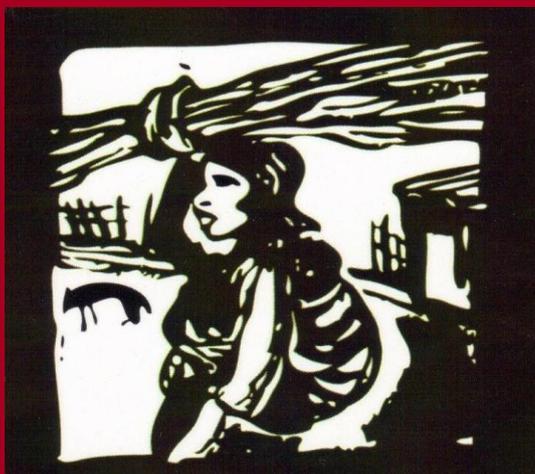


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## The Ethiopian Federal Ethics and Anti-Corruption Commission: A Critical Assessment\*

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### 1 INTRODUCTION

Ethiopia's specialised anti-corruption agency (ACA) figures prominently in the contemporary anti-corruption tableau.<sup>1</sup> It has usefully been defined as:

“a separate, permanent government agency whose primary function is to

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<sup>1</sup> Transparency International counts ACAs amongst the “institutional pillars” of any society's national integrity system. See generally Pope *Confronting corruption: the elements of a national integrity system* (2000).

provide centralized leadership in core areas of anticorruption activity”.<sup>2</sup>

There seems to be general agreement that a centralised, coherent and co-ordinated anti-corruption regime is superior in all aspects to a diffuse and dislocated *modus operandi*. Evidently, the dedicated ACA is already an item of “growing institutional imitation and isomorphism”<sup>3</sup> and appears to enjoy widespread preference to spearhead national anti-corruption movements. By extrapolation, the international campaign against corruption is unlikely to make significant headway without the support of a worldwide corps of functioning ACAs. Needless to say, therefore, the structure and capacity of ACAs require critical evaluation and their performance constant monitoring.

In 2001 Ethiopia joined the international trend by establishing an ACA in the form of the Federal Ethics and Anti-Corruption Commission (FEACC).<sup>4</sup> The primary objective of the FEACC is to combat corruption “through investigation, prosecution and prevention”.<sup>5</sup> Its establishment was motivated by the belief that “corruption and impropriety are capable of hindering the social, economic and political development” of the country,<sup>6</sup> and that the FEACC was necessary to address the threat posed to Ethiopian development by such corruption and impropriety.

Corruption is rampant in Ethiopia. According to the Global Integrity Report of 2006, corruption is considered a norm of social, economic and political intercourse in Ethiopia.<sup>7</sup> The culture of corruption has sunken such deep roots in Ethiopia that the country has been tagged “a land of ten per cent – meaning hardly anything can be accomplished without adding this amount as a kick-back”.<sup>8</sup> The highwater mark of this ten per cent mentality is to be found in the Ethiopian curiosity “where a taxpayer is requested to pay a bribe simply to pay tax, duty or other bills to the government”!<sup>9</sup>

Needless to say, the blatancy of Ethiopian corruption brings the FEACC, as the country’s premier anti-corruption institution, into sharp relief. Although ACAs are relatively abundant internationally, few of them can claim unqualified or even sustained success in their efforts to prevent or combat corruption. This article represents an attempt to comprehend the FEACC in the context of the globalisation of anti-corruption legal discourse, and to analyse its efficacy in the Ethiopian socio-economic and political milieu, in the hope of identifying those aspects of its operations which may be in need of improvement or development.

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<sup>2</sup> See Meagher & Voland “Anti-corruption agencies: anti-corruption program brief” (2006) at 9.

<sup>3</sup> Meagher & Voland (2006) at 9.

<sup>4</sup> As corruption became the subject of discussion and condemnation across the globe in the mid-1990s, so did ACAs make their appearance as expressions of serious anti-corruption intent. Today ACAs are commonplace. Certainly, if a state has devised a national anti-corruption regime, it is not unlikely that an ACA is one of the core components of that regime.

<sup>5</sup> See the Preamble to the Revised Proclamation for the Establishment of the Federal Ethics and Anti-Corruption Commission No. 433 of 2005 (hereafter “Revised Establishment Proclamation”) para 3.

<sup>6</sup> Revised Establishment Proclamation para 1.

<sup>7</sup> See Global Integrity Report *Ethiopia: corruption notebook* (2006) at 2.

<sup>8</sup> Alemayehu “The perception of corruption and its unique features in Ethiopia” (2008).

<sup>9</sup> Alemayehu (2008).

## 2 THE BIRTH OF THE FEACC

Despite some economic progress over the last few years, Ethiopia remains one of the poorest countries in the world. What is more, the widespread corruption referred to above has been a melancholy fixture of the modern history of the country.<sup>10</sup> During the Imperial and Derg regimes corruption had a devastating impact on Ethiopian society and economy.<sup>11</sup> The Derg regime came to power on an anti-corruption ticket and actually did launch a number of anti-corruption initiatives. However, these were short-lived, owing mostly to inadequate resources, both financial and human, and to political interference.<sup>12</sup> Regrettably, therefore, corruption retained a debilitating grip on national life in Ethiopia.

By 2001 the problem of corruption had become conspicuous enough to prompt the Ethiopian government to commission a Corruption Survey with a view to understanding the severity of the problem and its impact upon the country. In the result,

“[t]he Survey revealed, among other things, a generalized dissatisfaction with the performance of the public sector. People working in customs, land distribution, public housing, telephone, water, and other public services were reported to be engaged in institutionalized corrupt practices.”<sup>13</sup>

One of the responses of the Ethiopian government to the Corruption Survey was to launch a Civil Service Reform Programme, which included an ethics sub-programme with a focus on corruption. Research conducted by the University of Addis Ababa for the ethics sub-programme “brought the sufferings of the Ethiopian public to light”.<sup>14</sup> In the same year, a project of the Ethiopian Institute of Educational Research, involving 600 business enterprises across the regional States, revealed that 78.5% of these enterprises considered corruption in the public sector to be the primary negative factor impinging upon their operations and growth.<sup>15</sup>

Such exposés sparked donor pressure to combat corruption.<sup>16</sup> In response to this litany of unflattering developments the Ethiopian parliament on 24 May 2001 established the FEACC, charged with the unenviable task of being the nation’s anti-corruption watchdog and ethics custodian.<sup>17</sup> This could not have been more timely, for in 2002 Ethiopia was ranked a lowly 59th out of 102 countries in the global Corruption Perceptions Index produced by Transparency International.<sup>18</sup>

The FEACC was established in the context of the globalisation of anti-corruption discourse and its existence expressed the spirit and purport of international anti-

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<sup>10</sup> For a list of the major factors to which corruption in Ethiopia may be attributed see Megiso “Anti-corruption efforts in Ethiopia” (2007) at 2.

<sup>11</sup> Megiso (2007) at 2.

<sup>12</sup> See Olowu “Governmental reforms and the control of corruption in Ethiopia” (2000) at 264-267.

<sup>13</sup> See African Development Bank Group “Combating corruption in Africa” (2003) at 16.

<sup>14</sup> Megiso (2007) at 2.

<sup>15</sup> See Getahun *Transparency International and the worldwide corruption* (2006) at 5.

<sup>16</sup> See Mwenda *Global corruption report: East Africa* (2003) at 238.

<sup>17</sup> However, some commentators were sceptical, claiming to discern behind the Commission’s establishment an agenda to enlist it as a weapon against powerful political opponents. See Belai “Disabling a political rival under the cover of fighting corruption in Ethiopia” at 2-3; Justice in Ethiopia *PM Meles’ anti-corruption campaign one year later* (2002).

<sup>18</sup> Transparency International “Corruption Perceptions Index 2002” *Surveys and Indices*.

corruption law. Ethiopia is party to two major international anti-corruption instruments, namely the African Union Convention on Preventing and Combating Corruption (AU Convention) and the United Nations Convention against Corruption (UNCAC).<sup>19</sup> Although the FEACC came into existence prior to the adoption of these conventions, its creation may be taken to signify Ethiopia's pre-emptive concurrence with conventional obligations regarding ACAs.<sup>20</sup>

Once a state has elected to establish an ACA, its physiognomy has to be decided. Needless to say, and despite the trend towards "institutional imitation and isomorphism", there is no single best model for an ACA. Hence it is the responsibility of each state to find the most effective institutional solution for its domestic context. The FEACC resembles Khemani's model of a multiple-purpose institution with law enforcement and prosecutorial powers.<sup>21</sup> This model combines investigative, preventive, educational and prosecutorial functions. It is notable as the ACA format which incorporates a more comprehensive set of anti-corruption powers than any other.<sup>22</sup>

The adoption of this model is commendable for a number of reasons. To begin with, the law enforcement institutions in Ethiopia suffer from major shortcomings. The police service easily ranks amongst the most corrupt and politically biased of public institutions.<sup>23</sup> It has a very poor public image and carries a considerable resources deficit in finances, technology and skills.<sup>24</sup> The public prosecution service is considered also to be politically partial and in significant want of qualified personnel.<sup>25</sup> Leaving the fight against corruption to these traditional law enforcement institutions almost certainly would have ensured that it did not receive the levels of attention and dedication it required. In this regard, Khemani makes the point that

"[h]aving prosecutors and investigators working in partnership under one body ensures the specialization and the streamlining of functions required to efficiently handle anti-corruption law cases from beginning to end."<sup>26</sup>

Certainly the piecemeal approach, in terms of which the anti-corruption campaign is left to disparate existing institutional structures, has minimal prospects of producing viable and sustainable preventive and law enforcement programmes in the Ethiopian socio-economic and political milieu. Hence the need for the FEACC.

Given the inadequacies of its conventional prosecution service, an effective Ethiopian ACA must needs possess prosecutorial competence. In this context it makes sense, in the pursuit of effectiveness and efficiency, to centralise and to integrate vertically all anti-corruption functions within a single designated body. The FEACC is a product of

<sup>19</sup> Ethiopia signed UNCAC on 10 December 2003 and ratified it on 26 November 2007. It signed the AU Convention on 1 June 2004 and ratified it on 18 September 2007.

<sup>20</sup> See Arts 6 and 36 of UNCAC and Art 5(3) of the AU Convention.

<sup>21</sup> See Khemani *Anti-corruption commissions in the African state* (2009) at 17-18.

<sup>22</sup> For a consideration of other functional typologies of ACAs, see generally OECD *Specialized anti-corruption institutions: review of models* (2007). See also De Sousa "Anti-corruption agencies as central pieces in a national integrity system" (2008) at 4; Dionisie & Checchi *Corruption and anti-corruption agencies in Eastern Europe and the CIS* (2008) at 7.

<sup>23</sup> See Global Integrity Report *Ethiopia: law enforcement integrity indicators scorecard* (2008b).

<sup>24</sup> See Vibhute "Comprehensive justice system in Ethiopia" (2009) at 3.

<sup>25</sup> Vibhute (2009) at 3.

<sup>26</sup> See Khemani (2009) at 23.

the specificities of the Ethiopian condition and its structure reflects the exigencies of that condition. Its creation has an important symbolic function, proclaiming anti-corruption to be an attribute of government.<sup>27</sup> However, while the establishment of an appropriate institutional framework is significant in and of itself, the litmus test of success, as always, is the practice of anti-corruption. Needless to say, therefore, the FEACC must be judged in terms of the practical impact of its work on the fight against corruption in Ethiopia.

### 3 CRITERIA OF SUCCESS

This section canvasses the factors which, in combination, the authors consider to constitute the dividing line between success and failure for the FEACC. ACAs which operate in underdeveloped countries invariably have to cope with problems which are significantly different, both qualitatively and quantitatively, from those faced by their first-world counterparts. And failure invariably hurts their societies and citizens severely at the bread-and-butter level. It is imperative, then, that the FEACC make every effort to avert failure, thereby to help spare its constituency at least some of the ravages of corruption.

#### 3.1 Independence of the FEACC

There is a directly proportion relationship between the independence of ACAs and their success. Thus, the sovereignty of these bodies must be promoted and protected as far as possible and they must be given the opportunity to perform their mandates free of political interference. Certainly, the international and regional anti-corruption instruments urge or require that the autonomy of ACAs be ensured.<sup>28</sup> The subsections which follow traverse the issues which seem especially pertinent to securing and reinforcing the independence of the FEACC.

##### 3.1.1 Positioning of the FEACC

The position which an ACA occupies within the state structure is an important determinant of its independence. By extrapolation, therefore, the success of an ACA well may turn on its institutional placement. Indeed, Transparency International considers that the celebrated successes of the Singapore and Hong Kong agencies derive significantly from their situation in the offices of the Prime Minister and Governor respectively.<sup>29</sup>

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<sup>27</sup> Khemani (2009) at 22.

<sup>28</sup> See Arts 6 and 36 of UNCAC and Art 5(3) of the AU Convention.

<sup>29</sup> See Pope (2000) at 96. However, such institutional placements cannot be transplanted without more. Grand corruption usually originates in the executive and an ACA located in the office of the head of state may find its ability to curb corruption compromised by its proximity to the source. For example, the ACAs in Tanzania and Zambia are both situated in the office of the President, and both have failed to make headway against corruption in the upper echelons of government. The integrity and independence of such ACAs perhaps may be regained by making them accountable to the legislature instead of the executive. See Pope & Vogl "Making anti-corruption agencies more effective" (2000) at 8; Organization for Security and Co-operation in Europe *Best practices in combating corruption* (2004) at 168.

The FEACC is not subsumed legally under any government office; it is “established as an independent Federal Government body”.<sup>30</sup> Originally, although the Commission was accountable to the Prime Minister, it enjoyed formal freedom from interference in the pursuit of its objectives.<sup>31</sup> Apparently, however,

“this provision prevented the Prime Minister from giving general direction and extending support to the Commission in areas other than the investigation and prosecution of alleged corruption offences.”<sup>32</sup>

It would appear, then, that the Establishment Proclamation had overstated the autonomy of the FEACC at the expense of the Prime Minister’s prerogative to guide and assist the FEACC in matters outside its criminal jurisdiction. The relationship between the FEACC and the Prime Minister in this regard was considered to be in need of “polishing and amendment”.<sup>33</sup> Hence Article 4 of the Revised Establishment Proclamation, which provides that “the Commission shall be free from any interference or direction by any person with regard to cases under investigation or prosecution or to be investigated or prosecuted.”<sup>34</sup>

Despite its expansive wording Article 4, read with Article 3(2),<sup>35</sup> has the intention and effect of according the Prime Minister the power to intervene in those areas of the Commission’s work which do not involve its prosecutorial and investigative roles. In a word, the Prime Minister may intrude into such matters as the administrative procedures, organisational structure, strategic planning, budgetary dispositions and public profile of the FEACC. Of course, such intrusion ought to be motivated by a desire to advise, support and fortify the institution.

Now it well may be commendable, even desirable, to afford the Prime Minister the power to assist the Commission in the fulfilment of its mandate. However, power always is potentially problematic, and the power at issue here may well pose a threat to the independence of the Commission. Given that so much corruption is located in the public sphere, a significant dimension of the FEACC’s work necessarily concerns the integrity of public officials. There is an evident need for the Commission to have as little interference as possible in its operations from the executive. If a successful ACA must be independent, then the “most important sign of independence is the absence of political intrusion into the agency’s operations.”<sup>36</sup> Despite its supposed beneficent inspiration, the Revised Establishment Proclamation amounts to an encumbrance upon the ideal of institutional autonomy for the FEACC.

### **3.1.2 FEACC executives**

The calibre of its executive staff can be the touchstone of the independence of an ACA, and is thus a matter of some considerable importance. The desideratum is to get executive appointments right. In this regard, Jennett has correctly posited that

<sup>30</sup> See Article 3(1) of the Revised Establishment Proclamation.

<sup>31</sup> See Article 4 of the Proclamation for the Establishment of the Federal Ethics and Anti-Corruption Commission No. 235 of 2001 (hereafter Establishment Proclamation).

<sup>32</sup> See *FEACC Amendment of the Proclamation*.

<sup>33</sup> *FEACC Amendment of the Proclamation*.

<sup>34</sup> Article 4 of the Revised Establishment Proclamation.

<sup>35</sup> Article 3(2) confirms that the FEACC is accountable to the Prime Minister.

<sup>36</sup> See Meagher “Anti-corruption agencies: a review of experiences” (2002) at 2.

“[t]he challenge of making executive appointments to anti-corruption agencies is to ensure that persons of integrity are selected and that they enjoy independence from political (and private sector) interference as well as being held to account for their actions.”<sup>37</sup>

An executive who is compromised in any way is an obvious liability to the ACA and poses a serious threat to its autonomy.

The FEACC has two established executive posts, namely, Commissioner and Deputy Commissioner.<sup>38</sup> The Commissioner is nominated by the Prime Minister and appointed by the House of Peoples’ Representatives (Parliament),<sup>39</sup> while the Deputy Commissioner is appointed directly by the Prime Minister.<sup>40</sup> It is apparent that these executive positions are both political appointments, in which the wishes of the Prime Minister loom large. In this connection Jennett argues for an executive appointments process which

“recognises that the task of the office holder will be to maintain a check on the Executive and, in particular, the political party in power. If the Executive or even the ruling party have (*sic*) a free hand in making the appointment, this will damage practical effectiveness and public confidence. At best, appointees would risk being seen as hand-picked supporters who could be relied upon not to rock the boat. At worst, they would be seen as the party’s ‘hatchet men’”.<sup>41</sup>

This argument makes eminent sense in relation to the legal rules governing the appointment of the FEACC executives. Appointees who are perceived to be ruling party yes-men or women will hardly be in a position to secure the public confidence which is indispensable to the success of the anti-corruption programmes of the FEACC.

The 2005 African Governance Report classified the executive branch of the Ethiopian government amongst those which are “largely or completely corrupt”.<sup>42</sup> What is more, according to a 2007 Freedom House report, “[i]t is widely held in Ethiopia that the commission was created principally to pursue powerful political figures who had fallen out of favour with the regime.”<sup>43</sup> Evidently there is entrained in the procedure currently regulating the appointment of its executives the danger of a “darling” FEACC. Certainly, the fact that the Prime Minister selects the Deputy Commissioner and recommends who should be appointed as Commissioner may prove to be an impediment to the success of the Commission’s crusade against corruption.

Here it bears noting that Transparency International has recommended that an appointment mechanism which operates through parliamentary consensus, together with an external accountability mechanism such as a multi-party Parliamentary Select Committee, can reduce opportunities of abuse of the appointments process or biased appointments.<sup>44</sup> The obvious antidote to the perception of the FEACC as a “darling” ACA is public participation in the selection of its executives. One route to such participation

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<sup>37</sup> Jennett “Criteria for appointing executives of anti-corruption agencies” (2007) at 1.

<sup>38</sup> Art 10 of the Revised Establishment Proclamation.

<sup>39</sup> Art 10(1) of the Revised Establishment Proclamation.

<sup>40</sup> Art 10(2) of the Revised Establishment Proclamation.

<sup>41</sup> See Jennett (2007) at 3.

<sup>42</sup> UN Economic Commission for Africa *African governance report* (2005) at 150.

<sup>43</sup> Keller “Ethiopia” (2007) at 19. See also Dizard, Kelly & Walker *Countries at crossroads: a survey of democratic governance* (2008) at 315.

<sup>44</sup> See Pope (2000) at 97.

is to invite nominations for executive positions from the public after publication of clear criteria pertaining to the requisite qualities and qualifications of successful candidates.<sup>45</sup> Parliament could then assume responsibility for compiling a shortlist, and the Prime Minister could make the appointments from Parliament's shortlist. An appointments procedure structured along these lines would see the Prime Minister filling the executive positions of the FEACC on the advice of Parliament, after Parliament has relied upon the public nominations process to identify potential appointees. The point is that an appointments process which is rooted in public participation is likely to attract public confidence in the successful candidates, thereby enhancing the chances of the Commission achieving sustainable success in its operations.

Initially the executives of the FEACC, once appointed, could be removed from office only on the grounds of a criminal conviction and of mental or physical illness hampering performance.<sup>46</sup> Today the removal of both the executives is governed by article 14(2) of the Revised Establishment Proclamation, which provides the following:

“Once appointed, the Commissioner or the Deputy Commissioner may not be removed, except on his own will, from his office unless:

- (a) he has violated the provisions of the relevant code of conduct;
- (b) he has shown manifest incompetence and inefficiency;
- (c) he can no longer carry out his responsibilities on account of mental or physical illness.”<sup>47</sup>

The Revised Establishment Proclamation thus retains mental or physical illness as a ground of removal and adds two additional grounds, namely, violation of the FEACC's code of conduct and manifest incompetence and inefficiency. However, disappointingly, it excludes removal on the basis of a criminal conviction. This change between the Establishment and Revised Establishment Proclamations is puzzling, given that conviction-based impeachment long has been germane to the process of removing an incumbent from public office all over the world. The FEACC's website contains an item called “Amendment of the Proclamation” which seeks to explain the general need for the Revised Establishment Proclamation as well as certain specific amendments. However, it makes no reference to the omission of conviction-based removal of FEACC executives. Regrettably, the lack of explanation can serve only to encourage public perceptions of impropriety in this regard.

As intimated above, the Revised Establishment Proclamation introduces code of conduct violations and manifest incompetence and inefficiency as grounds for the removal of an executive officer of the FEACC. Code of conduct violations usually are patent and hence do not raise any serious concerns as a ground of removal. Removal founded upon manifest incompetence and inefficiency enjoys historical legitimacy. However, they are not as readily proved or disproved as is, for example, a criminal conviction. In other words, this ground of removal is not anchored objectively and hence is prone to manipulation. Of course, it is necessary to remove leaders who prove

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<sup>45</sup> Nominees can be drawn from the ranks of public officials or interest groups such as civil society organisations and professional bodies. Needless to say the nominees, whatever their origins, must possess the impeccable personal integrity which is required of the men and women who are to be entrusted with the task of leading the Commission in its fight against corruption.

<sup>46</sup> See Arts 10(2) and 12(2) of the Establishment Proclamation.

<sup>47</sup> Art 14(2) of the Revised Establishment Proclamation.

to be manifestly incompetent and inefficient; but it is necessary, too, to ensure that the ground of removal does not operate as a weapon of retaliation against “recalcitrant” anti-corruption leaders.<sup>48</sup> This may happen, for example, in a situation where the Commission has opted to investigate and possibly prosecute “protected” public officials. It would appear that the crucial consideration here is the need for clearly delineated criteria of competence and efficiency. Absent such yardsticks, decisions on competence and efficiency stand to be bedevilled by political machinations.

Since the Commissioner is appointed by Parliament, any decision to remove him or her before the expiry of the relevant term of office would have to be a decision of Parliament. It is submitted that Parliament ought also to have the final say about the removal of the Deputy Commissioner, even though he or she is appointed directly by the Prime Minister. Parliamentary supervision of the removal process will minimise the risk of the designated grounds of removal being enlisted by the executive to silence or eject Commission leaders who might decide to pursue corruption charges against those who enjoy the patronage of the government.

### **3.1.3 Resources of the FEACC**

There is perhaps no more decisive measure of institutional independence than fiscal autonomy. For an institution like the FEACC to be more than formally independent it must be free of serious fiscal constraints. At very least the resources apportioned to it should be commensurate with its responsibilities and competencies. Hitherto this desideratum has been singularly elusive. The FEACC has been chronically under-resourced, which disability constitutes one of the major challenges it has had to negotiate.<sup>49</sup> In 2009 it had a staff of 236 people and a budget of only \$1.4 million; in 2010 its staff increased to 284 while its budget decreased to less than \$1.2 million!<sup>50</sup>

Assuring financial independence of ACAs invariably is difficult, because in most cases they are reliant for their budgets on government allocations. In Ethiopia the executive has the mandate both to prepare the Federal budget and to implement it after it has received parliamentary approval.<sup>51</sup> The preparation of the FEACC’s annual budget lies within the competence of the Commissioner. However, the budget which the Commissioner proposes has to be submitted to the Prime Minister, who in turn must submit it to Parliament for approval.<sup>52</sup> There is thus a *lacuna* between the Commissioner submitting the budget to the Prime Minister and the Prime Minister submitting it to Parliament in that there appears to be no legal bar to the Prime Minister amending it before it goes to Parliament.

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<sup>48</sup> There is a popular perception that the effectiveness of the Commission has been compromised significantly by the control and influence of the ruling party, as demonstrated by its failure to pursue senior government officials. See Global Integrity Report *Ethiopia: anti-corruption agency integrity indicators scorecard* (2008a).

<sup>49</sup> See Megiso (2007) at 9.

<sup>50</sup> See Tamyalew *A review of the effectiveness of the Federal Ethics and Anti-Corruption Commission of Ethiopia* (2010) at 27.

<sup>51</sup> Art 77(3) of the Ethiopian Constitution provides that the Council of Ministers “shall draw up the annual Federal budget and, when approved by the House of Peoples’ Representatives, it shall implement it”.

<sup>52</sup> See Art 12(2)(d) of the Revised Establishment Proclamation as read with Arts 55(11) and 77(3) of the Ethiopian Constitution.

The Commission requires a secure financial base if it is to make significant headway in formulating and pursuing its paramount directive of dismantling the culture of corruption which has long been entrenched in Ethiopian society. According to the Manager of its Finance Department, the FEACC has received its requested budgetary allocation from the Minister of Finance since its inception.<sup>53</sup> Welcome as such government consistency may be, it is no substitute for a legal framework that guarantees the FEACC budgetary stability.<sup>54</sup>

A possible route to fiscal security would be to allow the Commission to submit its annual budget plan directly to Parliament. However, this may require an amendment to the Constitution, which is a lengthy and burdensome process.<sup>55</sup> A viable alternative would be to circumscribe the unfettered discretion which the Prime Minister currently enjoys in respect of the Commission's budget and legislate for some form of budgetary stability as an attribute of the Commission. In this regard the standard legal intervention would be to prevent the Prime Minister from reducing the budget of the FEACC from the allocation approved in the previous year, with adjustments made for inflation.<sup>56</sup>

### 3.2 Accountability of the FEACC

Whereas independence is a necessary ingredient of success for any ACA, care must be taken that the pursuit of independence does not become a barrier to accountability. Certainly, the type of independence proposed by the international anti-corruption instruments is a qualified independence which does not entail a sacrifice of accountability.<sup>57</sup> Here the OECD's position on the relationship between the independence and accountability of ACAs is representative:

"Independence should not amount to a lack of accountability: in the discharge of its duties and powers, specialised services should strictly adhere to the principles of the rule of law and internationally recognised human rights. Forms of accountability of specialised institutions and persons must be tailored to the level of their specialisation, institutional placement, mandate, functions and most of all, their powers against other institutions and individuals."<sup>58</sup>

In practice, accountability is a necessary route to credibility for ACAs. De Speville makes the argument graphically:

"Any government body in receipt of public funds should be required to account for the way it has spent that money. An anticorruption agency which regards itself as an exception is doomed to fail. Failure to account for its implementation of the strategy and for the conduct

<sup>53</sup> See Tamyalew (2010) at 26.

<sup>54</sup> See Global Integrity Report (2008b): "Though the commission receives regular funding, the amount requested by the commission is not secure."

<sup>55</sup> See Art 105(2) of the Ethiopian Constitution, which provides that the Constitution may be amended only "(a) when the House of Peoples' Representatives and the House of the Federation, in a joint session, approve a proposed amendment by two thirds majority vote; and (b) when two-thirds of the Council of the member States of the Federation approve the proposed amendment by majority votes".

<sup>56</sup> See Tamyalew (2010) at 8.

<sup>57</sup> See, for example, para 99 of the Explanatory Report to the Council of Europe Criminal Law Convention on Corruption: "It should be noted that the independence of specialised authorities for the fight against corruption ... should not be an absolute one."

<sup>58</sup> OECD (2007) at 19.

of its officers will alienate the public. Without community support it cannot do its job.”<sup>59</sup>

Like independence, accountability has to be comprehended as indispensable to the long-term success of an ACA. A lack thereof invariably will foster perceptions of arbitrariness and favouritism and will redound to the detriment of the work of the ACA in leading the national struggle against corruption.

Many countries appreciate the need for their ACAs to be answerable for their decisions and have devised oversight regimes to promote and implement accountability. These regimes span a range of different monitoring methods, including parliamentary multi-party monitors and oversight committees involving members of the public.<sup>60</sup> Pope and Vogl rank accountability as “the most difficult issue related to building successful anticorruption agencies”.<sup>61</sup>

In this regard it is regrettable that Ethiopia has not sought to foreground the accountability of its ACA. The FEACC is accountable only to the Prime Minister,<sup>62</sup> to whom the Commissioner is required to submit performance and financial reports.<sup>63</sup> This arrangement was selected over two proposed alternatives: for the Commission to be accountable to Parliament or to a committee representing all three branches of government.<sup>64</sup>

According to Sartet, there were three arguments for designating the Prime Minister as the person to whom the Commission is accountable. First, parliamentary decision-making tends to be tardy, whereas anti-corruption decisions often have to be taken swiftly. Secondly, even if taken by parliament, anti-corruption decisions go to the Prime Minister for implementation; and thirdly, given that corruption is most prevalent in the executive, the FEACC’s direct link to the Prime Minister would allow it to act quickly against offenders.<sup>65</sup>

In this sense it may be owned that the intention of making the FEACC accountable to the Prime Minister was to facilitate its anti-corruption work. However, it is as well to remember that the road to damnation is paved with good intentions. In truth, the case for making the Prime Minister the adjudicator of FEACC accountability is both weak and indefensible. On the one hand, it is widely acknowledged that it is within the ranks of the executive that corruption in Ethiopia has found its most fertile breeding ground. On the other hand, the Commission is responsible to the head of the executive. There is a

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<sup>59</sup> De Speville “Failing anticorruption agencies” (2008) at 5.

<sup>60</sup> For instance, the Hong Kong ICAC has opted to involve the citizenry directly in monitoring its operations. “There are four advisory committees comprising prominent citizens appointed by the Chief Executive to oversee the work of the ICAC. All four advisory committees are chaired by civilian members.” See ICAC Hong Kong *Advisory committees*. By contrast, the ICAC of New South Wales is held accountable through a multi-party Parliamentary Joint Committee which “monitors the ICAC’s performance of its functions and reports” and an Inspector who “oversees the ICAC’s use of investigative powers, investigates complaints against ICAC employees and monitors compliance with the law” and who “monitors delays in investigations and any unreasonable invasions of privacy”. See ICAC New South Wales *Accountability mechanisms*.

<sup>61</sup> Pope & Vogl (2000) at 8.

<sup>62</sup> Article 3(2) of the Revised Establishment Proclamation.

<sup>63</sup> Article 12(2)(i) of the Revised Establishment Proclamation.

<sup>64</sup> Sartet “Country report on the role of Ethics and Anti-Corruption Commission in preventing corruption in Ethiopia” (2004) at 8-9.

<sup>65</sup> Sartet (2004) at 9.

fundamental contradiction here which could lead easily to the undesirable situation where the Commission becomes imbricated in political gamesmanship to shield allies and to harass adversaries. The spectre of political favouritism lurks behind the accountability arrangement contained in Article 3(2) of the Revised Establishment Proclamation.

Transparency International has proposed cogently that “in setting the parameters for the establishment of an Anti-Corruption Agency, a government must ask itself if it is creating something that would be acceptable if it were an opposition party”.<sup>66</sup> As indicated earlier, it is widely contended that the FEACC had been created to serve as a pawn in the political machinations of the ruling party. In the circumstances it is unlikely that the existing accountability regime will be acceptable to opposition parties or to any political antagonist of the government. There is thus a compelling case to shift oversight from the Prime Minister to a committee composed of members of the legislature, executive and judiciary. Such a modification would provide the necessary platform for the work of the Commission to be scrutinised by a body which spans all three branches of government. Oversight by a tripartite inter-governmental committee would avoid the danger of protracted decision-making that was feared had the Commission been made accountable to Parliament only.

Coterminous with such a formal accountability arrangement, it is desirable that there be conduits of direct reporting by the Commission to the citizenry of Ethiopia. In this regard it must be noted that the Commission has been posting annual reports on its website. According to its 2009-2010 Annual Report, the FEACC has done much to spread “ethics and anti-corruption education through the dissemination of tailor-made publications”.<sup>67</sup> The Report indicates that the Commission uses virtually all available means of communication to propagate the anti-corruption idea to the public, from stickers and fliers through brochures and booklets to newspaper, radio and television messages. In addition the Commission publishes a quarterly magazine called *Ethics* and a bimonthly newsletter called *Insight*. From the Annual Report it is evident that the Commission takes public anti-corruption education seriously, thereby demonstrating a sense of accountability to the people of Ethiopia. Certainly, accountability is well served by a comprehensive anti-corruption education programme.<sup>68</sup>

### 3.3 Mandate of the FEACC

The powers and duties of the FEACC traverse the entire gamut of anti-corruption work as well as the ethical imperatives of good governance and good citizenship. The catalogue is comprehensive, quantitatively and qualitatively, and encompasses all that one would expect in the mandate of an ACA.<sup>69</sup> It is not possible within the scope of this article to provide a comprehensive assessment of the progress made by the Commission towards fulfilling its mandate. Instead, it will be attempted to shed some light on the question by way of considering three pertinent issues, namely the registration of assets

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<sup>66</sup> Pope (2000) at 97.

<sup>67</sup> See FEACC *Annual Report 2009-2010*.

<sup>68</sup> FEACC *Annual Report 2009-2010*.

<sup>69</sup> See Article 7 of the Revised Establishment Proclamation for full details of the powers and duties of the Commission.

of public officials, the protection of whistle-blowers and witnesses, and the civil forfeiture of corruptly-acquired assets.

### **3.3.1 Registration of Assets**

By definition, public officials are required to act in the public interest, and public resources ought not to become a source of private accumulation for public officials. Many governments seek to minimise this possibility by establishing a scheme of assets divulgence for public officials. Such a scheme is accepted generally as a viable anti-corruption technique aimed at developing and maintaining public trust by promoting accountability and transparency.<sup>70</sup> Indeed, most anti-corruption instruments enjoin or, at least, urge states parties to require designated public officials to declare their assets regularly.<sup>71</sup> The registration of such declared assets is especially useful in that it facilitates the prosecution for illicit enrichment of public officials who have acquired wealth corruptly.<sup>72</sup>

The Ethiopian Criminal Code devotes a provision to the criminalisation of possession of unexplained property.<sup>73</sup> Its definition of the crime transcends the conventional definition, considering as tainted not only assets controlled by the accused directly, but also those which he or she controls indirectly through other individuals.<sup>74</sup> This extension is a most useful addition to the arsenal of anti-corruption investigators and prosecutors, whose work is facilitated somewhat by the possibility of pursuing illicit enrichment charges also against public officials who seek to evade justice by transferring their ill-gotten property to loyal proxies.

Needless to say, the success of illicit enrichment prosecutions often will turn on the existence and implementation of a comprehensive programme of assets disclosure and registration. In this connection the FEACC took the commendable step of submitting a draft law to Parliament in January 2010,<sup>75</sup> which was enacted on 30 March 2010 as the Disclosure and Registration of Assets Proclamation No. 668 of 2010. The Preamble to the Proclamation expressly recognises the importance of a programme of assets disclosure and registration in combating corruption and constructing a public culture of transparency and accountability. The Proclamation is applicable to all “appointees, elected persons and public servants of the Federal Government and the Addis Ababa

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<sup>70</sup> See Larbi “Between spin and reality” (2005) at 1-2.

<sup>71</sup> See Article 52(2) of UNCAC and Article 7 of the AU Convention. Disclosure of assets is mandatory under the AU Convention but, regrettably, not under UNCAC.

<sup>72</sup> Illicit enrichment or unexplained wealth is a crime committed by a public official who lives above his means and is unable to account for being wealthy beyond his lawful income. It is presumed then that he has supplemented his lawful income by raids upon the public purse. Although the crime of illicit enrichment has generated considerable controversy as a possible violation of the presumption of innocence, many states rely upon it to act against public officials who would otherwise be beyond the reach of the law. See Wysluch “The UN Convention against Corruption and development cooperation” (2007) at 7-8.

<sup>73</sup> See Article 419 of the Ethiopian Criminal Code.

<sup>74</sup> Article 419 (2) of the Ethiopian Criminal Code.

<sup>75</sup> See Tamyalew (2010) at 14; New Business Ethiopia Reporter ‘Parliament approves officials’ asset registration bill’ (31 March 2010). Although only presented to Parliament in 2010, the law was drafted in 2002 already. See Tadesse “Gov’t officials’ assets registration to start in November” (16 Aug 2010); Anonymous “Ethiopia enacts assets and property registration law” (31 March 2010).

and Dire Dawa city administrations”.<sup>76</sup> Collectively these three categories span the gamut of public officials from the President, the Prime Minister and State Ministers through mayors, managers of public enterprises and members of parliament to tax collectors, prosecutors and traffic police officers. To be sure, the list of public officials identified in the Proclamation is by no means exhaustive, but it seemingly does include virtually all public positions which are perhaps the most prone to corruption.

Article 4(1) of Proclamation No. 668 of 2010 makes assets disclosure and registration a legal duty for public officials:

“Any appointee, elected person or public servant shall have the obligation to disclose and register:

- (a) the assets under the ownership or possession of himself and his family; and
- (b) sources of his income and those of his family.”

The ambit of Article 4(1) may be taken as an expression of the expansive definition of the crime of possession of unexplained property in Article 419(2) of the Criminal Code, in the sense that the assets to be declared and registered include those owned and possessed by the family of the public official in question. Any unregistered personal or familial assets thus fall to be classified as unexplained property absent proof to the contrary. Such unregistered assets then may be dealt with in terms of Article 419(2) of the Criminal Code.<sup>77</sup>

Article 7(7) of the Revised Establishment Proclamation places the question of assets disclosure and registration squarely within the FEACC’s mandate. This article endows the Commission with the power and duty

“in cooperation with relevant bodies, to register or cause the registration of the assets and financial interests of public officials and other public employees compellable to do so as specified by law.”

Article 6(1) of Proclamation No. 668 of 2010, read with Article 2(1), identifies the FEACC as the institution responsible for registering the assets of public officials. Article 7(1) prescribes that all public officials must disclose and register their assets “within six months after the six months from the coming into force of this Proclamation”. Article 11 confers on the Commission powers of verification in respect of registration information which it reasonably suspects to be incomplete, inaccurate or false. And Article 6(4) requires the Commission to issue registration certificates to public officials who have fulfilled their obligations under the Proclamation. In a word, Proclamation 668 elevates the Commission to the status of legal custodian of assets divulgence in Ethiopia. Thus the Proclamation is an enabling statute investing the Commission with authority to implement its obligations under Article 7(7) of the Revised Establishment Proclamation, thereby removing a long-standing hiatus in Ethiopian anti-corruption law.

It may well be premature to pass overall judgment upon the implementation of Proclamation 668 and the extent to which the Commission has succeeded in fulfilling its mandate in respect of assets registration. However, it is necessary to consider some of

<sup>76</sup> Article 3 of Proclamation No. 668 of 2010. The categories of appointees, elected persons and public servants are defined in Article 2.

<sup>77</sup> Article 13 of Proclamation No. 668 of 2010. Article 5 identifies the assets which are exempt from registration. They are common inherited property in private use, household and personal property and pension benefits.

the criticisms which have been levelled against the Proclamation and against the Commission's handling of the registration process.

The strongest objection to the Proclamation is that it fails to require proof that assets registered by public officials were not acquired illicitly.<sup>78</sup> This is an issue of some significance, in that such an unencumbered approach to registration gives public officials carte blanche to validate corruptly-acquired assets as legitimate. It is true that the Commission is required to conduct verification investigations in respect of suspect registration attempts. However, the verification process is no substitute for a legal provision obliging public officials to substantiate the provenance of the assets which they register.

The Commission itself has come under fire for alleged tardiness in respect of the registration process. The timeline prescribed in Article 7(1) means, essentially, that the registration process should have been completed within a year after the Proclamation entered into force on 12 April 2010.<sup>79</sup> The assets of some 22 000 public officials had to be registered. However, the process likely will include more than 45 000 people if the families of the public officials are counted.<sup>80</sup>

Registration commenced in November 2010.<sup>81</sup> By February 2011 the assets of 500 senior public officials, including the President and Prime Minister, had been registered formally with the Commission. Critics have berated this miserly rate of registration. For example, the Ethiopian Law and Justice Society described the registration process as a fiasco<sup>82</sup> and accused the Commission of dragging its heels.<sup>83</sup> It noted, somewhat sardonically, that since the Commission needed six months to register the assets of 500 public officials, it will need 22 years to complete registering the assets of the 22 000 public officials identified by the government!<sup>84</sup>

Proclamation 668 provides the Commission with a simple but invaluable tool to enhance its efforts to root out corruption in the public sector. And it makes viable the relatively uncomplicated pursuit of unlawful enrichment charges against non-compliant public officials, especially those whose abuse of public funds amounts to grand corruption. The anti-corruption opportunities presented by the Proclamation were a long time coming, and it remains to be seen whether the Commission can and will exploit them to the full.

### **3.3.2 Whistle-blowers and Witnesses**

Owing to its clandestine nature, corruption is difficult to detect and successfully prosecute. The problem is exacerbated by the fact that corruption often is a "victimless" crime, in the sense that there is seldom a readily identifiable victim who can trigger an

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<sup>78</sup> See Anonymous "Will the new asset declaration law keep officials honest?" (3 April 2010).

<sup>79</sup> The timeline itself was initially the target of criticism. It was argued that the registration period allowed to public officials was too long, giving ample opportunity for assets to be secreted prior to registration.

<sup>80</sup> Gundarta "Government officials property registration to kick off with premier" (25 November 2010).

<sup>81</sup> See Tadesse (16 August 2010).

<sup>82</sup> Ethiopian Law and Justice Society *The asset registration fiasco still going on* (23 February 2011).

<sup>83</sup> Ethiopian Law and Justice Society *When will the FEACC finish the ever dragging registration of assets and make the register available for public view?* (19 February 2011).

<sup>84</sup> Ethiopian Law and Justice Society (19 February 2011).

investigation. In these circumstances, the role played by whistle-blowers in the fight against corruption is of substantial moment. Indeed, prosecutions regularly turn on the information that whistle-blowers provide to enforcement agencies.<sup>85</sup> However, whistle-blowers and other witnesses in corruption matters are vulnerable. For many it is risky, often extremely so, to expose corrupt practices and testify against the perpetrators. They need to be defended against retaliation and victimisation. The hazards facing whistle-blowers and witnesses are recognised expressly by the statutes of international anti-corruption law, which emphasise the need for their protection.<sup>86</sup>

In Ethiopia, fear of reprisal amongst potential informants is acute and debilitating. The FEACC has long been faced with the predicament of witness reluctance and recalcitrance in the investigation and prosecution of corruption allegations.<sup>87</sup> The Commission has been given a general power to provide for the protection of witnesses and whistle-blowers.<sup>88</sup> However, it has not been able to execute this power for lack of the required enabling legislation.<sup>89</sup> The FEACC has submitted to Parliament draft legislation for the protection of whistle-blowers and witnesses.<sup>90</sup> This has yet to be passed into law.<sup>91</sup> No doubt this tardy legislative process will perpetuate the reluctance of whistle-blowers and witnesses to co-operate in anti-corruption investigations and prosecutions, which in turn may create the unintended and dangerous perception that corrupt individuals are free to operate with impunity.

### **3.3.3 Civil Assets Forfeiture**

The question of impunity is especially prominent in the field of assets forfeiture. There is no more convincing a measure of success in anti-corruption law than the confiscation of corruptly-acquired assets. It is a conspicuous strike against impunity and makes the telling point that corruption does not pay. Certainly, it hurts corrupt offenders where it matters most. Forfeiture of the proceeds of corruption is therefore an indispensable instrument in the fight against corruption and impunity. The importance of assets forfeiture has been underlined by its incorporation into international anti-corruption law.<sup>92</sup>

<sup>85</sup> See Hall & Davies "Corruption and whistle-blowing" (1999) at 6.

<sup>86</sup> See, for example, Arts 32 and 33 of UNCAC and Art 5(5) of the AU Convention.

<sup>87</sup> See Megiso (2007) at 8; Tamyalew (2010) at 20; Tadesse "Whistleblower law in final stages" (6 April 2010).

<sup>88</sup> See Art 7(8) of the Revised Establishment Proclamation and s 7 of the Revised Proclamation to Provide for Special Procedure and Rules of Evidence on Anti-Corruption No. 434 of 2005. Art 444 of the Ethiopian Criminal Code also devotes some attention to the protection of whistle-blowers and witnesses.

<sup>89</sup> Megiso (2007) at 9 notes that witnesses and whistle-blowers make their testimony conditional upon seeing "a reliable legal framework in place" to protect them from the dangers posed by corruption offenders.

<sup>90</sup> Since the draft legislation is referred to in 2007 by Megiso, then Principal Consultant to the Corruption Prevention and Research Department of the FEACC, it may be presumed that the said legislation was formulated by the FEACC about four years ago at least. See Megiso (2007) at 7 & 9.

<sup>91</sup> In April 2010 Tadesse (6 April 2010) reported that the bill "is in the final stages before entering the statute books" and "is expected to be sent to the House of Peoples' Representatives shortly for final approval". It is more than a year later and the bill still has not been approved finally.

<sup>92</sup> See, for example, Art 31 of UNCAC and Art 16 of the AU Convention.

The basic divide in forfeiture law is between conviction-based and non-conviction-based forfeiture.<sup>93</sup> The former involves *in personam* criminal proceedings against the corruption suspect. Forfeiture is premised on a criminal conviction and usually is ordered as part of the sentencing process. The latter entails *in rem* civil proceedings. Here, the target of the legal process is not the corrupt individual but the property which has been acquired corruptly or used to commit a corruption crime. In other words, the property itself is the subject of a civil suit brought by the state as plaintiff, which property is forfeit if the plaintiff succeeds.<sup>94</sup>

The primary attraction of civil assets forfeiture lies in the required standard of proof; that is, proof on a balance of probabilities. Thus, even if a suspect is acquitted in a criminal court because the state was unable to prove guilt beyond a reasonable doubt, it is still possible to bring a civil action against the property which is considered to be the instrument or proceeds of corruption.<sup>95</sup> In this instance the state only has to prove its case on a balance of probabilities in order for the court to make a forfeiture order. Whereas forfeiture by way of a criminal conviction may be desirable because it kills two birds with one stone, *in rem* proceedings leading to civil forfeiture remain a useful option in those cases where it is not possible, for whatever reason, to succeed with criminal proceedings. The anti-corruption efforts of poorer states often run aground for lack of the resources required to investigate and prosecute so complex a crime as corruption. For such states, a civil assets forfeiture regime is certain to shore up their anti-corruption endeavours considerably.

The FEACC does have the power to pursue the forfeiture of corruptly-acquired property and the court which convicts a corruption suspect is enjoined to order the confiscation of such property.<sup>96</sup> In other words, conviction-based assets forfeiture is available in Ethiopia. However, the FEACC does not have the power to institute an action against the dirty property itself in the absence of a conviction. In other words, civil assets forfeiture is not on hand as an alternative to conviction-based assets forfeiture.

This is a deficiency which is both unfortunate and unacceptable. The result is that the Commission is burdened with the unenviable task of having to meet the criminal law standard of proof before the forfeiture of corruptly-acquired assets becomes possible. Invariably this retards the fight against corruption and emboldens perpetrators, many of whom are able to flee the country with large sums of money. Criminal proceedings are *in personam* and, as a rule, are not feasible against absent suspects.<sup>97</sup> However, *in*

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<sup>93</sup> See Simser "Perspectives on civil forfeiture" (2009) at 15.

<sup>94</sup> Simser (2009) at 13.

<sup>95</sup> OSCE (2004) at 174.

<sup>96</sup> See Art 7(6) of the Revised Establishment Proclamation as read with Art 29 of the Revised Proclamation to Provide for Special Procedure and Rules of Evidence on Anti-Corruption No. 434 of 2005.

<sup>97</sup> Art 161 of the Criminal Procedure Code of Ethiopia Proclamation No. 185 of 1961 makes provision for an accused to be tried *in absentia* in cases where such accused has absconded after being charged with "an offence punishable with rigorous imprisonment for not less than twelve years; or an offence under Art. 354-365 Penal Code punishable with rigorous imprisonment or fine exceeding five thousand dollars". The designated articles of the Penal Code deal with "crimes against currencies, government bonds or security documents, official seals, stamps or instruments". The possibility of such *in absentia* criminal prosecutions may well be a useful anti-corruption tool, the more so in the confiscation of property acquired corruptly by the accused. Certainly, the provisions of Art 161 may be deployed readily against

*rem* proceedings can be used in such circumstances, because an action can be brought against the property of suspects who have fled. It is high time that the Commission be mandated to employ civil forfeiture proceedings also. The longer the option of civil assets forfeiture remains absent from the Ethiopian anti-corruption strategy, the harder it will remain to recover national assets lost to corruption. This omission is a conspicuous disability which is hampering the Commission in the pursuit of its anti-corruption mandate.

### 3.4 The FEACC and Civil Society

Nowadays it is accepted as a truism that an anti-corruption strategy is incomplete if it does not integrate such non-state anti-corruption campaigners as non-governmental organisations, the media, and community and religious groups. These bodies not only inject energy and commitment into the crusade against corruption but also play a crucial role in the promotion and sustenance of corruption-free governance.<sup>98</sup>

It is generally accepted also that prevention is at least as important an anti-corruption instrument as criminalisation. Successful prevention turns on successful attitudinal change. In other words, corruption will be prevented if, instead of accepting it as normal and inevitable, people learn to comprehend it as objectionable and avoidable.

Non-state bodies are central to strategies aimed at changing the perception of corruption and combating social tolerance of the phenomenon. Civil society anti-corruption programmes range wide, from promoting awareness of corruption through monitoring government compliance with its anti-corruption commitments to assisting official anti-corruption institutions with the investigation and prosecution of corruption offences.<sup>99</sup> There is much to be said for Transparency International's submission that "governments could not hope to tame corruption without the help and support of their people".<sup>100</sup>

The FEACC is cognisant of the crucial role that can be played by non-state anti-corruption campaigners.<sup>101</sup> With a view to enhancing their participation, the Commission established the Directorate for the Co-ordination of Ethics Infrastructures which is tasked with the duty of coordinating anti-corruption efforts across the country. This duty includes facilitating collaboration between the Commission and civil society

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absent corruption offenders whose crimes fall within the categories traversed by the article. However, the ambit of the article may be too limited to render unnecessary a comprehensive *in rem* civil assets forfeiture regime. The evolution of civil forfeiture is coupled closely to the real problems inscribed in the criminal forfeiture procedure which adds "a financial dimension to already complex criminal investigations and prosecutions": see Young "Introduction" (2009) at 3. Despite its apparent utility as an anti-corruption tool, Art 161 cannot be taken as a remedy for the inherent deficiencies of conviction-based assets forfeiture. It is submitted that the best remedy for Ethiopia lies in a parallel non-conviction-based assets forfeiture regime.

<sup>98</sup> See Kumar "Human rights approaches of corruption control mechanisms" (2004) at 338-340. For conventional commitments to the anti-corruption role of civil society, see Art 13 of UNCAC and Art 12 of the AU Convention.

<sup>99</sup> See Gyimah-Boadi "Towards an enhanced role for civil society in the fight against corruption in Africa" (1999) at 1-5.

<sup>100</sup> Pope (2000) at 134.

<sup>101</sup> See Megiso (2007) at 7-9.

campaigners.<sup>102</sup> Since 2009 the Directorate has co-ordinated the National Anti-Corruption Coalition, “a joint forum between the FEACC regional anti-corruption institutions, government bodies, the media, civic associations and law enforcement agencies”.<sup>103</sup> According to Megiso, the FEACC has maintained good relations with both the private and public media and strives to provide them with up-to-date information on the state of the anti-corruption campaign.<sup>104</sup> All in all, then, it would appear that the Commission is fully committed to including civil society as an integral element of the Ethiopian national strategy to resist corruption.<sup>105</sup>

However, there are major considerations which may impede a sustained engagement of non-state entities with the anti-corruption endeavours of the Commission. These relate primarily to freedom of the press and state regulation of civil society. Press freedom is protected as a democratic right under Article 29 of the Ethiopian Constitution. However, it reportedly has been breached routinely since the 2005 elections.<sup>106</sup> Certainly, the international perception of press freedom in Ethiopia is unflattering.<sup>107</sup>

The most recent legislative offensive against media freedom is the Mass Media and Freedom of Information Proclamation No. 590 of 2008 (the Press Law). It is beyond the scope of this article to consider this law in any detail.<sup>108</sup> However, two areas of concern ought to be highlighted. Firstly, Article 43(7) confers on the state the power to prosecute members of the media for defaming any component of the *trias politica* (separation of powers). Whereas it is usually an individual who is the victim of defamation, this article recognises that the state itself may be defamed criminally. It allows the state to prosecute for defamation *mero motu*, without any public official alleging defamation or pressing charges. The intimidation inscribed in the article is obvious.<sup>109</sup>

Secondly, the Press Law punishes contraventions of its provisions with fines which range from a minimum of about \$1 500 to a maximum of about \$20 000.<sup>110</sup> In the context of the Ethiopian fines regime, such amounts are potentially punitive and can be used easily as an economic weapon against recalcitrant media and their personnel.<sup>111</sup> Since the Press Law is more often antagonistic to media freedom than not, both its official title and its magnanimous preamble are deeply ironic.<sup>112</sup> The fight against corruption depends crucially upon genuine media freedom, and continued government

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<sup>102</sup> See Tamyalew (2010) at 24-25.

<sup>103</sup> Tamyalew (2010) at 25-26

<sup>104</sup> See Megiso (2007) at 6.

<sup>105</sup> See Tamyalew (2010) at 29-31.

<sup>106</sup> See Business Anti-Corruption Portal *Ethiopia country profile* (2010a); Alemayehu “Freedom of expression under increasing pressure in Ethiopia” (19 July 2010).

<sup>107</sup> Ethiopia was ranked at 139 out of 178 countries in the 2010 *World Press Freedom Index* published by Reporters without Borders. It occupied position 169 (with Kazakhstan and Tajikistan) out of 196 countries and was classified as “not free” in the 2010 *Table of Global Press Freedom Rankings* published by Freedom House.

<sup>108</sup> For a detailed analysis of the Press Law see Ross “A test of democracy: Ethiopia’s Mass Media and Freedom of Information Proclamation” (2010).

<sup>109</sup> Ross (2010) at 1060-1062. See also Alemayehu (19 July 2010).

<sup>110</sup> Art 45 of the Press Law.

<sup>111</sup> Ross (2010) at 1063-1064.

<sup>112</sup> Ross (2010) at 1058-1059.

incursions into such freedom are likely to impede directly the pursuit of allegations of corruption by investigative journalists.<sup>113</sup>

Civil society organisations are governed by the Proclamation to Provide for the Registration and Regulation of Charities and Societies No. 621 of 2009 (the Civil Society Law). This law has been condemned widely as an assault on the independence and integrity of the civil society sector in Ethiopia.<sup>114</sup> Again, its full meaning for civil society cannot be analysed here. Nevertheless, a few words are required about its extremely contentious categorisation of charities and societies as Ethiopian, Ethiopian Resident and Foreign.<sup>115</sup> Whereas factors such as law of origin and nationality of membership play a role, the classification pivots on the organisation's source of income. Any charity or society which receives more than ten per cent of its funds from foreign sources is deemed either Foreign Resident or Foreign<sup>116</sup> and, once so classified, it is disqualified from operating in most areas of civil society advocacy, from basic human rights through conflict resolution and reconciliation to justice and law enforcement.<sup>117</sup>

Given that most Ethiopian NGOs are heavily dependent on foreign funding, the Civil Society Law poses a serious threat to both the existence and work of these organisations. When the Civil Society Law was passed in January 2009 there were 3 522 NGOs in Ethiopia. By July 2010 there were 1 655. The link between the Law and the disappearance of 1 867 NGOs is hard to overlook.<sup>118</sup> The Civil Society Law amounts to unnecessary and excessive government interference in the business of civil society. However, the exercise may be self-defeating and deprive the government of the considerable weight which civil society can add to its anti-corruption strategy.

If the fight against corruption cannot progress without the collaboration of the non-state campaigners, then *a fortiori* it behoves the state to remove the legal and other obstacles to such collaboration. In a word, the non-state actors need legal guarantees of their freedom from unnecessary intimidation and arbitrary interference by the state.

#### 4 FEACC POSITIVES

The Corruption Perceptions Indices compiled annually by Transparency International suggest that Ethiopia has not made much progress in the fight against corruption since the establishment of the Commission<sup>119</sup> and the Global Integrity Report of 2008 rated the Commission, then in its eighth year of existence, as “weak”, despite the national anti-corruption law being classified as “very strong”.<sup>120</sup> These assessments imply that the

<sup>113</sup> See Dizard, Kelly & Walker (2008) at 315.

<sup>114</sup> See Amnesty International *Ethiopia: draft law would wreck civil society* (14 October 2008); World Alliance for Citizen Participation *New law will cripple Ethiopian civil society* (28 January 2009).

<sup>115</sup> Art 2(2)-(4) of the Civil Society Law.

<sup>116</sup> Art 2(2)-(4) of the Civil Society Law.

<sup>117</sup> Art 14(5) of the Civil Society Law read with Art 14(2)(j)-(n). See also Center for International Human Rights *Sounding the horn* (2009) at 4-5; International Crisis Group *Ethiopia: ethnic federalism and its discontents* (2009) at 20. These activities are reserved for charities and societies which are classified as Ethiopian.

<sup>118</sup> Anonymous “1867 NGOs vanish from Ethiopia” (6 July 2010).

<sup>119</sup> Ethiopia's ranking in the CPI from 2002 to 2010 has been 59th of 102, 92nd of 133, 114th of 145, 137th of 158, 130th of 163, 138th of 179, 126th of 180, 120th of 180 and 116th of 178. See Transparency International *Surveys and Indices*.

<sup>120</sup> See Global Integrity Report (2008a).

Commission has not enjoyed much success in its ten years as the premier anti-corruption institution in Ethiopia.

However, there are certain positive aspects of the work of the FEACC which warrant discussion. As intimated above, the Commission has put into practice its obligation to provide anti-corruption education to the citizens of Ethiopia. During its first five years the Commission distributed some 75 000 magazines, 48 000 posters, 265 000 brochures and 120 000 fliers as part of its project to create public awareness about corruption.<sup>121</sup> Its latest annual report shows that the Commission has remained diligent about this aspect of its mandate.<sup>122</sup>

The Commission has taken seriously also its obligation to investigate and prosecute corruption. Thus it is reported that

“[i]n the last eight years, the Commission has investigated more than 1 300 alleged corruption crimes, which has resulted in the conviction of 380 people who have received prison sentences ranging from 1 to 19 years.”<sup>123</sup>

The case profile of the FEACC includes investigations and prosecutions of high-flying state functionaries and executives.<sup>124</sup> In one 2006 case, twelve senior officials of the Development Bank of Ethiopia were prosecuted for corruption in respect of bank policy and overseas transfers.<sup>125</sup> In 2007 the Commission prosecuted 49 land corruption cases which resulted in “the confiscation of over 575 000 square metres of land at an estimated value of almost USD 120 million”.<sup>126</sup> From 2008 the Commission led the investigation and prosecution of executives of the Ethiopian Telecommunications Corporation (ETC) for corruption involving the tendering process for the provision of a mobile telephone network. Tesfaye Birru, the former CEO of the ETC, allegedly approved the contract being awarded illegally to Ericsson of Sweden, resulting in a loss of \$126 million to the corporation. Birru and 16 of his fellow executives were convicted of corruption in January 2011.<sup>127</sup>

Since 2006 the Commission has made a toll-free anti-corruption hotline available to members of the public to submit, anonymously if preferred, reports and complaints about corruption. The hotline has probably contributed to the steadily rising number of tips received by the Commission from the public, reaching almost 3 000 in the period 2009 to 2010.<sup>128</sup> All in all it would appear that the FEACC is committed to deploying its investigative and prosecutorial powers in the fight against corruption, including grand corruption.

The FEACC has made a noticeable contribution to preventing corruption also. Its Corruption Prevention Directorate studies the operational physiognomies of government bodies and public enterprises with a view to detecting and removing

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<sup>121</sup> See Global Integrity Report (2006) at 3.

<sup>122</sup> FEACC *Annual Report 2009-2010*.

<sup>123</sup> Tamyalew (2010) at 21. See also Megiso (2007) at 6-7; FEACC *Annual Report 2009-2010* s 2.4.

<sup>124</sup> Tamyalew (2010) at 21.

<sup>125</sup> Keller (2007) at 10.

<sup>126</sup> See Business Anti-Corruption Portal *Ethiopia country profile* (2010b).

<sup>127</sup> Sahl “Ex-CEO of former ETC guilty of corruption” (21 March 2011); Sebsibe “Court finds former ETC CEO guilty” (15 January 2011).

<sup>128</sup> FEACC *Annual Report 2009-2010* s 2.4.

loopholes for corruption.<sup>129</sup> In 2008 the Directorate reviewed the practices and procedures of 64 government offices, and in 2009 of 65, recommending alterations to remove corruption weak points where necessary.<sup>130</sup> It also monitors the implementation of its suggestions.

Credit must be given where it is due, and the FEACC must be commended for the educational and preventive programmes it has implemented as well as the success it has enjoyed in its investigatory and prosecutorial endeavours. To be sure, had the FEACC not been operational, corruption would have had a much firmer grip upon Ethiopia and its people.

## 5 CONCLUSION

Notwithstanding the positives surveyed above, there remains much to be concerned about in the Commission's performance to date. The task of building an independent anti-corruption institution that enjoys popular legitimacy that is well resourced and successful in the execution of its mandate is a daunting and protracted one. It has been only ten years since Ethiopia chose to establish the FEACC as the institution to spearhead the anti-corruption movement in the country. Given the circumstances and constraints under which it operates it could not be expected of the Commission to be fully functional and properly effective as yet.

The Commission has been given enough powers, more or less, to combat corruption by pursuing a comprehensive range of educational, preventive, investigative and prosecutorial activities. Although its anti-corruption efforts have improved over time, the Commission – regrettably but unsurprisingly – has not made noteworthy progress in actually taming corruption in Ethiopia. This may be attributable to the Commission's structural flaws, its continued vulnerability to political interference, its lingering difficulties with securing public trust, its deficiencies in respect of human and financial resources, and its resultant inability to produce more potent investigative and prosecutorial strategies.

Perhaps the most telling measure of the Commission's difficulties is the persistent perception that its anti-corruption work is deeply politicised, in the sense that corruption charges and trials are used routinely to silence or disarm opponents of the ruling party. Keller's comment in this regard, made soon after the establishment of the FEACC, is instructive:

“As 2001 drew to a close, several high profile politicians and businesspeople were being investigated and tried for corruption. However, this process coincided with major purges in the TPLF and other EPRDF affiliate parties, and some observers have argued whether the primary aim of the Commission was to root out official corruption or to settle old political scores. It can be noted that individuals close to the dominant faction in the ruling EPRDF clearly seem to have been spared by the Commission.”<sup>131</sup>

The cases of Seeye Abraha (former Defence Minister), Abate Kisho (former head of the Southern Nations, Nationalities and People's State) and Bitew Belay (former head of

<sup>129</sup> See Tamyalew (2010) at 21.

<sup>130</sup> Tamyalew (2010) at 22.

<sup>131</sup> Keller “Ethnic federalism, fiscal reform, development and democracy in Ethiopia” (2002) at 45.

Regional Affairs in the Prime Minister’s office) are paradigmatic here.<sup>132</sup> The three were prosecuted by the FEACC for corruption at a time when there was serious political infighting within the TPLF over the conduct of the war with Eritrea. Because the three had lined up on one side of the party divide against Prime Minister Meles Zenawi, allegations that the FEACC prosecutions were part of a political witch hunt were rife and continue to this day.<sup>133</sup> Pointedly, the recent celebrations of the tenth anniversary of the FEACC were marred by a research report claiming that it was afraid to prosecute political appointees and senior state officials.<sup>134</sup>

It would seem that the FEACC is facing a classic double bind. On the one hand it needs to demonstrate its resolve to combat corruption by deploying its investigative and prosecutorial powers wherever and whenever the need arises; on the other hand it needs to allay tenacious suspicions that its prosecutorial decisions are informed by political favouritism. Its success in negotiating these contraries will enhance its functionality and render its anti-corruption efforts more efficacious. The modifications proposed in this article may help too.

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<sup>132</sup> See Mekuria “Seeye Abraha out from jail” (23 December 2007); Yenekal “Bitew Belay to be freed this week” (22 August 2005).

<sup>133</sup> See Mekuria (23 December 2007); Yenekal (22 August 2005). The *gim gima* programme of self-criticism or evaluation promoted by the EPRDF has fuelled this perception since it operates to spare party loyalists the indignities of public corruption trials. See Keller (2002) at 45; Young “Ethnicity and Power in Ethiopia” (1996) at 540; Ethiopian Reporter “Kenya’s officials are charged for corruption: how about Ethiopia’s?” (31 October 2010).

<sup>134</sup> Ethiopian Reporter “A study was presented that the anti-corruption commission is afraid of political appointees” (10 August 2011).

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