Addis Ababa University

(Since 1950)

ADDIS ABABA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE STUDIES

SCHOOL OF LAW

CONSTITUTIONAL AND PUBLIC LAWS STREAM

PROBATION UNDER ETHIOPIAN CRIMINAL JUSTICE SYSTEM

THE LAW AND PRACTICE

BY SOLOMON YOHANNES DUKETO

JUNE, 2018

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PROBATION UNDER ETHIOPIAN CRIMINAL JUSTICE SYSTEM

THE LAW AND PRACTICE

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ADDIS ABABA UNIVERSITY

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APPROVAL SHEET

PROBATION UNDER ETHIOPIAN CRIMINAL JUSTICE SYSTEM

THE LAW AND PRACTICE

By Solomon Yohannes Duketo

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Acronyms

AAU	Addis Ababa University
AG	Attorney General
Art	Article
Ato	Mister
CC	Criminal Code
CJC	Criminal Justice System
CPC	Criminal Procedure Code
CS	Civic Societies
E.C	Ethiopian Calendar
EU	European Union
FDRE	Federal Democratic Republic of Ethiopia
HPR	House of Peoples' Representatives
JSRP	Justice System Reform Program
Mo CB	Ministry of Capacity Building
NGO	Non Governmental Organization
PC	Penal Code
PP	Public Prosecutor
VAT	Value Added Tax
W/ro	Mistress
W/rt	Unmarried Woman

Declaration

I hereby declare that the title “Probation under Ethiopian Criminal Justice System: The Law and Practice” is my own original work which has not been presented for any degree or examination in any University and the sources used have been duly acknowledged and cited.

Declared by: Solomon Yohannes Duketo

Confirmed by: Simeneh Kiros(Ass. Prof.)

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Abstract

The study deals with the legal framework and practice of probation in the Ethiopian criminal justice system. The significance of probation has greatly enlarged and acquired substantial support in the modern criminal justice system. Probation should be allowed by means of due care. To do this, there should be conditions to be followed and institutions mandated with the duty to follow up the probationer to implement the probation. There should be responsible institution whether it is governmental, nongovernmental or mixed according to the situations of a given country. The same is true in Ethiopia because the concept of probation is incorporated in our criminal justice system in both substantive and procedural laws. Since the beginning of 19th century, many countries incorporated the concept of probation in their criminal justice system. Researches show the efforts to update the procedures and application of probation at national and international level. But in Ethiopia, decades have passed without modernizing the concept of probation although it is significant; it is being applied without systematic mechanisms. Since probation is one of the mechanisms of implementing punishment, it should be applied in light of theories of punishment, principally the reform and rehabilitation of the probationer which is recognized in the FDRE Criminal Code and integration of them into the community. The Code provides purposes, mechanisms and the effects of probation. It further emphasizes that remittance of a sentence where the probation is successfully undergone. But in practice, there is a problem of implementation of probation particularly, evaluating the behavior, supervising, controlling, assessing the outcome are missing points. Besides, although decades passed since Ethiopia enacted modern Criminal Code, there is no institutional set up that manages probation effectively. Considering these problems, discussion is made by taking international standards and trends of other countries in assumption of getting lessons from them to increase understanding

of justice organs concerning the concept of probation and to identify gap filling mechanisms to practical problems, in case of non uniformity of the administration of probation. Lastly, the effects of successfully undergone probation are addressed.

Key words: probation, inquiry, conditional suspension of penalty, supervision and monitoring, institutions of probation, Criminal Code, Ethiopia

CHAPTER ONE: INTRODUCTION

1.1 Background of the Study Area

In Modern criminal justice system, objective of criminal law should be achieved through effective ways of implementation of punishments based on established mechanism of application. Since crime and respective punishments are inevitable phenomenon in any society, the mechanisms of application should be regulated and implemented according to the provisions of the law. Among different alternatives of non custodial punishments, probation is one of the mechanisms to execute suspended punishment imposed on convict. Since the main purposes of probation are rehabilitation and reformation of the offender, justice organs should strive for these intended purposes to achieve the goal of prevention. Their efforts should be based on the clear and applicable provisions of relevant laws. Although the application of probation may differ from country to country based on the specific situation of that country, it has commonly considered issues such as basic features, principles, rules and organs to supervise. Further, since probation is modern way of implementing punishment, concerning organ has to follow legally established mechanisms. In administration of probation, there should be duly established organ that acts according to the principles and procedures provided under the law. Since the effect of probation cannot be evaluated by single organ, the researcher reviewed legal provisions and practice of the federal justice organs in Ethiopia like court, public prosecutor office and police office.

Finally, since probation is commonly incorporated in both common and continental legal systems with the same purpose of punishment, discussion is made based on international standard and trends of other countries rather than discussing on the difference of both systems.

1.2 Statement of the Problem

Implementation of any law as well as probation on a continuing basis requires clear legal provisions, effective institutional arrangement and that functioning organs would have proven their value as part of the set of core institutions. A further assumption is that the intended goal of criminal law and punishment is to promote general public and rehabilitative purpose must be applied to this effect. Peace and security, public order and reformation of criminals are attained when laws are applied correctly. Besides, the intended purpose of criminal punishment should be met. The case of federal justice organs of Ethiopia concerning the probation of penalty must be based on the established rules. The law making organ should enact legislations and establish controlling and supervising organ that provide the mechanisms how the judiciary does on the issue of probation. In effect, the rule of law prevails. In the federal justice organs of Ethiopia, there is a problem to identify and evaluate the conduct of criminals after and before the decision of probation because of ineffective handling system of probation and absence of laws that establish the supervising organs. There is neither supervising institution nor probation officers while there are enormous amount of decision of probation. There is no mechanism to evaluate the behavior of the probationer whether he/she is rehabilitated or not. In addition, relevant provisions should be regulated clearly. But there is a gap between the law and practice. Thus the court uses its arbitrary discretion and could not evaluate whether rehabilitated and reformed or not.

1.3 Significance of the Study

The main significance of this study is to evaluate the necessity of probation in modern criminal justice system and role of justice organs in ensuring the goal or purpose of probation and

forwarding possible recommendations based on the findings of the study. Secondly, the study assessed the social and economic benefits of probation if it is managed correctly. More specifically, the study helps to victims of crime by involving in the process of probation. Further, the study helps to get opportunity of employment for persons like social workers, probation officers, lawyers, and persons in related fields. In addition, the research helps policy framers especially in modern criminal justice system that is being globalized in which trends of other countries are to be taken in to consideration. Lastly, the research helps the researcher himself and others who need to be engaged in a probation work.

1.4 Objectives of the Study

General Objective

The main objective of this research is to evaluate the extent of the effectiveness of probation applied by justice organs to ensure purpose of rehabilitation and reformation and its challenges in discharging such duty.

Specific Objectives

The specific objectives of this research are:

- To evaluate the effective implementation of probation decision;
- To evaluate the extent of the effectiveness of court decisions;
- To assess the effect of absence of legally established supervising organ;
- To evaluate administration of the probation and its challenges in discharging such duty;
- To evaluate whether there is connection between intention of the law maker and the practice;

- In nutshell, it is to asses and to evaluate effective implementation of the probation and forward some solutions.

1.5 Scope of the Research

The purpose of demarcating the study is to make it more manageable and to this end, this research was only limited to the probation of punishment at level of federal courts of Ethiopia.

1.6 Research Methodology

The research methodology applied is both qualitative and quantitative since it is socio legal type. It is conducted by interviewing the concerned judges of the court, public prosecutors and police officers. Besides, since the researcher is practicing in this area as day to day career, observation is taken as the major method of conducting the research. Thus, the participants for this study are institutions and individuals of the concerned organs. The individuals are legal professionals, practitioners and non lawyers. The sampling technique employed was purposive sampling technique. Accordingly, the researcher deliberately or purposively selected certain units for study from the population. Sample Size the respondents of the study were six judges, five public prosecutors, three investigating police, three lawyers, two defense lawyers, study of ten dead files, and supreme court cassation division cases. Interview and questionnaire are used methods of data collecting in addition to day to day observation while practicing at the Federal AG[1] of Ethiopia. The areas are taken purposively. Since it represents practical application of probation in other courts, special attention is given to cases of Federal Supreme Court Cassation Division.

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[1] See Federal Attorney General establishment proclamation No. 943/20016, *Negarit Gazeta* of Federal Democratic Republic of Ethiopia ,Addis Ababa, 22nd year no 62,2nd may 2016

1.7 Research Questions

The study is conducted to answer the following major questions.

- How Ethiopian laws and legal system incorporated probation?
- What are the conditions to grant probation?
- Are these conditions being applied by the courts during granting probation?
- Is there any organ in practice that supervises the probationer? What is the purpose of it?
- Is there any mechanism to identify criminals whose penalties are suspended in practice?
- What factors (Institutional, economic, Legal, and other factors) affect the effectiveness of the purpose of probation?
- Have the intended legislature target benefited from the law?
- What are the obstacles to the effective implementation of probation?
- Is the goal of punishment particularly the rehabilitation of probationer being achieved through the decision of probation currently?
- If there is failure, who will be responsible for it? These are the questions asked to evaluate effectiveness of probation.

1.8 Limitation of the Study

Time and resources are limitations in the study. Although probation is granted in day to day decision of courts, it is not possible to get comprehensive report on probation of a given year. The research is done at limited area so that cannot represent the problems of the whole country.

CHAPTER TWO: CONCEPTUAL AND THEORETICAL FRAMEWORK

2.1 Introduction

Probation is one of the mechanisms to manage penalty of the offender(s) so that the objectives of modern criminal law and punishment, especially rehabilitation and reform of the criminals in one hand and the public interest on the other hand should be achieved. This idea is incorporated in most modern criminal justice systems as well as Ethiopian criminal justice system. The principle of reformative justice which is preferred to punitive justice is incorporated in Ethiopian Criminal Code like most modern Criminal Codes of other countries. Currently, there are many countries which have incorporated probationary supervision to make reform and rehabilitation on the offenders' character as well as to implement the decision of probation effectively by setting standards, preconditions, and job descriptions to be followed by each stakeholder. To this effect, there must be clear and legally provided means of application of probation, legislative framework to establish supervising organs and duties and responsibilities of them, and conditions to be fulfilled by each stakeholder in modern criminal justice system.

Since probation is conditional suspension of punishment while the offender is placed under supervision and treatment, control and supervision are the intrinsic elements of probation. These are the main elements that aim to rehabilitate and reform the character of offenders which also shows the change of modern criminal philosophy from the primordial retributive punishment to reformative.

In absence of the aforementioned elements and institutional set up of controlling and supervising organ, courts grant probation arbitrarily. The arbitrary decisions which lack the effective

evaluation mechanism of administration of probation may affect the general purpose of criminal law. Thus the researcher tried to discuss the principles, rules and elements of probation which are provided in the Ethiopian criminal justice system and the practice in Ethiopia in particular with an attempt to show its application in practice.

2.2 Historical Background of Probation

Historical development of probation can be traced to 19th c. As will be discussed under the following discussion, this was the period in which modern cultural and social trends led movement of criminal philosophy from retribution to reformation came in to application. It is not possible to clearly identify the exact date and place of origin of probation. But there are scholars who tried to identify the period. According to Klaus, although history of probation has its origins in common and civil law legal systems, its development was also 'influenced by the development of the juvenile justice system, "positivism" in criminology and ideologies of control outside of the criminal justice system.'[2] He further explains the period of developments of modern probation system as post Second World War.[3]

Put differently, the origin of probation differs from time to time and place to place. Let us look at some of them. Probation originated in US during the nineteenth century with John Augustus who developed the concept of community corrections. It was initially developed in the US by generous contributor John Augustus, who tried to find ways to rehabilitate the behavior of criminal and developed the concept of probation. He convinced a judge in the Boston Police Court in 1841 to give him supervision of a convicted offender, a "drunkard," for a concise period

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[2] Jon F. Klaus(1998),Handbook On Probation Services, Guidelines For Probation Practitioners and Managers, United Nations Interregional Crime And Justice Research Institute, Rome / London, Publication No. 60 p11

[3] Ibid.

and then helped the man to appear rehabilitated by the time of sentencing.'[4]Augustus brought the man home, had him sign a temperance pledge and three weeks later returned the man to court sober[5]that is why he is called "father of probation"[6] or "father of American probation"[7]

In some countries, probation was begun in private sectors. For example, in Germany, the provision of aid and support to offenders began in private sectors with the help of Christian humanitarian aid early part of the 20th century.[8] In other countries like Latvia, it started in the period of independence (1918-1940) when assistance to prisoners and suspended sentences were introduced. During the period, some community sanctions and measures – like suspended sentences, correctional work and early release from imprisonment existed.[9]

When we come to Ethiopian case, no literatures show the starting point of probation as the intended initial point. But, Tadese identified existence of probation service in Ethiopia started in 1962 with the appointment of Director of Social Defense in the Ministry of Community Development. Later, independent probation office was established.[10] It seems it was dependent on the incorporation of prevention through balancing the public welfare and rehabilitation of criminals in the 1957 Penal Code.[11] This balanced approach is included in FDRE Criminal Code

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[4] Robin Campbell, Robert Victor Wolf(2001), Probation, Problem -solving; Texas Journal of Corrections, Vol. 27, No. 3, p1

[5] Ibid.

[6] Tadese Workneh(1973), a Study of Probation Office of Addis Ababa, senior essay, school of social work, Hailesellasie I university, Addis Ababa,Ethiopia, , p1 (unpublished)

[7] Campbell,*et.al*,supra note 4 p1

[8] A.M. van Kalmthout, J. Roberts, S. Vinding, (2003), Probation and Probation Services in the EU accession countries Affairs, New York, pp.185-189

[9] Ibid.

[10] Tadese ,supra note 6, p 1

[11] Philip Graven (1965), An introduction to Ethiopian Penal Code, The Faculty of Law, Hailesellasie I University, Addis Ababa, Ethiopia, (Art1-84) p 11

as the purpose of punishment in general as well as purpose of probation in particular.[12] The researcher found no literature on the existence of probation service in the recent past and current context of Ethiopia.

2.3 Definition of Probation

In spite of several attempts of scholars, we can't find complete definition of probation. The word probation derived from the Latin, *'probare',* which means to test or to prove.[13] It is the suspension of all or part of sentence[14]in a modern way of treating criminals. Probation can be defined as 'a method of dealing with specially selected offenders and ... consists of the conditional suspension of punishment while the offender is placed under personal *supervision* and is given *individual guidance or "treatment.*" [15][*Emphasis added*]. Thus, the word probation can be defined as conditional release of punishment that is suspended by court on the convicted criminals in which the execution of judgment or penalty is applied in the community by the relevant controlling and supervising organs instead of serving jail that is based on the good character of the offender in specified conditions. As summarized by Lewis, probation can be known as a **system** because it is composed of a sentence and judicial order affects the person's liberty; an **organization** since there should be agency that helps judicial organ and controls the offender; and a **process** since it involves presentence investigation and supervision of persons in the community.[16]

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[12] The Criminal Code of the Federal Democratic Republic of Ethiopia, May 2005, Proclamation No. 414/2004, *Negarit Gezeta*, Addis Ababa, preamble

[13] Stanford, H.Kadish, Encyclopedia of Crime and Justice ,vol.3,Free press,1983 p1247

[14] Glory Nirmala.k (2009), Criminology, Teaching Material Prepared under the Sponsorship of the Justice and Legal System Research Institute p222

[15] United Nations Department of Social Affairs(1951), Probation and Related Measures, New York, p 4

[16] Diana Lewis(1970), *"what is probation?",*Probation and Parole, Selected Readings, edited by Robert M.Carter and Leslie T.Wilkins, John Wily and Son's, p50-51

2.4 Probation Distinguished From other Related Non-Custodial Sanctions

There are different types non custodial punishments which are similar with probation at least in the sense of punishment out of prison. For example, there are about twelve non-custodial sanctions cover a range of measures that are related to the concept probation. UN Standard Minimum Rules for Non-Custodial Measures (here under cited as the Tokyo Rules) lists twelve sentencing dispositions which judicial authorities should be able to impose.[17] These include verbal sanctions; such as admonition, reprimand and warning, conditional discharge; status penalties; economic sanctions and monetary penalties; such as, fines and day-fines, confiscation or an expropriation order; restitution to the victim or a compensation order; suspended or deferred sentence; probation and judicial supervision; a community service order; referral to an attendance centre; house arrest; and any other mode of non-institutional treatment. Among these, some related concepts are discussed hereunder.

2.4.1 Probation and Parole

Parole is a prisoner's conditional release under the supervision after a portion of sentence has been served but before serving the full sentence.[18] Although not in all cases, parole is as a rule granted for good conduct that the parolee shows during prison period. Both probation and parole have similarity in that: provide periods in which a criminal lives in the community instead of serving time in a prison center; both programs require supervision to guarantee good behavior

[17] United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), adopted by General Assembly resolution 45/110 of 14 December 1990,available at < *https://www.penalreform.org/priorities/alternatives-to-imprisonment/international-standards*> last accessed 20 March 2018

[18] Freda Adler, Gerhard O. W. Mueller William S. Laufer(2006) Criminal Justice, New York: MacGraw Hill, 4th ed., p. 445

and rehabilitation and reformation of the convicted, and in both cases, violation of the condition may result in applying incarceration. Both probation and parole are intended to achieve preventive goal in correctional process and to attain dual objectives by protecting society and helping individual to adjust acceptable behavior. In both, liberty of the criminal is restricted on decision of the court and the criminal is not free and subject to jail if the conditions are violated by the criminal. Like probation, parole is subject to certain conditions and the non compliance of those conditions may lead to the revocation in which case the prisoner would be sent back to the prison to serve the remaining sentence.[19] Both consist of regular reporting to concerned organ and observance with certain rules, such as refraining from using alcohol or drugs and carrying on employment. Both probation and parole are important in restorative justice since the interests of victims as they put repairing the damage as prerequisite. They serve to reduce negative effect of incarceration and prison population and reduce cost of prison administration.

On the other hand, they have major differences. Firstly, in the case of probation, a convicted criminal is granted period of probation before imprisonment. However, in case of parole, a person is released from prison and placed under it after serving portion of the punishment. Adler expresses the difference in short as probation is a front-end measure whereas parole is a tail-end measure.[20] Secondly, while probation is granted by the court, a parole board or a similar institution grants a release on parole though there are differences among the experience of different countries. Similarly, while a parole officer is a state officer working for the executive, a probation officer is an officer of the court. Thirdly, while originally serious offenders may be

[19] The Criminal Code of FDRE, supra note12, Art.206

[20] Adler,*et.al* supra note 18, p. 445

involved in parole through good conduct they show in prison, probation is mostly appropriate for less serious crimes at least in principle.

In Ethiopian context, although courts grant parole on the recommendation of prison administration, it is different from probation or conditional suspension of penalty. Parole is provided under Articles 201-207 of the Criminal Code and it is awarded with probation. It is granted at the end of the period of enforcement of penalty provided by law, when the general requirements are fulfilled.[21]For example, the prisoner has to serve two-third of a sentence of imprisonment or twenty years in case of life imprisonment.[22] Similarly, parole is a privilege that is ordered by the court when (i) there is a tangible proof from the conduct and work of the criminal that his behavior is improved and (ii) he has repaired, as far as his capacity allows, the damage incurred by the victims of his action/crime or otherwise agreed with the aggrieved party and (iii) the character and behavior of the criminal warrants the assumption that he will be of good conduct when released and that the measure will be effective.[23]

2.4.2 Probation and Pardon

Pardon can be defined as 'the release from legal penalties of an offense.'[24] As opined by Adler, it may be either conditional which is revocable for violation of the imposed conditions or unconditional where there is no any condition attached and there is no any rule of conduct expected from the criminal after his release.[25]

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[21] The Criminal Code of FDRE, supra note12,Art 201(1)

[22] Id., Art. 202(1)

[23] Id., Art. 202(1) (a)-(c)

[24] Adler, *et.al* supra note 18,p. 452

[25] Ibid.

Both probation and pardon have different characteristics and purpose. In case of probation, criminals are under supervision while in the case of pardon, they are free from entire punishment prescribed for the offence.[26]

When we see the Ethiopian case, the power to grant or deny pardon is given to the president of the country under Art 71(7) FDRE constitution.[27] Pardon can be granted based on the recommendations submitted by pardon boards usually for public interest.[28] In Ethiopia, pardon constitutes remittance of the whole or part of penalty or commuting a penalty into a penalty of a lesser nature or gravity and it may apply to all penalties and measures[29]. Although the effect differs in other countries, pardon does not have the effect of cancelling of the record and its consequences[30].

2.4.3 Probation and Amnesty

The word amnesty is derived from the Greek word "*amnestia*" which means 'forgetting'.[31] Hence, it has been aimed at actions of a more broad nature offenses whose 'criminality is considered better forgotten.'[32] Black's law dictionary defines the word amnesty as '[a] pardon extended by the government to a group or class of persons, usually for a 'political offense'; the act of a sovereign power officially forgiving certain classes of persons who are subject to trial

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[26] Corpus Juris Secundum, The American Law Book West Publishing,vol.24,1961 p 562

[27] The Constitution of the Federal Democratic Republic of Ethiopia (1995), Proclamation of. No.1, *Negarit Gazeta*, Year 1, No.1, Article 71(7)

[28] Procedure of Pardon Proclamation(2004) Proc. No.395, *Negarit Gazeta*, Year 10, No. 35 articles 3,4 and 11

[29] The Criminal Code of FDRE, supra note12, Art. 229(1)

[30] Id. Art. 229(2)

[31] Leslie Sebba(1983), Amnesty and Pardon, in Encyclopedia of Crime and Justice Sanford H. Kadish (eds.), p59, as cited in Bryan A. Garner, Black's law dictionary (8th ed), west a Thomas on business, 2004.p264

[32] Ibid.

but have not yet been convicted.[33] It wipes out 'past offenses such as treason, sedition, rebellion, and even war crimes' and it may be granted by sovereign to 'all guilty persons or only to certain categories of offenders.'[34] The Dictionary in advance makes clear that distinction "unlike an ordinary pardon, amnesty is usually addressed to crimes against state sovereignty". It is granted to 'political' offenses with respect to which forgiveness is deemed more expedient for the public welfare than prosecution and punishment."

Amnesty and pardon have different origins and purposes. Whereas the power to grant amnesty is usually a legislative act,[35] pardon is an executive act granted by heads of state. Amnesty deals with offences against the state usually of a military or 'political' nature. Nevertheless, pardon is usually granted to persons who have been convicted of an infraction (generally common crimes) against the peace and security of the state.[36] Further, amnesty is usually general, addressed to classes or even communities thus termed as 'general pardon.'[37]

In Ethiopia, amnesty is regulated under article 230 of Criminal Code. Accordingly, it 'may be granted in respect to certain crimes or certain classes of criminals, either absolutely or subject to certain conditions or obligations, by the appropriate competent authority, when circumstances seem to indicate that such a measure is expedient'.[38] Crimes against humanity may not be commuted by amnesty or pardon of the legislature or any other state organ.[39] But, the head of the

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[33] Ibid.

[34] Ibid.

[35] Fuastin Z. Ntouband(2007), Amnesty for Crimes Against Humanity Under International Law, Martinus Nijhof Publishers, , p. 11,

[36] Beryan A. Garner(2004), Black's law dictionary (8th ed), west a Thomas on business, p264

[37] Ibid.

[38] The Criminal Code of FDRE, supra note12, Art. 230 (1)

[39] The Constitution of FDRE, supra note 27, Art. 28(1)

state has the power to commute death penalty to life imprisonment.[40] Finally, it has effect of cancellation to all the consequences of conviction of an offender.[41]

2.5 Probation In Light of Theory of Punishment

The concept of probation cannot be seen independently without considering historical background of criminalization, purpose and determination of punishment and ideological background about it. Hence, theoretical and historical development of goals of punishment shows the necessity of probation. The goal of punishment has been changed throughout time from retribution to prevention through reformation. The writer tries to show this in the following sections.

The initial point of the concept of reformation in history can be cited as classical school of punishment .This period was represented most predominantly by Beccaria and Jeremy Bentham 'to bring about the reform of criminal justice system of Europe'[42] in 18th c.by opposing unrestricted power of judges. They used to impose barbarous penalty like 'death by burning, gibbet or breaking on the wheel.'[43]The true measurement of crime was the harm done for the society. As a result, existence of law was supposed to ensure the maintenance of society, and punishment was supposed to fit the crime but not criminal, like offenders should receive like punishments.[44] The goal of [the severe] 'punishment was primarily the prevention and only

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[40] Id., Art. 28(2)

[41] The Criminal Code of FDRE, supra note12, Art 230 (2)

[42] Francis T. Cullin And Lawrence Travis(1996), Criminal Justice, Theories And Ideologies Readings (Eds), George S.Bridgers,Joseph,G.Weis,Robert,D.Crutchfield P 12

[43] Ibid.

[44] Ibid.

secondarily to exact retribution for the harm.'[45]Later, neo classical schools supported them but added some diverging points like circumstances of individuals such as recidivism, childness, incompetentness, first offender, mental and environmental conditions[46]. In the other hand, the legacy of positivists focuses on the study of the criminal, not crime. They advocated about the biological, psychological, social, environmental cause of crime that are the factors largely outside the control of the individual as a result, individualization must be determined by the competent judges[47].

There are also ideologies about punishment. For conservative ideologists, the main concern was maintaining social order and protecting the society than the offender. The offender was viewed as one whom "out of the step" with rest of the society and they focused on punishment rather than rehabilitation.[48] The liberal ideologists focused on more realistic and limited goal of 'just deserts together with reductions in system discretions and with determinate sentencing'[49]rather than rehabilitation. For communitarians, protection of community was taken as the primary goal of punishment.

Based on the above theoretical and ideological background, philosophies of punishment revolve around six competing objectives of punishment: retribution, incapacity, deterrence, rehabilitation, restoration of victims' right, and all inclusive theories.[50]

[45] Id.,p13

[46] Id., p 14

[47] Ibid.

[48] Id., p 16

[49] Ibid.

[50] Robert M. Bohm and Keith N. Haley(2007), Introduction to Criminal Justice, fourth edition, McGraw Hill, p.32.

2.6 Theories of Punishment and Probation in FDRE Criminal Code

Let us assess the purpose of Ethiopian criminal law in light of the theories and philosophies discussed above. The Objective and purpose of criminal law is provided under Article 1 of the Criminal Code as:

> *The purpose of the Criminal Code of the Federal Democratic Republic of Ethiopia is to ensure order, peace and security of the State, its peoples, and inhabitants for the public good.*
>
> *It aims at the prevention of crimes by giving due notice of the crimes and penalties prescribed by law and should this be ineffective, by providing for the punishment of criminals in order to deter them from committing another crime and make them a lesson to others, by providing for their reform and measures to prevent the commission of further crimes*

The first purpose of criminal law is preventing crime. This can be achieved by giving a warning notice. Similarly, the preamble of the Criminal Code shows the view to prevention of crime even though the death penalty does not give the convict a chance to reform. The second purpose is incapacitation by isolating criminals from society temporarily or permanently. The third purpose is rehabilitation through promoting effective correctional ways like probation, parole, and effective prison systems. This helps wrongdoers to lead a peaceful life and indicates the major shift from retribution to rehabilitation. Furthermore, vocational training and participating in academic education, which would benefit them upon their release, reaffirms the great concern envisaged by the Criminal Code about the reform of criminals.[51] The fourth purpose is

[51] Nirmala , supra note 13, p170

restoration of the victims' rights by incorporating mechanisms to protect rights of victims as mitigation circumstances.[52] Since it is inhuman, retribution is obsolete.[53]

2.7 Rationales of Probation

Probation reflects the welfare approach to criminal justice and emphasizes the need to treat offenders as individuals. It was evolved to smooth the progress of offenders whose offending is regarded as being more the outcome of social disorganization[54]. They often lack the social, economic, emotional and family supports which protect or prevent them from developing criminal associations and then criminal behavior. The welfare model regards rehabilitation as the best protection for the community when it is applied to those offenders who have the capacity to be rehabilitated.[55]

In contemporary criminal justice system, literatures of different scholars show that at times the interest of justice may require resorting to suspension with supervision instead of execution of punishments in confinement. The principal justification behind probation is the need to rehabilitate and reform criminals.

2.8 Purposes /Objectives of Probation:

Objective of probation is rehabilitation and reform of offenders by 'reduction of risk of imprisonment, reduction of impact on re-offending, promoting more cost-effective system. Similarly, application of probation is the best correctional program to achieve the purpose of

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[52] The Criminal Code of FDRE, supra note12, Art.82/1(e)

[53] Id. Art.87

[54] Tulett J, The Changing Role of Probation in South Australia', in McKillop S (ed), Keeping People out of Prison, Australian Institute of Criminology Conference Proceedings No.11,1991 p 129

[55] Ibid.

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rehabilitation of offenders and effective than imprisonment to meet the objectives of sentencing. Besides, it promotes increased compliance with human rights and other international standards.[56]

2.9 Advantages of Probation:

Probation has several advantages over imprisonment which makes it popular both with courts and governments. These advantages are: it promotes rehabilitation of the offender by maintaining normal family and community contacts; it avoids the negative effects of confinement which often severely makes difficult the reintegration of the offender into the community. It costs much less than confining an offender in prison; and it minimizes the impact of conviction upon family and dependants of the offender.[57]

2.10 Disadvantages of Probation*:*

The disadvantage of probation is that it leaves offenders free to re-offend if they are so inclined, although the probation officers are careful to make community safety their main priority.[58] These advantages and disadvantages are based on the mechanisms of enforcements of the suspended penalty.

[56] Penal reform international, Rob Allen (2016), Promoting Fair and Effective Criminal Justice, On Probation: Models of Good Practice for Alternatives To Prison section 1 (10), <*https://www.penalreform.org/wp-content/uploads/2016/12/Probation-model-report-final-2016.pdf*> last accessed May 2,2018

[57] NSW(New South Wales) parliamentary library Research service, Probation: an overview , Briefing Paper No 21/98 ,1998 p 1 < *http://www.parliament.nsw.gov.au/gi/library/publicn.html* >last accessed march 28,2018

[58] Ibid.

CHAPTER THREE: GRANTING, CONDITIONS AND ADMINISTRATION OF PROBATION

3.1 Probation and Criminal Policy

As discussed in previous sections, in history of Ethiopian criminal justice, system it is evident that criminal policy has changed between retribution, incapacitation, and deterrence, as well as rehabilitation throughout the years. When the focus is change of criminal justice system, probation policies and practices also change in line with the current focus of the criminal justice system[59]. For example, if the criminal justice system gives focus to restorative justice and rehabilitation, the government must set effective mechanism for community correction to apply it. Thus, successful probation program must set up essential components for achievement of individuals on probation and 'should be used to guide the conditions those individuals must follow.'[60] If policy in respect of probation is significantly out of step with public opinion, courts will find it harder to make use of such sentences.[61]

3.2 Organs to Grant Probation

In modern criminal justice system, though it is only the authorized organ by the law that has the power to grant probation, there are different organs who involve in administration of probation decision. Although community correction officials or probation departments are the main factors,

[59] Archambeau,Brittany(2011), "Factors that contribute to success of probationers: Probation officers' point of view".Thesis, Rochester Institute of Technology (unpublished),P32 available <http://scholarworks.rit.edu/theses> last accessed May 2,2018

[60] Ibid.

[61] Penal Reform International,supra note 56, section8(144).

it is the court that has ultimate authority to grant probation.[62]Probation officers help courts in identifying whether a criminal is granted probation or not. They usually investigate the character of the offender whether he/she is risky to the society or not.[63] Courts should make decision whether to imprison the convict or to let him / her off on probation based on the report.

Similarly, the FDRE Criminal Code provides the power to grant probation to courts when they consider the rehabilitation and reformation of the criminal is possible through probation.[64] However, the court is given the discretion to give this power to other organs in which the court deems necessary such as 'a supervisor or a reliable welfare worker or an officer of a charitable organization'[65]to investigate the antecedents, character, living and working conditions of the criminal.[66] These organs have the power to make investigation to help the court in decision making process of the probation. They are not given the power to grant probation. The only power of them is to give recommendations based on the findings of the investigation. Therefore, even though these organs have involvement in the decision making, courts are the only organ that can give or deny probation decision.

3.3 Decision Making Process on Probation

The process of deciding on probation is regulated under Articles 190-199 of the code. Considering the gravity of the case, courts may order probation at different stages. It provides

[62] Dressler, David(1969), Origin of Probation In, Practice And Theory of Probation And Parole, Columbia University press, New York and London, 2nd edition p 44

[63] Ibid.

[64] The Criminal Code of FDRE, supra note12, Article 190

[65] Id. Article 195(first paragraph)

[66] Id. second paragraph

two types of probation. The first one is suspension of pronouncement of sentence in which the court may postpone the imposition of sentence for specific period of time.[67] The other type of probation included under Ethiopian Criminal Code is suspension of execution of sentence. In this case, courts impose the sentence and order the suspension of its enforcement. These two types of the probation are discussed hereafter.

A. Suspension of Pronouncing of Sentence/Suspended Sentence

Suspension of sentence is considered as a suspension of active proceeding in criminal prosecution and it is not a final judgment. i.e., postpone of the imposition of sentence.[68]From this definition, it is obvious that suspension of sentence is not a final judgment. When we analyze provisions of the FDRE Criminal Code and the practice, it is possible to infer the same meaning as provided above. As explained by Dejene, the suspension of sentence under Ethiopia shows simply a 'temporary postponement of the enforcement of penalty', [69] only when the conditions provided by the relevant law are fulfilled. i.e., unless the conditions are provided by the law, the court cannot suspend sentence.

Under FDRE Criminal Code, suspension of sentence and the conditions of it are provided under Art 191 of Criminal Code which provides the suspension of sentence as:

> *When the criminal has no previous conviction and does not appear dangerous and where his crime is punishable with fine (Art. 90), compulsory labour (Arts. 103 and 104) or*

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[67] Id. Article 191

[68] *Corpus Juris Secundum*, supra note 25 p449

[69] Dejene Girma and Mekonnen Feleke(2009), Sentencing and Execution, Teaching Material, Prepared under the Sponsorship of the Justice and Legal System Research Institute(unpublished) p150

simple imprisonment for not more than three years (Art. 106), the Court, after having convicted the criminal, may suspend sentence and place the criminal on probation, where it is of the opinion that such decision will lead to the reform of the criminal. No conviction shall be entered when a criminal is placed on probation and does not break the conditions of his probation[70].

The conditions to order decision of suspension of sentence that are provided under the above article are discussed as hereafter.

Absence of previous conviction: This is the first requirement which is provided under the code in which a person who has previously been convicted cannot benefit from the decision of suspension. But the nature of the previous conviction whether it is for a serious offence or for simple offence is not stated under the provision. Therefore, the researcher concludes that offender cannot benefit from the decision of the suspension of sentence if he has previous conviction whatever its nature. In other words, only first time offenders are entitled to benefit suspension of sentence[71]. However in practical application, it is hardly possible to grant based on such requirements since the lack of link of computerized record system as inferred from the

[70] The Criminal Code of FDRE, supra note12, Article 191

[71] Ibid.

respondents of interview in First Instance court,[72] High Court,[73] and Supreme Court.[74] It seems this element is absent in practice.[75]

If the criminal does not appear dangerous: this is the second criteria provided under Art 191 of the FDRE Criminal Code. The offenders should not endanger the public. The assumption of non dangerousness of the criminal is capability of criminal to learn from his own mistakes, ability of being corrected in the future and not endangering of the general public[76]. Therefore, such criterion must be applied by the court before granting the suspension of sentence based on presentence investigation of character of the offender(s) by the relevant organ. However the practice shows, in absence of probation officer and presentence investigation about the defendant, there is problem to identify the conduct of the probation whether dangerous or not. As explained by the interviewees, the only mechanism used is the character of defendants that he /she shows during trial stage at the bench and some extenuating circumstances usually written and brought by the offender himself, but no further investigation is being done in Supreme,[77] High[78] and First Instance Courts[79] in practice.[80]

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[72] An Interview made with *W/t* Tizita Yifru, Judge at Federal First Instance Court, *Gullele* Sub Bench, April 30/2018

[73] An Interview made with *Ato* Muluken Teshale, Judge at High court and court manager, *Ato* Kebede Tadese, Judge at High court, May 2,2018

[74] An Interview made with W/ro Zahafta Abay, Judge at Cassation Division of Federal Supreme Court, W/ro Zewditu Tadese,Judge at Federal Supreme Court, May7, 2018.

[75] I have personally observed the problem for more than three years at Federal First Instance and High Courts, *Yeka* and *Bole* sub Benches respectively. There is no systematic mechanism to identify convicts whether they are first time offenders or not.

[76] Graven, supra note 11, p 8

[77] Interview made with Zahafta, supra note 74

[78] Interview made with Muluken, supra note 73

[79] Interview made with Tizita,supra note 72

Offenses which are not of grave or serious nature: this is the third subjective condition which is provided under Art 191 of the code in which the criminal can benefit from the suspension of sentence where the crime is punishable with fine; which may extend from ten Birr to ten thousand Birr for physical persons[81]. However, in the case of a juridical person fine may extend from one hundred up to five hundred thousand Birr[82].

Compulsory labour: compulsory labour is a sentence that is imposed on criminals who are 'healthy and not a danger[ous] to society[83]and 'where the crime is of minor importance and is punishable with simple imprisonment for a term not exceeding six months.'[84] It may be without any restriction of personal liberty subject however to supervision.[85]

Simple imprisonment: it is relevant to crimes of a 'not very serious nature committed by persons not danger[ous] to society for not more than three years.'[86]

Cooperation of the offender: The Criminal Code under second paragraph of Art 190 provides cooperation of the offender as a necessary element to suspend sentence,[87] on the basis of probationer's willingness for his own reform.[88]

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[80] All of the interviewees have the same opinion in the absence of presentence examination mechanism because of lack of duly established organ. The respondents suggest that the establishment of such organ is important for the effective application of probation.

[81] The Criminal Code of FDRE, supra note12, Art. 90, first Para.

[82] Id., Art. 90, first Para.

[83] Id., Art. 103(1)

[84] Id., Art 103(1)

[85] Id. Art 104(1)

[86] Id., Art. 106(1)

[87] Id. Art.190, second para

[88] Graven, supra note 11, p8

Fine, compulsory labour and simple imprisonment for less than three years are generally sentences which apply to less serious crimes. Therefore, suspension of sentence is not available for offenses which are of grave nature although the offender has no previous conviction under Ethiopian Criminal Code.

B. Suspension of enforcement of penalty

Suspension of enforcement of penalty is the second type of under Ethiopian Criminal Code. It is provided under Article 192 as:

> *'When the Court considers that the criminal whether previously sentenced or not (Art 194), shall receive a warning, it shall enter a conviction and pass sentence but may order that the enforcement of the sentence be suspended for a specified period of probation.'*[89]

The code provides conditions that are necessary for suspension of execution of penalty. The first condition is where the offender is not previously convicted. i.e., first time offenders are beneficiary of it.

The second condition that courts may grant probation decision for criminal is when he /she previously sentenced and if he/she has previously "already undergone" a sentence of rigorous imprisonment.[90] Unlike suspension of judgment, in the case of suspension of execution of sentence, previous conviction of the offender is not precondition. Courts may grant probation for criminal whether previously sentenced or not if it is of opinion to grant. The eligibility of offenders to benefit from suspension arises from the specific provision of the code. The code clearly provides

[89] The Criminal Code of FDRE, supra note12, Art. 192

[90] Id. Art194(1)

criminals whose penalties were suspended previously and who are not subject to suspension of execution of sentence. In this regard, Article 194(1) (a) of Criminal Code provides as:

> *Suspension of the enforcement of a penalty shall not be allowed: where the criminal has previously already undergone a sentence of rigorous imprisonment or a sentence of simple imprisonment for a term exceeding three years and where he is sentenced again to one of these penalties for the crime for which he is tried without prejudice to the provisions regarding recidivism (Arts. 67 and 188).*[91]

These requirements are not cumulative requirements and need to be discussed independently. *Acontrario* reading of art 194 of Criminal Code authorizes grant for suspension of execution of sentence for offenders sentenced previously for simple imprisonment less than three years and who have undergone such sentence. Hence, it is possible to conclude that suspension of execution of sentence is to be granted for offences of less serious nature.

The code provides about offenders who are sentenced for simple imprisonment, but not undergone such sentences for different reasons. However, there is difference in Amharic and English versions of the provision. The Amharic version of Criminal Code talks simply about those who are '*sentenced for the above stated penalties'* while the English version of Criminal Code provides '*where the criminal has previously already undergone a sentence of simple imprisonment'*[92]*[emphasis added]*.Therefore, the English version in addition to being sentenced, requires the undergoing of such a sentence. This shows the discrepancy in both versions of codes that needs to be corrected by the legislative organ.

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[91] Ibid.

[92] Id.,first para.

Secondly, suspension cannot be granted for fresh offender who are "*sentenced"* to a term of rigorous imprisonment exceeding five years for the crime for which he is now tried. But the Amharic version of it says, "*Yemiferedibet endehone*" which means "*to be sentenced" [translation mine]*.Here, though the English version provides about the final penalty that is decided after extenuating and aggravating circumstances, the Amharic version is not clear about the time to request probation and the maximum penalty. There are many problems in practice regarding this provision. The first one is misunderstanding of the requirement; some take the maximum amount of penalty provided under the relevant provision[93] while others take the final calculated result of the punishment after considering mitigation and aggravation circumstance which is less than or equal to five years rigorous imprisonment.[94] In practice, all the decisions taken for this study are given by taking final calculated sentence not the maximum penalty provided under the relevant provision.[95] The researcher argues for the English version is better than that of Amharic since it should be interpreted in favour of defendant. The second problem that arises from such discrepancy is the time issue. In the English version, the claim of probation can be raised after the final calculated penalty while the Amharic version shows the possibility to

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[93] Interview with Tsegaye Abebe and Daniel Hailu public prosecutors at AG, April 30,2018.Both have the same side of argument; they substantiate their argument by the fact that the existence of less effective way of implementing probation decision.

[94] Interview made with Muluken, supra note 73. All court judgments included for this study show the same ie, the final calculated sentence is being considered.

[95] See for example, Federal attorney General v Defendant (Federal First Instance Court, *Yeka* sub bench ,File No.115516, may 3, 2018);Federal attorney General v Defendant (Federal High Court, File No. 175446, October 18, 2017),Federal Public Prosecutor v Daniel and three others (Federal Supreme Court Cassation Division, File No. 46382, Vol. 9, p. 16-18,August 5, 2009, *SNNPs Public Prosecutor v Mr. Mekuria Bulo* (Federal Supreme Court Cassation Division, File No. 94404Vol. 16, p. 257-261,March 17, 2014), Federal attorney General v Ermiyas Mulugeta, (Federal high court , File No.184317,April 2,2018), *Federal attorney General v Gebremedhin seyum (*Federal First Instance Court, *Gullele* sub bench ,File No. 66173, March , 2018), *Federal attorney General v Defendant (*Federal First Instance Court, *Nifas Silk* sub bench ,File No. 125516, December 18/2018). The researcher concealed the identity of the accused for privacy purpose.

claim any time after the judgment is rendered. In effect, as opined by some lawyers, this discrepancy creates inequality between offenders who have lawyers and that do not have because they ever don't raise the issue of probation.[96] i.e., lawyers in practice request probation immediately after the judgment is rendered while some wait for until the decision of final sentence. The third problem in practice is the blurred feature of the provision that may lead courts to decide unfair decision since the only requirement is five years minimum sentence. Let me show this point by comparing two cases. In a case entertained at federal first instance court, the criminal was convicted of committing damage to property of others contrary to Article 689 of the Criminal Code and sentenced to six months simple imprisonment to be effected in prison administration.[97] (N.B Article 689 of Criminal Code is punishable by simple imprisonment or fine). While in another case entertained at Federal high court, the criminal was convicted of committing an attempt to Ordinary Homicide under Articles 27/1 and 540 of the Criminal Code and sentenced to five years rigorous imprisonment after considering mitigation and aggravating circumstances.[98] The court, by taking the request of probation of the lawyer of the defendant, ordered probation of two years after stating some conditions; absence of record, being family head and compromise with the victim. The court further stated that there is no law that prohibits suspension of penalty if the sentence is not more than five years five years rigorous imprisonment. Finally, the court ordered the prison administration to release the criminal without putting any precondition and supervision. (N.B the provision is punishable with rigorous imprisonment from five years to twenty years.) In the former case, the defendant was unable to pay the damage for the broken window while in the latter; there was compromise with the

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[96] Interview made with: Zahafta,supra note 74, Muluken, supra note 73.

[97] Federal attorney General v Defendant (Federal First Instance Court, *Yeka* bench, File No. 115516, may 3, 2018).

[98] *Federal attorney General v Defendant (*Federal High Court, File No. 175446, December 13, 2017)

victim. There are many similar cases. Secondly, some courts say nothing on the request of probation while others grant by initiation of themselves. For example, a case entertained at Federal First Instance Court *Nefas Silk* sub bench, the criminal was convicted of committing an attempt to aggravated theft contrary to Articles 27/1 and 669/3/b of the criminal code and sentenced four years and five months simple imprisonment to be applied in prison administration.[99] In this case, the defendant claimed to be released on probation but the court was silent on the request. It didn't explain the reason of rejection of the request. Further, the same was decided in another case similarly.[100] In this case, the defendant was sentenced for two years and eight months simple imprisonment and requested probation via his lawyer but the court was silent on the request and ordered to be applied in prison administration.

Based on these cases, the researcher interviewed some judges. Some say the provision gives unwarranted discretion to judges may create inequality between defendants.[101] Some judges of Federal Supreme Court[102], High Court[103] and First Instance Court[104] suggest that minimum objective criteria with the existence of discretion must be regulated under special legislation like regulating under sentencing manual. The researcher argues for the necessity of special legislation and minimum objective standard to minimize such unwarranted discretion.

The other ambiguity of the provision is although minimum sentence to grant probation seems five years, convicts of life imprisonment are entitled to get probation not more than seven

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[99] Federal attorney General *v Deribe Mulu*(Federal First Instance court *Nifas Silk* sub bench File 133122, March 28, 2018)

[100] The same was decided in Federal attorney General *v Kifle Woldemeskel* (Federal First Instance court, File no.208273, and confirmed by Federal High Court, January 2,2018), unpublished)

[101] Interview made with Muluken,supra note 73, all of the interviewed persons agree on this.

[102] Interview made with Zahafta,supra note 74

[103] Interview made with Muluken,supra note 73

[104] Interview made with Tizita, supra note 72

years.[105] Hence, probation can be granted even in serious cases that are punishable with life imprisonment.

The other issue is the possibility of recidivists to benefit from suspension of sentence. However, the Criminal Code provides that the inability of the court to suspend the sentence of measures. The following measures cannot be suspended.

1. Measures applicable to irresponsible persons and criminal with a limited responsibility: After ascertaining on the bases of normal enquiry and expert examination,[106] the court may order confinement[107] or treatment.[108]

A. Confinement: Confinement in a suitable institution may be ordered by the court when the criminal, by reason of his condition, is a threat to public safety or order, or if he proves to be dangerous to the persons living with him.[109]

B. **Treatment:** it is order of the court that may be given where defendant is suffering from 'mental disease or deficiency, deafness and dumbness, epilepsy, chronic alcoholism, narcotic and psychotropic substances, intoxication due to the abuse of narcotics or any other pathological deficiency and requires to be treated or placed in a hospital or asylum.'[110]

2. General measures for purposes of prevention and protection:

The code provides the measures that cannot be suspended. These include: measures of a material nature such as guarantee of good conduct, recognizance or guarantee, seizure of dangerous

[105] The Criminal Code of FDRE, supra note12, Art. 204

[106] Id., Art. 129

[107] Id., Art.130(1)and (2)

[108] Id., Art.131

[109] Id., Art. 130

[110] Id., Art.131

articles,[111]measures entailing restrictions on activities such as: suspension and withdrawal of a license prohibition and closing of an undertaking;[112] measures entailing a restriction on personal liberty; such as prohibition from resorting to certain places, prohibition to settle down or reside in a place, placing under supervision, withdrawal of official papers, prohibition from residing territory; expulsion.[113]However, it is possible to decide Suspension of the measures by way of probation.[114]

3. **Measures for purposes of information**: courts cannot suspend notification to the competent authority.[115] These are the measures that the court cannot suspend because of their nature.

Like suspension of judgment, suspension of execution of sentence may be ordered when the conditions and rules provided by the law are fulfilled. The above are conditions incorporated under FDRE Criminal Code in which courts should follow before granting probation. Nonetheless, it does not mean that courts are obliged to grant probation if these elements are fulfilled. It is only when the court, considers that conditional suspension of the penalty will promote the reform and reinstatement of the criminal by considering the interest of society. Therefore, the law provides subjective criteria to be considered by the deciding judge that would be considered on the circumstances like capability of the offender to correct him.[116] Literatures of scholars on the area show the same stand. For example, Tsehai clearly explained the discretion

[111] Id., Art.135-140

[112] Id., Arts. 142-143

[113] Id., Arts. 145- 150

[114] Id., Art.152

[115] Id., Art. 154

[116] Graven, supra note 11,p 8

in his book.[117] The same is provided in the current training material of Federal Justice Organs.[118] However, in practice, there are decisions of courts contrary with the provision of discretion given by the law. Cassation division of federal Supreme Court considered granting of the probation as mandatory to courts whenever the conditions provided by the law are fulfilled. In such cases, according to the court of cassation division, "denial of probation is considered as violation of rights." [119] As a result, it is considered as fundamental error of law.[120] The decision has binding effect on courts in the whole country as well as in Federal criminal bench.[121] The problem here is how it can be said denial is violation of right while discretion is a matter of fact but not matter of law. By arguing against the decision, some lawyers say only the entertaining judge can identify the capability of rehabilitation of the offender based on individual circumstances of him.[122] Others argue for the decision for the reason by saying that judge has no ground to deny if the conditions are fulfilled and if there is a gap, it would not jeopardize rights of defendant.[123] The researcher argues against the decision of Supreme Court because the law clearly provides the discretion of courts to grant probation. It seems the decision itself creates fundamental error of law. Hence, it should be corrected.

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[117] ፀሐይ ወዳ (1974) ዓ.ም፣ የወንጀል ህግ መሰረታዊ መርሆዎች፣ ገጽ 226-227, The Criminal Code of FDRE, supra note12,190 para 1,

[118] የኢትዮጵያ የወንጀል ህግ ሥነ ሥርዓት (2004) ዓ.ም ለረዥም ጊዜ የስራ ላይ ስልጠና የተዘጋጀ ሞጁል በፌዴራል የፍትህ አካላት ባለሙያዎች ስልጠና ማእከል የተዘጋጀ ገጽ 209

[119] Federal Public Prosecutor v Daniel and three others (Federal Supreme Court Cassation Division, File No. 46382, Vol. 9, p. 16-18, August 5, 2009).

[120] *Ibid.*

[121] See Federal Courts Re-amendment Proclamation No. 454/2005, Federal *Negarit Gazeta*, Year 11, No. 42, Article 2(1)

[122] Interview made with Muluken,supra note 73

[123] Interview made with Nega Hailu, Public Prosecutor at AG, interview made on may 3,2018

3.4 Enquiry

As repeatedly discussed under the previous chapters, courts should order the organs that make investigation before granting decision of probation**.** The decision of courts whether to grant probation or not should depend on the investigation report of such organ. Since it is not clearly explained in the code, the organ may be charitable organ, probation officer or any other person ordered by the court to do the same**.**

The Criminal Code provides responsibility of courts to order presentence investigation before ordering probation. Accordingly, if the court is of the opinion to give probation and of the opinion that previous enquiry is necessary for the purpose of deciding on probation, it shall order the concerned organs to give information about the defendant. The information required may show the 'antecedents, character, living and working conditions of the criminal applying for suspension.'[124] This is discretion of the court when the court is of the opinion to grant decision. The court orders such investigation only when it thinks the investigation is deemed necessary before granting probation. However, if the court is not of the opinion about the necessity of investigation, it may order probation without ordering to the investigation and without getting the information. Probation officers are expected to make systematic investigation about the physical needs, socio-economic situations, environmental and possible psychological strains.[125] This helps judges to determine appropriate sentence for the criminal, to balance the interests of criminal and the community.[126] Since presentence investigation has significant advantage on the decision of probation, the discretionary power of the court to decide on issue of probation without any

[124] The Criminal Code of FDRE, supra note12, Art. 195

[125] Tadese,supra note 6 p17

[126] Giri V.V, Prevention of Crime, The Role of The Society, New Delhi, vo. l XVIII,No.9 December 1971,p1-2

information about the defendant may result in inappropriate implementation. According to Muluken, almost all courts are not ordering presentence investigation because of its discretionary nature and absence of duly established organ.[127] The practice in this regard shows the problem of absence of effective implementation of probation. Courts are unwilling to order presentence investigation since no relevant organ, no officer, and no assigned social worker exists currently in Ethiopia. In such cases, although not for all cases and not sufficient, forensic report and record of criminals are infrequently used.[128] Besides, the researcher did not find presentence investigation in cases analyzed in the thesis. Put in nutshell, no probation service at all.[129]

3.5 Period of Probation

Period of probation is another requirement that courts should consider during granting of probation. Usually, it is the discretion of judge to fix specific period of time in which the criminal can stay on probation based on the individual character of the criminal. It includes periodic reviews that is aimed to assess the 'objectives, effectiveness and functioning'[130] of the probation. However, the duration of it 'shall not exceed the period established by the competent authority in accordance with the law.'[131] Under FDRE Criminal Code, Probation period shall in no case is neither of less than two years nor, subject to any provision to the contrary, of more than five years. However, in case of life imprisonment the period is between five years and not

[127] Interview made with Muluken,supra note 73

[128] Interview made with: *Sajin* Birhane Tekleegzi,deputy head of crime investigation department,*Yeka* subdivision , D/Inspector Tsegaye Petros,head of crime investigation *Meri* police station respectively on May 8,2018

[129] None of the cases studied, interview, court judgments etc..shows the existence of presentence investigation.

[130] Klaus,supra note 2, p105

[131] Id , p98.

more than seven years.[132] Thus, courts are required to fix probation period between the maximum and minimum ranges based on individual circumstances of the cases.

[132] The Criminal Code of FDRE, supra note12, Art. 204

3.6 Conditions of Probation

Under the Criminal Code, probation is recognized in relation to conditions provided by the law whether mandatory or discretionary based on specific circumstances.[133] As discussed repeatedly, probation is agreement between court and criminal. As agreement between them, there must be consent between both of them. The court promises to suspend a prison on conditions when the criminal agrees to respect probation order and /or he is capable to obey such rule/s. However, subject to different conditions such suspension can only be granted if the court believes that it will promote the rehabilitation and reinstatement of criminals.[134]

There are two kinds of conditions of probation. The first conditions are general conditions which are applicable for all criminals released on probation without any discrimination. For example, conditions of respecting all laws, refraining from committing further crime and condition to maintain good behavior are general conditions applicable to all offenders. The second categories of conditions of probation are special conditions that are applicable in specific conditions based on individual character of the offender. Here, courts have discretionary power to fix the conditions to be followed by probationer. For example, these conditions may include 'prohibiting the criminal from taking alcohols, consorting with certain people, not leaving a given place, and reporting to the appropriate authorities'[135]

Regarding the conditions of probation, although there is no provision which provides both conditions in specific words, close reading of Article 197 and 198 the FDRE Criminal Code

[133] The Criminal Code of FDRE, supra note12, Art. 190 and 191
[134] Id., Art.190
[135] Nirmala, supra note 13, p171

shows the same. Accordingly, Article 197 (1) of FDRE Criminal Code provides conditions of the probation as:

> *Conditional suspension shall follow upon the criminal entering into a formal undertaking to be of good conduct, to accept the requirements laid down, as well as to repair, to the fullest extent possible, the damage caused by the crime or to pay the indemnity to the injured person (Art. 101) as well as to pay the judicial costs within the time thereof.* [136]

These are general and mandatory requirements in which courts should apply to all probationers. Besides, bringing security for the undertaking of the conditions and the security is mandatory requirement. It may consist in a guarantee of a personal or material nature based on the circumstances and the possibilities of the case.[137] The code is silent about what will follow if the probationer is unable to present the guarantee. The rearrangement of such security is considered as additional guarantee that the offender will comply with the conditions of his release. However, covering financial costs and bringing personal security is not often possible in third world countries like Ethiopia.[138] By explaining the practice, some judges explain the problem of absence of mechanism to convicts who commit crimes of public interest like damaging public property.[139]In such cases, there is no organized structure to apply costs of the public though courts may order 'probation' as they wish.[140] Considering this problem, some courts grant probation irrespective of not covering financial costs and personal security while others strictly

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[136] The Criminal Code of FDRE, supra note12 ,Art.197(1)

[137] Id., Art. 197(2)

[138] Interview made with Muluken,supra note 73

[139] Interview made with Muluken, Kebede, supra note 73

[140] Interview with Kebede, supra note 73

apply the conditions.[141] From this researcher finds that the provision is problematic in practice and affects the rights of persons who are willing but unable to cover the costs as well as persons particularly who are able to pay but non existence of system in public cases.

The rules of conduct: The second point concerning conditions of probation which is provided under article 198 of the code is about the rules of conduct. Rules of conduct are to be imposed as condition of probation taking the 'individual criminal's needs, circumstances, the nature of the risk'[142] and personal character of individual(s) in to consideration.

Rules of conduct are provided under Article 198(1) of the code as:

> *(1) The Court shall specify the rules of conduct, protection and supervision, which appear to it to be necessary.*
>
> *Such rules may prescribe, in particular, the requirement of learning a trade, residing, working or living in a particular place, refraining from consorting with certain people or consuming alcoholic beverages, remitting to the probationer's family, guardian or protector part of .his earnings, undergoing a requisite treatment or subjecting himself to any other similar measure for securing the success of the probation.*

The rules of conduct provided under above provision are not exhaustively listed. Courts may use other requirements based on individual character of the offender(s). Since these rules are conditional, they are subject to modification and revocation according the specific situations of the probationer. None of the rules of conduct or the specified conditions is ordered by the courts in all of the analyzed cases ranging from first instance courts to cassation division.[143] In these

[141] Interview with Nebyu Mikru, Habtom Berhe,W/ro Addis Mohammed, lawyers at any courts in Federal and state courts on May 9,2018 .They have same side of argument.

[142] The Criminal Code of FDRE, supra note12, Art. 198(2)

[143] See for example, Public Prosecutor v defendants supra note 95

decisions, courts order probation simply by looking at the status of criminals like student, family administrator, being poor, being the head of a family as rationalization. As stated by Ato Muluken, courts are not ordering such conditions in almost all cases and these are rarely applicable conditions.[144]

3.7 Supervision of Probation

As repeatedly discussed in the previous chapters, supervision is the intrinsic element of probation. Writers explain supervision as significant and intrinsic element of the probation. For example, for Dressler, 'the time a probationer spends under care is called supervision period.'[145] Similarly for Ming Li, probation is explained as community supervision.[146] Hence, in granting probation, the offender is released into community under supervision of community officer.[147] It is after effective supervision and individual treatment of the probationer that the purpose of probation could be achieved because 'community protection and individual guidance go hand in hand in application of probation.'[148]The same research explains two models of probation supervision as 'surveillance [model] has been the dominant model of probation supervision, whereas the "treatment model is difficult to find" in practice in institutions and agencies across

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[144] Interview with Muluken,supra note 73

[145] Dressler,supra note 62, p47

[146]Ming-Li Hsieh, Moana Hafoka,Youngki Woo, Jacqueline van Wormer, Mary K. Stohr Craig Hemmens,PROBATION OFFICER ROLES: A STATUTORY ANALYSIS:Department of Criminal Justice and Criminology, Washington State University, Volume 79 Number 3, December 2015 p20 <http://www.uscourts.gov/sites/default/files/79_3_4_0.pdf > accessed last may 10,2018

[147] Id., p19

[148] Dressler, supra note 62 p 47

the states." This strengthens the assertion that the development of the concept of probation as both reformation of the offender and law enforcement. Although the initial assumption of goal of probation was taken as rehabilitation and reformation, in a modern criminal justice system, it is also taken as law enforcement.[149] This is the 'balanced approach' now recognized by scholars as a contemporary goal for probation officers'[150] and/or the supervision. Similarly, purpose of the supervision is 'to reduce reoffending and to assist the offender's integration into society in a way which minimizes the likelihood of a return to crime.'[151]

From the above readings, it is clear that supervision is mandatory requirement of probation whether it is surveillance model or treatment model. Thus, supervision has dual purpose; rehabilitating or reforming their character and protecting the general public by reducing the risk that offenders under control will commit future crimes.[152] In other words, since supervision is the main part of probation, it should be incorporated in effective manner of application. The implementation mechanisms of it should be provided under the relevant laws of the country and should be applied. Absence of it affects the criminal justice system as a whole and this makes the concept of probation valueless.

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[149] Hsieh,*et.a*l,supra note 146,p21-22

[150] Ibid

[151] The Tokyo Rules,supra note 16, section 10(1)

[152] Office of probation and pretrial services(2007), administrative office of the US courts, Court community, an information about US probation and pretrial services, p1

When we come to the context of Ethiopia concerning the supervision requirement, the FDRE Criminal Code provides it as one of the requirement that courts should order during granting suspension or/and probation. Art 198(1) of the code provides as, ‘Upon granting suspension the Court shall, if it is necessary, place the criminal under the supervision of a protector, guardian, probation officer or a charitable organization in general. Although the Criminal Code provides supervision as a condition of probation, in practice, it is hardly possible to find the cases of probation with supervision. The reason for such absence of supervision seems absence of duly established probation officers.[153] Besides, no effort is being done by the courts. This also shows that the absence of effective implementation of probation which also results in impossibility of evaluation of the probationer whether he/she is reformed or not.[154]

3.7.1 Protector or Supervising Officer

Protector or supervising officer is provided in the Criminal Code in similar manner what we have discussed as probation officer. The researcher uses the word ‘probation officer’ interchangeably with ‘probation worker’, ‘supervising officer’. Although they appear in different names in different literatures, they are officers ordered by courts for the same roles and responsibilities to the purpose of effective implementation of probation.

Probation officers in many countries supervise, manage and provide assistance to offenders on conditional liberty, including those on bail, probation and community service. The Service’s

[153] Interview with Chaka Debele,Head of Federal AG,*Yeka* Branch office, May 3,2018

[154] Among all analyzed cases, the supervision order exists in none of them. See Public Prosecutor V Defendants, supra note195

other main function is providing advice to courts and parole release authorities in pre-sentence and post sentence activities. For example, State Probation Service (SPS) is a 'public organization under the Ministry of Justice in Latvia mandated by law to delegate its tasks to private organizations.[155] In Germany, like Latvia, numerous responsibilities have been accepted by federal government regulating the tasks and functions of probation officers, court assistants and social workers in penal institutions across the entire country. In general, the service makes an important contribution to legal and social peace in society, by finding solutions to personal and social problems. In particular the service aims at enabling the offender to live his or her life in a law-abiding and responsible way and to (re-) integrate with the local community, in order to prevent re-offending and by that protect the community and its members[156]

Roles of Supervising Officers

Supervising officers have significant role in modern criminal justice system in general and effective implementation of probation in particular. According to Klockars, the first and 'broadest component of the theory of probation supervision is the role which the officers do.'[157] These roles can be taken as: social worker; focusing on rehabilitation, peace officer; here, the role of probation of the officer is considered as emphasizing law enforcement practices, case manager; considering risk assessment and individual needs, synthetic officer; balancing treatment and surveillance. The 'central issue of probation supervision is the treatment- control dilemma and its resolution in the revocation of the decision.'[158]

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[155] Kalmthout *et.al*, supra note 8, p.185-189
[156] Ibid.

[157] Carl B. Jr. Klockars(1973), A Theory of Probation Supervision, Journal of Criminal Law and Criminology: Volume 63 Issue 4, Article 14, p 552
[158] Id., p553

The roles and responsibilities of probation officers are provided under Art 199(2) FDRE Criminal Code as:

> *The protector or supervising officer shall keep in touch with the probationer: he shall visit him at home or at his place of work, make arrangements for his leisure hours, give him guidance and facilitate to the best of his ability his readjustment, in life and his reform. The protector or supervising officer shall exercise over the probationer a regular but unobtrusive control and report at least every three months and at more frequent intervals when necessary to the appropriate probation commission.*[159]

These are the roles of the officers to apply for the effective implementation of probation. They are persons appointed from qualified and of unimpeachable morality.[160] In doing so, the officers should strive to reform the conduct of offenders. Besides, law should be seen implemented since the roles and responsibilities of the officers are provided. The officers are expected to do in unobtrusive manner. However, in practice, there is no reference of decisions and order of probation officers by courts to do such roles. Neither the relevant and duly established officers are found nor evaluation of the manner of supervision possible currently in federal courts of Ethiopia.[161] Furthermore, although the criminal law states that 'the organization and the duties of the probation commissions and probation officers shall be regulated by law', [162]in practice, there is no law that regulates such organs at First Instance[163], High[164] and Supreme courts.[165] Neither

[159] The Criminal Code of FDRE, supra note12,Art.199(2)

[160] Id. 210(1)

[161] Muluken, Kebede, supra note 73,Zahafta,Zewditu, supra note 74,Chaka, supra note 151

[162] The Criminal Code of FDRE, supra note12,Art.199(2)

[163] Interviw with Tizita, supra note 72

[164] Interview with Kebede,supra note 73

the decisions of cassation division of Supreme Court [166] nor the decisions of courts studied for this research show the existence of probation officer and supervision order.

3.7.2 Charitable Organization

The second organ mandated to effective implementation of probation under FDRE Criminal Code is the existence of active supervising charitable organization. It is an 'essential feature of the system aiming at obtaining good results from the enforcement of penalties and measures and the various methods whereby such enforcement is carried out.'[167] The purpose and duties of such organization is clearly defined in Art 208 of the Criminal Code as:

> *The duties of the charitable organizations consist in affording criminals who have to readjust themselves to life in the community, either during a period of suspension or after their conditional or final release from a penalty or a measure entailing lost of liberty, counsel, guidance and moral and material assistance with a view to achieving the purpose of reinstatement which is aimed at, and forestalling a future relapse. The appointed charitable organization may, in particular, place the protected persons in employment or find for them, or assist them in finding, work, an employer, lodgings or relief, direct them as to the proper use of their savings or earnings and, generally, give them every other support necessary to enable them to lead an honest life. It shall exercise regular supervision over them but with such discretion as is proper so as not to, risk*

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[165] Interview with Zahafta,supra note 74,

[166] See Public Prosecutor V Defendants, supra note 95

[167] The Criminal Code of FDRE, supra note12, Art.208

impairing their rehabilitation, and report to the Court and to the competent authorities whenever necessary.[168]

The duties of these organs shall be carried out by the association or group, of a public or private character, that is dedicated their activity thereto, with the assistance and under the control of the State.'[169]The enforcement should be based on the detailed conditions which are regulated by law. However, in practice, it is hardly possible to identify such regulated duties of them. In the absence of these organs, expecting reformation and rehabilitation of convicts seems senseless.

The code also provides placing under the supervision of a charitable organization as necessary element in all cases where the law so provides. i.e, courts have no discretion when it is clearly provided by the law and the charitable organizations should assist whenever necessary. However, in practice, the researcher couldn't find such kind of compulsory supervision.[170] Nor the cases analyzed show the existence of supervision.

To summarize the problems of supervision, the researcher is not the only person to find the problems. There was identified problem the problem by the former Ministry of capacity building. Although it is long time since Ethiopia adopted modern criminal law like other country, special laws and regulations relating to the right of conditional release (or parole) do not exist [171]for a long period of time. Likewise the problem of non-existence of probation service is not recent phenomenon. In this respect, the research with recommendation was done before thirteen years

[168] Id., Art.209

[169] Id., Art.210

[170] Interview Zewditu ,supra note 73

[171] Center for International Legal Cooperation (CIL),with Ministry of Capacity Building, Comprehensive Justice System Reform Program, Baseline Study Report, Justice System Reform Program Office with February, 2005, p19, <*http://www.cilc.nl/cms/wp-content/uploads/2014/11/CILC-Ethiopia-D-05-0103.pdf* > last accessed 20 March 2018

ago.[172] For example, the research conducted by Center for International Legal Cooperation in 2005 identified the problem of overcrowding in prisons and put its recommendation under '*Recommendation 9*' for the availability of sanctions that are alternatives to imprisonment.[173]The research further recommended the FDRE government to make effective use of the "provisions enabling conditional release as found in articles [194 to 205][174] of the Penal Code" [175] and to develop "form of community corrections or probation service in the country."[176] Thus what the researcher would like to recommend is identifying the solution by the relevant organs for the problem identified before long time ago as explained above.

[172] Ibid.
[173] Ibid.
[174] Those provisions of Penal Code were directly copied and regulated under Articles 190-199 of the Criminal Code so that no further discussion is needed.

[175] Center for International Legal Cooperation, supra note171
[176] Ibid.

CHAPTER FOUR: EFFECTS OF PROBATION

The decision of probation has different effects on the result found from the supervision. In principle, the probationer is expected to respect the conditions ordered by courts. However, these conditions may be violated by the probationer. Let us look at the effects of both and violation of the probation successively undergone probation.

4.1 Violation of Probation and Its Effects

Violation of the probation is '[a]ny act or omission on the part of a probationer which is contrary to the express or implied conditions under which the individual is being supervised.'[177] Probation is given with specific conditions to be followed by the probationer. But, sometimes, these conditions may be violated. Thus the effect of violation of the conditions must be expressly and reasonably provided in the relevant law. The court, after hearing the case, may give warning, modify or order revocation of the probation based on individual circumstances of the case.[178]
When we come to the FDRE Criminal Code, the code provides three effects of violation of probation conditions. These are: formal warning, modification of the rules of conduct and revocation of the probation. Each of them is discussed separately as following.

4.1.1 Formal Warning by the Court:

Formal warning is the first remedy that the court is expected to do whenever the requirements provided by the law are fulfilled. The code provides the power of courts to give formal warning firstly, when he 'infringes one of the rules of conduct imposed upon him during the period of

[177] Klaus, supra note 2,p115

[178] Dressler,supra note 62

probation.'[179] These are rules ordered by the court considering the individual needs of the convict and nature of risk on the public. In principle, these rules should be obeyed by the probationer. But they may be modified in some circumstances. Secondly, formal warning would be given when the probationer evades supervision or the authority of the charitable organization to which he is entrusted. The rationale behind it seems reformation of the probationer under supervisor is the effective way. The third ground that courts may give warning to probation is when he commits a crime by negligence. Fourthly, courts may give warning when the convict betrays the confidence placed in him in any other manner.[180] Thus, formal warning may be given to probationers for not serious issues done during probation period. It seems it is necessary to be attentive about the reformation and rehabilitation of probationers during probation period.

However, in practice, the effect of formal warning seems not applicable because of lack of controlling and reporting system. Among all interviewees, all of them have the same response about non applicability of warning effect because of lack of effective monitoring mechanisms.[181]

4.1.2 Modification of the Rules

Courts have responsibility of checking the consent of the offender. Likewise, necessary conditions should be investigated upon the information of the relevant organ. Courts should order probation that matches the needs of offender that is aimed to reform him and the probationer is expected to respect it. However, there may be situations that cannot fit the decision. As provided under Article 198(3) of the Criminal Code, the rules discussed above are subject to modification when the necessity is obvious. In such cases, the rules can be modified.

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[179] The Criminal Code of FDRE, supra note12, Art. 200 (1)

[180] Id. Art 200 (1)

[181] For example, interview made with: Tizita, supra note 72,Muluken,supra note 73 ,Chaka , supra note 153

Request for the modification can be brought by both the probationer, his protector, guardian or guarantor and the application of the Attorney General.

The modification may result in minimization or maximization of the restriction of liberty. Hence, if the probationer shows improvement, new set of rules suitable for his reformation and/or rehabilitation may be imposed. However, if the probationer violates the rules, the court may order the extension of the probation period originally fixed within the limits permitted by law.[182] However, in practice this effect is not also applicable. The reasons are similar to the warning effect discussed above.

4.1.3 Revocation of Probation:

United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), defines revocation of [probation] as an action taken by the court 'which removes a person from probation, because of a violation of conditions of release'[183].These conditions may include rules of conduct or committing fresh intentional crime. Thus, the probation granted by the court may be revoked in different manner.

The first manner is revocation with warning. It is provided under the code to revocation of probation when the probationer continues infringement of rules of conduct discussed above despite his formal warning.[184] Here, the court is required to give warning for the probationer before the decision of revocation. This kind of warning has effect of bringing suspended penalty into force. That means, violating such conditions does not constitute itself a new crime.

[182] The Criminal Code of FDRE, supra note12, Art 200(1) second para

[183] Klaus, supra note 2, p103

[184] The Criminal Code of FDRE, supra note12 ,Art 200 (2)

The second situation to revocation of probation is revocation without warning. The court automatically revokes when the probationer intentionally commits fresh crime during the probation period.[185] When the probationer commits a fresh crime while he is in probation, the probation shall be revoked by the Court but not before the probationer has been given an opportunity of being heard.[186] There is no second probation for intentionally committed crimes.[187] In such cases, the penalty shall be aggravated by and executed by adding the penalty for the fresh crime to the penalty pronounced or to be pronounced'.[188] This means, on revocation of probation, temporary suspension of the original decision becomes effective and comes in to force. Unlike the first case, during commission of fresh intentional crime, the court passes a sentence for the new crime in addition to revocation of the former. Another crucial point during revocation is the rights of probationer. Probation can only be revoked by the competent organ after careful examination of the facts produced by the probation officer and hearing of the offender [the probationer].[189]

The above discussion is about the effects of violation of conditions. Although the law clearly provides formal warning, modification and revocation, the practice shows weak implementation. Since there is no supervising and controlling mechanism, it is hardly possible to identify whether the probation is violated or not.[190] Among all the respondents of interview and questionnaire, the researcher found only one judge who decided on revocation by the application of police

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[185] Id., 200 (2)

[186] Id., Art 200 (2)

[187] Id., 2nd para

[188] Id., Art 200 (3) 2nd para

[189] Id., Art 200 (2)

[190] Among all, interviewees, Tizita,supra note72, is the only judge who decided on revocation. She remembers only one case on her entire period of career.

organization. [191] Some argue that absence of effective recording system and absence of link of it to other justice organs is the main factor even to identify criminals from non criminals in general and probationers from innocents.[192] Many of the suspects are not willing to give their real name during interrogation and change their address.[193] To solve the problem, police identifies some criminals via forensic result although it is not organized and only for some cases[194] but this does not help to control and supervise probationers.[195] Besides, the researcher made direct observation at AG and some of its sub divisions. In view of that, there is no systematic record of probationers to find whether they are on probation or not.[196] One cannot find even the total number of probationers at least in annual reports of courts, AG offices and because final report includes them in the category of "guilty", but not "probationers" .[197]

4.2 Effects of Successfully Undergone Probation

In Ethiopia, successfully undergone probation has different effects on different kinds of probations. In case of suspension of pronouncement of penalty, no conviction shall be entered into record when a criminal is placed on probation and does not break the conditions of his probation[198]. But in case of suspension of execution of sentence, if the probation is successfully

[191] Interview with Tizita, supra note 72

[192] Interview with Chaka, supra note 153, and Muluken,supra note 73

[193] Interview with Birhane, Tsegaye, supra note 128

[194] At the police organization, not for all cases, but only 'grave' '*kebad' in Amharic* and 'small' amount of medium crimes to be registered and the defendant gives his finger print at forensic division in the stage of interrogation(for them, these are crimes which are punishable 0-3,3-5 and above 5 years respectively)

[195] Interview with Birhane supra note 128

[196] Observed from personal observation of: my day to day activity, annual report, questionnaire and interview

[197] The researcher is practitioner in one of the AG offices observed the problem personally for more than 4 years.

[198] The Criminal Code of FDRE, supra note12 ,Art.191

undergone the sentence shall be remitted but the conviction entered in the judgment register shall remain with all its other consequences.[199]

When we look at the practice in this respect, no one follows up the probationer and evaluates whether the probation is successful or not for the aforementioned reasons. The researcher wants to summarize the practice of effects of probation by the statement of the high court judge and court manager *Ato* Muluken Teshale, which is read as:

> "*Courts are neither applying the provisions of probation rather than releasing convicts on 'probation' by one line statement nor do other concerning organs give emphasis on the application of probation though probation is crucial one in modern criminal justice system.*" [200]

[199] The Criminal Code of FDRE, supra note12,Art. 195 first para.

[200] Interview with Muluken,supra note 73

CHAPTER FIVE: CONCLUSION AND RECOMMENDATION

5.1 Conclusion

The role of implementing organs of probation under criminal justice system should be evaluated based on the clearly defined role of the executive, legislative, judiciary, the police, prison service and probation including relevant social service agencies. These roles and relationships should be established by law. The selection of probation shall be based upon an assessment of established criteria in respect of both the nature and gravity of the offence, the personality and background of the offender, the purposes of sentencing and the rights of the victim. These are the missing points and should be done by the relevant and competent established organ.

In contemporary criminal justice system, probation is almost primarily applicable and advantageous to rehabilitative purpose if properly applied. The same is true for federal justice organs. But, Ethiopia incorporated the concept of probation without effective mechanisms to apply it; as a result, there is no any procedure of following up it. The researcher finds the failure in this regard is common failure of executive and judiciary organs because of absence any organ (and also its duties and rights) to enforce probation affects the goal of criminal punishment and probation. , i.e., the judiciary should give its decision based on information gathered by the relevant supervising organ/or officer where as executive has duty to organize information about offender's, especially about ***pre*** and ***post*** probation decision.

Although the law provides presentence investigation about the criminal has invaluable advantage to balance the needs of him and the community, in practice, courts are not applying the law. This may be because the discretionary nature of the requirements provided under Art 195 and absence of relevant officer social worker in Ethiopia currently active.

None of the evaluated court cases above either in cassation division or regular courts order supervision. Currently, courts simply grant probation without any order of following up mechanisms of the probationer. Courts, in practice, do not order any organ to supervise and it is hardly possible to find it for the researcher. Neither courts nor any other organ supervises, controls, and follows up the effect of probation decision.

Consequently, there will be a greater chance to the offenders to commit further crime since there in no any way to check the intended rehabilitative goal. Even if the court that granted the suspension deems that the suspension will no longer promote the rehabilitation and reinstatement of the criminal because the probationer is not observing the conditions of the probation, as a rule, it can withdraw the suspension and order the execution of the simple imprisonment .But, there is no way to check and do this situation even whether the probationer commits the new intentional crime. Therefore, the impact of law and institution affects the outcome of probation. Hence, it is hardly possible to say that the provisions of probation serve the needs of society and the goal of criminal law. All respondents for the interview have the same conclusion in this respect.

In Ethiopia, FDRE Criminal Code provides that supervision by a charitable organization is an essential feature of the system aiming at obtaining good results from the enforcement of penalties and measures and the various methods whereby such enforcement is carried out. Although the law clearly says the placing under the supervision of a charitable organization is compulsory in all cases when the law provides, in practice it is not being applied almost in all federal courts. Though the discretion of judges is clearly provided in the code, the decision of Supreme Court made it mandatory to grant probation when the conditions are fulfilled. This discrepancy between cassation court and the code may create a gap in application and should be corrected.

It seems Art 194/b of the code gives unwarranted discretion to judges which may lead to give unfair decision. It is common to see prisoners who are sentenced to even one month. Conditional release of criminals sentenced for less than or equal to five year to be released on ‘probation’. It seems unfair to release 5 year sentenced criminal in the name of probation while incarcerating one month sentenced criminal in prison. For example, in practice it is not new to see imprisoned convicts contrary to Article 615 of the Criminal Code insulting behavior and outrage while granting ‘probation’ for convicts’ of intentional homicide as discussed above. What makes the situation worsen is releasing criminals in the name of “probation” which is similar to innocent persons in practice since there is no further action rather than releasing the convict. The ambiguity discussed may be further strengthen by article 204 of the Code convicts of life imprisonment allows probation for life imprisonment. The researcher finds such kind of discretion may create miscarriage and non predictability in the criminal justice system and inequality between citizens. In nutshell, the researcher didn’t find any case that shows implementation of probation in federal justice organs.

5.2 Recommendations:

Based on the facts identified, the writer of this study would like to recommend the following points.

- Since supervising organ is backbone of probation, policy should be formulated to effective implementation of probation. Since there is no supervising mechanism of the offenders whose penalties are suspended, executive organ has to establish the supervising organs immediately and their respective duties and rights to attain the rehabilitative purpose of the criminal law and to control and rehabilitate the offender. Lawyers are of the opinion that the government should establish supervising organ. Since Federal

attorney General has such responsibility, it has duty to promote the mechanisms to effective application of probation at least in cooperation with other justice organs and/or charitable organizations. As provided under Article 6/1 of Federal Attorney General Establishment proclamation no. 943/20016, AG has responsibility prepare criminal justice policy, coordinating relevant bodies, and ensure its implementation. Secondly, Art.6/2 of the same proclamation responsibility of AG to work as principal advisor and representative of the federal government regarding law. Thirdly, according to Art.6/3/f of the proclamation, AG has responsibility to follow up effective implementation of judgments and sentences including probation. Thus, the principal responsibility to effective implementation lies on federal Attorney General. This organ should strive to establish relevant organ and manage decisions of probation.

- Federal Attorney General should create coordination between different stakeholders like the concerned justice organs, CSs, NGOs, to effective reformation and rehabilitation even as a minimum standard.

- Presentence investigation about the criminal has invaluable advantage to balance the needs of him and the communities, in practice, courts are not applying the law concerning presentence investigation. Hence it seems requirements provided under Art 195 should be mandatory. Courts may use other alternatives such as *kebele* offices, families of the criminal until relevant organ is established at least to get information about the behavior of the convict.

- Since imprisonment is principle and probation is exception, courts should strictly apply the conditions of probation.

- Current filing system in the application of probation is unfit for follow up the application of probation. Police organizations as well as public prosecutor office have responsibility to organize managing of information about the probationer at the times of presentence, during sentence and post sentence. This process helps to check whether the decision gives the intended result or not. This can be done by at least registering probationers in organized and computerized manner. There should be strong link of recording system between the concerned justice like organs; courts, public prosecutors and police office. The researcher suggests this may be taken as tentative solution until the concerning institution is established.

- The criminal policy as well as the Criminal Code of Ethiopia considers paying judicial costs and compensating the victim as mandatory requirement. Absence of alternative remedies to this in third world countries like Ethiopia may affect the rights of individuals who are willing but unable to pay. In addition, there is no mechanism to ensure compensation in cases which affect public interest. In such cases, the law is silent about the mechanisms and responsible organs to ensure compensation for the damage caused. This in turn may affect the rights of the convicts. Therefore, the policy should be revised.

- Currently, there is different practice of probation not only in different courts but also in the same court by different judges. Some grant probation for grave cases such as homicide which is grave offence while others order imprisonment for less serious offences like insulting behavior contrary Article 615 of the code that is simple offence. In both examples, courts decide without presentence investigation and the trend makes application of probation senseless. Similarly, the practice shows that criminals who have lawyers benefit more than that do not have. Put differently, some consider probation as

right while others consider it as privilege in practice. To fill these gaps, it seems the law should provide minimum objective criteria that courts must follow whether the there is request to probation or not.

- Establishment of probation officer is one of the concerns in which government should give emphasis. To this effect lawyers, social workers and psychologists should be given consideration.

- In modern correctional system, probation is given special emphasis to achieve purpose of punishment. By considering its advantage, the executive branch of government should give more emphasis to administer probation as the intention of law maker at least by regulating separate legislation to effective application of probation.

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