

A Critical Legal and Practical Appraisal of Ethiopian Fault Based Liability Rules[→]

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Abstract

Ethiopia's Civil Code governing tortious liability was adopted six decades ago and is still applicable without any amendment. The basic purpose of this research is to explore the shortfalls and practical application of the Ethiopian tort law on liability arising from fault. To this effect, a qualitative research method is employed. Therefore, relevant laws are critically analyzed and data is collected by interviewing judges, attorneys, and law professors. The research findings reveal that the special part of the fault-based liability section of the Code is insufficient and does not adequately address breaches of human rights recognized under the FDRE constitution. The findings of the research also demonstrate that some of the provisions on fault-based liability are not practically applied by courts. Therefore, this article suggests an amendment to accommodate constitutional stipulations. The article also recommends extending the list of special faults to embrace emerging issues.

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Introduction

The life and time of individuals in an egalitarian society are typified by a multitude of, at times complex, interactions. In as much as these interactions are imperative for the sane existence of individuals, they do have their own perils. Societal interactions normally result in misdoings, faults, harms, and breaches of trust. These perils of societal interactions necessitate a remedial mechanism. As such morality, religion, custom, and law have been employed to fix the wrongs of societal interactions. That partly explains why the law is commonly understood as a social engineering device. Viewed from this vantage point, the law is a means to achieve societal goals. Consequently, one may conceive tort law as a “public standard of conduct” having two-fold goals: “detering the most harmful and costly forms of social behavior, and indemnifying its victims.”¹

Tort law provides rules of redress that enable a victim to seek remedy in cases of breach of duty prescribed by law. Tortious liabilities normally arise by virtue of law.² In other words, the law fixes the duties in which infringements result in tortious liabilities, not by the parties. Oftentimes, the remedial mechanism for breach of duty in tort is an action for damages.³ One might say the central aim of tort law is “to restore the claimant, in so far as money can do so, to his or her pre-accident position”.⁴

¹ Gerald J. Postema, Search for an Explanatory Theory of Torts, in Gerald J. Postema, (ed.), *Philosophy and the Law of Torts*, Cambridge University Press,(2001),p. 4

² Vivienne Harpwood, *Principles of Tort Law*, 4thedition, Cavendish Publishing Limited, (2000), p. 1.

³ Id., p.

⁴ Id., p. 4.

Tracing its historical development, the modern tort system is a post-industrial revolution phenomenon.⁵ The industrial revolution was a turning point in the development of tort law. During this period, modern means of production and machines with an enormous capacity to severely cripple workers were invented, thereby necessitating a new tort system. Highlighting the need for a new tort system right after the industrial revolution, Lawrence Friedman was quoted as writing: “[f]rom about 1840 on, one specific machine, the railroad locomotive, generated, on its own steam (so to speak), more tort law than any other in the 19th century”.⁶ Consequently, one can rightfully say the modern tort system emerged as a response to the perils of the industrial revolution.

In Ethiopia, the origin of the modern tort system is traceable back to the adoption of new laws in the country that is commonly called the Codification Era. The Civil Code of Ethiopia (the Code) was promulgated in 1960. The Code containing five books and 3367 articles “is the biggest body of law that regulates large areas of life in the country today.”⁷ Title XIII of the Code, which comprises 135 articles, regulates tortious liability and unlawful enrichment. This section of the Code identifies three sources of tortious liability.⁸ The first is liability arising from a fault; wherein a person is liable if the damage is attributable to his fault. The second consists of tortious liability arising irrespective of fault. This category is commonly called strict liability as it arises irrespective of the defendant’s fault. The third source comprises liability for others. This type of tortious liability makes a person vicariously responsible for the acts of another person.

⁵ Mark Geistfeld, Economics, Moral Philosophy, and the Positive Analysis of Tort Law, in Gerald J. Postema, (ed.), *Philosophy and the Law of Torts*, Cambridge University Press, (2001), p. 255.

⁶ Id., p. 271.

⁷ Yirga Gelaw, *Native Colonialism: Education and the Economy of Violence Against Tradition in Ethiopia*, Red Sea Press,(2017), pp. 107 – 108.

⁸ Civil Code of the Empire of Ethiopia, Proclamation No. 165/1960,*Federal NegaritGazzeta Extraordinary*, (1960), Article 2027, [hereinafter Civil Code].

As a long-standing body of law regulating fault-based liability cases in the country today, an inquiry into the practical applicability of this section of the Code is essential. In this regard, one of the practical issues in the area of fault-based liability relates to post-traumatic stress disorder (PTSD). A victim of PTSD may experience various symptoms including nightmares about the traumatic happenstance and an absence of interest in life.⁹ The modern tort system comprises extensive rules of redress for victims of PTSD. However, the Code provides little to no rule governing PTSD. The other notable practical issue in fault-based liability law relates to the way the Code addresses breaches of human rights. However, a study conducted on these rules revealed that the tortious liability section of the Code is mostly impractical and inadequate to address breaches of human rights.¹⁰

This article analyzes the practical application of Ethiopia's fault-based liability rules, as it constitutes the principal source of liability under Ethiopia's tort law. The writers have appraised the stipulations contained in domestic legislation governing fault-based liability. In addition to a critical analysis of the relevant laws, the writers have gathered data from 9 judges, 15 attorneys, and 3 law professors through interviews and questionnaires.

Primary data is mainly gathered from the Federal First Instance Court eleven benches. These are Kirkos, Nefas Silk Lafto, Kolfieheranio, Addis Ketema, Lideta, Yeka, Bole, Akaki Kaliti, Arada, Menagesha and Dire Dawa Benches. A preliminary survey before the study was started showed that tort cases except issues of bodily injury are the least entertained civil cases in Ethiopia. Moreover, most of the tort cases in Ethiopia are entertained by the first instance courts. According to the Federal courts proclamation number

⁹ Vivienne Harpwood, *Modern Tort Law*, 7th edition, Routledge-Cavendish,(2009), pp. 38 – 39.

¹⁰ Tilahun Gebre, *Compensation of Victims of Human Rights Violations in Ethiopia in Light of International Human Rights Law: With Specific Reference to Addis Ababa and Oromia*, (LL.M thesis, Addis Ababa University),(2010)

1234/2021, first instance courts have the jurisdiction to entertain cases that amounts up to a maximum of 10 million birr¹¹. Reasonably, most of the tort claims especially those which involve moral compensation are below the 10-million-birr limit. Therefore, the judges from the federal first instance court benches are taken as a sample for interview. The judges of high courts and the Supreme Court were not part of the data collection plan as interviewees, except the Supreme Court cassation decisions are taken into consideration. The federal high courts and the Supreme Court mostly entertain cases through their appellate jurisdiction which is slightly out of the scope of the article. In other words, the article is basically about the sufficiency of the fault-based liability rules which makes the appellate justice less relevant to the issue of this article. The writers believe that data collected from the federal first instance court judges, attorneys all over Ethiopia and law professors from different universities are enough to draw conclusions for this study.

The article is composed of four sections. The first section briefly outlines the concept and notion of fault-based liability. The second section examines the Ethiopian law of tortious liability arising from fault. The third section assesses the practical application of the Ethiopian fault-based liability law. The fourth section provided concluding remarks.

1. A Brief Account on Concepts and Notions of Fault based Liability

Authors have been advancing various conceptions of tort. Vivienne Harpwood offers a picturesque description of tort. For Harpwood, “[t]ort is a broad church and many hymns, ancient and modern, can be heard within it.”¹² This description of tort succinctly signifies the extensive realm and evolutionary process of tort. The “ancient hymns” of tort are said to be

¹¹ Federal Courts Proclamation, Proclamation No. 1234/2021, Article 11(1).

¹² Harpwood, *supra* note 9, preface.

composed in the earliest civilizations of humankind. Many propagate Mesopotamian ancients were pioneers of the concept of tort. The ancient Mesopotamian law identified some commissions and omissions as civil wrongs, thereby laying stepping stones for the ideation of tort.¹³ The law of Mesopotamia addressing civil wrongs was generally concerned with “the protection of person, property, and commerce from forced divestiture of a right or a prerogative.”¹⁴ The ancient Romans also played a profound role in the emergence of the concept of tort. M. Stuart Madden in an essay titled “*Tort Law through Time and Culture: Themes of Economic Efficiency*” asserted “[r]egarding delicts or harms that were neither crimes nor grounded in contract, it became the special province of Roman lawyers and lawmakers to record and categorize a sprawling array of specific wrongs and consequent remedies.”¹⁵ These “harms that ... [are] neither crime nor grounded in a contract” form the basis of tort.¹⁶

Many associated the emergence of the “modern hymns” of tort with the industrial revolution. According to Percy H. Winfield, the invention of industrial machinery in general and railways in particular as offspring of the industrial revolution stimulated the development of the modern system of tort.¹⁷ In his words, “[a]t that time railway trains were notable for neither speed nor for the safety. They killed any object from a Minister of State to a wandering cow, and this naturally reacted upon the law.”¹⁸ Hence, the emergence of modern means of production and machinery with a devastating

¹³ M. Stuart Madden, *Tort Law through Time and Culture: Themes of Economic Efficiency*, in M. Stuart Madden, (ed.), *Exploring Tort Law*, Cambridge University Press, (2005), p. 22.

¹⁴ *Id.*, p. 23.

¹⁵ *Id.*, p. 34.

¹⁶ *Id.*, pp. 34-35.

¹⁷ *Id.*, p. 40.

¹⁸ *Id.*

capacity to cripple workers during the industrial revolution necessitated a new tort system.

Writers generally identify two broad functions of tort law: compensation and deterrence. Emphasizing the compensatory function of tort law, Winfield and Jolowicz wrote: “[i]n the great majority of tort actions the claimant is seeking monetary compensation (damages) for the injury he has suffered, and this fact strongly emphasizes the function of tort in allocating or redistributing loss.”¹⁹ Mark Geistfeld augmented this function of tort law by describing its central aim as restoration of “the claimant, in so far as money can do so, to his or her pre-accident position”.²⁰ Others prefer to conceive tort law as “public standard of conduct” having “detering the most harmful and costly forms of social behavior” as overriding function.²¹ Nevertheless, these two functions of tort law are not mutually exclusive. Commenting on the conceptual and historical interplay between these two functions of tort law, Mark Geistfeld in an essay titled *Compensation as a Tort Norm* wrote:

By the middle of the twentieth century, scholars had reached a consensus that “tort law ought primarily to be a means for compensating injured people” rather than “an instrument for admonishing currently undesirable civil conduct.” Since then, scholars have coupled the function of compensation with that of deterrence, yielding “the baseline proposition . . . repeated at the outset of countless law review articles published in the last fifty years” that “the function of tort law is to compensate and deter.”²²

¹⁹ Edwin Peel and James Goudkamp, *Winfield and Jolowicz on Tort*, 19th edition, Thomson Reuters and Maxwell, (2014), p. 1-028.

²⁰ *Id.*, p. 1-002.

²¹ Postema, *supra* note 1, p. 4.

²² Mark Geistfeld, *Compensation as a Tort Norm*, in John Oberdiek, (ed.), *Philosophical Foundations of the Law of Torts*, Oxford University Press,(2014), p. 66.

Hence, historically, the function of tort law was confined to compensating persons who sustained an injury; and the place of deterrence as a function of tort law was infinitesimal. But modern tort systems are principally set to compensate injured persons; and at the same time, deter harmful social behaviors.

2. Ethiopia's Law on Fault-based Liability

According to the Ethiopian law of tort, a person may be extra-contractually liable if he is at fault. A fault is a type of liability in which the plaintiff must prove that the defendant's conduct was either negligent or intentional.²³ Faulty conduct or offense is a piece of conduct that would not have been pursued by a prudent person placed in the same external circumstance as the author of damage.²⁴ The prudent person for sociologists is what lawyers call a "*reasonable man*". However, the Ethiopian law of extra-contractual liability nowhere defines fault. Rather, it chooses to describe the elements of fault instead of defining fault. Basically, the general principle is envisioned under article 2028 of the Code which reads "whosoever causes damage to another by an offense shall make it good." Some conditions must be cumulatively fulfilled for the tortfeasor to be held liable under tortious liabilities arising from a fault. Firstly, his faulty conduct must be shown. This element tends to be the duty of care though not clearly indicated under Article 2028. Secondly, there needs to be a causal link between the defendant's faulty conduct and the damage sustained by the plaintiff. Causation is set to determine whether the defendant's failure to meet the applicable standard of care is casually connected to the plaintiff's harm.

²³ Civil Code, *supra* note 8, Article 2029.

²⁴ YohannesTakele, Note on Ethiopian extra-contractual liability law, Lecture at Addis Ababa University School of Law,(2003-2007) available at <https://www.studocu.com/en-us/document/university-of-maryland-global-campus/torts/lecture-note-on-tort-law-specifically-on-ethiopian-extra-contractual-law-by-yohanes-tekle/6889484> (accessed Feb. 20, 2022).

As dealt with in detail below, unless otherwise provided by law, the Ethiopian legislator makes use of an objective criterion in the determination of the defendant's fault without taking into account such subjective parameters like age or mental condition.²⁵ Some tend to argue that this position of Ethiopian legislator is too harsh. This is because; it is not a fault-based liability, but strict liability at the level of minors and mentally deficient persons. Others argued that such a position is taken by the legislator in order to strike a balance between the minor wrongdoer and the innocent victim.²⁶

When it comes to the structural arrangement of the provisions regulating tortious liability arising from fault, Ethiopia has borrowed concepts from both civil law and common law legal systems. While articles 2028 to 2037 of the Code set the general rules, articles 2038 to 2065 are meant to regulate special cases of fault. The civil law legal system tries to regulate every factual circumstance in terms of reasonable person standard, reasonable professional standard, or presumption of fault.²⁷ Not every misdeed that may result in fault-based liability is listed, as is the case in Article 2038 of Ethiopian extra-contractual liability law. On the other hand, the common law legal system specifies every source of liability like criminal law.²⁸ Articles 2038 to 2065 of the Code are partly structured in line with the common law approach, which specifies the sources of fault-based liability. These provisions are designed to protect constitutionally guaranteed fundamental rights. However, the Civil Code was enacted before the coming into effect of the 1995 FDRE Constitution and the ratification of international human rights instruments. This means investigation as to the viability of the Civil Code concerning the

²⁵ Civil Code, *supra* note 8, Article 2030(3).

²⁶ Yohannes, *supra* note 24.

²⁷ *Id.*

²⁸ *Id.*

enforcement of human rights standards recognized under the Constitution and international human rights treaties is required.²⁹

The rules governing fault-based tortious liability provided intention and negligence as important elements. Article 209 (1) of the Code clearly declares that “an offense may consist in an intentional act or mere negligence”. Nonetheless, the Code refrains from elaborating on what constitutes intention or negligence. On top of that, decisions of courts (including the decision of the Cassation Division of the Federal Supreme Court) fail to provide a jurisprudential explanation of negligence as an important aspect of the mental element in fault-based liability. This entails that the meaning, scope, and requirements of negligence are left to the subjective determination of judges. With this backdrop, the meaning and essence of intention and negligence can be inferred from Articles 58 and 59 of the Criminal Code. Unlike criminal law, intention and negligence in the case of extra-contractual liability are simply alternatives. Both of them may equally result in extra-contractual liability. This makes extra-contractual liability different from criminal liability as the major concern for criminal law is punishing criminal intention. Hence, reference to criminal law cannot give a full picture of the notion of intention and negligence in the context of tortious liability.

3. Practical Application of the Ethiopian Fault-Based Liability Law

3.1. Raison D'être and Functions of Ethiopian Tort Law

One can hardly find explicit provisions of the Ethiopian tort law that provides for its *raison d'être* and functions. However, interpretive reading of some provisions sheds light on the *raison d'être* and its functions. As far as the *raison d'être* is concerned, the close reading of Articles 207(1), 208, and

²⁹ As explained below, this research reveals serious incompatibility between the two.

2030 seems to suggest that the drafters of the Ethiopian Civil Code have intended to attribute accountability to a person who causes damage to another person as a result of his faulty behaviour. By so doing, the Ethiopian tort law considers fault or offense as a failure on the part of the wrongdoer to live with the moral standard expected of a reasonable person.³⁰ The Ethiopian legislator's intent to ensure the morally blamed defendant's accountability for his or her moral failure went to the extent of disregarding subjective considerations in the assessment or determination of fault. According to Krzeczunowicz, this approach taken by the drafters of the Ethiopian Civil Code is unusual and quite different from the experience of many other legal systems.³¹ Empirical data collected from the participants of the study seems to show a lack of consensus in this respect. Some support the position of the law that an offense should be determined without taking into account the subjective conditions of the wrongdoer. They justify their stand based on the argument that the primary purpose of tort law is to compensate the innocent victim not to protect the wrongdoer whether or not the latter is in a position to appreciate the consequences of his conduct because of his infancy or insanity.³² On the other hand, some other participants contend that the law was supposed to take into account the subjective conditions of the wrongdoer while determining fault and the approach taken by the legislature under Article 2030 needs some kind of revision.³³ This group of people tried to justify their position by making an analogy with the criminal law that excludes responsibility for those who may not be able to understand the

³⁰ Civil Code, *supra* note 8, Article 2030(1) cum. Article 2030(2).

³¹ George Krzeczunowicz, *The Ethiopian Law of Extra-contractual Liability*, (1970), p. 36.

³² Interview with Dawit Bezabih, Judge, Federal First Instance Court, Akakai Kaliti Bench, (May 12, 2022); Interview with Iyasu Mesfin, Lecturer of Law, Jimma University, (May 12, 2022).

³³ Interview with Daniel Abebe, Judge, Federal First Instance Court, Menagesha Bench, (May 12, 2022).

consequence of their acts because of their age or mental condition.³⁴ However, the researchers are of the view that the reason d'être of the Ethiopian tort law shall mainly focus on redressing the victim, and thus the fault of the wrongdoer should be assessed objectively.

3.2. The Establishment of Causation

Although causation is an important element in establishing the required causal link between the defendant's faulty conduct and the damage that ensued as a result of such conduct, the Ethiopian law of extra-contractual liability provides little or no guidance as to its meaning and scope. However, the cumulative reading of Articles 2091 and 2101 provides a clue that the defendant can be liable for unforeseeable damage caused to the plaintiff subject to the possibility of a reduction of compensation. Moreover, sub-article 2 of Article 2101(2) provides that the reduction of compensation does not apply to damage caused by an intentional fault. This implies that causation is a requirement in the establishment of liability based on fault

As Krzeczunowicz clearly provided, the experience of other legal systems suggests that the conduct which caused harm to the plaintiff needs to be adequate in fact and in law for the defendant to be held liable and the defendant could raise the inadequacy of the causal link as a defence.³⁵ Showing the adequacy of the cause would have practical relevance where there is an intervening cause that resulted in the greater damage while the initial cause in itself cannot under the normal course of things result in that damage or where multiple causes are contributing to the result the damage sustained by the plaintiff. Therefore, the Ethiopian tort law fails to sufficiently cover these and similar issues related to causation. In such circumstances, resorting to the criminal code's provision on causation will not be a matter of

³⁴ Id.

³⁵ Krzeczunowicz, *supra* note 31, pp. 134-135.

choice and Krzeczunowicz claimed that such resort is warranted by virtue of Article 101 of the Criminal Code read together with Article 2035 of the Civil Code.³⁶

The practice of courts regarding the establishment of causation shows that causation is taken for granted or as though it is given. This appears to be related to the fact that there are no such complicated cases brought to courts requiring detailed analysis and interpretation of causation.³⁷ Krzeczunowicz also contemplated the rare occurrence of complicated cases related to causation and he stated “in the run-of-the-mill cases, the occurrence of damage and its causation is sometimes so obvious that the courts do not analyse them distinctly, but stress only the problems of fault and compensation”.³⁸ The only real experience mentioned by the judges concerning causation is related to the application of Article 2084 that provides about the collision between motor vehicles where in such cases the law makes the presumption that both motor vehicles have contributed to the accident and the owner of each motor vehicle will be responsible for half of the damage caused.³⁹ However, the application of such provision is limited to liability irrespective of fault cases, only between two motor vehicles that collided with each other (it fails to regulate scenarios where more than two motor vehicles are involved in the collision) and where it appears difficult to ascertain the

³⁶ Id. Of course, Krzeczunowicz refers to Article 100 of the repealed Penal Code of 1957 and this provision is more or less similar to Article 101 of the 2004 Criminal Code of the FDRE. Compared to the Criminal Code, the 1957 Penal Code provided detailed explanations about joining claims for civil and criminal liability together where the latter resulted in damage for compensation including the procedure to be involved in this respect.

³⁷ Interview with Judge Dawit, *supra* note 31; Interview with Judge Daniel, *supra* note 33.

³⁸ Krzeczunowicz, *supra* note 31, p. 63.

³⁹ Interview with Judge Dawit, *supra* note 32; Interview with Judge Daniel, *supra* note 33.

fault of either of the drivers.⁴⁰ Despite the non-appearance of cases related to causation that tested judges so far, the judges have realized the insufficiency of the Ethiopian law of extra-contractual liability. In such cases, they contend for reference to the criminal code's provision on causation.⁴¹ However, they did not clearly indicate whether they have actually applied the criminal code's provision on causation to deal with tort cases brought before them so far. Hence, it can be safely concluded that there exists a clear legal and practical gap related to causation under the Ethiopian tort law.

3.3. Substantive Scope of Fault-based Liability

The general rules of fault-based liability run from Articles 2028- 2037. As general rules, Articles 2028-2037 will apply to all possible scenarios of fault-based liabilities even though there is no infringement of specific provisions of the law (as provided under Article 2035) or the particular offense is not covered by the "Special Cases" provisions of the fault-based liability (Articles 2039-2065). That means the strict application of the principle of legality in criminal law does not work for fault-based extra-contractual liability.⁴² The main focus of this article is on some of the general provisions. These are the type of offenses⁴³, the reasonable person standard on the assessment of fault⁴⁴, professional fault⁴⁵, and infringement of the law as an offense (fault)

⁴⁰ As Article 2084(3) of the Civil Code provides where the collision has resulted from the fault of either driver entirely or chiefly, only the driver at fault or the owner of such vehicle will be held liable.

⁴¹ Interview with Judge Dawit, *supra* note 32; Interview with Judge Daniel, *supra* note 33.

⁴² Krzeczunowicz, *supra* note 31, p. 65.

⁴³ Civil Code, *supra* note 8, Article 2029.

⁴⁴ *Id.*, Article 2030.

⁴⁵ *Id.*, Article 2031.

as they are principal sources of tort-based liabilities⁴⁶. It also touches upon a few provisions of the “Special Cases” (Articles 2038-2065).

3.3.1. Type of Offence

As provided under article 2029 of the Civil Code, a person will be at fault when he/she commits an act or fails to commit an act either intentionally or out of negligence. The Ethiopian tort law nowhere defines what constitutes an intentional fault or negligence. As a result, it is very much open to the discretion of judges to determine whether the particular offense is intentional or negligence based. From the interview with judges of the Federal First Instance Court (FFIC) and law professors, it is learned that the law was supposed to provide guidance that enables judges to determine what constitutes intentional fault or negligence.⁴⁷ As far as negligence is concerned, it is important to make a distinction between negligence by an ordinary person under Article 2029 (who may be judged in light of the reasonable person standard under Article 2030) and negligence by a professional (whose negligence or otherwise will be determined by having regard to the reasonable professional in his/her stead) by taking into account the professional standards and practices within the specific profession at hand. However, there appears to be confusion in this respect where the driver’s fault as a result of negligence may be assessed based on the reasonable person standard (Article 2030) instead of the reasonable driver’s standard (Article 2031).⁴⁸

In this regard, it is important to make a distinction between intentional fault or intention that simply shows the doer of the act has actually intended to do that particular act amounting to a fault (e.g. the intentional contact with another

⁴⁶ Id., Article 2035.

⁴⁷ Interview with Fistum Herpassa, Judge, Federal First Instance Court, Dire Dawa Bench, (May 6, 2022); Interview with Tsegaw Bahiru, Lecturer of law, Debre Berhan University, (May 28, 2022); Interview with Iyasu Mesfin, *supra* note 31.

⁴⁸ Interview with Judge Dawit, *supra* note 32.

person against the latter's will that amounts to physical assault under Article 2038) and the expressions such as “intent to injure” or “intentional fault” referred in various fault based liability provisions of the Code. In the latter’s case, their absence or presence may be invoked to establish or exclude liability. It could also be invoked for the reduction or increase of damages.⁴⁹ However, as the interviews with judges have revealed, the difference and practical relevance of such expressions don't seem to be appreciated by courts in the real disposition of cases.

3.3.2. The Objective Assessment of Fault

The Ethiopian tort law determines fault objectively regardless of the subjective conditions of the wrongdoer including his/her age and mental conditions. Article 2030(2) of the Civil Code provides that regard shall only be made to the reasonable person standard so that any conduct that deviates from this standard constitutes fault irrespective of the condition of author of the wrongful conduct. Krzeczunowicz provides three possible policy reasons to explain the strict approach taken by the Ethiopian legislator in the objective determination of fault. These policy reasons include the practical need to solve tort cases by courts expeditiously which would be otherwise hampered when courts delve into the assessment of subjective situations of the defendant, the need to make life predictable for society, and to make sure that everyone relies on other members of the society will adhere to certain average conduct, and that justice requires the need to protect an innocent victim over a morally blameless harm doer.⁵⁰ Compared to many other legal systems which supplement the objective (social standard) with subjective (moral) factors in the assessment of fault, the Ethiopian legal system is said to be harsher by adopting the strictly objective assessment of fault while showing its lenience when it comes to the determination of the compensation by taking into

⁴⁹ Krzeczunowicz, *supra* note 31, p. 66.

⁵⁰ *Id.*, pp. 35-36.

account subjective considerations (including age and mental condition of the wrongdoer).⁵¹

The objective assessment of fault under Article 2030 is a subject of controversy among academics and practitioners. From the interview with judges and professors as well as the questionnaires filled by selected attorneys of law, it can be said there exist different views. Those who argued that the drafting of the existing provision of the law is appropriate supported their argument on the fact that the main purpose of tort law is to compensate the innocent victim irrespective of the subjective conditions of the defendant causing harm to such victim. This group of people further argued that unless the law put such strict requirements in the assessment of fault the number of people left uncompensated will be higher and that might lead to uncertainty and even social chaos.⁵² On the contrary, the other group strongly argues that the law should be crafted in such a way that exempts some categories of persons like minors and the insane who are unable to meet the objective standard of the reasonable person under Article 2030.⁵³ In between the two, some people argue that the law as a matter of principle should determine fault objectively while providing some discretion to courts that enable them to also take into account subjective considerations by way of exception.⁵⁴

3.3.3. Professional Fault under the Ethiopian Tort Law

While the Ethiopian tort law provides the assessment of fault based on the reasonable standard person under Article 2030, it provides another level of

⁵¹ Id.

⁵² Interview with Judge Dawit, *supra* note 32; Interview with Iyasu, *supra* note 32; Interview with Daniel Mekonnen, Judge, Federal First Instance Court, Nifas Silik Bench, (May 10, 2022).

⁵³ Interview with Judge Daniel, *supra* note 33.

⁵⁴ Interview with Fasika Aberra, Judge, Federal First Instance Court, Lideta Bench, (May 11, 2022).

assessment when it comes to the assessment of fault by a professional. A professional fault is assessed in accordance with Article 2031 by taking into consideration the professional standards or rules applicable to that specific profession. Professional faults entailing extra-contractual liability are difficult to visualize outside contractual relationships as they are most likely to be incurred by a professional having a valid contractual relationship with his/her clients when the former breaches his professional duty as directly or impliedly specified in the contract. The common professional fault instances resulting in extra-contractual liability are incurred by drivers of motor vehicles and in the case of employers' vicarious liability for their employees.⁵⁵ The application of Article 2031 could also overlap with Article 2035 where a professional violates the rules or standards explicitly regulated by law or regulation, the professional will be held liable for the violations of that specific provision of a law or regulation under Article 2035 without the need to show his/her fault ensued by the failure to observe the practices governing that activity or profession.⁵⁶

Despite providing the legal basis for professional fault and the resulting extra-contractual liability arising from such fault under Article 2031, the Ethiopian tort law nowhere provides the meaning of important terms used under this provision including what constitutes a profession, professional activity, scientific facts, and accepted rules of the practice of one's profession. This would leave the courts with no guidance in the interpretation of such terms and by so doing the law paves the room wide open for the subjective interpretation of such terms by judges. Moreover, by failing to put certain requirements as to what constitutes a profession or a professional, it is quite possible for anything claimed to be a profession or for anyone claiming to be a professional. Although the Federal Supreme Court Cassation Division has

⁵⁵ Krzeczunowicz, *supra* note 31, p. 77.

⁵⁶ *Id.*, p. 78.

tried to indicate the application of Article 2031 concerning certain professional faults (for example in the medical field)⁵⁷, the judicial decisions are far from providing an adequate jurisprudential explanation of the above issues related to the professional fault. The rare occurrence of cases related to a professional fault (except in those cases related to a motor vehicle which are primarily involving the strict liability of the owner while the driver could be held liable for failing to observe the rules of the profession by way of Article 2035 or 2031) has actually contributed to the lack of well-developed jurisprudence concerning professional fault.⁵⁸

3.3.4. Infringement of the Law as Fault

Article 2035 clearly provides that infringement of the law by/in itself is fault or offense without the need to prove the existence of fault on the part of the defendant. This provision is significant as it provides a remedy for the one who alleges that he/she has sustained damage as a result of the defendant's violation of the specific law which by virtue of Article 2035 constitutes a fault. Article 2035 covers all possible violations of any law irrespective of its nature or author or the purpose to which the law is destined. The fact that the scope of application of Article 2035 is so wide to include the infringement of all relevant laws as a fault has also practical significance to hold the defendant in violation of an international treaty⁵⁹ and to provide the plaintiff with the opportunity to avail him/herself of the remedy available in such international instrument that may not be otherwise available in other domestic laws. By so doing, the Ethiopian tort law's incompatibility to contemporary developments

⁵⁷ See for instance *Hayat Hospital v. W/ro Aster Solomon*, Federal Supreme Court Cassation Decision, File No. 96548, Sept., 24, 2008 E.C.

⁵⁸ Interview with Judge Dawit, *supra* note 32.

⁵⁹ See Constitution of Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazeta*, (1995), Article 9(4), [hereinafter FDRE Constitution]. By virtue of this provision, treaties ratified by the HPR are integral part of the law of the country.

(for instance human rights instruments ratified by Ethiopia) can be somehow dealt with.

Despite this, the infringement of some laws is also excluded from the application of Article 2035. For instance, laws related to contract are excluded from the application of Article 2035 by virtue of Article 2037 while the application of Article 2035 is also excluded where the specific legislation provides a remedy for the violation of its provision in which case the plaintiff can only avail himself/herself of the remedy provided by that specific law rather than invoking Article 2035. Obviously, Article 2035 will not also be applied where the defendant's fault arises from the violation of the "special cases" provisions (Articles 2038-2065) as well as where the plaintiff's claims are based on Articles 2030-2033.⁶⁰

When one looks into the contents of Article 2035 of the Civil Code, it contains some imprecise terms that are vulnerable to subjective interpretations by judges. For instance, it has used the term "specific and explicit provision" which leads to different interpretation in the absence of guiding rules or principles that helps courts to determine the specific and explicit nature of the relevant provision of the law. Besides the lack of clarity on such terms, the application of Article 2035 needs also to be seen in accordance with the existing Federal system of the country that has created a plurality of laws and a federal-state structure where both levels of the government have their own legislative power.⁶¹

As far as what constitutes law at the federal level is concerned, Proclamation No.3/1995 provides that "all laws of the Federal Government shall be published in the Federal *Negarit Gazeta*".⁶² Moreover, it is also provided that

⁶⁰ See Krzeczunowicz, *supra* note 31, p. 98.

⁶¹ See FDRE Constitution, *supra* note 59, Article 50(2).

⁶² A Proclamation to Provide for the Establishment of the Federal *Negarit Gazeta*, Proclamation No. 3/1995, *Federal Negarit Gazeta*, (1995), Article 2(2).

“all Federal or Regional legislative, executive and judicial organs, as well as any natural or juridical person, shall take judicial notice of Laws published in the Federal *Negarit Gazeta*”.⁶³ According to the cumulative reading of these provisions, subsidiary legislations made by the executive (such as directives or manuals) which are not published in the Federal *Negarit Gazeta* are not laws and therefore the infringement of such laws will not constitute fault within the meaning of Article 2035. This interpretation does not seem to be compatible with Article 2035 which clearly provides that law includes administrative directives or regulations. By the same token, the decisions of the Federal Supreme Court Cassation Division, which serve as a precedent on all lower levels of courts, will not also constitute law within the meaning of Article 2(2) and 2(3) of Proclamation No.3/1995 since such decisions are not published in the Federal *Negarit Gazeta*.⁶⁴

Of course, the requirement of publication of laws in the Federal *Negari Gazeta* has some important purpose to serve (the requirement of notification). It is only in such circumstances that persons can have access to such laws and the principle of “ignorance of the law is no excuse” incorporated under Article 2035(2) of the Civil Code should work. Therefore, it can be said that the government owes the duty to make laws accessible to all among other things through publicizing in the Federal *Negarit Gazeta*. However, practically, it is only Proclamations enacted by the House of Peoples’ Representatives and Regulations made by the Council of Ministers that are published in the Federal *Negarit Gazeta*.

The Federal Administrative Procedure Proclamation No.1183/2020 has also provided that any administrative directive that fails to fulfil the requirements of filing by the Federal Attorney General and posting on the Administrative

⁶³ Id., Article 2(3)

⁶⁴ Federal Courts Proclamation, Proclamation No. 1234/2021, Federal *Negarit Gazeta*, (2021), Article 10(2).

Agency's website may not be enforced.⁶⁵ This means that the violation of a directive issued by an administrative agency may not amount to a fault where such a directive fails to fulfil such legal requirements. Therefore, the above and similar theoretical and practical problems could be invoked in relation to the application of Article 2035 of the Civil Code and legislative reforms related to this provision should take into account these concerns. Provided that Article 2035 is the most frequently invoked and applied provision of the Ethiopian fault-based tort law, its revision and amendment require serious attention.⁶⁶

3.3.5. The "Special Cases of Fault"

The special cases are categorized into fault on one's person and injury to the rights of spouses, a fault against property, and fault against other economic interests.

i) **Fault on One's "Person" and Injury to the Rights of Spouses**

Fault on one's person is one of the oldest forms of wrongdoing for which claimants would be able to obtain a remedy from the English courts.⁶⁷ These include physical assault (battery), interference with the liberty of another person, and defamation. According to Article 2038(1) of the Civil Code, "a person commits an offense [of physical assault] where he intentionally makes contact with the person of another against the latter's will." Intentions, making personal contact or contact by use of an animate or inanimate object, and against the victim's will are the main elements of physical assault under the

⁶⁵ See Federal Administrative Procedure Proclamation, Proclamation No. 1183/2020, Federal *Negarit Gazeta*, (2020), Article 18(1).

⁶⁶ According to the interview with Judge Dawit, *supra* note 32, Article 2035 of the Civil Code is a stipulation that applies to a considerable number of cases related to fault-based extra-contractual liability.

⁶⁷ Nicholas J. McBride and Roderick Bagshaw, *Tort Law*, 6th edition, (2018), p. 46.

Civil Code. However, if the defendant could not reasonably have foreseen that the plaintiff would object to his actions, or if the act was done, in a reasonable manner, in legitimate self-defence, or in the legitimate defence of another, or to safeguard the property of which the defendant is the lawful owner or possessor, or if the act consists in reasonable corporal punishment inflicted by the defendant on his child, ward, people or servant, or if the plaintiff was a dangerous lunatic whom it was necessary to restrain from doing harm, and the act was done in a reasonable manner, or if in the eyes of a reasonable person, the circumstances of the defendant's action can be justified, then no physical assault is deemed to be committed.⁶⁸ Corporal punishments on a ward, pupil, or servant are clearly unconstitutional and hence this justification cannot be presented to a court which makes this provision of the Civil Code invalid and as such there is a need for amendment.

But, even though, pursuant to the constitution, every child has the right to be free from corporal punishment in schools and in institutions responsible for the care of children,⁶⁹ it is not clear to what extent the punishment is prohibited. The constitution is silent about corporal punishment by parents which is open to interpretation as reasonable corporal punishment by parents is somehow allowed. To what extent a corporal punishment is reasonable is another question worth asking. Since the provision is not clear in this regard, there is a possibility of confusing judges to decide on this matter. The criminal law puts the parental relationship, parental guidance, and reasonable corporal punishment as a defence for criminal liability.⁷⁰ Criminal law is adopted after the adoption of the FDRE Constitution and, therefore, we can conclude that reasonable corporal punishment is a justification for parents to be free from the liability of physical assault. According to Judge Daniel Mekonnen, it is

⁶⁸ Civil Code, *supra* note 8, Article 2039.

⁶⁹ FDRE Constitution, *supra* note 59, Article 36(1) (e).

⁷⁰ Interview with Judge Daniel, *supra* note 33.

possible to interpret reasonable corporeal punishment by parents as a defence for physical assault. The law should be as clear as possible in this regard so as to avoid confusion.

A person commits an offense of ‘interference with the liberty of another’ or false imprisonment if he prevents the victim from moving about without due legal authority even for a brief time and notwithstanding that no injury is done. However, if the defendant has authority conferred upon by law and imposed confinement in a reasonable manner if the plaintiff is reasonably suspected of a crime and a ‘citizen arrest’ happens, and if the defendant is a bailer that confines the plaintiff because he has a good reason to believe that he is preparing to abscond, then the law does not make the defendant liable for the tort of false imprisonment.⁷¹ From the pieces of literature about the tort of interference with the liberty of another and the practices assessed, it is safe to conclude that this part of the Civil Code does not have problems.⁷²

According to Article 2044 of the Civil Code, the false claim should make another living person detestable, contemptible, or ridiculous and jeopardize his credit, his reputation, or his future to find someone liable for defamation. Absence of intent to injure, when an opinion is expressed on matters of public interest, when the alleged facts are entirely true or when he has immunity, and when the utterances are made in parliamentary debates or in the course of legal proceedings are stipulated as defences.⁷³ An offense of defamation is in between the two rights: the freedom of expression and protection of the reputation, honour, and dignity of others. Both rights are constitutional rights.⁷⁴ If one exceeds the freedom of expression, then there is a possibility

⁷¹ Civil Code, *supra* note 8, Articles 2041-2043.

⁷² From the interviews of judges about what the commonly entertained cases, no one says false imprisonment is one of them.

⁷³ Civil Code, *supra* note 8, Articles 2045-2049.

⁷⁴ Article 24 of the FDRE Constitution says everyone has the right to respect for his human dignity, reputation and honour. Article 27(5) also provides the freedom of

of committing defamation. The question that remains here is what is the demarcation line between freedom of expression and defamation which the Ethiopian tort law needs to define defamation with respect to the relatively new concept of the right to freedom of expression as embodied in the FDRE Constitution.

Injury to the rights of spouse is the other tortious fault in which someone induces the spouse of another to leave that other spouse. Receiving, harboring, or detaining a married woman against the will of her husband in full knowledge of the husband's opposition constitutes an offense of injury to the rights of spouses.⁷⁵ The practical assessment with regard to this issue shows that injury to the rights of spouses is not as common as in other tort cases. Irrespective of the practical reality, the Ethiopian Civil Code on this part is designed in a way that the husband is the head of the household. The law does not have an answer if a person receives, harbors, or detains a husband against the will of his wife in full knowledge of the wife's opposition. The fact that applies to a husband should also apply to a wife since according to the Revised Family Code, the husband is not the sole head of the family as opposed to what was provided under the 1960 Civil Code. The law in this regard should be updated.

ii) Fault against Property

Trespass is an assault on immovable property: land and house. The Civil Code provides: “[a] person commits an offense [of trespass] where, without due legal authority, he forces his way on the land or into the house of another, against the clearly expressed will of the lawful owner or possessor of the land

expression. The freedom of expression has limitations as prescribed by law and when necessary for protecting public safety, peace, health; education, public morality or the fundamental rights and freedoms.

⁷⁵ Civil Code, *supra* note 8, Article 2050.

or house.⁷⁶ Who can be the victim of trespass to land in the Ethiopian context? According to FDRE Constitution, individuals can only have possessory or holding right in both rural and urban land.⁷⁷ Thus, possession or holding right over the land is enough to fulfil one of the elements of trespass. However, since the tort law is outdated in this regard, it has to be amended to be consistent with the FDRE Constitution and to apply it without confusion.

As per article 2054 of the Code, a person commits an offense where, without due legal authority, he takes possession of property against the clearly expressed will of the lawful owner or possessor of the property. Actual damage of goods, use of goods, or moving goods from one place to another are conducts that constitute elements of assault on property. The Civil Code does not seem to have a problem in this regard.

iii) **Fault against Other Economic Interests**

If a person arbitrarily abandons his intention of entering into a contract and if the potential contracting party incurs damage due to that, the tort law considers it as an offense.⁷⁸ Moreover, as per Article 2056 of the Civil Code, entering into a contract with a person with full awareness of an existence of a previous contract and making the previous contract impossible to be performed is an offense. These tort issues are rarely brought before Ethiopian courts⁷⁹ and though the provisions are clear, it is hard to assess the sufficiency of these provisions from the practical standpoint.

Unfair competition law is primarily made up of torts that cause economic harm to a business through deceptive or wrongful business practices. The

⁷⁶ Id., Article 2053.

⁷⁷ FDRE Constitution, *supra* note 59, Article 40.

⁷⁸ Civil Code, *supra* note 8, Article 2055.

⁷⁹ Out of all the data collected from several judges, only one judge: Judge Fitsum asserted that cases related to pre-contractual negotiations are brought before his bench.

Civil Code makes a reference to acts compromising the reputation of a product or the credit of a commercial establishment through false publications or by other means contrary to good faith as acts that constitute an offense of unfair competition.⁸⁰ There are many ways in which an offense of unfair competition might be expressed. The law specifically puts false publications as one of the means to compromise the reputation of a product or the credit of a commercial establishment. The law on this should include some details so as to govern contemporary matters of unfair competition.

An offense of false information is committed if a person supplies false information to another knowing that the person would act according to the information supplied or when he has a professional duty to give true information.⁸¹ False information can be written or verbal statement or representation of the fact that is false and was made intentionally, knowingly, or without taking reasonable steps to determine whether or not the information was true, and that information harms the victim's interests. Incurring damage due to false information from the side of the victim is another basic element of the offense. The Ethiopian law on this issue is clear.

In summary, from the practical standpoint, generally, there is a view that the Civil Code which deals with fault-based liability is sufficient to entertain the cases commonly brought before the courts.⁸² The argument for this conclusion is that the law provides principles in some provisions like Articles 2027-2029 and 2035 and it is possible to apply those provisions to any case brought before courts by interpreting⁸³, applying through analogy,⁸⁴ and using

⁸⁰ Civil Code, *supra* note 8, Article 2057.

⁸¹ *Id.*, Article 2059.

⁸² Most of the judges say that they don't face any problem in implementing the law to the cases brought before them.

⁸³ Interview with Judge Daniel, *supra* note 33; Interview with Judge Fitsum, *supra* note 47.

the cassation bench's interpretation of vague provisions.⁸⁵ However, there are also arguments that say the law is not sufficient from different viewpoints. The first reason that makes the law insufficient is the type of offense. False imprisonment is one of the offenses that need detailed dealing by the law.⁸⁶ Additionally, even though interpreting the general principles and applying them to any case seems a way to deal with the sufficiency of the law, this might create a bigger problem. The decision of the judges would be/is subjective and hence different judges give different decisions on issues that are virtually the same. Therefore, actions that are considered as fault should be included in the law in a detailed fashion.⁸⁷

Conclusion

Tort laws play a paramount role in societies where misdoings, faults, harms, and injuries are rampant. In Ethiopia, liability arising from fault constitutes the core source of tortious liability. The rules regulating liability arising from fault are chiefly contained in the Code that has been in use for the last sixty-plus years. The aim of this study was to examine the legal and practical application of Ethiopia's law of tortious liability arising from fault. The section of the Code on fault-based extra-contractual liability is structured as general rules and special cases. However, both the general and special parts of the Code suffer from some limitations. Pertaining to the general part, the establishment of causation under Ethiopia's tort law is found to be inadequately addressed. That is, in spite of the fact that causation is a crucial element in establishing the required causal link between the tortfeasor's faulty

⁸⁴ Interview with Hussien Shiferaw, Judge, Federal First Instance Court, Addis Ketema Bench, (May 7, 2022)

⁸⁵ Interview with Tsegaye Lombabo, Judge, Federal First Instance Court, Kirkos Bench, (May 11, 2022)

⁸⁶ Interview with Judge Hussien, *supra* note 84; Interview Judge Fitsum, *supra* note 47.

⁸⁷ Interview with Judge Fasika, *supra* note 54.

conduct and the damage that ensued as a result of such conduct, Ethiopia's tort law provides little to no guidance as to its meaning and scope.

Besides, professional fault and infringement of laws form consequential parts of Ethiopia's law on fault-based liability. Nonetheless, these parts of the law are also found to be problematic. The provision on professional fault fails to provide a substantive scope for basic terms utilized under the very provision including profession and professional activities. Infringement of law as a major part of fault-based liability in Ethiopia is also found to be surrounded by a handful of inadequacies. First, the provision stipulating this form of liability has employed the generic term "specific and explicit provision" which could lead to different interpretations in the absence of guiding rules or principles. Second, the current federal political structure of Ethiopia results in two sets of laws: federal and state laws. Ethiopia's rule on an infringement of law cannot solve issues arising from the intricacies of the federal political structure.

With respect to the special cases of liability arising from fault, the rules on physical assault; defamation; injury to the rights of spouses; and trespass are found to be insufficient in guaranteeing the protection and enforcement of constitutional rights.

Therefore, Ethiopia's law on fault-based liability needs some amendment. As the law is found to be commendable in some respects, the task of the legislator should be confined only to filling the gaps in the law. In particular, the law ought to include explicit grounds that could help courts in establishing causation between the tortfeasor's action and the resultant harm sustained by the victim. The section on professional fault must encompass qualifications with respect to what constitutes a profession or who is a professional. In addition, the legislator needs to revisit the provision on infringement of the law in light of the current federal politico-legal structure of Ethiopia; and the

rules on physical assault, defamation, injury to the rights of spouses and trespass should be amended and made compatible with the rights and freedoms enshrined under the FDRE Constitution. The revisiting and extending the special case of fault to embrace emerging faults is also an issue worth considering.