators should have been avoided and crimes allegedly perpetrated by opponents of the *Derg* regime should have been investigated and prosecuted as well. b) Massive prosecutions of all perpetrators: Instead of large-scale prosecutions of all level of perpetrators (or all offenders and all crimes approach), the focus should have been in prosecuting only the most heinous crimes and in respect of the most responsible perpetrators. Other complementary transitional justice mechanism (example truth and reconciliation) should have been used to deal with the less serious crimes and lower level perpetrators. c) Protracted trials: The investigation and prosecution of *Derg* officials took unreasonably long time to wind up which in turn jeopardized fair trials rights of the individuals involved and the legitimacy of the whole process; d) Offenders oriented approach: In the post-*Derg* criminal prosecutions, there were minimal engagement and participation of victims of egregious human rights violations.

In a nutshell, the post-*Derg* transitional justice mechanism (or criminal prosecution) was incomplete, delayed, selective and inadequate. It, therefore, left several issues unaddressed and unsettled, which arguably contributed to the poor human rights record during the periods of the successor regime—EPRDF that followed. In the presence of such limitations, transitional justice mechanisms would not have salutary effects and contributions for the process of moving forward from bleak past.

6.3.2 The Current Transitional Process and the Transitional Mechanisms Charted

Currently, Ethiopia is in transitional process, although the nature of this transition is not as clear as Ethiopia's transition from *Derg* to EPRDF. The nature of Ethiopia's transition, from Prime Minister Haile-Mariam Desalegn's EPRDF to Prime Minister Abiy Ahmed's

³¹⁹ For detailed discussion on the pitfalls of Red Terror trials, see Marshet (2018), pp. 240 *et seq*; Tronvoll K, Schaefer Ch, Aneme GA (eds) *The Ethiopian Red Terror Trials: Transitional Justice Challenged* (2009).

EPRDF/PP is what Huntington refers to as trans - placement.³²⁰ The waves of anti-government protests and resistances in Oromia and Amhara Regional States and in other parts of the country; which resulted in the deterioration of the power of the governing coalition, forced the latter to concede change and start the democratization process. As a result, the ruling coalition was forced to make changes of the top leadership by replacing the staunch stand patter. Hence, the type of Ethiopia's current transition is trans placement, not transformation, which is a result of a combined action of the reformist within the EPRDF and anti-government protests.

Admittedly, the line between transformation and trans placement as types of transition is fuzzy, hence for some the type of Ethiopia's current transition can be transformation or reform. Whatever type of transition it may take, Ethiopia is in transition and transitional process.

Since April 2018 Prime Minister Abiy and his administration have adopted several transitional justice mechanisms which range from Official Apology, Amnesty,³²¹ establishment of the Reconciliation Commission, criminal prosecutions to legal³²² and institutional reforms as mechanisms to come to terms with past.³²³ The part that follows briefly highlights and analyzes some of the blind spots of the ongoing criminal prosecutions as well as the establishment process of the Reconciliation Commission and its enabling law in seriatim.

Criminal Prosecutions

There are several on-going criminal prosecutions at the Federal and Regional levels against some suspects of past gross human rights violations and /or corruption crimes.³²⁴ Neither

³²⁰ *Supra*, p. 7.

³²¹ The law-making organ passed Amnesty law on 28 June 2018, which applies for individuals suspected of, charged with, convicted, or sentenced for political crimes such as treason and acts of terrorism. See Proclamation 1098 of 2018.

³²² The government established advisory council called the Legal and Justice Affairs Advisory Council (LJAAC) in 2018 with a view to make reform the laws and institutions that enabled past gross human rights violations. As a result of the fruitful works of the LJAAC and its diverse working groups, several laws which enabled the perpetration of gross human rights violations have been abrogated and replaced by relatively progressive laws.

³²³ To the best of this author's knowledge, although some institutional reforms like that of Human Rights Commission have been progressing fairly well, the same cannot be said for the security and judicial sectors.

³²⁴ These include cases against some of the former officials, intelligence officers, and prison officials. To mention few, cases against *Getachew Assefa* et al (26 former National Intelligence and Security Service officials, 4 *in absentia*, are charged with various crimes); Commander Alemayehu et al (9 accused from federal and Addis Abeba Police); Abdi Muhamud Omer et al (Cr. File No. 231812, some 43 accused charged for various crimes). Also, former prison

special court, nor special prosecution office has been established; instead, the investigation and prosecutions of the suspects are carried out by and before the existing justice machinery.

One of the challenges in using criminal prosecutions as transitional justice mechanism is lack of independent and impartial justice machinery in the wake of transition from authoritarian rule. In a situation where the transitional state inherited a judiciary and other justice sectors which were used as instruments of repression or were at least complicit in the perpetration of past gross human rights violations, adequate and proper institutional reform should precede criminal prosecutions. Or else, it is advisable to bypass existing justice machinery and carry out criminal prosecutions before specially constituted court.

In Ethiopia's current transition, the justice sectors particularly the judiciary are yet to undergo meaningful, adequate and proper reform including vetting process. Thus, the Ethiopian government should have established special court to investigate and prosecute those who bear greatest responsibility for perpetration of past gross human rights violations. Had Ethiopia's government established such special court it would help to lessen issues of partiality and selectivity that arise in relation to the ongoing trials. Hence forward, to restore the credibility of the process and to minimize plausible danger of partisan justice, selectivity and issues of legitimacy in relation to the on-going criminal prosecutions, it is desirable to at least fast track the reform process of the judiciary.

Due to the scale of past violations and large number of perpetrators involved, it is hardly possible to investigate all the crimes perpetrated by all the offenders. Even if it was possible to do so, conducting massive criminal accountability is not a viable option for successful transitional process. Thus, it is necessary to adopt prosecutorial strategy to clearly address the criteria or basis to select and prioritize the crimes and /or offenders to be investigated and prosecuted. Accordingly, criminal accountability should focus on gross human rights violations(or serious crimes or crimes under international law) perpetrated by (former) high ranking and middle level officials.

officials (nine accused from Makelawi and eight accused from Qilinto) are charged with various crimes. The case against Bereket Simon and Tadesse Tenkeshu before Amhara Regional Supreme Court; and the case against the former higher officials of Metals and Engineering Corporation are also among the high profile cases for past crimes. Some of these cases have reached or about to reach their logical conclusion. Also, it is worth to mention that the Federal Attorney General has recently dropped charges against some 63 individuals including from some of the aforementioned cases.

In relation to some of the on-going criminal prosecutions, one can discern that albeit most of the conducts for which the individuals are charged with squarely meet the contextual elements of crimes against humanity (and torture); the charge is for less serious crimes such as abuse of power. What is clear from this is that akin to Ethiopia's transition from *Derg* to EPRDF, the current transition also faced the challenge of inadequate legal framework on crimes against humanity and/or torture.³²⁵ There are two plausible options to overcome this problem: First, using ordinary crimes approach to prosecute crimes against humanity: Most of the individual acts of crimes against humanity such as killing, enforced disappearance, and arbitrary arrest are criminalized under the FDRE Criminal Code. Hence, crimes against humanity can be prosecuted as these ordinary crimes, as the Ethiopian government has done albeit this is not a good approach for many reasons. The second option is using customary international law as a legal basis to prosecute crimes against humanity in same characterization and label. Crimes against humanity is one of the *juscogens* crimes that impose *ergaomnis* obligation, hence absence of domestic legal framework is not necessarily a bar against prosecuting such crimes which attained the status of customary international law. Thus states can rectify the blind spot in their domestic criminal law either by direct application of customary international law or by enacting a law on crimes against humanity that confers retroactive jurisdiction on courts to investigate and prosecute these crimes as such. Doing so would not fly against principle of legality as the law-makers are not creating new crimes rather simply conferring retroactive jurisdiction on courts.³²⁶ Using the second approach is preferable as it enable states to invoke the various features of core crimes, not to mention the moral condemnation associated with such core crimes. However, most states are reluctant to use customary international law as a legal basis to prosecute core crimes; the same is true in Ethiopia. Thus, it is advisable to repair this blind spot in Ethiopia's criminal law by enacting a law that adequately and comprehensively criminalizes crimes against humanity as such.

The Restorative Justice Route: The Reconciliation Commission

³²⁵ The Ethiopian law criminalized torture in a narrow sense. *Cf* Art. 424 of the Criminal Code with Art.1 Convention against Torture and Art.8 (2) (f) of Rome Statute.

³²⁶ Art. 15 (2) ICCPR

Ethiopia's government established a national 'Reconciliation Commission' which became effective on 25 December 2018.³²⁷ The Reconciliation Commission is the first of its kind in Ethiopia, hence a new restorative justice path for the country. It has been a year and half since the Commission was established, which is half of its lifespan, but it has not yet started its core functions rather still grappling with preparatory works.

Although such body is one of the much-needed and a long overdue mechanisms for Ethiopia to move forward from its bleak past, for it to be effective, the major factors that determine the success of truth commissions in general have to be present. These include the establishment process, scope of the mandate, composition, temporal jurisdiction, period of operation and political context.³²⁸

Establishment Process: Defective, but not Stillborn Commission

As discussed in part one of this paper,³²⁹ the establishment process of truth commissions in general should be preceded by public consultation. The Ethiopian Reconciliation Commission was rushed, if not done meteorically. To the best knowledge of the author of this paper, no public consultation and dialogue was conducted prior to the establishment of the Commission. Although this birth defect is not a serious irredeemable problem, had public consultation been conducted that not only would have increased the legitimacy and credibility of the Commission but also would have helped the lawmakers to have a clear picture on the needs of victims and types of violations that need priority and focus. To mitigate the impact of this defective establishment process, the Commission should design a clear strategy that helps to actively engage different stakeholders specially the victims of past gross human rights violations and civil societies.

Composition of the Commission: Appointment, Removal, and Replacement

As highlighted in part one of this paper, for a truth commission to be effective, one of the determining factors is its composition. Truth commission should be composed of recognized and independent personalities from all relevant social groups and sectors. The selection of the members should be in a consultative and representative process. Therefore, prior to the

³²⁷ Reconciliation Commission Establishment Proclamation 1102 of 2018.

³²⁸ *Supra*, p. 14.

³²⁹ *Supra*, p. 15.

appointment of members of a truth commission, public consultation in the selection process should be conducted.

On this matter, the Ethiopian law states that the Chairperson, vice Chairperson and other members of the Commission shall be appointed by the House of Peoples Representatives upon the recommendation of the Prime Minister.³³⁰ The law says nothing concerning the participation of the public and other stakeholders in the appointment of the commissioners. This adversely affects the legitimacy and credibility of the process and work of the Commission. Therefore, it is submitted that prior to making recommendation of the commissioners to the law-making organ, the law should have imposed obligation on the Prime Minister to conduct public consultative selection process before choosing the commissioners. The reason being, the consultative process would make the victims and other members of civil societies to feel local ownership of the mechanism and boost the credibility of the resulting outcome.

Moreover, unlike the experience of countries like South Africa,³³¹ and Sierra Leone,³³² the Ethiopian law does not determine the number of commissioners.³³³ Rather, it empowers the government to determine the number of the members of the Commission.³³⁴ In this regard, it would have been better had the Ethiopian law clearly stated the minimum and maximum number of the Commissioners. Regardless, the law-making organ stupefyingly appointed 41, oodles by any standard, Ethiopians as commissioners, His Eminence Cardinal Berhane Yesus Sourafel and Mrs Yeteneberesh Nigusse as Chairperson and Deputy Chairperson, respectively.

The other serious blind spot of the enabling law of the Reconciliation Commission in relation to its composition is the fact that it does not provide for conditions to be appointed as commissioners.³³⁵ The law should have provided for eligibility or otherwise conditions for

³³⁰ Art. 4(2), Proclamation 1102 of 2018.

³³¹ Art. 7 (1) of the Act that established the South Africa's Truth and Reconciliation Commission stated: 'The Commission shall consist of not fewer than 11 and not more than 17 commissioners, as may be determined by the President in consultation with the Cabinet.'

³³² 'The Commission shall consist of seven members', See Art 2 (3), the Truth and Reconciliation Commission Act 2000.

³³³ Art. 4, Proclamation 1102 of 2018.

³³⁴ Ibid, Art. 4(1). From the wording of the law it is not clear which specific organ of government is empowered to determine the number of commissioners.

³³⁵ The enabling law of the Reconciliation Commission does not regulate the nationality of the members of the Commission. Truth commission can be national, mixed or international based on its composition. The Ethiopian law, however, is silent whether foreign national/s can be elected as commissioners or not.

appointment as a commissioner.³³⁶ The other equally important point is conditions for the removal (and/ or replacement) of the commissioners which are not addressed under the enabling law of Ethiopia's Reconciliation Commission. Issues such as who has the power to remove (and /or replace) a commissioner and on what ground/s remain the lacunae of the law as well.

Mandates: Scope

The enabling law of a truth commission should clearly define and specify the types of gross human rights violations that fall within the subject matter jurisdiction of a commission.³³⁷

The law of Ethiopia's Reconciliation Commission provides the mandates of the Commission under its Article 6. This provision reads like mishmash—the problem starts with its structure. This provision of the law provides both mandates and legal powers of the Commission. For example, while the other sub-provisions are about the mandate of the Commission, Articles 6(1) (5) (6) (7) are legal powers of the Commission. As these two matters are essentially different, they should have been regulated in distinct provisions of the law.

Be the above as it may, the Ethiopian law is not express enough as to the type of violations which are within the mandates of the Commission. Hence, it is necessary for the law to specifically and plainly regulate the types of violations that fall under the mandates of the Commission. It is submitted that the main mandates of the Commission should include the power to investigate and establish historical record of the **pattern, causes, nature, extent, and consequences of past gross human rights violations** in Ethiopia. The investigation should not be limited to gross-violations of civil and political rights; instead, in view of the indivisibility nature of human rights, it should also include gross violations of socio-economic rights. The law should also illustratively define the constituent elements of gross human rights violations. In relation to this, the law should also provide a guideline for the contents of the final report of the Commission on the gross human rights violations. Also, as the law is silent on the implementation of the recommendations and follow-up mechanism/s to ensure proper implementation; it is necessary to clearly address this under the law.

³³⁶ This resulted in the appointment of some controversial figures as members of the Commission.

³³⁷ *Supra*, p. 16.

Temporal Jurisdiction: Period under Investigation

It is important to determine the time frame within which a commission should confine its operation. The enabling law of Ethiopia's Reconciliation Commission does not mention period of coverage of the works of the Commission. In other words, it does not limit the mandate of the Commission in terms of time-period from when up to which period it should investigate the gross human rights violations. The law should not have left unaddressed an important issue like this one; instead, it should have clearly addressed this by first conducting public consultation as regards the period to be covered by the Commission. Therefore, in consultation with different stakeholders, the law should have also clearly specified the time-period that fall in the ambit of the Commission's mandate of investigation. The draft regulation stated the cut-off period of the temporal jurisdiction of the Commission, still without proper public consultation. Over and above this, even if public consultation will be conducted at a later stage, trying to solve decisive matter like this by a subsidiary law would be problematic in many ways.

Period of Operation: Life Span of the Commission

Truth commission is a temporal body by its very nature, hence, the period for which a commission operates should be determined by the law that establishes it. The law that established Ethiopia's Reconciliation Commission under Article 14 provides that the tenure of the Commission be for three years with the possibility of extension for additional time. Given the time period to be investigated is not determined by the enabling law, it is not clear how the lawmakers determined the period of operation. The other point is, it is not clear as to when this three-year period starts to run. Does it include time for preparatory work such as appointment of commissioners and staffing? Although members of the Commission were appointed, the Commission, a year and half after its establishment, is yet to officially start its operation. There is a possibility to extend the period of operation; however, the law does not clearly state the body which has the power to extend the period of operation.

Legal Powers

Truth commission should be vested with necessary powers to enable it to effectively carry out its mandates.³³⁸ On the basis of Article 6 (1) (5) (6) (7) and Article 15 of the law, the Reconciliation Commission of Ethiopia has the legal powers to search and seizer, and access to archives. From the reading of the Ethiopian law, the Commission has the power to order the presence of anyone, however, it is not clear whether the Commission has the power to issue summon. The law should have plainly entrusted this power to the Commission. Also, the law does not clearly state the consequences of failure to cooperate with or obstructing the works of the Commission.

Moving to another issue, as evidenced from foreign experiences, some truth commissions were given the power to grant a conditional amnesty, i.e. depending on the nature and gravity of the crimes and the extent to which the suspects have cooperated in the discovery of the truth and the compensation of the victims. Under the enabling law of the Reconciliation Commission of Ethiopia, there is no mention of conditional amnesty. There is a need to trade-off amnesty for full disclosure of the details of commission of crimes. Therefore, the law should have given the power to grant conditional amnesty to the Commission and should have provided conditions such as individual application, nature and gravity of the crime, degree of participation, and full disclosure for granting amnesty.

The other issue that the law does not address is whether the Commission has the power to name perpetrators. The Commission should be empowered to name identified perpetrators of egregious human rights violations. Besides, the Commission should have been empowered to award reparation, mainly collective reparation to identified victims. In this regard, the enabling law should have provided working definition of who is victim of past gross human rights violations and possible measures to assist victims.

Integrating and Synchronizing the Mechanisms: Managing their Symbiosis and Synergy

The wide-ranges of transitional justice mechanisms are not a substitute to one another, nor mutually exclusive, instead, they are complementary. The crucial roles of criminal accountability or reparation cannot be achieved by truth commission alone and vice versa. For instance, it is only by way of criminal accountability that one can establish individual

³³⁸*Supra*, p. 16.

criminal responsibility—individualization of guilt. Transition from repressive past to a society based on a culture of rule of law and reconciliation requires a comprehensive or synergy of transitional justice mechanisms. Although the leadership of Prime Minister Abiy put in place relatively diverse mechanisms simultaneously, the various measures are operating disconnectedly.

Under the Ethiopia's Reconciliation Commission law, the relationship of the Commission with the finalized, ongoing and future criminal accountability for past gross human rights violations is not regulated. Can a court and the Commission share evidence? Can the Commission recommend prosecution of identified perpetrators? Can the Commission look at matters which have already been entertained before courts of law?

The law states that no one will be prosecuted on the basis of testimony he gave before the Commission.³³⁹ However, this does not inhibit investigation and prosecution of a person on the basis of other possible evidence. In other words, since the Commission is not given the power to grant conditional amnesty, perpetrators of crimes who gave testimony before the Commission can be prosecuted if there is other evidence that can prove the perpetration of the crimes by them. Thus, these and other issues as regards the relationship of the Reconciliation Commission and criminal accountability mechanism need to be plainly regulated. Ideally, I am of the opinion that; alongside the Commission, the government should have established a special tribunal with mandates to investigate and prosecute the most responsible perpetrators of egregious human rights violations.

Also, the indigenous restorative justice mechanisms in Ethiopia are not integrated in the design and implementation of the ongoing formal transitional justice mechanisms adopted by the government. The mechanisms put in place specifically the Reconciliation Commission should be synchronized with the indigenous restorative justice mechanisms. Undoubtedly, the various indigenous dispute resolution mechanisms in Ethiopia have a lot to offer in coming to terms with past gross human rights violations. In fact, these mechanisms are considered as informal transitional justice mechanisms that play vital complementary roles to formal transitional justice mechanisms in addressing past human rights violations.

³³⁹ Art. 18(1), Proclamation 1102 of 2018.

There are diverse indigenous restorative justice mechanisms throughout Ethiopia. These mechanisms offer several useful and positive contributions in truth seeking, healing of wounds, promoting reconciliation and redressing past gross human rights violations. However, they are not synchronized with the various transitional justice mechanisms, particularly the Reconciliation Commission, chartered by the government. It is necessary to utilize the useful roles of these mechanisms in truth finding and reconciliation process. Admittedly, it is necessary to first conduct a balanced assessment of these mechanisms in order to identify their specific roles and compatibility with international standards.

6.4 The Way Forward to Restore the Mechanisms

Although the nature of Ethiopia's ongoing transition is not as clear as Ethiopia's transition from *Derg* to EPRDF, since April 2018, Ethiopia is again on transitional process. To set the democratization process on the right path, the current government should not repeat the incompleteness, selectivity and inadequacy of Ethiopia's transition from *Derg* to EPRDF. The government should build a bridge that would help the country to quickly move forward from its bleak past by charting comprehensive and integrated transitional justice mechanism that help to uncover the truth and bring closure, ensure justice and unify all Ethiopians. Based on the foregoing discussions the author recommends the following:

6.4.1 Comprehensive and Integrated Transitional Justice Mechanisms

It is commendable that the current leadership took the initiative to adopt broader transitional mechanisms including the establishment of Reconciliation Commission. But these mechanisms should not operate disjointedly. There is a need for a clear strategy that regulates the **sympiosis and possible tension** of the mechanisms that are put in place.

6.4.2 Prosecutorial Strategy

It is necessary to adopt prosecutorial strategy to clearly address the criteria or basis to select and prioritize the crimes and /or offenders to be investigated and prosecuted. Accordingly, criminal accountability should focus on gross human rights violations (or serious crimes) perpetrated by former high-ranking officials. To carry out the accountability process in

compliance with international standards and norms, fast tracking the much-needed reform of the judicial sector is pivotal. Also, just like the Red Terror Trials, (some of) the on-going criminal prosecutions for the past gross human rights violations have faced challenges of inadequate legal framework that criminalizes crimes against humanity under Ethiopian law. This forced the prosecutorial organ to resort to ordinary crimes approach as opposed to crime under international law—crimes against humanity. Thus, it is necessary to repair this defect in the Ethiopia's criminal law by way of criminalizing crimes against humanity in the same label and characterization as under international criminal law.

6.4.3 Rectifying the Defects in the Enabling law of the Commission

Some of the serious flaws in the enabling law such as issues of period under investigation, types of violations, and conditional amnesty need to be addressed by way of amending the law, not by subsidiary laws. In addition, for the Commission to have salutary effects, it must be used in combination to other transitional justice mechanisms. In more specific terms, criminal accountability for the upper echelon and the most responsible perpetrators of gross human rights violations should be carried out preferably by special tribunal; and conditional amnesty as a trade-off to full-disclosure of the egregious human rights violations by middle and low-level perpetrators need to be recognized. Also, identifying the indigenous restorative justice mechanisms in Ethiopia which offer useful and positive contributions for promoting reconciliation and integrating them within the Reconciliation Commission is imperative.

Finally, to ensure full implementation of the recommendations of the Commission and maximum dissemination of the report/s, it is necessary to device implementation and follow-up mechanisms as well as comprehensive dissemination strategies.

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SECTION SEVEN

Reparation for Human Rights Violations in Criminal Proceedings in Ethiopia: Legal and Institutional Framework

7.1 Introduction

Human rights violations are serious in authoritarian regimes such as the Ethiopian government led by Ethiopian Peoples' Revolutionary Democratic Front (EPRDF). The EPRDF ruled the country since the fall of the military regime in 1991 until its dissolution in 2019. The EPRDF came to power by armed struggle but fell because of popular protests that first rocked two most populous states of the Federation, Oromia and Amhara. Widespread public protests swept through the State of Oromia since November 2015 and spread to the State of Amhara in August 2016. As a result of the series of protests, Hailemariam Desalegn resigned from his positions as the Prime Minister of Ethiopia and Chairperson of the EPRDF on 15 February 2018. His successor, Abiy Ahmed Ali (PhD) sworn in as the new Prime Minister on 2 April 2018.

Abiy's government embarked on several reform initiatives that totally changed the political landscape of the country. The reform initiatives include the acknowledgement of human rights violation committed during criminal proceedings and the release of political prisoners. In his speech to the Members of the House of Peoples Representatives in July 2018, Prime Minister Abiy explained that the government committed state terrorism because its security forces subjected suspects of crime to torture. Certainly, the release from unlawful detention is a relief. However, the release of prisoners in 2018 was not accompanied by remedies that make good harms suffered by the victims, who include individuals subjected to torture or those who lost their income due to loss of liberty. The release of prisoners in 2018 occurred during a period of transition. Are there remedies for victims of torture or arbitrary detention during normal period? The government's admission of state terrorism indicates improper use of criminal law and criminal proceedings.

In fact, criminal law is an important legislative measure for the implementation of human rights. States use criminal law to prohibit acts that violate human rights. For example, states criminalise homicide to protect the right to life and prohibit robbery and theft to protect the

right to property. To be effective, a legislative measure alone is not enough; it must be complemented by executive and judicial measures that take place in a criminal proceeding, involving investigation and prosecution of criminal suspects in a court of law. That is, a criminal proceeding is a means of protecting human rights. However, human rights of criminal suspects may be violated during the criminal proceedings.

This diagnostic study examines legal and institutional framework for the reparation of human rights violations occurring during criminal proceedings. The study examines texts of international human rights instruments and the practice of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights to identify standards and forms of reparation provided to the victims of human rights violations, including victims of criminal proceedings. The study uses international human rights instruments and practice as a background for assessing compliance of Ethiopian Laws, institutional settings and organisational practices with human rights standards. Secondary sources are the main source of data. Interviews, an expert workshop and a public consultation were used as additional means of data collection.

Human rights are interdependent by nature as the violation of one right may lead to the violation of another right; the realisation of one right may lead to the realisation of another right. Because of the interdependence, criminal proceeding may indirectly affect all human rights. For example, a criminal proceeding may result in a violation of the accused's right to liberty. The loss of liberty may result in the deprivation of the right freedom of movement because an individual cannot exercise the right to freedom of movement without exercising the right to liberty. In other words, a criminal proceeding violates the right to liberty directly but violates the right to freedom of movement indirectly. While a criminal proceeding may indirectly affect the enjoyment of all human rights, only a few rights are directly violated during criminal proceedings. The second section of this paper discusses human rights that are directly violated during criminal proceedings.

In international human rights law, a victim of human rights violations is entitled to reparation, a broad term that includes restitution, compensation, satisfaction, and guarantees of non-repetition.³⁴⁰ The term 'compensation' refers to only one of the forms of reparation, but

³⁴⁰ Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, OUP 2015) 16; Gabriella Citroni, 'Measures of Reparation for Victims of Gross Human Rights Violations: Developments and Challenges in the Jurisprudence of Two Regional Human Rights Courts' (2012) 5 *Inter-American and European Human Rights Journal* 49-71, 53. Citroni argues

at times appears to convey a meaning similar with reparation. For example, the Criminal Code of the Federal Democratic Republic of Ethiopia (Criminal Code) lists different forms of reparation under a provision entitled ‘compensation’.³⁴¹ This study uses the term ‘reparation’ as understood in international law. The third section of the study identifies forms of reparation under international human rights law.

The fourth section uses the forms of reparation recognised in international human rights law as a framework for assessing reparation provided in Ethiopian law, considering human rights violation a crime and a tort. Finally, the study summarises the finding and offers some recommendations in the last section.

7.2 Human Rights in Criminal Proceedings

Criminal proceedings affect all human rights directly or indirectly, as already indicated. The most affected rights are those guaranteeing physical integrity, dignity and property of individuals. These rights include the rights to life, liberty and security, privacy, and the protection against torture. These rights are guaranteed in the Constitution of Federal Democratic Republic of Ethiopia (Constitution)³⁴² and international human treaties ratified by Ethiopia including the International Covenant on Civil and Political Rights (ICCPR)³⁴³ and the African Charter on Human and Peoples’ Rights (African Charter).³⁴⁴ A criminal punishment usually results in the deprivation of the right to liberty and property of the convicted persons, except in serious crimes warranting death penalty. Other rights can also be affected due to loss of life, liberty and property because human rights are interdependent and interrelated.³⁴⁵

The right to life is the supreme right and is ‘the most precious right for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right, the effective

that the Inter-American Court’s reparation orders ‘try to guarantee, besides compensation (covering pecuniary and non-pecuniary damages), also restitution, rehabilitation, satisfaction, restoration of dignity and reputation and guarantees of non-repetition.’

³⁴¹ Proclamation No. 414/2004, 9 May 2005 (hereafter ‘Criminal Code’).

³⁴² The Constitution of Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, *Federal Negarit Gazeta*, Year 1, No. 1, 21 August 1995.

³⁴³ Adopted 10 December 1966, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171.

³⁴⁴ Adopted 27 June 1981 & came into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982).

³⁴⁵ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para 5.

protection of which is the prerequisite for the enjoyment of all other human rights.³⁴⁶ The right to life is non-derogable, but is not absolute in some states retaining capital punishment, including Ethiopia, where the execution of death sentence does not violate the right to life. However, an execution of death penalty imposed in violation of the right to fair trial is a violation of the right to life as the Human Rights Committee underlined in *Johnson v Jamaica*.³⁴⁷ Summary execution and extra-judicial killings are violations of the right to life, but occur without criminal proceedings.

The right to liberty is guaranteed in the Constitution and international human rights treaties ratified by Ethiopia.³⁴⁸ Arbitrary arrest or detention is a violation of the right to liberty. According to the ICCPR, ‘Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.’³⁴⁹ It is clear from the Constitution and international human rights treaties that all deprivation of liberty is not a violation. An arrest or detention is not a violation of the right to liberty when conducted according to the grounds and the procedures laid down by law. In other words, a person can be arrested for specific reasons, for example, for committing a crime. Criminal procedure laws lay down steps to be followed while arresting or detaining an individual suspected of committing a crime. In most cases, the processes and consequences of criminal proceedings lead to the deprivation of liberty.

The Constitution and international human rights treaties contain provisions, which have the purpose of providing additional protection to individuals’ right to liberty. The Constitution and the ICCPR require speedy trial of an accused person.³⁵⁰ The Constitution recognizes habeas corpus: ‘All persons have an inalienable right to petition the court to order their physical release where the arresting police officer or the law enforcer fails to bring them before a court within the prescribed time and to provide reasons for their arrest.’³⁵¹ Individuals have the constitutional right to request the court to restore their liberty. Moreover, the Constitution guarantees the right to be released on bail.³⁵² The Constitution and international human rights treaties contain detailed provisions on the right to fair trial,

³⁴⁶ Human Rights Committee, *General Comment No. 36, Article 6: right to life*, CCPR/C/GC/36, 3 September 2019, para 2.

³⁴⁷ *Errol Johnson v Jamaica*, Communication No. 588/1994, U.N. Doc. CCPR/C/56/D/588/1994 (1996), para 8.9.

³⁴⁸ Constitution, Art 17; ICCPR, Art 9; African Charter, Art 6.

³⁴⁹ ICCPR, Art 9(5).

³⁵⁰ Constitution, Arts 19(4) & 20(1); ICCPR, Art 14(3)(c).

³⁵¹ Constitution, Art 19(4).

³⁵² Constitution, Art 19(4).

guaranteeing several rights, including the rights to be presumed innocent, be represented by a legal counsel, be informed about the charge, present one's defence and appeal against one's conviction and sentence.³⁵³ The compliance with these provisions provides protection to the life, liberty and property of the accused persons.

The Constitution and international human rights law ban torture or cruel, inhuman or degrading treatment or punishment.³⁵⁴ The right to protection against torture is an absolute right because the right is not subject to any limitation. The prohibition of torture is also non-derogable as states cannot suspend the right even in the time of public emergencies.³⁵⁵ However, a violation of this right may occur during criminal proceedings. As Prime Minister Abiy explained to the House of Peoples' Representatives, security forces had been torturing accused or arrested persons. The methods include solitary confinement, denailing and detention in dark cells.

'Everyone has the right to privacy,' according to the Constitution.³⁵⁶ The right to privacy includes 'the right not to be subjected to searches of his home, person or property, or the seizure of any property under his personal possession.'³⁵⁷ This right also includes the right to the inviolability of one's notes and correspondence, which include 'postal letters, and communications made by means of telephone, telecommunications and electronic devices'.³⁵⁸ Like most rights, the right to privacy is not an absolute right; the State can limit this right for legitimate reasons such as the protection of 'national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedoms of others'.³⁵⁹ For example, a police person can get a court permission to search homes of an individual suspected of committing a crime and seize items.³⁶⁰ Victims of human rights violations, including the violation of the rights to life, liberty, protection against torture, and privacy, are entitled to remedy and reparation. The following section briefly discusses remedies and reparation.

³⁵³ Constitution, Art 20; ICCPR, Art 14; African Charter, Art 7.

³⁵⁴ Constitution, Art 18; ICCPR, Art 7; African Charter, Art 5.

³⁵⁵ Constitution, Art 93(4)(c); ICCPR, Art 4.

³⁵⁶ Constitution, Art 26(1).

³⁵⁷ Constitution, Art 26(1).

³⁵⁸ Constitution, Art 26(2).

³⁵⁹ Constitution, Art 26(3).

³⁶⁰ See Criminal Procedure Code, Art 32: 'Any investigating police officer or member of the police may make searches or seizures' in accordance with the provisions of the Code.

7.3 Remedies and Reparation for Human Rights Violations

The recognition of human rights in national constitutions and international human rights treaties entails state obligation to provide remedy in cases of violations. States parties to international human rights treaties have the obligation to provide remedies to the victims of human rights violations. For example, the ICCPR requires states to ensure that any person whose rights or freedoms recognized in the ICCPR are violated ‘shall have an effective remedy’.³⁶¹ The remedies claimed by the complainant should be determined by ‘competent judicial, administrative or legislative authorities, or by any other competent authority’.³⁶² States have the obligation to develop the possibilities of judicial remedy.

Instruments adopted by the resolutions of the United Nations General Assembly provide guidelines on remedies and reparation. These instruments include the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles)³⁶³ and Responsibility of States for Internationally Wrongful Acts (RSIWA).³⁶⁴ The Basic Principles identify forms of remedies and reparation, including ‘restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition’³⁶⁵ specific to the violations of International Human Rights Law and International Humanitarian Law while the RSIWA identifies similar forms of reparation for the violations of International Law in general. The same forms of remedies and reparation have also been identified in the practice of the African Commission on Human and Peoples’ Rights (African Commission),³⁶⁶ which supervise the implementation of the African Charter on Human and Peoples’ Rights (African Charter) to which Ethiopia is a party. The African Court on Human and Peoples’ Rights (African Court), another organ supervising the implementation of the African Charter, includes the cost of litigation in its reparation orders.³⁶⁷ These forms of remedies and reparation are discussed below.

³⁶¹ ICCPR, Art 2(3).

³⁶² ICCPR, Art 2(3).

³⁶³ Resolution adopted by the General Assembly on 16 December 2005, A/RES/60/147.

³⁶⁴ Resolution adopted by the General Assembly on 12 December 2001, A/RES/56/83.

³⁶⁵ Basic Principles, para 18.

³⁶⁶ African Commission, *General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)*, adopted at the 21st Extra-Ordinary Session held from 23 February to 4 March 2017 in Banjul, para 10 (hereafter ‘General Comment 4’). The Commission explains that reparation includes ‘restitution, compensation, rehabilitation, satisfaction - including the right to the truth, and guarantees of non-repetition.’

³⁶⁷ *Zongo* case, paras 87 & 94.

7.3.1 Restitution

Restitution restores the victim to the original situations before the violation of her or his rights, including ‘restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property’.³⁶⁸ In the international law of state responsibility, restitution refers to the re-establishment of ‘the situation which existed before the wrongful act was committed’.³⁶⁹ In other words, restitution places the victim in the situation that would have existed if the violation of his or her rights did not occur. The purpose of restitution is ‘to take from the wrongdoer that to which the victim is entitled and restore it to the victim.’³⁷⁰ In human rights litigations, ‘most restitution claims arise in respect to illegal deprivations of land, art, and other personal property, arbitrary detention, and wrongful termination of employment.’³⁷¹ Thus, restitution includes a release of detained individual.³⁷²

Restitution is the preferred form of reparation for violations of human rights.³⁷³ However, it is not always possible to restore the situation that would have existed but for the violation of a right. An example is loss of life. A wrongful act of a State may result in a violation of the right to life. In such case, restitution is not a possible form of reparation because it is impossible to restore human life. Thus, article 35 of the RSIWA provides for two conditions. First, restitution is provided only when it ‘is not materially impossible.’³⁷⁴ Second, restitution should not ‘involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.’³⁷⁵

The practice under the African Charter shows that restitution is one of the forms of reparation. In its general comment on the right to redress for the victims of torture, the African Commission emphasises that restitution aims at putting the victims ‘back to the situation they were in before the violation.’³⁷⁶ Restitution includes ‘the restoration of citizenship, employment, land or property rights, accommodations, the release of persons

³⁶⁸ Basic Principles, para 19.

³⁶⁹ RSIWA, art 35.

³⁷⁰ Shelton (1 6) 298.

³⁷¹ Shelton (1 6) 298.

³⁷² International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) 96 (hereafter ‘Commentaries on ILC’s Articles’).

³⁷³ Shelton (1 6) 298.

³⁷⁴ RSIWA, art 35(a).

³⁷⁵ RSIWA, art 35(b).

³⁷⁶ General Comment 4, para 36.

arbitrarily detained or restoration of the ability for victims to exercise the right to return.³⁷⁷ Restitution may be ordered when there is a violation of the right to work due to an unlawful detention leading to the unlawful dismissal of an employee. In that case it may take a form of reinstatement. The African Commission ordered this form of reparation in *Pagnouille (on behalf of Mazou) v Cameroon*.³⁷⁸ In a case against Mauritania, the African Commission ordered the respondent State to reinstate the victims, who were unduly dismissed and/or forced to retire but the Commission did not clearly state the violation of the right to work.³⁷⁹

Restitution may take a form of release from detention. An arbitrary detention is a violation of the right to liberty. Releasing a person from an arbitrary detention is restitution.³⁸⁰ The African Commission usually recommends release from detention when it finds a violation of the right to liberty. In *Jean-Marie Atangana Mebara v Cameroon*, the African Commission examined an alleged violation of the right to liberty and the right to a fair trial.³⁸¹ Mr Mebara was detained in relation to charges of embezzlement allegedly committed while he was serving in different ministerial posts. He was detained for around seven years although the maximum of pre-trial detention was 18 months according to the Cameroonian law. The African Commission found that the detention was arbitrary. For this reason, it recommended the release of the victim.

Restitution, one may argue, includes the reopening of a defence case or retrial. Indeed, the African Court orders reopening of a defence case when it finds a violation of the right to a fair trial. In *Diocles William v Tanzania*, the Court found that ‘the Respondent violated the Applicant's right to a fair trial contrary to Article 7(1) of the Charter by failing to afford him legal aid, denying his witnesses to be heard and convicting him in the face of insufficient and contradictory statements of the prosecution witnesses.’³⁸² The reparation for this wrongful act is reopening the case. Thus, the African Court held that ‘the trial of the Applicant should be reopened’ to provide ‘fair and adequate reparation for the violations.’³⁸³

In exceptional circumstances, however, the Court orders release of a person from prison when it finds a violation of the right to a fair trial. In *Alex Thomas v Tanzania*, the Court examined

³⁷⁷ General Comment 4, para 36.

³⁷⁸ (2000) AHRLR 57 (ACHPR 1997).

³⁷⁹ *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000), para 147.

³⁸⁰ General Comment 4, para 36.

³⁸¹ Communication 416/12 adopted during the 18th Extraordinary Session, 29 July to 8 August 2015 in Nairobi, Kenya.

³⁸² App No 016/2016, 21 September 2018, para 103.

³⁸³ *William v Tanzania*, para 105.

the case of a complainant who was sentenced to 30 years.³⁸⁴ When the Court received the case, the complainant had already served 20 years in prison.³⁸⁵ Finding a violation of the right to a fair trial, the Court held that:

The appropriate recourse in the circumstances would have been to avail the Applicant an opportunity for reopening of the defence case or a retrial. However, considering the length of the sentence he has served so far, being about twenty (20) years out of the thirty (30) years, both remedies would result in prejudice and occasion a miscarriage of justice.³⁸⁶

For this reason, the Court ordered the respondent State ‘to take *all necessary measures* within a reasonable time to remedy the violations found, specifically precluding the reopening of the defence case and the retrial of the applicant.’³⁸⁷ While interpreting its judgment later, the Court clarified that ‘the expression “all necessary measures” includes the release of the Applicant and any other measure that would help erase the consequences of the violations established and restore the pre-existing situation and re-establish the rights of the Applicant.’³⁸⁸ In another similar case, *Mohamed Abubakari v Tanzania*, the Court interpreted its judgment and ordered release of the complainant from prison.³⁸⁹

Restitution is appropriate to remedy a violation of the right to property.³⁹⁰ The African Commission orders restitution particularly in cases of eviction from land. In *Centre for Minority Rights Development and Others v Kenya* (Endorois case), the African Commission examined an alleged violation of the right to property due to the forceful removal of Endorois indigenous people from their ancestral land.³⁹¹ The Commission found a violation of the right to property (article 14 of the Charter).³⁹² For this reason, the Commission recommended the restitution of Endorois People’s ancestral land.³⁹³ The Commission also recommends restitution of land when it finds a violation of the right to property due to the failure of the

³⁸⁴ App No 005/2013, 20 November 2015.

³⁸⁵ *Thomas v Tanzania*, para 158.

³⁸⁶ *Thomas v Tanzania*, para 158.

³⁸⁷ *Thomas v Tanzania*, para 161(ix). Italics added.

³⁸⁸ *Alex Thomas v Tanzania* App No 001/2017 (African Court, 28 September 2017) para 39.

³⁸⁹ App No 002/2017 (African Court, 28 September 2017) para 42(iii).

³⁹⁰ African Charter, Art 14, which provides that ‘The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.’

³⁹¹ (2009) AHRLR 75 (ACHPR 2009).

³⁹² *Endorois* case, para 238.

³⁹³ *Endorois* case, para 298(a).

respondent state to carry out its obligation to protect. In *Mbiankeu Geneviève v Cameroon*, the African Commission examined a complaint involving a dispute over a plot of land intended for building a residential house.³⁹⁴ The complainant purchased a plot of land from a fraudulent seller. While processing the transfer of title, the Cameroonian authorities did not discover the fraud. When the fraud was discovered later, the authorities invalidated the title of the complainant. The African Commission found a violation of the right to property (article 14 of the African Charter). Therefore, it ordered ‘the Republic of Cameroon to provide the Complainant with a plot of land of equal value and nature.’³⁹⁵

The African Commission has ordered another form of restitution in *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria* (Ogoniland case).³⁹⁶ The case concerns, among other things, pollution of water sources and farmland due to oil exploration in Nigeria. The Commission found a violation of the right to food (implied in articles 4, 16 & 22), the right to health (article 16) and the right to a general satisfactory environment (article 24). It ordered Nigeria to undertake ‘a comprehensive clean up of lands and rivers damaged by oil operations.’³⁹⁷ Therefore, the African Commission required the respondent State to restore clean environment used to exist before oil exploration activities. However, the African Commission did not call its recommendations restitution.

In conclusion, the practice under the African Charter shows that restitution includes reinstatement, release from prison, retrial and restoration of property. However, restitution alone may not constitute full reparation as stated under article 31(1) of the RSIWA. If restitution is not possible or if it does not constitute full reparation, the victims of human rights violation should be provided with other forms of reparation including compensation discussed in the next subsection.

7.3.2 Compensation

Compensation is a form of reparation for the injury caused by human rights violation. Compensation is provided for any economically assessable damage such as physical or mental harm, lost opportunities (including employment, education and social benefits),

³⁹⁴ Communication No 389/10, adopted 6 May 2015.

³⁹⁵ *Geneviève v Cameroon*, para 153(1).

³⁹⁶ (2001) AHRLR 60 (ACHPR 2001).

³⁹⁷ *Ogoniland case*, para 71.

material damages and loss of earnings (including loss of earning potential), moral damage and costs (including expenses required for legal or expert assistance, medicine and medical services, and psychological and social services).³⁹⁸

Human rights treaties provide for compensation. An example is the Protocol to the African Charter on the Establishment of the African Court (African Court Protocol), which expressly stipulates the state obligation to pay compensation.³⁹⁹ In practice, the African Commission and the African Court order respondent States to pay compensation. In its general comment on the right to redress for the victims of torture, the African Commission explains that

Compensation shall cover [...] reimbursement of medical expenses and provision of funds to cover future medical or rehabilitative services needed by the victim to ensure as full rehabilitation as possible; material and non-material damage resulting from the physical and mental harm caused; loss of earnings and earning potential due to disabilities caused by the torture or other ill-treatment; and lost opportunities such as employment and education.⁴⁰⁰

The general comment is specific to compensation for a violation of the right to protection against torture and other ill treatments (article 5 of the African Charter). Still, it explains that compensation covers material and moral damage. Moreover, it indicates that the compensation for material damage includes provision of ‘legal aid or specialised assistance, and other costs associated with bringing a claim for redress.’⁴⁰¹ The follow subsections discusses three types of damages: material and moral damages, and costs.

Material Damage

The practice relating to compensation evolved over time under the African Charter. The African Commission did not determine the quantum of compensation in its early cases.⁴⁰² In *Embga Mekongo v Cameroon* decided in 1995, the African Commission found a violation of the right to fair trial (article 7 of the Charter) due to false imprisonment and miscarriage of justice.⁴⁰³ The African Commission held that the victim in fact suffered damage but did not

³⁹⁸ Basic Principles, para 20; RSIWA, Art 13(1).

³⁹⁹ African Court Protocol, art 27(1).

⁴⁰⁰ General Comment 4, para 38.

⁴⁰¹ General Comment 4, para 39.

⁴⁰² Shelton (n 1) 321.

⁴⁰³ (2000) AHRLR 56 (ACHPR 1995), paras 1-2.

determine the amount to be paid by the respondent State. The African Commission stated that it was unable to ascertain the amount of damages. For this reason, it has recommended that the quantum should be determined under the Cameroonian law.⁴⁰⁴

In some cases, the African Commission makes a general recommendation that compensation should be paid. This is the case in *Haregewoin Gabre-Selassie and the Institute for Human Rights and Development in Africa (on behalf of former Dergue Officials) v Ethiopia* (Dergue Officials case).⁴⁰⁵ In this case, the African Commission has examined a communication alleging long pre-trial detention of former officials for more than three years (from 1991 to 1994) and long period of trial for around 13 years (from 1994-2007). The African Commission found a violation of the right to non-discrimination (article 2), the right to be presumed innocent (article 7(1)(b)), and the right to be tried within reasonable period by an independent and impartial tribunal (article 7(1)(d)).⁴⁰⁶ The African Commission has recommended that Ethiopia should pay ‘adequate compensation to the Victims for violation of their right to be presumed innocent until proved guilty by a competent court or tribunal and to be tried within a reasonable time by an impartial court or tribunal as recognized in Article 7(1)(b) and (d) of the African Charter.’⁴⁰⁷ However, the African Commission did not determine the amount of the compensation.

The African Commission began determining the quantum of compensation in its relatively recent cases. The Commission determines the amount of compensation for material as well as moral damage. In *Jean-Marie Atangana Mebara v Cameroon* decided in 2015, the complainant claimed 800,000,000 CFA francs for material and non-material damage caused by a violation of his rights to liberty and to a fair trial.⁴⁰⁸ The African Commission ordered the respondent State to pay 400,000,000 CFA francs as compensation for material and non-material damage. To determine the quantum of compensation, the African Commission considered the length of arbitrary detention (about seven years), position held before the detention and the loss of reputation. However, it did not separately assess material and non-material damage.

⁴⁰⁴ (2000) AHRLR 56 (ACHPR 1995), paras 1-2.

⁴⁰⁵ Communication 301/O5, adopted in Banjul during the 50th Ordinary Session from 24 October to 7 November 2011.

⁴⁰⁶ *Dergue Officials* case, paras 180, 210 & 240.

⁴⁰⁷ *Dergue Officials* case, para 240.

⁴⁰⁸ Communication 416/12 adopted during the 18th Extraordinary Session held from 29 July to 8 August 2015 in Nairobi, Kenya.

In *Mbiankeu Geneviève v Cameroon*, the African Commission separately assessed the amount of compensation for material and non-material damage. The case involves a violation of the right to property due to loss of title over a plot of land contrary to the right to property guaranteed under article 14 of the African Charter.⁴⁰⁹ In its assessment of the material damage, the African Commission included the purchase price of the plot (50,692,185 CFA francs) as well as its appreciated value (to be determined), other expenses associated with the purchase and development of the plot (9,000,000 CFA francs), and the damage due to the deprivation of enjoyment of the rights (15,391,460 CFA francs).⁴¹⁰

The African Court determines the amount of compensation when it finds a violation of the rights guaranteed in the African Charter and other human rights treaties. The Court requires applicants to prove the material damage arising from the violation. In *Mtikila v Tanzania*, it emphasises that:

It is not enough to show that the Respondent State has violated a provision of the Charter; it is also necessary to prove the damages that the State is being required by the Applicant to indemnify. In principle, the existence of a violation of the Charter is not sufficient, *per se*, to establish a material damage.⁴¹¹

The African Court also requires applicants to prove a causal relationship between the damage and the violation. In *Mtikila v Tanzania*, the Court found violations of several rights guaranteed in the African Charter. It declared that the respondent State violated the right to non-discrimination (article 2), the right to equality (article 3), the right to freedom of association (article 10(1)) and the right to participate in the government of one's country (article 13(1)).⁴¹² However, the applicant failed to provide the Court with evidence proving the causal nexus between the violations of these rights and the material damage of around four billion (4,168,667,363) Tanzanian Shillings claimed by the applicant. Therefore, the Court declined to grant the request even for a token amount.

In a later case, the African Court restated the general principles applicable to reparation. In *Lohé Issa Konaté v Burkina Faso*, it held that:

⁴⁰⁹ *Mbiankeu Geneviève v Cameroon*, paras 104-119.

⁴¹⁰ *Mbiankeu Geneviève v Cameroon*, paras 140-149.

⁴¹¹ *Mtikila v Tanzania* (reparation), para 31.

⁴¹² *Mtikila v Tanzania* (Merits), para 126.

- a) a State found liable of an internationally wrongful act is required to make full reparation for the damage caused;
- b) such reparation shall include all the damages suffered by the victim and in particular includes restitution, compensation, rehabilitation of the victim as well as measures deemed appropriate to ensure the non-repetition of the violations, taking into account the circumstances of each case;
- c) for reparation to accrue, there must be a causal link between the established wrongful act and the alleged prejudice;
- d) the burden of proof lies with the Applicant to show justification for the amounts claimed.⁴¹³

In *Lohé Issa Konaté v Burkina Faso*, the African Court examined an alleged violation of the right to freedom of expression guaranteed under article 9 of the African Charter. The Court found a violation because the respondent State sentenced the applicant to a prison term of one year for a defamatory statement he published in his weekly newspaper and suspended the publication of the latter for six months. The Court assessed different sort of material damage. Although the applicant did not prove all the damage he claimed, based on equity, the Court awarded the applicant the sum of 25 million CFA francs (US\$50,000) for lost income and 108,000 CFA Francs (US\$216) for medical and transport expenses.⁴¹⁴

Moral Damage

Moral or non-material damage includes ‘pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium.’⁴¹⁵ In *Mtikila v Tanzania*, the African Court defines moral damage as follows:

The term "moral" damages in international law includes damages for the suffering and afflictions caused to the direct victim, the emotional distress of the family members and non-material changes in the living conditions of the victim, if alive, and the family. Moral damages are not damages occasioning economic loss.⁴¹⁶

⁴¹³ *Lohé Issa Konaté v Burkina Faso* (reparation), para 15.

⁴¹⁴ *Lohé Issa Konaté v Burkina Faso* (reparation), para 60.

⁴¹⁵ Commentaries on ILC's Articles (n 25) 102.

⁴¹⁶ *Mtikila v Tanzania*, para 34.

The African Commission has also indicated that moral damage involves ‘physical, psychological, and emotional trauma’ in *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia* (Woineshet case).⁴¹⁷ The case concerns Woineshet Zebene Negash, who was abducted and raped when she was 13 years old. This occurred in Arsi Zone, Oromia State, where the practice of marriage by abduction was common. The Guna Woreda Court sentenced the main culprit, Mr Aberew Jemma Nigussie, to 10 years of rigorous imprisonment. The Court also punished his accomplice. However, they were set free on appeal which was confirmed by the Cassation Bench of the Federal Supreme Court. As the Commission emphasized, abduction, rape and forced marriage, no matter how grave the acts may be, do not result in international responsibility of Ethiopia. It is the responsibility of the government to prevent such acts from happening in the first place. The government, as the Commission noted, has a variety of means to prevent acts that lead to violations of rights. It can use, for example, education to raise awareness of the community where such practices are common. Once such acts occur it is the duty of the government to investigate the acts and prosecute the perpetrators.

However, the Ethiopian authorities failed to investigate and prosecute the criminals. For these reasons, the African Commission found violations of a number of rights guaranteed in the African Charter including the right to equality (article 3), the right to life (article 4), the right to dignity (article 5), the right to liberty (article 6) and the right to a fair trial (article 7(1)). The Commission noted that the victim had suffered moral damage. It emphasised that:

[M]onetary compensation for non-material damage is at large and is determined as a matter of impression, taking into account all the relevant circumstances of the case as opposed to a mathematical formula. The relevant circumstances include the physical, psychological, and emotional trauma that Ms Negash suffered as a result of the primary violations by the private individuals, as well as the denial of justice by the Respondent State's failures.⁴¹⁸

As the Commission has underlined, there is no mathematical formula for assessing moral damage. It makes the assessment as a matter of impression. Thus, it ordered Ethiopia to pay US \$ 150,000 for the moral damage suffered by the victim due to the violations.

⁴¹⁷ Communication 341/2007, 57th Ordinary Session, 4-18 November 2015, Banjul.

⁴¹⁸ *Woinshet* case, para 158.

In some cases, however, the African Commission does not make a separate determination of compensation for moral damage. In *Jean-Marie Atangana Mebara v Cameroon* decided in 2015, the Commission awarded the complainant a lump sum of 400,000,000 CFA francs without separating the compensation for moral damage from the compensation for material damage.⁴¹⁹ In another case decided in the same year, *Mbiankeu Geneviève v Cameroon*, the Commission separated the compensation for moral damage from the compensation for material damage. It granted the requested 5,000,000 CFA francs to make good the moral damage suffered by the complainant as a result of uncertainty and frustration for about seven years.⁴²⁰

Regarding material damage, applicants must provide proof as discussed above. In contrast, victims of human rights violation are assumed to have suffered moral damage. In *Lohé Issa Konaté v Burkina Faso*, the African Court explained that moral ‘prejudice is often assumed by international courts in cases of human rights violations.’⁴²¹ Despite this assumption, the Court sometimes refuses to grant a claim for moral damage. In *Mtikila v Tanzania*, the Court refused to award the amount claimed.⁴²² Rather, it ordered that the judgment and the orders made therein are just satisfaction for the non-pecuniary damages.⁴²³

Cost and Fees

Compensation covers reimbursement of expenses incurred to obtain redress according to the African Commission. In its general comment on the right to redress for the victims of torture, the African Commission emphasises that States should provide adequate compensation ‘for legal aid or specialised assistance, and other costs associated with bringing a claim for redress.’⁴²⁴ However, it has yet to award cost and fees incurred as a result of seeking redress for the violation.

The African Court includes the reimbursement for cost and fees in reparation. In *Mtikila v Tanzania*, the Court held that:

⁴¹⁹ Communication 416/12 adopted during the 18th Extraordinary Session held from 29 July to 8 August 2015 in Nairobi, Kenya.

⁴²⁰ *Mbiankeu Geneviève v Cameroon*, para 149.

⁴²¹ *Lohé Issa Konaté v Burkina Faso*, para 58.

⁴²² *Mtikila v Tanzania*, para 37.

⁴²³ *Mtikila v Tanzania*, para 37.

⁴²⁴ General Comment 4, para 39.

expenses and costs form part of the concept of ‘reparation’. Therefore, where the international responsibility of a State is established in a declaratory judgment, the Court may order the State to compensate the victim for expenditure and costs incurred in his or her efforts to obtain justice at the national and international levels.⁴²⁵

In the *Zongo* case, the African Court confirmed this holding. It emphasised that ‘reparation payable to the victims of human rights violation can also include reimbursement of the transport fares and sojourn expenses incurred for the purposes of the case by their representatives at the Seat of the Court.’⁴²⁶ In this case, the Court granted a claim for reimbursement amounting to US\$5,195.37.⁴²⁷ In addition, the Court held that ‘the reparation paid to the victims of human rights violation may also include the reimbursement of lawyers’ fees.’⁴²⁸ Therefore, the African Court awarded a total lump sum of 40 million CFA francs as expenses and lawyers’ fees.⁴²⁹

7.3.3 Satisfaction

Satisfaction is a form of reparation usually order when the injury caused by an internationally wrongful act ‘cannot be made good by restitution or compensation.’⁴³⁰ According to article 37(2) of the RSIWA, satisfaction consists in ‘an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.’

In its general comment on the right to redress for the victims of torture, the African Commission explains different forms of satisfaction wider than those listed in article 37(2) of the RSIWA. According to the Commission, satisfaction ‘includes the right to truth, the State’s recognition of its responsibility, the effective recording of complaints, and investigation and prosecution.’⁴³¹ The Commission usually recommends the last modalities (i.e., investigation and prosecution) in its case law. In *Gabriel Shumba v Zimbabwe*, the Commission found a violation of article 5 of the Charter (prohibition of torture and other ill-treatment) because the respondent State subjected the victim ‘to prolonged electric shocks in the mouth, genitals,

⁴²⁵ *Mtikila v Tanzania* (reparation), para 39.

⁴²⁶ *Zongo* case, para 91.

⁴²⁷ *Zongo* case, para 94.

⁴²⁸ *Zongo* case, para 79.

⁴²⁹ *Zongo* case, para 87.

⁴³⁰ ILC Articles, art 37(1).

⁴³¹ General Comment 4, para 44.

fingers, toes and other parts of the body.’⁴³² The Commission recommended that ‘an inquiry and investigation be carried out to bring those who perpetrated the violations to justice.’⁴³³ In *Woinshet*, the Commission recommended that the respondent State should ‘diligently prosecute and sanction’ perpetrators of marriage by abduction and rape.⁴³⁴

Moreover, the African Commission lists a range of modalities considered satisfaction:

Satisfaction also includes [...] effective measures aimed at the cessation of continuing violations; verification of the facts and full and public disclosure of the truth [...]; the search for disappeared victims, abducted children and the bodies of those killed, and assistance in the recovery, identification and reburial of victims’ bodies [...]; official declaration or judicial decision restoring the dignity, reputation and rights of the victims and of persons closely connected with the victims; judicial and administrative sanctions against persons liable for the violations; public apologies [...]; and commemorations and tributes to the victims.⁴³⁵

In this general comment, the African Commission does not state that satisfaction includes a declaration of violation. However, a declaration of violation is the most common modality of satisfaction in international law.⁴³⁶ Thus, one may argue that satisfaction is the most common form of reparation in the practice of the African Commission since it limits itself to a declaration of violation in most cases. Nevertheless, the Commission does not state that a finding of violation is a measure of satisfaction.

In contrast, the African Court clearly states that a finding of violation is a measure of satisfaction. In *Mtikila v Tanzania*, the Court found that the finding of a violation in itself is a just satisfaction for moral damage.⁴³⁷ Similarly, while ordering the respondent State to amend domestic laws that violate international human rights standards in *APDF and IHRDA v Mali*, the Court held that a finding of violation is a form of reparation.⁴³⁸ However, it is not clear

⁴³² Communication No 288/2004 adopted during the 51st Ordinary Session held from 18 April - 2 May 2012, paras, 149 & 167.

⁴³³ *Gabriel Shumba v Zimbabwe*, para 194.

⁴³⁴ *Woinshet* case, para 160(d).

⁴³⁵ General Comment 4, para 44.

⁴³⁶ Commentaries on ILC’s Articles (n 25) 106.

⁴³⁷ *Mtikila v Tanzania*, para 37.

⁴³⁸ *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) & the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali* App No 046/2016 (African Court, 10 May 2018) para 135.

why the Court holds that the finding of a violation is a form of reparation in some cases but not in the other cases.

A publication of judgment is one of the modalities of satisfaction according to the African Court. In *Mtikila v Tanzania*, where it ordered constitutional amendment, the Court required the publication of its judgment as a measure of satisfaction.⁴³⁹ In addition, the Court ordered the publication of its judgment as a measure of satisfaction in two cases against Burkina Faso, where it found a violation of the right to freedom of expression.⁴⁴⁰ Again, it is not clear why the Court orders publication of its judgment in some cases but not in other cases.

7.3.4 Guarantees of Non-Repetition

A State responsible for an internationally wrongful act has an obligation to cease that act and ‘to offer appropriate assurances and guarantees of non-repetition.’⁴⁴¹ Assurances or guarantees of non-repetition ‘may also amount to a form of satisfaction.’⁴⁴² In its general comment on the right to redress for the victims of torture, the African Commission considers that satisfaction includes guarantees of non-repetition.⁴⁴³ According to the Commission, to ‘guarantee non-repetition of torture and other ill-treatment, State Parties should undertake measures to combat impunity for violations.’⁴⁴⁴ To combat impunity, States should take measures such as establishing independent mechanisms of investigation, training public officials, strengthening judicial independence, reforming laws and ensuring the fairness and impartiality of judicial proceedings.⁴⁴⁵

The African Court sometimes addresses the guarantees of non-repetition in its reparation judgment. In *Mtikila v Tanzania*, the Court found a violation of the African Charter (articles 10 and 13(1)) since a Tanzanian law ‘prohibits independent candidature for election to the Presidency, to Parliament and to Local Government.’⁴⁴⁶ The Court ordered amendment of the law. So long as the impugned law is in force, Tanzania continues violating the African Charter. One may argue that the compliance with the order of the Court amount to cessation

⁴³⁹ *Mtikila v Tanzania*, para 45.

⁴⁴⁰ *Zongo case*, para 100; *Lohé Issa Konaté v Burkina Faso*, para 60.

⁴⁴¹ RSIWA, art 30.

⁴⁴² Commentaries on ILC’s Articles (n 25) 106.

⁴⁴³ General Comment 4, para 10.

⁴⁴⁴ General Comment 4, para 46.

⁴⁴⁵ General Comment 4, para 46.

⁴⁴⁶ *Mtikila v Tanzania*, para 43.

of the violation. Nevertheless, the Court addressed this issue under the guarantees of non-repetition.⁴⁴⁷

7.4 Compensation for Human Rights Violations Occurring in Criminal Proceedings

International human rights law engenders four levels of state obligations: the obligations to respect, protect, promote and fulfil.⁴⁴⁸ States discharge their obligation to respect when they refrain from interfering with the exercise of rights; they carry out their obligation to protect by preventing third parties from interfering with the enjoyment of rights; they discharge their obligation to promote by creating awareness about human rights; and they carry out their obligation to fulfil by taking steps, including legislative measures, towards the realisation of rights. The following subsection discusses legislative measures taken by Ethiopia in the areas of criminal law, civil law and period of transitions.

7.4.1 Violations of Human Rights as a Crime

The promulgation of the Criminal Code is one of the legislative measures taken towards the realisation of human rights recognized in the Constitution and international human rights treaties. The Criminal Code proscribes acts violating human rights, including rights usually affected during criminal proceedings. As noted above, the rights to liberty and protection against torture are commonly violated during criminal proceedings. The arbitrary deprivation of liberty is a crime under the Criminal Code. Prohibiting unlawful arrest and detention, Article 423 of the Criminal Code provides that ‘Any public servant who, contrary to law or in disregard of the forms and safeguards prescribed by law, arrests, detains or otherwise deprives another of his freedom, is punishable with rigorous imprisonment not exceeding ten years and fine.’

Article 423 relates to the crime of deprivation of liberty committed by public servant. The meaning of public servant is broader than the term ‘civil servant’ defined in Article 2(1) of the Federal Civil Servants Proclamation No. 1064/2017.⁴⁴⁹ Judges, prosecutors and members of the police are not civil servant, but they are public servant. Article 423 of the Criminal Code defines ‘public servant’ as ‘any person who temporarily or permanently performs functions being employed by, or appointed, assigned or elected to, a public office or a public

⁴⁴⁷ *Mtikila v Tanzania*, para 43.

⁴⁴⁸ *Ogoniland case*, para 44.

⁴⁴⁹ Federal Negarit Gazette, 24th Year No. 12, 15 December 2017.

enterprise.’ For instance, a policeperson who arrests an individual without an arrest warrant, where the circumstances do not justify arrest without warrant, commits a crime contrary Article 423 of the Criminal Code. Similarly, a judge who refuses to grant the writ of habeas corpus without any justification commits a crime of unlawful detention.

The criminal law is an instrument for the implementation of the right to protection against torture recognized in the Constitution and international human rights treaties ratified by Ethiopia. Under Article 424 of the Criminal Code, it is a crime for the police persons (and other public servants) in charge of the custody of a person to commit or permit the commission of torture, cruel, inhuman or degrading treatment or punishment.⁴⁵⁰ The violation of the right to privacy of a person by searching and seizing the person’s property is a crime punishable with rigorous imprisonment not exceeding seven years.⁴⁵¹

Therefore, the Criminal Code lays down the legislative framework for holding judges, police officers and prosecutors accountable when they fail to discharge their duties. It is the obligation of the state, particularly the Attorney General, to prosecute public servants, who commit crimes and violate human rights.

7.4.2 Human Rights Violations as a Tort

A breach of law is a tort under the Civil Code of Ethiopia.⁴⁵² Human rights are guaranteed in international treaties, which are part of the law of Ethiopia,⁴⁵³ and in domestic laws including in the Constitution. Thus, a violation of human rights is a breach of law, constituting tort under the Civil Code. For example, a police officer’s failure to bring an arrested person before a court of law within 48 hours of the time of arrest is a breach of Article 19(3) of the Constitution, constituting a constitutional tort. In particular, the Civil Code establishes that

⁴⁵⁰ Criminal Code, Art 424(1) provides that ‘Any public servant charged with the arrest, custody, supervision, escort or interrogation of a person who is under suspicion, under arrest, summoned to appear before a Court of justice, detained or serving a sentence, who, in the performance of his duties, improperly induces or gives a promise, threatens or treats the person concerned in improper or brutal manner, or in a manner which is incompatible with human dignity or his office, especially by the use of blows, cruelty or physical or mental torture, be it to obtain a statement or a confession, or to any other similar end, or to make him give a testimony in a favourable manner, is punishable with simple imprisonment or fine, or, in serious cases, with rigorous imprisonment not exceeding ten years and fine.’

⁴⁵¹ Criminal Code, Art 422(1) provides that ‘Any public servant who, without legal authority, executes acts of search, seizure or sequestration of a person’s property, is punishable with rigorous imprisonment not exceeding seven years.’

⁴⁵² Civil Code, Art. 2035.

⁴⁵³ Constitution, Art. 9(4).

physical assault,⁴⁵⁴ deprivation of liberty,⁴⁵⁵ trespass⁴⁵⁶ and assault on property⁴⁵⁷ are torts. When the torts are committed during criminal proceedings, the victim can claim reparation from the state as the offenders are usually public servants.⁴⁵⁸

7.4.3 Forms of Reparation

The Civil Code and the Criminal Code lack detailed rules, but both contain provisions recognising different forms of reparation identified by international human rights instruments and courts. The Criminal Code envisages different forms of reparation: ‘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 ordered to *make good the damage* or to make *restitution* or to pay damages by way of *compensation*.’⁴⁵⁹

Restitution is a form of reparation under the Criminal Code and Civil Code. The Criminal Code states that the criminal should be ordered to make restitution according to Article 101. Similarly, the Civil Code stipulates that restitution is a form of reparation. Under Article 2118 of the Civil Code, courts have the power to ‘order the return to the plaintiff of property which has been improperly taken away from him, and of the emblements yielded by the property since the date of its removal’. Both the Criminal Code and the Civil Code seem to limit restitution to restoration of property. In international human rights law restitution has a broader meaning as the concept includes remedies such as reinstatement and release from prison as discussed above.

Compensation is recognised both under the Criminal Code and the Civil Code. The term ‘compensation’ is the title of Article 101 of the Criminal Code, which also contains other forms of reparation, implying that the term ‘compensation’ includes restitution and other forms of reparation. The Criminal Code does not distinguish material damage from moral damage. The Civil Code contains detailed provisions on compensation both for material and moral injury.⁴⁶⁰ According to the Civil Code, compensation for material injury is equivalent

⁴⁵⁴ Civil Code, Art. 2038.

⁴⁵⁵ Civil Code, Art. 2040.

⁴⁵⁶ Civil Code, Art. 2053.

⁴⁵⁷ Civil Code, Art. 2054.

⁴⁵⁸ Civil Code, Art. 2126.

⁴⁵⁹ Criminal Code, Art 101. Italics added.

⁴⁶⁰ Civil Code, Arts. 2090 - 2117.

to the harm caused to the victim. The Code limits compensation for moral injury to one thousand Ethiopian Dollars.⁴⁶¹ Considering that an Ethiopian dollar is equivalent to Ethiopian Birr, the maximum amount provided a compensation for moral injury is negligible. Recent laws provide for higher amount of compensation. For example, Article 41 of Prevention and Suppression of Terrorism Crimes Proclamation No. 1176/2020 provides that the maximum limit for the compensation for moral injury is Birr 100,000.

In addition to restitution and compensation, the Criminal Code and the Civil Code envisage other modes of reparation. The Criminal Code requires that the criminal should be ordered to ‘make good the damage’, implying that restitution and compensation are not the only forms of reparation. The Civil Code expressly provides for the other forms of reparation. Injunction can be considered a form of reparation. Article 2121 of the Civil Code empowers the court to ‘grant an injunction restraining the defendant from committing, from continuing to commit or from resuming an act prejudicial to the plaintiff’. Thus, injunction is similar with the guarantee of non-repetition recognised in international human rights law. The court may also order publication of statements, which can be an example of satisfaction. Therefore, the Criminal Code and the Civil Code provide for all forms of reparation recognized in international human rights instruments and courts.

Moreover, the Criminal Code gives procedural advantages to the victim, stipulating that victims of crimes in general can join their civil claim for compensation with the criminal suit.⁴⁶² When the victim of crime claims compensation, she or he specifies the amount of the claim and provides additional evidence including witnesses without paying court fee.⁴⁶³ The acquittal of the accused does not extinguish the claim for compensation, rather changes the nature of the suit, from criminal suit to civil suit.⁴⁶⁴

7.4.4 Practical Challenges

Ethiopian laws and procedures lay down rules applicable to remedies and reparation of human rights violations, including different forms of reparation such as restitution, compensation, injunctions and other orders. However, the forms of reparation provided by

⁴⁶¹ Civil Code, Art 2116(3).

⁴⁶² Criminal Code, Art 101.

⁴⁶³ Criminal Procedure Code, Art 154(1).

⁴⁶⁴ Criminal Procedure Code, Art 158.

the law are hardly implemented in practice. The main barrier is the culture of impunity. It appears that the old Ethiopian adage, “the king can never be sued,” extends to every official whose power concerns the arrest, detention, custody, investigation or trial of a suspect.⁴⁶⁵ It is a matter of common knowledge among Ethiopians that individuals released from prison or detention prefers to enjoy their new liberty than suing a state official.⁴⁶⁶ Judges do not allow joinder of criminal cases with civil suits for reparation.⁴⁶⁷ The Prosecution does not provide remedies for victims of criminal proceedings. In sum, victims have no recourse even when the fault of state or public servants is clear; for example, in the cases of wrongful convictions, the practice is to pardon wrongly convicted individuals instead of nullifying the conviction and compensating the victims.⁴⁶⁸

As is the case in normal periods, victims of criminal proceedings do not obtain remedy and reparation during transitional periods. Following the transition in 1991, when the Ethiopian Peoples’ Revolutionary Democratic Fronts (EPRDF) overthrew the communist military regime (*Dergue*), the Office of Special Prosecutor was established to investigate and prosecute crimes committed by abusing one’s power.⁴⁶⁹ The Court identified close to 13,000 victims, but none were compensated as the prosecution was not accompanied by any reparation scheme.⁴⁷⁰ It seems that international forums are the only recourse for victims. For example, in a case against Ethiopia involving the prosecution of the *Dergue* officials, as discussed above, the African Commission found violations of the right to be presumed innocent and the right to speedy trial of the accused persons and ordered Ethiopia to pay compensation.⁴⁷¹

The 2018 reform, which includes the transformation of the EPRDF into the Prosperity Party, established a reconciliation commission.⁴⁷² One of the tasks of the Commission is to investigate causes of human rights violations in Ethiopia, but it lacks the power to identify

⁴⁶⁵ Discussions of Working Group on Criminal Justice, Legal and Justice Affairs Advisory Council, Attorney General of Ethiopia at the meeting held on 4 January 2020, Momona Hotel, Addis Ababa (notes on file with the author).

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ Interview conducted with Mr Zeleke Delalo Beriso, head of Pardon Board Office, Attorney General of Ethiopia, Addis Ababa, 25 December 2019.

⁴⁶⁹ Proclamation No. 22/1992, the Proclamation Establishing the Office of the Special Prosecutor, Art. 6.

⁴⁷⁰ MARSHET TADESSE TESSEMA, PROSECUTION OF POLITICIDE IN ETHIOPIA: THE RED TERROR TRIALS, 175-176 (Springer, 2018).

⁴⁷¹ *Haregewoin Gabre-Selassie and the Institute for Human Rights and Development in Africa (on behalf of former Dergue Officials) v. Ethiopia* Communication 301/05 (African Commission, October – November 2011).

⁴⁷² Proclamation No. 1102/2018, Reconciliation Commission Establishment Proclamation.

victims and determine reparation for their injury. A part of the 2018 reform is a law that grants amnesty to political crimes, but expressly excludes restitution of property even if such property was confiscated in relation to crimes affected by the Amnesty Law.⁴⁷³

7.5 Conclusions and Recommendations

A victim of human rights violation is entitled to reparation including compensation. Human rights violations may constitute a crime or tort, whether the violations occur in the criminal proceedings or not. The Criminal Code and the Civil Code provide for different forms of reparation that can be applicable to human rights violations occurring during criminal proceedings. However, the forms of reparation provided in the law are hardly applied in practice. To address the problem, a range of reforms can be proposed. The reform agenda can be achieved by taking legislative, institutional, financial, and education measures.

Ethiopia has the legislative framework for claiming remedies and reparation, but the implementation of the law is lacking. Thus, a new law should lay down guidelines applicable to remedies and reparation for victims. The new law may draw on the jurisprudence of international human rights bodies supervising the implementation of treaties to which Ethiopia is a party. In particular, the jurisprudence developed by the African Commission on Human and Peoples' Rights and the African Court of Human and Peoples' Rights under the African Charter on Human and Peoples' Rights to which Ethiopia is a party is more relevant. The African Commission and the African Court laid down guidelines relevant to forms of reparation available to victims of human rights violations, including victims of criminal proceedings. Some of the forms of reparation such as compensation is clearly laid down in the Criminal Code and the Civil Code, but these Codes do not clearly lay down some forms of reparation such as rehabilitation for victims of torture. Therefore, drawing inspiration from the jurisprudence of the African Commission and the African Court is helpful to include recent human rights developments into domestic legislation.

⁴⁷³ Proclamation No. 1096/2018, Granting of Amnesty to Outlaw Who Have Participated in Different Crimes Proclamation.

The new law may establish institutions responsible for holding public servants accountable and supporting victims of human rights violations. The new law may create an environment conducive for the establishment and operation of non-governmental organizations, which support victims' effort to claim reparation. The new law may also introduce a procedure innovation that allows accused or arrested persons to claim remedies and reparation for violations of their rights in the same criminal file opened against them. Such procedural innovation has already been included in Prevention and Suppression of Terrorism Crimes Proclamation No 1176/2020.

The reform proposal should include institutional measures. An ideal institutional reform is the establishment of an independent public institution with the power to enforce the new law on reparation for victims, including the power to prosecute public servants and the mandate to claim compensation on behalf of the victims. However, the establishment of new institutions is burdensome in terms of human, financial and material resources. A more pragmatic approach is to consider assigning additional responsibility to existing institutions. For example, a department responsible for the prosecution of crimes committed during the criminal proceeding can be established within the Attorney General and tasked with the additional responsibility of claiming reparation on behalf of the victims. Another example is the assignment of additional responsibilities to national human rights institutions, the Ethiopian Institution of the Ombudsman and the Ethiopian Human Rights Commission, to investigate and determine reparation for the victims.

The adoption of financial measures is an essential part of the reform. The establishment of new institutions or the assignment of additional tasks to the existing institution would not be successful without adequate financial resources to employ necessary staff and acquire office spaces, equipments, and other materials. Annual budget can be allocated from state coffer to provide reparation for the victims. Moreover, a fund can also be established to support the work of non-governmental organizations, which support victims to obtain reparation. The sources of such a fund can be voluntary contributions and donation from individuals, private organizations, and international donors.

Educational measures should be part of the reform. The culture of impunity in the country contributes to the violation of human rights in criminal proceedings and the lack of reparation

for the victims. Educational measures aimed at creating awareness and changing the attitudes of the public are instrumental in eradicating the culture of impunity, fostering an environment favorable to the enjoyment of human rights, and creating a generation of accountable public servants. The Ethiopian Human Rights Commission should be the main institution implementing the educational measures in collaboration with other state organs and non-governmental organizations. It is not necessary to establish another institution since the Commission has the mandate to promote human rights.⁴⁷⁴ In sum, it is necessary to prepare a reform package containing legislative, institutional, financial, and education measures addressing victims of criminal proceedings.

⁴⁷⁴ Ethiopian Human Rights Commission Establishment Proclamation No 210/2000, *Federal Negarit Gazeta* 6th Year No. 40, Addis Ababa, 4 July 2020.